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:
OSB2000-0355-FEC

July 6, 2001

Mr. Peter Poolman
Chief, Environmental Compliance Section
Attn: Mr. Ben Tice
Department of the Army
Walla Walla District, Corps of Engineers
201 North Third Avenue
Walla Walla, Washington 99362-1876

Re: Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Act Essential Fish Habitat Consultation on the Effects of the Proposed Milton-Freewater 1135 Setback Levee Project, Walla Walla Subbasin, Oregon

Dear Mr. Poolman:

Enclosed is a biological opinion (Opinion) prepared by the National Marine Fisheries Service (NMFS) pursuant to section 7 of the Endangered Species Act (ESA) on the effects of the proposed Milton-Freewater 1135 Setback Levee Project in the Walla Walla Subbasin, Oregon. The NMFS concludes in this Opinion that the proposed action is not likely to jeopardize Middle Columbia River steelhead (*Onchorynchus mykiss*) or destroy or adversely modify critical habitat. As required by Section 7 of the ESA, NMFS included reasonable and prudent measures with non-discretionary terms and conditions that NMFS believes are reasonable and appropriate to minimize the impact of incidental take associated with this action.

This Opinion also serves as consultation on Essential Fish Habitat pursuant to section 305(b) of the Magnuson-Stevens Fishery Conservation Management Act and implementing regulations at 50CFR Part 600.

Please direct any questions regarding this consultation to Scott Leonard of my staff in the Oregon Habitat Branch at 208.378.5708.

Sincerely,

for Michael R Course

Donna Darm
Acting Regional Administrator

cc: Linda Hallock, U.S. Fish and Wildlife Service
Jon Germond, Oregon Department of Fish and Wildlife

Endangered Species Act - Section 7 Consultation & Magnuson-Stevens Act Essential Fish Habitat Consultation

Biological Opinion

Proposed Milton-Freewater 1135 Setback Levee Project in the Walla Walla Subbasin, Oregon

Agency:	U.S. Department of the Army, Corps of Engineers
Consultation Conducted By:	National Marine Fisheries Service, Northwest Region
Date Issued:	July 6, 2001
Refer to:	OSB2000-0355-FEC

TABLE OF CONTENTS

1. ENDANGERED SPECIES ACT

1.1 Background

On August 3, 2000, the National Marine Fisheries Service (NMFS) received a letter and biological assessment (BA), dated August 3, 2000, from the Corps of Engineers (COE) requesting formal consultation regarding the potential effects of a proposed levee setback project in the Walla Walla subbasin on Middle Columbia River (MCR) steelhead (*Onchorynchus mykiss*) and their designated critical habitat. The BA described the proposed action, and concluded that the proposed action is likely to adversely affect (LAA) MCR steelhead or their designated critical habitat in the Walla Walla River. NMFS then received a letter dated February 20, 2001 which modified the proposed action but which did not change the determination of effects. The proposed project is located at two sites, the "Harris" site (Township 5N, Range 36E, Section 20) and the "Lampson" site (Township 5N, Range 36E, Sections 18, 19, and 20). It is likely that MCR steelhead juveniles will be present at these sites at the time the work would be conducted.

The MCR steelhead was listed as threatened under the Endangered Species Act (ESA) by NMFS on March 25, 1999 (64 FR 14517). The NMFS designated critical habitat for MCR steelhead on February 16, 2000 (65 FR 7764) and issued protective regulations under section 4(d) of the ESA on July 10, 2000 (65 FR 42422). The proposed action is within designated critical habitat for MCR steelhead in the Walla Walla River.

The objective of this biological opinion (Opinion) is to determine whether the subject action is likely to jeopardize the continued existence of MCR steelhead or result in the destruction or adverse modification of designated critical habitat for MCR steelhead.

1.2 Proposed Action

1.2.1 Lampson Site

The objective is to remove or setback the levees from the riverbank to allow the river to function more naturally. Overbank flooding would help reestablish riparian vegetation nearer to the active channel and help buffer the channel from nearby human activities. The existing levee at the Lampson site was privately constructed and provides some bank protection and flood protection. It may, however, also increase flood duration because the water enters from behind the levee and is blocked from returning to the river. Much of the Lampson site consists of abandoned agriculture fields. The Confederated Tribes of the Umatilla Indian Reservation are currently working on a project to restore native vegetation to these fields. Approximately 0.48 hectares (1.2 acres) of riparian vegetation and locust trees exist on the site. The site includes a berm along the riverbank that is approximately 0.5 meter (1.6 feet) above the natural ground elevation. The riverbank is protected with scattered riprap, a car body, debris, and vegetation. The car body, riprap, and any other man-made debris would be removed to an offsite location. Impacts to vegetation would be avoided wherever possible. Holes or gaps in the existing levee

would be constructed to allow the river more access to the floodplain. A levee would be constructed around the site of Mr. Lampson's future home which is approximately 300 feet from the stream. A total of 14.5 hectares (35.8 acres) of riparian and upland habitat would be restored at this site. The Oregon Department of Fish and Wildlife's (ODFW) preferred in-water work window is between July 1 and October 31. All instream work would be completed between July 1 and August 31 due to bull trout migratory concerns. All streambank areas disturbed by the project would be planted with native grasses and willows.

1.2.2 Harris Site

Currently, the Harris site includes an apple orchard, woody and metal debris, vegetation, and some riprap along the riverbank. The proposed action involves real estate acquisition by the Milton-Freewater Water Control District (MFWCD) that encompasses an area of 10 hectares (24.7 acres) that includes riparian and upland habitat. The COE would retain a perpetual riparian conservation easement that includes the entire 100-year flood plain. Car bodies, riprap, and man-made debris along the riverbank would be removed to an offsite location. Existing vegetation would be left in place as bank protection. Very little existing vegetation would be impacted except for the apple orchard that makes up a large portion of this site. This apple orchard does not provide any shade to the stream. Any fruit trees left unmaintained would need to be killed and either removed or left standing to reduce tree pests which could affect other commercial growers in the area. The ODFW's preferred in-water work window is between July 1 and October 31. All instream work would be completed between July 1 and August 31 due to bull trout migratory concerns. All streambank areas disturbed by the project would be planted with native grasses and willows.

1.3 Biological Information and Critical Habitat

The listing status and biological information for MCR steelhead are described in Busby et al. (1996) and NMFS (1997). The NMFS designated critical habitat for MCR steelhead on February 16, 2000 (65 FR 7764). The adjacent riparian zone is included in this critical habitat designation. The proposed action discussed in this Opinion is within the area designated as critical habitat for MCR steelhead.

The Walla Walla River provides spawning, rearing, and migratory habitat for both adult and juvenile life stages of MCR steelhead. Juvenile MCR steelhead are expected to be rearing in the project area. Essential features of the adult spawning, juvenile rearing, and adult and juvenile migratory habitat for the species are: 1) Substrate, 2) water quality, 3) water quantity, 4) water temperature; 5) water velocity, 6) cover/shelter, 7) food (juvenile only), 8) riparian vegetation, 9) space, and 10) safe passage conditions (50 CFR 226). The essential features that the proposed project may affect are substrate, water quality, and riparian vegetation resulting from construction activities.

1.4 Evaluating Proposed Action

The standards for determining jeopardy are set forth in section 7(a)(2) of the ESA as defined by 50 CFR Part 402 (the consultation regulations). NMFS must determine whether the action is likely to jeopardize the listed species and/or whether the action is likely to destroy or adversely modify critical habitat. This analysis involves the: 1) Definition of the biological requirements and current status of the listed species; and 2) evaluation of the relevance of the environmental baseline to the species' current status.

Subsequently, NMFS evaluates whether the action is likely to jeopardize the listed species by determining if the species can be expected to survive with an adequate potential for recovery. In making this determination, NMFS must consider the estimated level of mortality attributable to: 1) Collective effects of the proposed or continuing action; 2) the environmental baseline; and 3) any cumulative effects. This evaluation must take into account measures for survival and recovery specific to the listed salmonid's life stages that occur beyond the action area. If NMFS finds that the action is likely to jeopardize, NMFS must identify reasonable and prudent alternatives for the action.

Furthermore, NMFS evaluates whether the action, directly or indirectly, is likely to destroy or adversely modify the listed species' designated critical habitat. The NMFS must determine whether habitat modifications appreciably diminish the value of critical habitat for both survival and recovery of the listed species. The NMFS identifies those effects of the action that impair the function of any essential element of critical habitat. The NMFS then considers whether such impairment appreciably diminishes the habitat's value for the species' survival and recovery. If NMFS concludes that the action will destroy or adversely modify critical habitat it must identify any reasonable and prudent alternatives available.

For the proposed action, NMFS' jeopardy analysis considers direct or indirect mortality of fish attributable to the action. NMFS' critical habitat analysis considers the extent to which the proposed action impairs the function of essential biological elements necessary for juvenile and adult migration, spawning, and rearing of the MCR steelhead under the existing environmental baseline.

1.4.1 Biological Requirements

The first step the NMFS uses when applying the ESA section 7(a)(2) to listed steelhead is to define the species' biological requirements that are most relevant to each consultation. The NMFS also considers the current status of the listed species taking into account population size, trends, distribution and genetic diversity. To assess the current status of the listed species, NMFS starts with the determinations made in its decision to list MCR steelhead for ESA protection and also considers new data available that is relevant to the determination.

The relevant biological requirements are those necessary for MCR steelhead to survive and recover to naturally reproducing population levels at which protection under the ESA would

become unnecessary. Adequate population levels must safeguard the genetic diversity of the listed stock, enhance their capacity to adapt to various environmental conditions, and allow them to become self-sustaining in the natural environment.

For this consultation, the biological requirements are improved habitat characteristics that function to support successful adult and juvenile migration, spawning and rearing. MCR steelhead survival in the wild depends upon the proper functioning of certain ecosystem processes, including habitat formation and maintenance. Restoring functional habitats depends largely on allowing natural processes to increase their ecological function, while at the same time removing adverse impacts of current practices. In conducting analyses of habitat-altering actions, NMFS defines the biological requirements in terms of a concept called Properly Functioning Condition (PFC) and applies a 'habitat approach' to its analysis (NMFS 1999). The current status of the MCR steelhead, based upon their risk of extinction, has not significantly improved since the species was listed.

1.4.2 Environmental Baseline

The environmental baseline is an analysis of the effects of past and on-going human-caused and natural factors leading to the current status of the species or its habitat and ecosystem within the action area. The action area is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action" (50 CFR 402.02). The action area for this consultation, therefore, includes the streambed and streambank of the Walla Walla River within the area of disturbance at the project site and downstream to the extent of visible short-term turbidity increases resulting from the project work.

The current population status and trends for MCR steelhead are described in Busby et al. (1996) and in NMFS (1997). In general, the current status of MCR steelhead populations is the result of several long-term, human-induced factors (e.g. habitat degradation, water diversions, hydropower dams) that serve to exacerbate the adverse effects of natural environmental variability from such factors as drought, floods, and poor ocean conditions.

Environmental baseline conditions within the action area were evaluated for the subject action at the project site and watershed scales. This evaluation was based on application of the matrix of pathways and indicators (MPI) described in *Making Endangered Species Act Effects Determinations for Individual or Grouped Actions at the Watershed Scale* (NMFS 1996). This method assesses the current condition of instream, riparian, and watershed factors that collectively provide properly functioning aquatic habitat conditions essential for the survival and recovery of the species. An assessment of the essential features of MCR steelhead critical habitat is obtained by using the MPI process to evaluate whether aquatic habitat is properly functioning, functioning at risk, or not functioning.

In the Walla Walla River, the COE, through use of the MPI, determined that one habitat feature (substrate embeddedness) is properly functioning. Seven indicators (sediment/turbidity, physical barriers, pool quality, width/depth ratio, streambank stability, drainage network increase, and

road density and location) are functioning at risk and ten indicators (temperature, chemical contamination/nutrients, pool frequency, off-channel habitat, refugia, floodplain connectivity, change in peak/base flows, disturbance history, and riparian reserves) are not properly functioning.

1.5 Analysis of Effects

1.5.1 Effects of Proposed Action

The effects determination on habitat parameters in the BA was made using a method for evaluating current aquatic conditions (the environmental baseline) and predicting effects of the action on them. This process is described in the document *Making ESA Determinations of Effect for Individual or Grouped Actions at the Watershed Scale* (NMFS 1996). This assessment method was designed for the purpose of providing adequate information in a tabular form in BAs for NMFS to determine the effects of actions subject to ESA consultation. The effects of the actions are expressed in terms of the expected effect (restore, maintain, degrade) on each of 16 aquatic habitat factors in the action area, as described in the "checklist for documenting environmental baseline and effects of the action" (checklist) completed for each action and watershed. The results of the completed checklist for the action provides a starting point for determining the overall effect of the action on the environmental baseline in the action area.

Over the long term, the proposed project is expected to maintain or help restore floodplain function and riparian habitat at the project sites. At the watershed scale, all aquatic habitat indicators would be at least maintained.

In-water work will be needed to remove rip-rap and car bodies at both sites and to create openings in the levee at the Lampson site. This in-water work will result in disturbance of stream substrate and a temporary increase in stream turbidity. The temporary increase in stream turbidity could result in temporarily reduced feeding efficiency for juvenile MCR steelhead. There is also the possibility that removal of these materials by the excavator could kill or injure juvenile MCR steelhead. Direct mortality is expected to be insignificant, because juvenile fish will likely avoid the equipment and can move freely upstream or downstream from the project site.

Over the long term, the proposed streambank stabilization project is expected to increase floodplain function which will provide more shade for fish. The project will also likely increase allocthonous input into the stream which would increase future food supplies for juvenile steelhead.

1.5.2 Cumulative Effects

"Cumulative effects" are defined in 50 CFR 402.02 as those effects of "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." The action area for this consultation includes

the streambed and streambank of the Walla Walla River within the area of disturbance at the project sites and downstream to the extent of visible short-term turbidity increases resulting from the project work. NMFS is not aware of any specific future actions which are reasonably certain to occur on non-Federal lands within the project action area.

1.6 Conclusion

NMFS has determined that, when the effects of the levee setback project addressed in this Opinion are added to the environmental baseline and cumulative effects occurring in the action area, it is not likely to jeopardize the continued existence of MCR steelhead. Additionally, NMFS concludes that the subject action would not cause adverse modification or destruction of designated critical habitat for MCR steelhead. NMFS believes that the proposed action would cause a minor, short-term degradation of anadromous salmonid habitat due to sediment impacts from construction. These effects will be off set in the long term through the habitat enhancement activities. Although direct mortality from this project could occur during in-water work, it is not expected, and the level of mortality would be minimal and would not result in jeopardy.

These conclusions are based on the following considerations: 1) All in-water work will be completed during ODFW's preferred in-water work period of July 1-October 31; 2) equipment used to perform the work will operate from the streambank; 3) all disturbed areas will be planted with native grasses, shrubs, or trees upon completion of construction work; 4) best management practices will be implemented to minimize transport of sediment into the stream and to areas downstream from the project site both during and after construction; and (5) the net effect of the proposed action is expected to be the maintenance and restoration of functional MCR steelhead habitat conditions.

1.7 Conservation Recommendations

Section 7 (a)(1) of the ESA directs Federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of threatened and endangered species. Conservation recommendations are discretionary measures suggested to minimize or avoid adverse effects of a proposed action on listed species, to minimize or avoid adverse modification of critical habitat, or to develop additional information. The NMFS has no additional conservation recommendations regarding the action addressed in this Opinion.

1.8 Reinitiation of Consultation

Reinitiation of consultation is required if: 1) The action is modified in a way that causes an effect on the listed species that was not previously considered in the BA and this Opinion; 2) new information or project monitoring reveals effects of the action that may affect the listed species in a way not previously considered; or, 3) a new species is listed or critical habitat is designated that may be affected by the action (50 CFR 402.16).

2. INCIDENTAL TAKE STATEMENT

Section 4 (d) and Section 9 of the ESA prohibit any taking (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct) of listed species without a specific permit or exemption. Harm is 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, and sheltering (64 FR 60727; November 8, 1999). Harass is defined as actions that create the likelihood of injuring listed species to such an extent as to significantly alter normal behavior patterns which include, but are not limited to, breeding, feeding, and sheltering. Incidental take is take of listed animal species that results from, but is not the purpose of, the Federal agency or the applicant carrying out an otherwise lawful activity. Under the terms of Section 7(b)(4) and Section 7(o)(2), taking that is incidental to, and not intended as part of, the agency action is not considered prohibited taking provided that such taking is in compliance with the terms and conditions of this incidental take statement. An incidental take statement specifies the impact of any incidental taking of threatened species. If necessary, it also provides reasonable and prudent measures that are necessary to minimize impacts and sets forth terms and conditions with which the action agency must comply in order to implement the reasonable and prudent measures.

2.1 Amount or Extent of Take

The NMFS anticipates that the subject action covered by this Opinion has more than a negligible likelihood of resulting in incidental take of MCR steelhead. Some minimal level of incidental take is expected to result from direct mortality or injury to juvenile MCR steelhead during rip-rap and car removal and while creating openings in the levee at the Lampson site. The temporary increase in stream turbidity could result in temporarily reduced feeding efficiency for juvenile MCR steelhead. Direct mortality is expected to be minimal, because juvenile MCR steelhead are able to avoid instream construction activities. Effects from turbidity are also expected to be minimal because turbidity levels will quickly return to pre-construction levels once instream work is completed. Because of the inherent biological characteristics of aquatic species such as MCR steelhead, however, the likelihood of discovering take attributable to this action is very limited. Effects of actions such as that addressed in this Opinion are largely unquantifiable in the short term, and may not be measurable as long-term effects on the species' habitat or population levels. Therefore, although NMFS expects some incidental take to occur (primarily through harassment) due to the action covered by this Opinion, the best scientific and commercial data available are not sufficient to enable NMFS to estimate a specific amount of incidental take of listed fish at any life stage.

2.2 Effect of the Take

In this Opinion, NMFS has determined that the level of anticipated take is not likely to result in jeopardy to MCR steelhead or to destroy or adversely modify designated critical habitat for MCR steelhead when the reasonable and prudent measures are implemented.

2.3 Reasonable and Prudent Measures

The NMFS believes the following reasonable and prudent measures are necessary and appropriate to minimize the likelihood of take of MCR steelhead resulting from the action covered by this Opinion. The COE shall include, as part of the Section 404 permit, measures that will:

1. Minimize the likelihood of incidental take resulting from in-water work required to complete the project addressed in this Opinion by implementing measures to limit the duration and extent of in-water work, and to time such work when the impacts to MCR steelhead are minimized.

2. Minimize the likelihood of incidental take and impacts on critical habitat resulting from erosion associated with this project by implementing measures that minimize the movement of soils and sediment both into and within the stream, and will stabilize bare soil over both the short term and long term.

3. Minimize the likelihood of incidental take and impacts on critical habitat resulting from chemical pollution associated with this project by implementing measures that minimize the potential movement of fuel and chemicals from construction equipment into the stream system.

4. Minimize the likelihood of incidental take and impacts on critical habitat resulting from loss of instream habitat and riparian vegetation in the project area.

5. Carry out a comprehensive monitoring and reporting program to ensure this Opinion is meeting its objective of minimizing the likelihood of take from permitted activities and that the proposed mitigation actions are performing adequately.

2.4 Terms and Conditions

To be exempt from the prohibitions of section 9 of the ESA, the COE must require, as part of the Section 404 Permit, and the applicant and/or their contractors must comply with the following terms and conditions, which implement the reasonable and prudent measures described above. These terms and conditions are non-discretionary.

1. To implement reasonable and prudent measure #1, above, the applicant and/or their contractors shall:

    a. Complete all work below the ordinary high water line within ODFW's in-water work period for the Walla Walla River (July 1- October 31). Any extensions of the in-water work period will first be approved by and coordinated with ODFW and NMFS prior to implementation.

b. Operate equipment used to perform the construction work from existing roads or the streambank (equipment will not enter the active stream).

c. Provide passage for both adult and juvenile forms of all salmonid species throughout the construction period.

2. To implement reasonable and prudent measure #2, above, the applicant and/or their contractors shall:

a. Implement appropriate sediment control measures (e.g. silt fences, straw bales) to minimize sediment transport into the stream channel and downstream from the project site.

b. Maintain effective erosion control measures in-place at all times during the project construction. Construction within the project vicinity will not begin until all temporary erosion controls (e.g., sediment barriers and containment curtains) are in place. Erosion control structures will be maintained throughout the life of the project.

c. When the erosion control features are at 2/3 capacity they will be cleaned and maintained. They will be inspected regularly during construction to ensure that they are functioning as intended, and daily during periods of precipitation. Any failure of erosion control measures will be corrected immediately to maintain sedimentation controls.

d. Material removed during excavation shall only be placed in locations where it cannot enter sensitive aquatic habitat.

e. Monitor the success of erosion control measures at the project site daily during implementation of the project and on at least three occasions after completion of the project (e.g. one month, six months, and one year), or more often if necessary to minimize sedimentation to the stream.

3. To implement reasonable and prudent measure #3, above, the applicant and/or their contractors shall:

a. Locate areas for fuel storage and servicing of construction equipment and vehicles at least 150 feet away from any water body. Appropriate spill containment materials shall be made available at the project site.

b. Report any fuel spills that enter the stream to NMFS within 24 hours.

4. To implement reasonable and prudent measure #4, above, the applicant and/or their contractors shall:

a. Minimize disturbance of existing native vegetation at the project site. Where possible, native vegetation will be clipped by hand so that roots are left intact.

b. Reseed and replant all disturbed areas resulting from construction activities at the project sites, where soils are appropriate for a reasonable expectation of success of the plantings, with native grasses, shrubs, and trees.

c. Monitor the success of plantings at the project site on at least three occasions (e.g. one month, six months, and one year), or more often if necessary, after completion of the project.

d. Replace failed plantings, if replacement would potentially result in success, or implement alternative measures.

e. Report the results of channel cross section monitoring to NMFS at the address listed below.

5. To implement Reasonable and Prudent Measure #5 (Monitoring and Reporting) above, the COE shall ensure that:

a. Within 30 days of completing the project, the COE will submit a monitoring report to NMFS describing the COE's success meeting their permit conditions. This report will consist of the following information.

i. Project identification.

ii. Project name;

iii. starting and ending dates of work completed for this project;

iv. the COE contact person;

v. a summary of any pollution and erosion control inspection reports, including descriptions of any failures experienced with erosion control measures, efforts made to correct them and a description of any accidental spills of hazardous materials shall be provided upon request;

vi. a narrative assessment of the project's effects on natural stream function; and,

vii. photographic documentation of environmental conditions at the project site and compensatory mitigation site(s) before, during and after project completion.

(1) Photographs will include general project location views and close-ups showing details of the project area and project, including pre and post construction.

(2) Each photograph will be labeled with the date, time, photo point, project name, the name of the photographer, and a comment describing the photograph's subject.

(3) Relevant habitat conditions include characteristics of channels, streambanks, riparian vegetation, flows, water quality, and other visually discernable environmental conditions at the project area, and upstream and downstream of the project.

b. If a dead, injured, or sick endangered or threatened species specimen is located, initial notification must be made to the National Marine Fishery Service Law Enforcement Office, located at Vancouver Field Office, 600 Maritime, Suite 130, Vancouver, Washington 98661; phone: 360/418-4246. Care should be taken in handling sick or injured specimens to ensure effective treatment and care or the handling of dead specimens to preserve biological material in the best possible state for later analysis of cause of death.

In conjunction with the care of sick or injured endangered and threatened species or preservation of biological materials from a dead animal, the finder has the responsibility to carry out instructions provided by Law Enforcement to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

c. All monitoring reports shall be submitted to:

National Marine Fisheries Service
Oregon Habitat Branch, Habitat Conservation Division
Attn: OSB98-2000-0355
525 NE Oregon Street, Suite 500
Portland, Oregon 97232-2778

3. MAGNUSON-STEVENS ACT

3.1 Background

The objective of the Essential Fish Habitat (EFH) consultation is to determine whether the proposed action may adversely affect designated EFH for relevant species, and to recommend conservation measures to avoid, minimize, or otherwise offset potential adverse effects to EFH resulting from the proposed action.

3.2 Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended by the Sustainable Fisheries Act of 1996 (Public Law 104-267), requires the inclusion of EFH descriptions in Federal fishery management plans. In addition, the MSA requires Federal agencies to consult with NMFS on activities that may adversely affect EFH.

EFH means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity (MSA '3). For the purpose of interpreting the definition of essential fish habitat: Waters include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; substrate includes sediment, hard bottom, structures underlying the waters, and associated biological communities; necessary means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and ``spawning, breeding, feeding, or growth to maturity'' covers a species' full life cycle (50CFR600.110).

Section 305(b) of the MSA (16 U.S.C. 1855(b)) requires that:

- Federal agencies must consult with NMFS on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH;
- NMFS shall provide conservation recommendations for any Federal or State activity that may adversely affect EFH;
- Federal agencies shall within 30 days after receiving conservation recommendations from NMFS provide a detailed response in writing to NMFS regarding the conservation recommendations. The response shall include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with the conservation recommendations of NMFS, the Federal agency shall explain its reasons for not following the recommendations.

The MSA requires consultation for all actions that may adversely affect EFH, and does not distinguish between actions within EFH and actions outside EFH. Any reasonable attempt to encourage the conservation of EFH must take into account actions that occur outside EFH, such as upstream and upslope activities, that may have an adverse effect on EFH. Therefore, EFH consultation with NMFS is required by Federal agencies undertaking, permitting or funding activities that may adversely affect EFH, regardless of its location.

3.3 Identification of EFH

The Pacific Fisheries Management Council (PFMC) has designated EFH for Federally-managed fisheries within the waters of Washington, Oregon, and California. Freshwater EFH for Pacific salmon includes all those streams, lakes, ponds, wetlands, and other water bodies currently, or historically accessible to salmon in Washington, Oregon, Idaho, and California, except areas upstream of certain impassable man-made barriers (as identified by the PFMC), and

longstanding, naturally-impassable barriers (i.e., natural waterfalls in existence for several hundred years)(PFMC 1999).

Detailed descriptions and identifications of EFH for salmon are found in Appendix A to Amendment 14 to the Pacific Coast Salmon Plan (PFMC 1999). Assessment of the potential adverse effects to these species' EFH from the proposed action is based on this information.

The Pacific Fisheries Management Council (PFMC) has designated EFH for three species of Pacific salmon: chinook (*Oncorhynchus tshawytscha*); coho (*O. kisutch*); and Puget Sound pink salmon (*O. gorbuscha*)(PFMC 1999). Freshwater EFH for Pacific salmon includes all those streams, lakes, ponds, wetlands, and other water bodies currently, or historically accessible to salmon in Washington, Oregon, Idaho, and California, except areas upstream of certain impassable man-made barriers (as identified by the PFMC), and longstanding, naturally-impassable barriers (i.e., natural waterfalls in existence for several hundred years). Detailed descriptions and identifications of EFH for salmon are found in Appendix A to Amendment 14 to the Pacific Coast Salmon Plan (PFMC 1999). Assessment of potential adverse effects to these species' EFH from the proposed action is based on this information.

3.4 Proposed Action

The proposed action is detailed above in Part 1.2. The "action area" for this consultation includes the streambed and streambank of the Walla Walla River within the area of disturbance at the project site and downstream to the extent of visible short-term turbidity increases resulting from the project work. This area has been designated as EFH for chinook salmon.

3.5 Effects of Proposed Action

Historically, spring chinook salmon spawned, reared, and migrated in the Walla Walla River in the action area. They are, however, extinct in the subbasin. Information submitted by the COE in its request for consultation and additional information provided by ODFW is sufficient for NMFS to conclude that the effects of the proposed action are transient, local, and of low intensity and are not likely to adversely EFH in the long term. The short-term effects described above, however, may adversely affect EFH. Since spring chinook are currently extinct in the basin, the adverse effects described are short-term and minimal in scale, and the project is expected to produce long-term benefits to habitat these effects are expected to be minimal.

3.6 Conclusion

The NMFS believes that implementation of the 1135 Levee Setback Project in the Walla Walla River may adversely affect designated EFH for chinook salmon. The conservation measures proposed for the project by the COE and all of the Reasonable and Prudent Measures and the Terms and Conditions contained in section 2.3 and 2.4 above are applicable to salmon EFH. Therefore, NMFS incorporates each of those measures here as EFH conservation recommendations.

3.7 EFH Conservation Recommendations

Pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act, NMFS is required to provide EFH conservation recommendations for any Federal or state agency action that would adversely affect EFH.

3.8 Statutory Response Requirement

Please note that the Magnuson-Stevens Act (section 305(b)) and 50 CFR 600.920(j) requires the Federal agency to provide a written response to NMFS' EFH conservation recommendations within 30 days of its receipt of this letter. This response must include a description of the measures proposed by the agency to avoid, minimize, mitigate, or offset the adverse effects of the activity on EFH. If the response is inconsistent with a conservation recommendation from NMFS, the agency must explain its reasons for not following the recommendation.

3.9 Consultation Renewal

The COE must reinitiate EFH consultation with NMFS if either the action is substantially revised or new information becomes available that affects the basis for NMFS' EFH conservation recommendations (50 CFR 600.920).

4. LITERATURE CITED

Section 7(a)(2) of the ESA requires biological opinions to be based on "the best scientific and commercial data available." This section identifies the data used in developing this in addition to the BA and additional information requested by NMFS and provided by the NRCS.

Busby, P.J., T.C. Wainwright, G.J. Bryant, L.J. Lierheimer, R.S. Waples, F.W. Waknitz, and I. V. Lagomarsino. 1996. Status Review of West Coast Steelhead from Washington, Idaho, Oregon, and California. NOAA Technical Memorandum NMFS-NWFSC-27. August. (Available @ www.nwr.noaa.gov, under Protected Resources Division, Status Reviews).

National Marine Fisheries Service (NMFS). 1996. Making ESA Determinations of Effect for Individual or Grouped Actions at the Watershed Scale. NMFS, Environmental and Technical Services Division, Habitat Conservation Branch, 525 NE Oregon Street, Portland, Oregon. (Available @ www.nwr.noaa.gov, under Habitat Conservation Division, Habitat Guidance Documents).

National Marine Fisheries Service (NMFS). 1997. Status Review Update for Deferred and Candidate ESUs of West Coast Steelhead. December. (Available @ www.nwr.noaa.gov, under Protected Resources Division, Status Reviews).

National Marine Fisheries Service (NMFS). 1999. Endangered and Threatened Species: Threatened Status for Two ESUs of Steelhead in Washington and Oregon. Federal Register. Vol. 64, No. 57, pages 14517-14528. Final Rule. March 25. (Available @ www.nwr.noaa.gov, under ESA Information, Federal Register Notices).

National Marine Fisheries Service (NMFS). 1999. Endangered and Threatened Wildlife and Plants; Definition of "Harm". Federal Register. Vol. 64, No. 215, pages 60727-60731. Final Rule. November 8. (Available @ www.nwr.noaa.gov, under ESA Information, Federal Register Notices).

National Marine Fisheries Service (NMFS). 1999. The Habitat Approach: Implementation of Section 7 of the Endangered Species Act for Actions Affecting the Habitat of Pacific Anadromous Salmonids. Guidance memorandum from Assistant Regional Administrators for Habitat Conservation and Protected Resources to staff. 3 pages. August. NMFS, 525 NE Oregon Street, Suite 500, Portland, Oregon 97232-2737. (Available @ www.nwr.noaa.gov, under Habitat Conservation Division, Habitat Guidance Documents).

National Marine Fisheries Service (NMFS). 2000. Designated Critical Habitat: Critical Habitat for 19 Evolutionarily Significant Units of Salmon and Steelhead in Washington, Oregon, Idaho, and California. Federal Register. Vol. 65, No. 32, pages 7764-7787. Final Rule. February 16. (Available @ www.nwr.noaa.gov, under ESA Information, Federal Register Notices).

United States Department of the Interior-Bureau of Land Management (USDI-BLM). 2000. Final Biological Assessment for Steelhead Trout and Its Habitat in the John Day River Basin. Ongoing and Proposed Actions in 2000. June.