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:
OSB2001-0121-FEC

August 15, 2001

U.S. Army Corps of Engineers
Attn: Mr. Lawrence C. Evans
Regulatory Branch, CENWP-OP-G
P.O. Box 2946
Portland, OR 97208-2946

Re: Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Act Essential Fish Habitat Consultation on the McGilvra Dam Removal Project on Milton Creek, Columbia County, Oregon (Corps No. 2001-00540)

Dear Mr. Evans:

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 McGilvra Dam Removal Project on Milton Creek in Columbia County, Oregon (Corps of Engineers Permit Number 2001-0540). The NMFS concludes in this Opinion that the proposed actions are not likely to jeopardize Lower Columbia River (LCR) steelhead (*Onchorynchus mykiss*) or adversely modify critical habitat for this species. As required by Section 7 of the ESA, NMFS included reasonable and prudent measures with nondiscretionary 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 for coho salmon (*O. kisutch*) and chinook salmon (*O. tshawytscha*) pursuant to section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR Part 600.

Please direct any questions regarding this consultation to Ron Lindland of my staff in the Oregon Habital Branch at (503) 231-2315.

Sincerely,

Michael O'Connor

Donna Darm
Acting Regional Administrator

Endangered Species Act - Section 7 Consultation
Biological Opinion

&

Magnuson-Stevens Act
Essential Fish Habitat Consultation

McGilvra Dam Removal Project
Milton Creek near the City of St. Helens, Columbia County, Oregon

Agency: U.S. Department of the Army, Corps of Engineers

Consultation Conducted By: National Marine Fisheries Service,
Northwest Region

Date Issued: August 15, 2001

Refer to: OSB2001-0121-FEC

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1. ENDANGERED SPECIES ACT

1.1 Background

On June 13, 2001, the National Marine Fisheries Service (NMFS) received a letter from the U.S. Army Corps of Engineers (COE) requesting formal consultation regarding the potential effects of the McGilvra Dam Removal Project (COE Permit Number 2001-00540) on Milton Creek on Lower Columbia River (LCR) steelhead (*Oncorhynchus mykiss*) and their designated critical habitat. The applicant is Mrs. L.A. McGilvra. The letter described the proposed action, and concluded that the action is "likely to adversely affect" (LAA) LCR steelhead or their designated critical habitat. The COE also requested formal consultation on coho salmon (*O. kisutch*), a candidate species, which is also be present in Milton Creek. Milton Creek is a tributary to the Columbia River near the City of St. Helens, Oregon. The project is at creek mile 4.25 on Milton Creek in Section 31 of T5N, R1E.

The LCR steelhead was listed as threatened under the ESA by NMFS on March 19,1998 (63 FR 13347). Lower Columbia River/Southwest Washington (LCRSW) coho salmon is currently a candidate for listing under the ESA (60 FR 38011; July 25, 1995). Since NMFS does not consult on candidate species, LCRSW coho salmon will not be further addressed under the ESA portion of this Opinion. Coho salmon are addressed in the Essential Fish Habitat (EFH) section of this Opinion below. The NMFS designated critical habitat for LCR 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 LCR steelhead.

The objective of this Opinion is to determine whether the subject action is likely to jeopardize the continued existence of LCR steelhead or result in the destruction or adverse modification of designated critical habitat.

1.2 Proposed Action

The proposed action is to authorize the removal of the remnants of McGilvra Dam (a small concrete/rock dam) located at stream mile 4.25 on Milton Creek under section 404 of the Clean Water Act. The 5-foot high concrete/rock dam has been previously breeched in the center. The dam, in its existing condition, is a partial barrier to fish migration at certain flows[1]. The stream substrate around the dam is bedrock. The remaining sections to be removed are 22 feet x 5 feet x 1 foot and 16 feet x 5 feet x 1 foot (approximately 9.5 cubic yards of material). Dam sections to be removed would be isolated from flowing water by constructing sandbag cofferdams around them. Removal would be accomplished using a backhoe or trackhoe. Oregon Department of Fish and Wildlife (ODFW) fishery biologists would remove (by seining or dip netting) any fish inside the area surrounded by the cofferdams and release them back to the stream. In-water work would be completed during a 2-day period within the ODFW preferred work window of July 15

[1] Telephone conversation with Dick Caldwell, ODFW, June 27, 2001 (Discussing McGilvra Dam)

to August 31. The excavated material would be removed to an upland landfill, upland quarry, or concrete recycling facility. All streambank areas disturbed by activities associated with this project will be seeded with native grasses and planted with willows and/or red-osier dogwood.

1.3 Biological Information and Critical Habitat

The listing status and biological information for LCR steelhead are described in Busby et al. (1996) and NMFS (1997). The NMFS designated critical habitat for LCR steelhead on February 16, 2000 (65 FR 7764) and applied protective regulations under section 4(d) of the ESA on July 10, 2000 (65 FR 42422). The adjacent riparian zone is included in this critical habitat designation.

Critical habitat for LCR steelhead in Oregon includes the mainstem Columbia River and tributaries from its mouth upstream to and including Hood River on the Oregon side of the Columbia River. Freshwater critical habitat includes all waterways, substrates, and adjacent riparian areas—areas beside a stream that provides the following functions: Shade, sediment, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter—below longstanding, natural impassable barriers (i.e., natural waterfalls in existence for at least several hundred years) and several dams that block access to historic LCR steelhead habitat. The proposed action in Milton Creek will occur within designated critical habitat for LCR steelhead.

Milton Creek provides spawning, rearing, and migratory habitat for both adult and juvenile life stages of LCR steelhead. Juvenile LCR steelhead are expected to be rearing in the project area during completion of the project. Essential features of the adult spawning, juvenile rearing, and adult and juvenile migratory habitats 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 226.212). The essential features that the proposed project may affect are safe passage conditions, substrate, water quality, and riparian vegetation resulting from project activities.

1.4 Evaluating Proposed Actions

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 LCR 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 information considered in its decision to list LCR steelhead for ESA protection then considers new data available that are relevant to the determination.

The relevant biological requirements are those necessary for LCR 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. LCR 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 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

LCR steelhead, based upon their risk of extinction, has not significantly improved since the species were listed.

1.4.2 Environmental Baseline

The environmental baseline is an analysis of the effects of past and ongoing 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 incudes, "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 Milton Creek 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 LCR steelhead are described in Busby et al. (1996) and in NMFS (1997). In general, the current status of LCR 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.

Most of the Milton Creek watershed is on private land. Much of the drainage upstream from the project is timber land that has been managed for timber production. According to StreamNet, winter steelhead and coho salmon use approximately 16.5 miles of Milton Creek's 19.9 mile length for spawning and rearing. Milton Creek is not listed on the Clean Water Act section 303(d) list. Approximately one mile downstream from the project area, Milton Creek flows through the City of St. Helens, Oregon and enters the Columbia River near the mouth of Scappoose Bay.

1.5 Analysis of Effects

1.5.1 Effects of Proposed Action

The proposed action, as described above in Section 1.2, is to remove the remnants of a small concrete/rock dam at stream mile 4.25 on Milton Creek. The remaining sections of the dam will be isolated from flowing water by sandbag cofferdams before removal. The stream substrate around the area of the dam is bedrock. Therefore, turbidity increases and downstream movement of sediment from the project site are expected to be minimal. Though substrate disturbance is expected to be minimal, some short term turbidity may occur in Milton Creek. The short-term increase in turbidity could result in temporarily reduced feeding efficiency for juvenile salmonids in the project areas and for a short distance downstream.

All in-water work will be completed in two days during the ODFW preferred in-water work period for Milton Creek, which is between July 15 and August 31, when listed steelhead are least likely to be present (ODFW 2000). However, since juvenile LCR steelhead rear in Milton Creek year-round, some may be present in the project area even during that time. If fish are present

within the areas surrounded by the cofferdams, ODFW fishery biologists will remove them by netting and release them back into Milton Creek. Some direct mortality or injury could result from netting listed LCR steelhead. However, it is expected to be minimal.

Removal of the remnants of the concrete/rock dam will improve upstream and downstream passage conditions for both adult and juvenile LCR steelhead in Milton Creek. Based on StreamNet data, approximately 12.3 miles of potential steelhead spawning and rearing habitat are available in Milton Creek upstream from the project site.

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 Milton Creek 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. NMFS is not aware of any specific future actions which are reasonably certain to occur on non-Federal lands within the Milton Creek watershed.

1.6 Conclusion

NMFS has determined that, when the effects of the removal of the remnants of the small concrete/rock dam 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 LCR steelhead. Additionally, NMFS concludes that the subject action would not cause adverse modification or destruction of designated critical habitat for LCR steelhead. NMFS believes that the proposed actions would cause a minor, short-term increase in stream turbidity in Milton Creek. In the long term, survival and safe passage conditions for adult and juvenile LCR steelhead will be improved. Although direct mortality of juvenile LCR steelhead from this project could occur during in-water work, it is not expected, and the level of potential 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 two days within the ODFW preferred in-water work period between July 15 and August 31; 2) an ODFW fishery biologist will remove or supervise the removal of any fish from the areas to be isolated by cofferdams during in-water work, and release them back into Milton Creek; 3) downstream movement of sediment from the project site will be minimized by using cofferdams to isolate the in-water work area; 4) streambank areas disturbed by project activities will be planted with native grasses and willows and/or red osier dogwood; and 5) NMFS expects that the net effect of the proposed action will be to maintain or help restore properly functioning habitat conditions in the project area of Milton Creek.

1.7 Conservation Recommendations

Section 7 (a)(1) of the ESA directs Federal agencies to use 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 the Take

NMFS anticipates that the proposed action has more than a negligible likelihood of resulting in incidental take of LCR steelhead because of detrimental effects from increased sediment and pollutant levels (non-lethal), riparian habitat disturbance (non-lethal), and the capture and release or any juvenile fish necessary to isolate the in-water work area (lethal and non-lethal).

Effects of actions such as minor sedimentation and minor riparian disturbance are unquantifiable in the short term and are not expected to be measurable as long-term harm to habitat features or

by long-term harm to salmonid behavior or population levels. Therefore, even though NMFS expects some low level incidental take to occur due to the construction actions other than isolating the work area covered by this Opinion, best scientific and commercial data available are not sufficient to enable NMFS to estimate the specific amount of incidental take to the species itself. In instances such as these, NMFS designates the expected level of take as "unquantifiable." Based on the information in the biological assessment, NMFS anticipates that an unquantifiable amount of incidental take could occur as a result of the habitat altering actions covered by the Opinion. The extent of the take includes the aquatic and associated riparian habitats affected by removal of McGilvra Dam, upstream to the edge of disturbance, and downstream 300 feet.

Unlike general habitat effects, the effects of isolating the work area from the flowing waters of Milton Creek could result in minor incidental lethal take of LCR steelhead that can be quantified based on the results of past salvage operations. NMFS anticipates that an incidental take of up to 20 juvenile LCR steelhead could occur as a result of isolating the work area as described in this Opinion. The extent of take is limited to LCR steelhead in Milton Creek.

2.2 Effect of the Take

In this Opinion, the NMFS has determined that the level of anticipated take is not likely to result in jeopardy to LCR steelhead or to destroy or adversely modify designated critical habitat 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 LCR 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.

2. Minimize the likelihood of incidental take and impacts on critical habitat resulting from damage to riparian vegetation, streambank erosion, or water pollution.

3. Complete a comprehensive monitoring and reporting program to ensure this Opinion is meeting its objective of minimizing the likelihood of take from permitted activities.

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 nondiscretionary.

1. To implement reasonable and prudent measure #1, above, the COE shall ensure that:

   a. All work within the active channel that could potentially contribute sediment or toxicants to the stream will be completed within the ODFW approved in-water work period for Milton Creek of July 15 to August 31[2].

   b. Extensions of the in-water work period, including those for work outside the wetted perimeter of the stream but below the ordinary high water mark must be approved by biologists from ODFW or NMFS.

   c. During removal of the concrete dam remnants the work area is well isolated from the active flowing stream within a coffer dam or similar structure (made out of sandbags, sheet pilings, inflatable bags, or similar materials), to minimize the potential for sediment entrainment.

   d. Before and intermittently during pumping of water from the areas enclosed by the cofferdams, attempts will be made to seine or dip net and release fish from the work isolation area as is prudent to minimize risk of injury.

      i. Seining or dip netting will be conducted by, or under the supervision of an ODFW fishery biologist experienced in such efforts. Staff working with the seining or dip netting operation must have the necessary knowledge, skills, and abilities to ensure the safe handling of all ESA-listed fish.

      ii. ESA-listed fish must be handled with extreme care and kept in water to the maximum extent possible during seining or dip netting and transfer procedures. The transfer of ESA-listed fish must be conducted using a sanctuary net that holds water during transfer, whenever necessary to prevent the added stress of an out-of-water transfer.

      iii. Seined or dip netted fish must be released as near as possible to capture sites.

      iv. If a dead, injured, or sick listed species specimen is found, initial notification must be made to the National Marine Fisheries Service Law Enforcement Office, in the 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. Dead specimens should be handled to preserve biological material in the best possible state for later analysis of cause of

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[2] Oregon Department of Fish and Wildlife, *Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources*, 12 pp (June 2000)(identifying work periods with the least impact on fish) (http://www.dfw.state.or.us/ODFWhtml/InfoCntrHbt/0600_inwtrguide.pdf).

death. With the care of sick or injured listed 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 disturbed.

v. A description of any seine or dip net and release effort will be included in a post project report, including the name and address of the supervisory fish biologist, methods used to isolate the work area and minimize disturbances to ESA-listed species, stream conditions before and following placement and removal of barriers; the means of fish removal; the number of fish removed by species; the condition of all fish released, and any incidence of observed injury or mortality.

vi. Water pumped from the work isolation area will be discharged into an upland area providing over-ground flow before returning to the creek. Discharge will occur so that it does not cause erosion.

vii. Discharges into potential fish spawning areas or areas with submerged vegetation are prohibited.

2. To implement reasonable and prudent measure #2, above, the COE shall ensure that:

a. Disturbance of existing riparian vegetation is minimized at the project site.

b. All areas disturbed during activities associated with this project will be planted with native vegetation specific to the project vicinity. Plantings will achieve an 80 percent survival success after three years.

c. Equipment used in the project will be cleaned of external oil and grease and inspected for fluid leaks before operating below the bankfull elevation of the stream. Equipment will be refueled and fuel stored at least 150 horizontal distance from the stream.

3. To implement reasonable and prudent measure #3, 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 these terms and conditions. This report will consist of the following information:

i. Project identification.

(1) Project name;

(2) starting and ending dates of work completed for this project, and;

(3) the name and address of the construction supervisor.

ii. A narrative assessment of the project's effects on natural stream function.

iii. Photographic documentation of environmental conditions at the project site 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. Monitoring reports will be submitted to:

National Marine Fisheries Service
Oregon Habitat Branch
Attn: OSB2001-0121
525 NE Oregon Street, Suite 500
Portland, Oregon 97232-2778

3. ESSENTIAL FISH HABITAT

3.1 Background

The objective of the Essential Fish Habitat (EFH) consultation is to determine whether the proposed actions 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 (50 CFR 600.110).

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 Milton Creek 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 coho salmon and chinook salmon.

3.5 Effects of Proposed Action

Coho salmon spawn, rear, or migrate in Milton Creek both upstream and downstream from the project site. Chinook salmon occur in the lower portion of Milton Creek approximately three miles downstream from the project site. As described in Section 1.5.1, removal of the remnants of the small concrete/rock dam on Milton Creek may cause some short-term effects to water quality (turbidity) in Milton Creek. The temporary increase in stream turbidity could result in temporarily reduced feeding efficiency for juvenile salmonids which may be present in the project area. Removal of the remnants of the concrete/rock dam will improve upstream and downstream passage conditions for both adult and juvenile coho salmon in Milton Creek. Based on StreamNet data, approximately 12.3 miles of potential coho salmon spawning and rearing habitat are available in Milton Creek upstream from the project site. Chinook salmon, which occur in Milton Creek, several miles downstream from the project site are not expected to be affected by the project. 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. NMFS also believes that the conservation measures proposed as an integral part of the action would avoid, minimize, or otherwise offset potential adverse impacts to designated EFH for coho salmon.

3.6 Conclusion

The NMFS believes that implementation of the project to remove the McGilvra Dam from Milton Creek may adversely affect designated EFH for coho salmon. The project is unlikely to adversely affect designated EFH for chinook salmon in lower Milton Creek.

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. The conservation measures that the COE has built into the project and all of the reasonable and prudent measures and terms and conditions contained in Sections 2.2 and 2.3 are applicable to salmon EFH. Therefore, NMFS incorporates each of those measures here as EFH recommendations.

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. The response must include a description of measures proposed to avoid, mitigate, or offset the adverse impacts 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 ODFW.

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ODFW (Oregon Department of Fish and Wildlife). 2000. Oregon Guidelines for Timing of In-water Work to Protect Fish and Wildlife Resources. June.

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