

United State Department Interior

BUREAU OF LAND MANAGEMENT

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In Reply Refer to:
6500 (OR-931) P

August 6, 2004

EMS TRANSMISSION 08/06/2004
Information Bulletin No. OR-2004-155

To: District Managers: Salem, Eugene, Coos Bay, Roseburg, and Medford

From: Deputy State Director for Resource Planning, Use and Protection

Subject: Strategy to Conduct and Complete Conferencing with the National Oceanic and Atmospheric Administration Fisheries Service on Proposed Fish Species; and Guidance on Magnuson-Stevens Fishery Conservation and Management Act Consultation Requirements for Designated Essential Fish Habitat

The Department of Commerce National Oceanic and Atmospheric Administration (NOAA) Fisheries (formerly known as National Marine Fisheries Service) has published proposed Endangered Species Act (ESA) listing determinations for 27 Evolutionarily Significant Units (ESU) of West Coast salmon in the Federal Register (69 FR 33102, 6/14/00). The status review which resulted in the listing determinations incorporates NOAA Fisheries policy on hatchery stocks.

Two of the listing determinations resulted in "proposed" threatened status for the Oregon Coast coho (OC coho) salmon ESU and the Lower Columbia River coho (LCR coho) salmon ESU. This triggers conferencing requirements under the ESA and Bureau of Land Management (BLM) policy for actions within these two ESUs. Listing determinations of "proposed" for other Pacific salmon ESUs encompassing BLM lands in Oregon and Washington will not require conferencing because their threatened or endangered status listing was not withdrawn pending the status review. BLM will continue to conduct ESA consultation for actions in the listed Pacific salmon ESUs.

NOAA Fisheries Policy

NOAA Fisheries issued a letter to federal executives for agencies with management actions within the OC coho area on June 29, 2004. The letter describes listing status, ESA requirements for federal actions, and Magnuson-Stevens Fishery Management Act consultation requirements for designated Essential Fish Habitat (EFH) in light of the proposed listing determination. It is attached for your reference.

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BLM Conferencing Policy

The ESA requires federal agencies to conference on proposed species only when actions may "jeopardize the continued existence of" the species. However, BLM Manual Section 6840.06 B.1 states that the BLM "...shall confer with the USFWS (US Fish and Wildlife Service)/NMFS (National Marine Fisheries Service) on any action that will adversely affect a proposed fish species and/or proposed Critical Habitat."

To meet BLM conferencing policy for the OC coho and the LCR coho, the districts will complete the following steps:

- 1) Resource Area Fish Biologists shall assess all actions and make effects determinations: No Effect (NE); May Affect, Not Likely to Adversely Affect (NLAA); or May Affect, Likely to Adversely Affect (LAA) for proposed fish species. Only LAA actions must be brought forward and evaluated in a conference.
- 2) Convene the Level One Team; discuss and evaluate the LAA actions; concur with, or modify calls, as needed.
- 3) If there is agreement upon the analysis and the LAA call, finalize and submit the Biological Assessment (BA) to NOAA Fisheries.
- 4) Do not proceed with the action until conference proceedings are completed. For timber sales, this means do not publish the decision in the newspaper.

The BLM Manual, Section 6840.06 B.2 states: "Until the conference proceedings are completed, BLM shall not carry out any action that would cause an irreversible or irretrievable commitment of resources such that it would prevent the formulation or implementation of a reasonable and prudent alternative that might avoid jeopardy to the proposed species and/or prevent the adverse modification of proposed critical habitat." The conference proceedings are considered completed when NOAA Fisheries produces a conference opinion.

Please keep in mind that both formal and informal consultation must be concluded prior to the effective date for a final listing determination or project activities must be suspended. The effective date is either 30 or 60 days, at NOAA Fisheries' discretion, after the Federal Register posting of the final listing determination. The steps described above facilitate conversion of the conference opinion to a biological opinion by NOAA Fisheries within that 30 or 60 day window.

Optional Conferencing for NLAA Actions

It is strongly encouraged to conference on NLAA actions with multiple year contracts or time frames, such as timber sales. It is likely that such actions will extend beyond June 2005, when the final listing determinations will be posted in the Federal Register. While not required to meet BLM policy, it reduces the risk that a project will be suspended pending completion of informal consultation. When conferencing on NLAA actions, you may proceed with the project after completion of Step 3 (above) except that the Level One Team will concur with the NLAA call. To meet BLM Manual policy in Section 6840.06 B.2, informal conferencing need not be concluded prior to proceeding with the action. An NLAA action cannot result in jeopardy to the species because there is no associated ESA "take."

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Consultations on EFH

The changes in ESA listing status for both OC coho and LCR coho do not affect requirements to assess for effects on EFH for coho salmon and Chinook salmon. BLM is still required to assess for effects to EFH for the two species. The EFH consultation requirements and process are explained by NOAA Fisheries on pages 3 and 4 of the attachment. On page 3, paragraph 3, the attachment describes that, "If the Federal agency determines that the proposed action will have no adverse effect, consultation is not necessary." To date, BLM has used BA documents as the vehicle for EFH effect analysis and determinations. Because BLM will continue to make ESA effect determinations using BAs to meet BLM policy requirements for ESA conferencing, the BAs for LAA actions will continue to serve as documents for EFH consultations.

Any questions regarding these processes may be directed to Joe Moreau, Fisheries Program Lead (OR-931), at 503-808-6418.

Districts with Unions are reminded to notify their unions of this Information Bulletin and satisfy any bargaining obligations before implementation. Your servicing Human Resources Office or Labor Relations Specialist can provide you assistance in this matter.

Signed by
Miles R. Brown
(Acting)

Authenticated by
Mary O'Leary
Management Assistant

1 Attachment

1 - [Listing Status, Section 7, and Consultation Requirements for Oregon Coast Coho Salmon](#) (4pp)

Distribution

WO-230 (Room 204 LS)

WO-270 (Room 204 LS)

OR-080 (Jeffrey Gordon, Bob Ruediger)

OR-090 (Dave DeMoss, Sharmila Premdas)

OR-100 (Steve Niles, Scott Lightcap)

OR-110 (Dave Roche, Dale Johnson)

OR-120 (Jon Menten, Bill Hudson)

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Received in OH/WA

JUL 02 2004

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Refer to:
OHB2004-0052

June 29, 2004

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Re: Listing Status, Section 7, and Consultation Requirements for Oregon Coast Coho Salmon

Dear Federal Agency Executives:

This letter is intended to help you better understand the present listing status of Oregon Coast coho salmon (*Oncorhynchus kisutch*), Endangered Species Act (ESA) section 7 requirements for Federal actions within their geographic range, as well as continuing Magnuson-Stevens Fishery



Conservation and Management Act (MSA) consultation requirements for designated essential fish habitat (EFH).

Legal Developments Affecting Oregon Coast Coho Salmon

In September 2001, in the case *Alsea Valley Alliance v. Evans*, U.S. District Court Judge Michael Hogan struck down the 1998 ESA listing of Oregon Coast (OC) coho salmon and remanded the listing decision to NOAA Fisheries for further consideration. In November 2001, the Oregon Natural Resources Council appealed the District Court's ruling. Pending resolution of the appeal, in December 2001, the Ninth Circuit Court of Appeals stayed the District Court's order that voided the OC coho listing. While the stay was in place, the OC coho Evolutionarily Significant Unit (ESU) was again afforded the protections of the ESA.

On February 24, 2004, the Ninth Circuit dismissed the appeal in *Alsea*. On June 15, 2004, the Ninth Circuit returned the case to Judge Hogan and ended its stay. Judge Hogan's order invalidating the OC coho listing is back in force. Accordingly, OC coho are now not listed, and ESA provisions for listed species, such as the consultation requirement and take prohibitions, do not apply to OC coho.

In response to the *Alsea* ruling, NOAA Fisheries released its revised policy for considering hatchery stocks when making listing decisions on June 3, 2004 (69 FR 31354). NOAA Fisheries completed a new review of the biological status of OC coho salmon, and applying the new hatchery listing policy, proposed to list OC coho salmon as a threatened species on June 14, 2004 (69 FR 33102). NOAA Fisheries must make a final decision on the proposed OC coho salmon listing by June 14, 2005.

The State of Oregon, in coordination with NOAA Fisheries, is currently conducting an ESU-scale analysis of the effectiveness of measures under the Oregon Plan in conserving the OC coho ESU. This analysis is expected to be completed in the fall of 2004. In the event that this analysis makes available new information showing that the Oregon Plan or other conservation efforts substantially mitigate ESU extinction risk, NOAA Fisheries has agreed to reinitiate a status review to take new information into consideration. Thus, it is possible that the current proposal to list OC coho as a threatened species may be further revised or modified later this fall.

As a species currently proposed for listing as threatened, Federal agencies are required to confer with NOAA Fisheries on any action that is likely to jeopardize the continued existence of OC coho or result in the destruction or adverse modification of critical habitat that may in the future be proposed to be designated for that species. The requirements for conferring on proposed species are described in the consultation regulations (50 CFR 402.10). If requested by the Federal action agency, NOAA Fisheries may issue a formal conference opinion that includes an incidental take statement. However, an incidental take statement would not become effective until NOAA Fisheries adopted the conference opinion as a biological opinion, after the listing is final. Until the time that the species is listed, the prohibitions of the ESA do not apply.

In addition to the ESA requirements for conferring on proposed species, the essential fish habitat (EFH) consultation requirements pursuant to the MSA remain in effect for OC coho salmon.

Essential Fish Habitat Consultation Requirements

In 1996, Congress amended the MSA to require that Federal fishery management plans identify all habitat “essential” to species managed under those plans. There are three Fishery Management Plans (FMPs), each with essential fish habitat designations for species in Oregon. The FMPs and their respective plan amendments on essential fish habitat are: Pacific Coast Salmon FMP (Amendment 14, September 2000); Pacific Coast Groundfish FMP (Amendment 11, March 1999); and, Coastal Pelagic Species FMP (Amendment 8, December 1998).

The 1996 amendments to MSA also require Federal agencies to consult with NOAA Fisheries regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect essential fish habitat identified in Fishery Management Plans. Regulations at 50 CFR 600.920 provide guidance on EFH consultations. EFH consultation is also mandatory for renewals, reviews, or substantial revisions of actions, but is not required for any action that would not adversely affect EFH or for completed actions, such as issued permits. The steps of the EFH consultation process are summarized below:

EFH Effect Determination: For all Federal actions, the lead Federal agency determines the potential effects of the proposed action on EFH. If the Federal agency determines that the proposed action will have no adverse effect, consultation is not necessary. The Federal action agency should retain an administrative record of the rationale for each EFH effect determination. Under the MSA, a “would not adversely affect” determination does not require written concurrence from NOAA Fisheries. Note that this is different from consultation under the ESA, where the Federal action agency must obtain written concurrence from NOAA Fisheries for activities “not likely to adversely to affect” listed species. 50 CFR 402.13(a).

Notification and EFH Assessment: If the proposed action “may adversely affect” EFH, the Federal agency must notify NOAA Fisheries and provide an EFH assessment. 50 CFR 600.920(g)(2). The length of the EFH assessment may vary depending on the significance of the potential adverse affects to EFH, but all EFH assessments must include the following information: (1) A description of the proposed action; (2) an analysis of the effects, including cumulative effects, of the proposed action on EFH, the managed species, including affected life history stages, and associated species, such as major prey species; (3) the Federal agency’s determination of the effects of the action on EFH; and (4) proposed mitigation, if applicable. An electronic EFH assessment template for use by Federal action agencies may be found on the Web at: <http://www.nwr.noaa.gov/1habcon/habweb/msa.htm>.

EFH Conservation Recommendations: MSA section 305(b)(4)(A) requires NOAA Fisheries to develop advisory EFH conservation recommendations for any state or Federal agency whose action NOAA Fisheries learns may adversely affect EFH. These conservation recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. Conservation recommendations will not suggest that Federal or state agencies take actions beyond their statutory authority. 50 CFR 600.925(a).

Statutory Response Requirement: MSA section 305(b)(4)(B) requires Federal agencies to respond in writing within 30-days of receiving EFH conservation recommendations from NOAA

Fisheries. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitats. For a response that is inconsistent with the NOAA Fisheries' recommendations, the Federal agency must explain its reasons for not following the recommendations. If the Federal agency is not able to respond fully within 30-days, it should send NOAA Fisheries an interim written response stating that it has received NOAA Fisheries' EFH conservation recommendations and will respond in detail at least 10-days before making a final decision on the action. State agencies are not required to respond to EFH conservation recommendations.

Dispute Resolution: If the Federal action agency decision is inconsistent with an EFH conservation recommendation from NOAA Fisheries, the NOAA Assistant Administrator for Fisheries may request a meeting with the head of the Federal action agency to discuss the proposed action and opportunities for resolving any disagreements. 50 CFR 600.920 (j)(2). NOAA Fisheries will strive to resolve any such issues at the field level wherever possible.

Reinitiation of Consultation: Federal action agencies must re-initiate EFH consultation with NOAA Fisheries if the agency substantially revises its plans for an action in a way that may adversely affect EFH, or if new information becomes available that affects the basis for NOAA Fisheries' EFH conservation recommendations. 50 CFR 600.920 (k).

I hope this letter answers any questions you may have about the present consultation requirements for OC coho salmon under the ESA and MSA. My staff and I stand ready to work with you to ensure the conservation and enhancement of fishery resources affected by Federal actions your agency authorizes, funds, or otherwise carries out within the range of OC coho salmon. If you have any questions concerning this matter, please contact Mr. Michael Tehan, Director, Oregon State Habitat Office, at 503.231.2224.

Sincerely,



D. Robert Lohn
Regional Administrator

cc: Jim Myron, Oregon Governor's Office
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Lindsay Ball, ODFW
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Katy Coba, ORDOA
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