Endangered Species Act & Magnuson-Stevens Act Guidance for HUD Projects in Oregon

Prepared in collaboration with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service

General Requirements	Legislation	HUD Regulations
Section 7(a)(2) of the Endangered Species Act mandates that actions that are authorized, funded, or carried out by Federal agencies do not jeopardize the continued existence of plants and animals that are listed, or result in the adverse modificationor destruction of designated critical habitat.	The Endangered Species Act of 1973; 16 U.S.C. 1531 et seq.	24 CFR 58.5(e) 24 CFR 50.4(e)
Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires Federal agencies to consult with NOAA Fisheries on any action that they authorize, fund, or undertake that may adversely affect essential fish habitat (EFH).	Magnuson-Stevens Fishery Conservation and Management Act; 16 U.S.C. 1801	

The purpose of this document is to assist the U.S. Department of Housing and Urban Development (HUD) and their responsible entities[1] (REs) in meeting their compliance and documentation obligations under the Endangered Species Act (ESA) and the Magnuson-Stevens Fisheries Conservation and Management Act (MSA). The ESA is administered jointly by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) [collectively, "the Services"], while the MSA is administered solely by the NMFS. Nearly all HUD projects, including HUD funded, financed, subsidized, or guaranteed projects constitute a federal action requiring project review for compliance with the ESA and MSA.

The ESA requires all federal agencies to use their authorities to help conserve "*listed species*" (i.e., those listed as "*threatened*" or "*endangered*" under the ESA). Therefore, as HUD staff or designated REs, you are responsible for minimizing the effects of your actions on ESA-listed species, designated critical habitat, and habitats identified in recovery plans. An ESA effects analysis must consider all effects to ESA-listed species and designated critical habitat caused by a proposed action. Few HUD actions occur within designated critical habitat, where direct injury or harm to ESA-listed species or critical habitat is likely to occur or easy to discern. More often, however, some types of HUD projects have the potential to effect ESA-listed species and their critical habitats that are far removed from the actual project location.

The MSA requires federal agencies to evaluate the effect of their actions on habitats used by a range of marine species that are commercially harvested. These habitats are identified as "essential fish habitat" (EFH).[2] In many cases, projects that have the potential to affect critical habitat designated under the ESA have similar effects on EFH, particularly with respect to Chinook and coho salmon, which are regulated species under both the ESA and MSA. Project assessment for ESA and MSA impacts are typically conducted concurrently, as the species and habitats regulated by both acts tend to overlap.

This document is intended to describe the circumstances under which a finding of "*no effect*" on ESA- and MSA-regulated species, their critical habitats, and EFH occurring in Oregon might be appropriate. A project that reaches a finding of "*no effect*" does not require coordination with, or approval from, the USFWS and NMFS, and documenting a finding of "*no effect*" satisfies the ESA/MSA review obligations by HUD. Note that, a finding of "no effect" would preclude NMFS or USFWS issuing liability protection for violations of the ESA,

[1] A Responsible entity is a unit of local government (state, county, city) designated by HUD under 24 Code of Federal Regulations (CRF) Part 58.

[2] Essential Fish Habitat (EFH) has been designated for Pacific salmon (Chinook, coho, and pink salmon), coastal pelagic species, groundfish, and highly migratory species.

and is based on the premise the project would not result in the take[3] of an ESA-listed species or result in adverse effects to critical habitat/EFH. However, if this determination is made in error, or if take does occur, HUD or the RE bears liability for such take.

HUD or the RE is solely responsible for making a finding of effect for a project and cannot defer responsibility to an external party. USFWS and NMFS rarely issue any correspondence for a "*no effect*" finding, except when there is strong disagreement about that finding. If you make a "*no effect*" finding for your project, document the circumstances and reason for your decision in a memo to the project file, as this will aid HUD should the project be reviewed internally or by another party. The worksheets presented in Part A and Part B of this document should be included in a project's Environmental Review Record to document what finding of effect was reached. Since USFWS and NMFS manage and regulate different species and habitats, it is entirely possible to reach a different finding of effect for each Service.

Making an appropriate effects determination for both the ESA and MSA is an essential part of carrying out HUD's obligation to use its federal authority to help conserve listed species. While there are a great number of HUD activities that will have "*no effect*" on federally-listed species, designated critical habitat, and EFH, there are a number of activities that will require further analysis, documentation, and consultation with USFWS and/or NMFS. As there are minor variations in process, this guidance is separated into multiple parts:

Part A Describes the "*no effect*" determination process for species and habitats under USFWS' jurisdiction;

Part B Describes the "*no effect*" determination process for species and habitats under NMFS' jurisdiction;

Part C Describes the process to initiate consultation with USFWS and/or NMFS if you are unable to reach a "*no effect*" finding for your project, and provides contact information for staff that can provide technical assistance in initiating the ESA consultation process;

Part D Includes a glossary of terminology frequently used when discussing the ESA and MSA.

Part A: Consultation with the U.S. Fish and Wildlife Service (USFWS)

USFWS' trust resources are found in a wide range of habitats throughout Oregon, including forests, wetlands, bogs, rivers, lakes, reservoirs, coastal dunes, estuaries, grasslands, prairies, shrub-steppe, and mountains. USFWS species listed or proposed for listing under the ESA that are found in Oregon include plants, insects, mollusks, crustaceans, birds, mammals, reptiles, and amphibians. Project concerns for ESA-species under USFWS' jurisdiction largely focus on preventing the destruction or loss of sensitive habitats (e.g., wetlands, prairie, oak savanna) that support ESA-listed species for all or part of their life history. Additional concerns include minimizing the adverse effects from construction and operation (e.g., noise, light, vibrations) that could temporarily or permanent impact habitats occupied by ESA-listed species, reducing the suitability of such habitats and/or disrupting essential life-stage activities of a listed species (e.g., nesting, feeding, migration). The following two steps will assist you in making a finding of effect for your project.

Step 1: Obtain Species List & Determine Critical Habitat

You must obtain a species list for the entire action area of your project. The action area encompasses all of the effects of the project, not just those that occur within the construction footprint. Project effects that extend beyond the project site itself and may include noise, air pollution, water quality, stormwater discharge, and visual disturbances. Additionally, effects to habitat must be considered, including the project's effects on

[3] "Take" of a listed species is defined as, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." [50 CFR 402.02]

roosting, feeding, nesting, spawning and rearing habitat, overwintering sites, and migratory corridors.

Go to https://ipac.ecosphere.fws.gov/ and log in or create an account to generate an official species list for the project area. Please note that this list includes listed, *proposed* and *candidate species* and designated and *proposed* critical habitats; consideration of project effects on *candidate species* is optional, unless the project's effects are very large (in this case, contact the local USFWS field office). However, *proposed species* or critical habitats may become listed as endangered or threatened species during the period of construction; a project with a protracted development schedule may opt to address *proposed species* as a way to reduce the potential need to reinitiate consultation with the USFWS, should the status of the *proposed species* or critical habitat be upgraded to threatened or endangered. If you have questions, contact the appropriate USFWS field office[4] to discuss the species list for your area.

Step 2: Determine Effect

Question 1: Will the project's effects overlap with federally-listed or proposed species or designated or proposed critical habitat covered by USFWS?

Consider all effects of the project within the action area. The action area encompasses all the effects of the project, including those that occur beyond the boundaries of the property (such as noise, air pollution, water quality, stormwater discharge, visual disturbance).

☐ **NO, the project and all effects are outside the range of ESA-listed or proposed species and designated or proposed critical habitat covered by USFWS**. Therefore, the project will have ***No Effect*** on ESA-listed or proposed species or designated critical habitat.

- Record your finding of ***No Effect*** on species or habitats covered by USFWS, and include this documentation in your Environmental Review Record.
- Attach a statement explaining how you determined that your project's effects do not overlap with species or habitat covered by USFWS.
- Section 7 Consultation with NMFS may still be necessary. CONTINUE TO PART B.

☐ **YES, project effects may overlap with ESA-listed or proposed species or designated or proposed critical habitat covered by USFWS**. Therefore, your project could affect ESA-listed species and habitat.

- Continue to Question 2.

Question 2: Will the project occur on a previously developed site?[5]

☐ **YES, the project site has been, or currently is, developed.** Therefore, the project will have ***No Effect*** on ESA-listed or proposed species and/or designated or proposed critical habitat.

- Record your finding of ***No Effect*** and maintain this documentation, including the official species list and map of your project location, include in your Environmental Review Record.
- Attach a statement to your determination explaining how your project's effects do not impact species or habitat covered by USFWS.
- Section 7 Consultation with NMFS may still be necessary. CONTINUE TO PART B.

☐ **NO, the project occurs on land that is not currently or has not been previously developed**.

- Continue to Question 3.

[4] https://www.fws.gov/office/oregon-fish-and-wildlife/contact-us

[5] Previously developed land typically includes land that has had structures or other features of the built environment (e.g., parking areas, roads, buildings) constructed upon it such that the land does not offer suitable habitat for wildlife. Land that was previously used for agricultural or timber production are ***not*** considered "previously developed."

Question 3: Is the project activity listed in Table 1 (following page) and does it meet all of the required parameters?

☐ **YES, the activity is listed in Table 1 and meets all of the required parameters.** Therefore, the project will have ***No Effect*** on ESA-listed or proposed species and/or designated or proposed critical habitat.

- Record your finding of ***No Effect*** and maintain this documentation, including the official species list and map of your project location, in your Environmental Review Record.
- Attach a statement to your determination explaining how your project met the required parameters in Table 1.
- Section 7 Consultation with NMFS may still be necessary. CONTINUE TO PART B.

☐ **NO, the project description does not match the activities in Table 1 and all of the specified criteria listed**.

- Continue to Question 4.

Question 4: Do you have some other basis for a *No Effect* determination, for example a biological assessment or other documentation from a qualified professional?[6]

☐ **YES, the project has professional documentation for a finding of *No Effect*.**

- Record your finding of ***No Effect*** and maintain this documentation, including the official species list and map of your project location, and include in your Environmental Review Record.
- Attach the biological assessment or other professional documentation.
- Section 7 Consultation with NMFS may still be necessary. CONTINUE TO PART B.

☐ **NO, the project does not have professional documentation for a finding of *No Effect* and *May Affect* a listed species and/or critical habitat.**

- The project ***May Affect*** listed or proposed species, or designated or proposed critical habitat. Consultation with the USFWS may be required. CONTACT THE USFWS TO DETERMINE THE APPROPRIATE EFFECTS DETERMINATION AND LEVEL OF CONSULTATION REQUIRED. Contact info is located in Part C.
- Section 7 Consultation with NMFS may still be necessary. CONTINUE TO PART B.

Table 1: Potential *No Effect* Categories and Required Criteria

Purchase building or property:

- Does not change footprint of existing structures.
- Does not create new impervious surface area, either constructed or reconstructed.
- Does not involve ground disturbing activities.[7]

[6] A "qualified professional" is a biologist trained in the assessment of habitat requirements of the ESA-listed species that overlap with your project's action area.

[7] Studies or surveys that do not require soil/ground disturbance are allowed. Wetland delineation, soil infiltration testing, and geotechnical drilling/boring are permitted.

Landscaping maintenance / improvement:

- Access and staging, source sites, and disposal sites have been assessed as part of the action.
- Disposal sits are approved for materials to be received. Waste materials are recycled or otherwise disposed of in an EPA approved sanitary or hazardous waste disposal site.
- Does not remove vegetation or trees within 150 feet of an aquatic resource.[8]
- New plantings shall be comprised of native species approved by the local jurisdiction. No planting of invasive species is permitted.
- Pesticides or herbicides shall not be applied within 150 feet of an aquatic resource.
- Pesticides or herbicides shall not be applied if precipitation is predicted in upcoming 24 hours.
- Outside lighting should be directed downward to the ground and lighting must not illuminate aquatic resources occupied by ESA-listed species.
- Does not increase the amount of impervious surface.
- Removal/maintenance of hazard trees[9] or similar vegetation is permitted, provided that the removal occurs outside of the breeding season (April 1 through August 31) and a qualified professional has documented that the tree does not provide habitat for ESA-listed species. [10] In addition, an equivalent number of trees appropriate to the location are replaced.[11]
- Does not result in wetland fill.

Interior rehabilitation:

- Applies only to existing structures.
- Access and staging, and source sites, have been assessed as part of the proposed action and occurs on previously developed land. The sites are located at least 150 feet away from any aquatic resources and include BMPs to prevent discharge of contaminants entering waterbodies or stormwater systems (e.g., filter fabrics in catch basins, sediment traps, etc.).
- New plantings shall be comprised of native species approved by the local jurisdiction. No planting of invasive species is permitted.
- Disposal sites are approved for materials to be received. Waste materials are recycled or otherwise disposed of in an EPA approved sanitary or hazardous waste disposal site.

[8] An aquatic resource, for the purposes of this opinion, includes: streams, rivers, ponds, lakes, wetlands, estuaries, or bays. The marine environment is not considered an aquatic resource, for the purposes of this guidance.

[9] A "hazard tree" is a tree that has a structural defect that creates a risk of failure and resulting damage to people or property.

[10] A “qualified professional” is a biologist trained in the assessment of habitat requirements of the ESA-listed species that overlap with your project’s action area.

[11] An “appropriate tree” is one that will be the correct size and species for the specific location and that the selected location is appropriate for the selected tree species at maturity. An arborist can recommend an appropriate species for replacement.

Exterior repairs or improvements of existing structures:

- Does not increase the amount of impervious surface.
- Does not install, repair, or replace exterior artificial lighting on properties adjacent to aquatic resources that support ESA-listed species.
- All exterior lighting is directed downward to the ground.
- Does not remove vegetation or trees within 150 feet of an aquatic resource.[12]
- Special projects directed to the removal of material or architectural barriers that restrict the mobility of and accessibility to elderly and persons with disabilities (e.g., curb cuts, wheelchair ramps, or similar) do not impact areas of natural habitat, including wetlands or riparian areas, and all activities comply with state and local building codes and stormwater regulations.
- Does not result in wetland fill.
- Does not result in discharges of new or additional sources of stormwater to wetlands or waterbodies.
- Access and staging, and source sites have been assessed as part of the proposed action. The sites are located at least 150 feet away from the aquatic resource and include BMPs to prevent discharge of contaminants from entering waterbodies or stormwater systems (e.g., filter fabrics in catch basins, sediment traps, etc.).Disposal sites are approved for materials to be received. Waste materials are recycled or otherwise disposed of in an approved sanitary or hazardous waste disposal site.

New construction or addition:

- Does not increase the amount of impervious surface.
- Does not remove vegetation or trees within 150 feet of an aquatic resource.
- Does not result in wetland fill.
- Will not impact an area of natural habitat, including wetlands or riparian areas.
- Complies with all state and local building codes and stormwater regulations.
- Does not result in discharges of new or additional sources of stormwater to wetlands or waterbodies.
- Access and staging, and source sites have been assessed as part of the proposed action. The sites are located at least 150 feet away from the aquatic resource and include BMPs to prevent discharge of contaminants from entering waterbodies or stormwater systems (e.g., filter fabrics in catch basins, sediment traps, etc.). Disposal sites are approved for materials to be received. Waste materials are recycled or otherwise disposed of in an EPA approved sanitary or hazardous waste disposal site.

[12] An aquatic resource, for the purposes of this opinion, includes: streams, rivers, ponds, lakes, wetlands, estuaries, or bays. The marine environment is not considered an aquatic resource, for the purposes of this guidance.

Part B: Consultation with the National Marine Fisheries Service (NMFS)

As stated in the introduction, few HUD actions occur within the designated critical habitat of NMFS-managed species, where direct injury or harm to an ESA-listed species or destruction of critical habitat/EFH is likely to occur. However, there are often affects from many HUD projects that occur outside the construction site or property boundaries of a given project, which can reach critical habitat/EFH and affect listed species. By far, the largest concern for NMFS is the generation of stormwater runoff from new or redeveloped impervious surfaces (e.g., concrete, asphalt, roofing materials, compacted gravel).

Impervious surfaces prevent precipitation from absorbing into the soil, resulting in runoff into storm drains and waterways. Stormwater runoff can transport pollutants (e.g., soil, fertilizer, metals, pesticides, tire particles) that degrade water quality in streams, lakes, reservoirs, and rivers where ESA-listed/MSA species occur. Many of these pollutants persist for years in the environment and can be transported downstream hundreds of miles from their point of origin. Pollutants can also make their way into the food chain where they can harm listed species and degrade habitat suitability. Of particular concern are dissolved metals and tire particulates. Dissolved metals can be generated from the wearing of a vehicle's brake pads and certain types of metal roofing and siding. Dissolved metals can be carried hundreds of miles downstream and interfere with listed salmon and steelhead's ability to navigate back to their spawning streams, among a range of other sub-lethal effects. Rubber particulate matter is generated from the wearing of a vehicle's tires and can leach compounds into the aquatic environment that have both lethal and sub-lethal effects on listed fish.

Additionally, impervious surfaces interrupt the natural cycle of rainwater infiltration into soil by diverting large volumes of runoff into streams, wetlands, rivers, and lakes. When this occurs, the volume and velocity of stormwater discharge to a receiving water can result in adverse hydromodification: the degradation of aquatic systems as a result of changes to the physical condition of a waterbody. Stormwater runoff can cause stream channel erosion, loss of habitat features required by listed species (e.g., large wood, spawning gravels), direct injury to aquatic species, and the incremental loss of overall habitat quality.

Many HUD projects result in the creation or redevelopment of impervious surfaces (e.g., roadways, sidewalks, parking lots, building roofs), assessment of stormwater runoff from a project is the most likely way that you will interact with NMFS and the ESA-listed/MSA species and habitats under their authority. Additional guidance of NMFS' stormwater treatment and management criteria can be found in the appendices of the programmatic biological opinion updates issued by NMFS for HUD projects in Oregon.[13]

The following steps will assist you in making a finding of effect for your project.

Step 1: Obtain Species List & Determine Critical Habitat / Essential Fish Habitat

NMFS' trust resources occur primarily in the marine environment; however, these resources include a number of ESA-listed fish species that spend a portion of their lives in inland, freshwater streams, rivers, reservoirs, and lakes. Additionally, through the MSA, NMFS manages a number of groundfish species that spend a portion of their lives in river estuaries and bays. Most watersheds in Oregon are within or upstream of a waterbody occupied by an ESA-listed species or designated as critical habitat/EFH.[14] As stormwater pollutants can be transported downstream and can persist in the environment, all projects that discharge post-construction stormwater have the potential to effect ESA-listed and MSA species and critical habitat/EFH. NMFS considers discharge of post-construction stormwater an ***Adverse Effect*** on these species and habitats. With few

[13] National Marine Fisheries Service (NMFS). 2024. Updates to the Endangered Species Act Section 7 Formal Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the U.S. Department of Housing and Urban Development Housing Programs in Oregon. West Coast Region. Portland, Oregon. August 2, 2024. https://www.hud.gov/states/shared/working/r10/environment

[14] Exceptions include watersheds in: Harney, Klamath, Lake, and Malheur counties.

exceptions, discharge of post-construction stormwater extends from its point of origin to the nearest receiving water, then downstream, terminating at the Pacific Ocean.[15] This means that most HUD projects that create new impervious surface area or replace existing impervious surface area are likely to have an adverse effect on NMFS listed species and critical habitat/EFH. Note that an ***Adverse Effect*** finding for a project does not necessarily preclude construction of the project, only that additional measure may be required in order to ensure the project's effects do not jeopardize listed species or adversely modify critical habitat/EFH.

Table 2 identifies the ESA-listed species under NMFS' jurisdiction that may be affected by your project; identify the area of the state in which your project occurs and see the ESA-listed species and critical habitat that may be affected. Figure 1, following page, depicts the geographic extent of NMFS' ESA-listed species and critical habitat occurrence in Oregon.

Table 2: NMFS' ESA-Listed Species & Critical Habitat Designations in Oregon

Oregon Coast (Middle/Northern)[16]	**Columbia River Basin**	
Coho Salmon	Chinook Salmon	Sockeye Salmon
Oregon Coast Coho Salmon	Lower Columbia River	Snake River sockeye salmon
Southern Green Sturgeon	Upper Columbia River spring-run	Steelhead Trout
Southern Eulachon	Snake River spring/summer-run	Upper Columbia River
	Snake River fall-run	Lower Columbia River
Oregon Coast (Southern)[17]	Upper Willamette River	Middle Columbia River
Coho Salmon	Chum Salmon	Snake River basin
Southern Oregon-Northern California Coast Coho	Columbia River chum	Upper Willamette River
Southern Green Sturgeon	Coho Salmon	Southern Green Sturgeon
Southern Eulachon	Lower Columbia River coho	Southern Eulachon

Should you desire more specificity, NMFS maintains GIS data[18] for the range and distribution of listed species and a web-based map application for identifying designated critical habitat and EFH.[19] Familiarity with web-based GIS applications will be necessary to utilize these resources.

Essential fish habitat is the same throughout the state. If your project will discharge stormwater that reaches a receiving water, your project may adversely modify EFH for Pacific Salmon and Groundfish.

Oregon counties where ESA-listed species and critical habitat do not occur include: Harney, Klamath, Lake, and Malheur counties. Projects occurring in these counties are assumed to have "no effect" as the areas are inaccessible to species under NMFS' jurisdiction. There is currently uncertainty as to whether stormwater pollutants can be transported through major reservoirs in the Snake and Klamath rivers at concentrations sufficient to have an effect on downstream listed species and habitats. Please note that the counties listed above are only excluded from NMFS' managed species and habitats and that ESA-listed species and critical habitat under USFWS' jurisdiction may be present, so remember to complete Part A of this guidance.

If you need to assistance confirming whether your action is in proximity to ESA-listed salmon or steelhead, designated critical habitat, or EFH, please contact the appropriate NMFS office, identified in Part C.

[15] Exceptions to this finding are identified in Table 3.
[16] Extending from Cape Blanco north to the mouth of the Columbia River.
[17] Extending from Cape Blanco south to the California border.
[18] https://maps.fisheries.noaa.gov/portal/home/
[19] Protected Resources App: https://www.fisheries.noaa.gov/resource/map/species-and-habitat-app

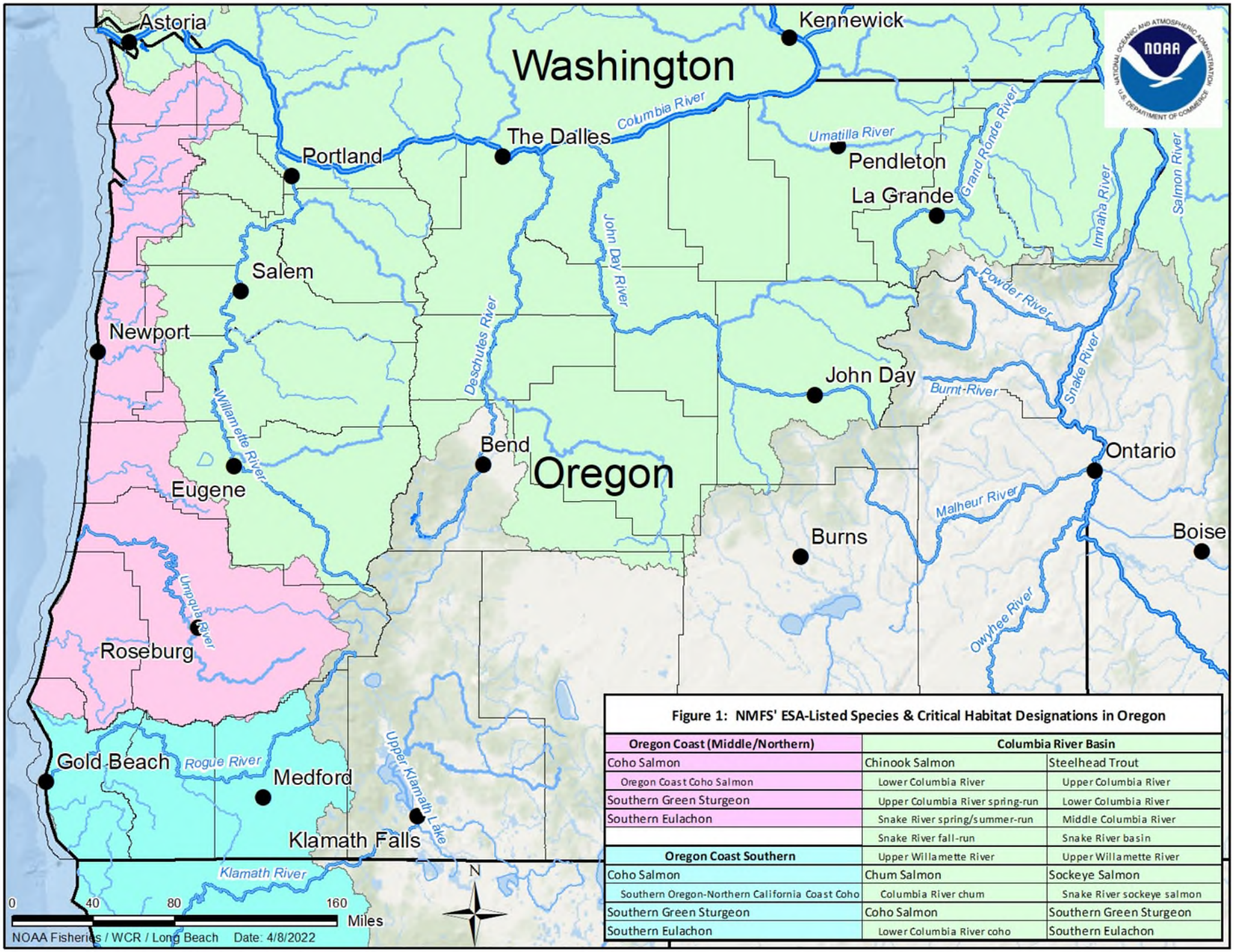


Figure 1: NMFS' ESA-Listed Species & Critical Habitat Designations in Oregon

Oregon Coast (Middle/Northern)	Columbia River Basin	
Coho Salmon	Chinook Salmon	Steelhead Trout
Oregon Coast Coho Salmon	Lower Columbia River	Upper Columbia River
Southern Green Sturgeon	Upper Columbia River spring-run	Lower Columbia River
Southern Eulachon	Snake River spring/summer-run	Middle Columbia River
	Snake River fall-run	Snake River basin
Oregon Coast Southern	Upper Willamette River	Upper Willamette River
Coho Salmon	Chum Salmon	Sockeye Salmon
Southern Oregon-Northern California Coast Coho	Columbia River chum	Snake River sockeye salmon
Southern Green Sturgeon	Coho Salmon	Southern Green Sturgeon
Southern Eulachon	Lower Columbia River coho	Southern Eulachon

Step 2: Determine Effect

Question 1: Will the project's effects overlap with federally listed or proposed species, designated or proposed critical habitat, and/or essential fish habitat covered by NMFS?

Note that project effects include those that extend beyond the project site itself, such as noise, water quality, stormwater discharge, visual disturbance; habitat assessment must include consideration for feeding, spawning, rearing, overwintering sites, and migratory corridors. Typically, discharge of post-construction stormwater extends from its point of origin to the nearest receiving water, then downstream, terminating at the Pacific Ocean.

☐ **NO, the project and all effects are outside the range of listed species and critical habitat covered by NMFS.** Therefore, the project will have ***No Effect*** on ESA-listed or proposed species or designated critical habitat/EFH.
- Record your determination of ***No Effect*** on species or habitats covered by NMFS.
- Maintain documentation in your Environmental Review Record. For example, a map showing that your project is not in or upstream of a watershed of a listed species.

☐ **YES, project effects may overlap with ESA-listed species or designated critical habitat/EFH covered by NMFS**.
- Continue to Question 2.

Question 2: Is the project activity listed in Table 3 (following page) AND does it meet all of the required parameters?

☐ **YES, the activity is listed in Table 3 and meets all the required parameters.** Therefore, the project will have ***No Effect*** on ESA-listed species and/or designated critical habitat/EFH.
- Record your determination of ***No Effect*** and maintain this documentation, including a species list and map of your project location, in your Environmental Review Record.
- Attach a statement to your determination explaining how your project meets the required parameters in Table 3.

☐ **NO, the activity does not match those described in Table 3 and all of the specified parameters**.
- Continue to Question 3.

Question 3: Do you have some other basis for a *No Effect* determination, for example a biological assessment or other documentation from a qualified professional?[20]

☐ **YES, the project has professional documentation for a *No Effect* determination.**
- Record your determination of ***No Effect*** and maintain this documentation, including a species list and map of your project location, in your Environmental Review Record.
- Attach the biological assessment or other professional documentation.

☐ **NO, the project does not have professional documentation supporting a *No Effect* determination.**
- YOU MUST INITIATE SECTION 7 CONSULTATION WITH NMFS.
- *Your project may qualify for inclusion under the Programmatic Biological Opinion for HUD Projects in Oregon.* See Section 5 of this Appendix and Appendix A for additional details.
- Contact information for NMFS offices is provided in Section 6 of this document.

[20] A "qualified professional" is a biologist trained in the assessment of habitat requirements of the ESA-listed species that overlap with your project's action area.

Table 3: Potential *No Effect* Categories and Required Criteria

Purchase of a building or property can reach a *No Effect* finding, if:

- The action does not change any existing structures.
- The action does not create new impervious surface area, either constructed or reconstructed.
- The action does not modify existing stormwater collection or drainage patterns.
- The action does not involve ground disturbing activities/construction.[21]

Landscaping maintenance/improvement actions can reach a No Effect finding, if:

- The action does not remove riparian vegetation or trees within 150 feet of an aquatic resource.[22]
- Hazard tree[23] removal must be matched by replanting of a native, canopy-forming tree species appropriate for the location.[24,25]
- New landscape plantings are of native species approved by the local jurisdiction (no invasive species shall be permitted).
- Pesticides or herbicides shall only be applied if 150 feet from aquatic resources, or by a licensed applicator, and in compliance with all federal, state, and local regulations.
- Sprinkler or irrigation systems direct spray away from pollution generating impervious surfaces.

Interior rehabilitation actions can reach a No Effect finding, if:

- The action applies only to existing structures.
- The action's access and staging areas are located at least 150 feet away from any aquatic resources.
- The action's material source sites have been assessed as part of the proposed action.
- Best Management Practices will be implemented to prevent debris, trash, and chemicals and discarded materials from entering aquatic resources.
- All waste materials must be disposed of at an approved disposal site (landfill or hazardous waste facility).

[21] Studies or surveys that do not require soil/ground disturbance are allowed. Permitted ground disturbing activities include wetland delineation, soil infiltration testing, geotechnical drilling/boring, or similar investigations.

[22] For the purposes of this guidance, an "aquatic resource" is any stream, river, lake, pond, ocean, bay, estuary, wetland, or tidally-influenced area, either permanently or seasonally inundated/submerged that may provide habitat to listed species.

[23] A "hazard tree" is a tree that has a structural defect that creates a risk of failure and resulting damage to people or property.

[24] An "appropriate tree" is one that will be the correct size and species for the specific location and that the selected location is appropriate for the selected tree species at maturity. An arborist can recommend an appropriate species for replacement.

[25] When replacing trees adjacent to impervious surface area, give preference to evergreen species (e.g., firs, pines), as they intercept precipitation and re-evaporate it back to the atmosphere, reducing stormwater generation.

Exterior repair or improvement actions can reach a No Effect finding, if:

- The action does not increase the amount of impervious surface area.
- The action does not replace an existing roof structure with hot tar roofing methods, torch down roofing methods, treated wood, copper, or galvanized metal.[26]
- The action does not replace existing siding with galvanized sheeting.
- All new or replaced heating ventilation air conditioning (HVAC) systems (or similar mechanical systems) constructed of galvanized metal must be painted or physically covered to prevent exposure to precipitation.
- All exterior lighting shall be positioned and/or directed to prevent illumination onto/over aquatic resources.
- All construction access and staging sites are located at least 150 feet away from aquatic resources.
- All construction activities comply with state and local erosion and sediment control Best Management Practices.
- The action will implement Best Management Practices to prevent debris, trash, chemicals and discarded materials from entering aquatic resources.
- All waste materials must be disposed of at an approved disposal site (landfill or hazardous waste facility).
- Any repair/maintenance of parking lots and access roads is limited to re-pavement, filling potholes/sealing, and re-painting. Repairs that require asphalt grinding or other methods of removal are excluded. Repairs that change the collection, conveyance, and discharge of surface runoff are excluded.

New construction or reconstruction actions can reach a No Effect finding, if:[27]

- The proposed action complies with all state and local building codes. AND,
- All waste materials are recycled or otherwise disposed of in an EPA-approved sanitary or hazardous waste disposal site. AND,
- The proposed action incorporates Low Impact Development or Underground Injection Control (UIC)[28,29] methods capable of infiltrating on-site,[30] the 10-year, 24-hour storm event; OR
- The proposed action incorporates stormwater filtration prior to discharge to a pre-existing, functional, and appropriately sized stormwater facility.[31]

Actions that contain multiple elements described in Table 3 (i.e., landscaping improvements and exterior repairs) must meet the criteria for all applicable project activities to reach a finding of No Effect. It is important to note that a beneficial effect is still an effect under the ESA, so a No Effect finding is not appropriate for projects that may have beneficial effects. Projects that cannot meet the above criteria are considered to have an effect on ESA/MSA-listed species and habitats and must consult with NMFS to obtain take coverage, as described in the following sections.

[26] Galvanized flashing, gutters, or fasteners may be used as part of a roofing system if coated or painted to prevent exposure to precipitation.

[27] Examples include building a new structure on an undeveloped site, complete or partial tear down and rebuild, addition to an existing structure, or similar.

[28] Underground Injection Control may be prohibited by state or local code. A project's engineer should confirm UIC methods are allowed and appropriate.

[29] Underground Injection Control methods are prohibited for actions where soil or groundwater contamination were identified and in areas proximate to municipal well fields or sole source aquifers.

[30] Infiltration means that no stormwater from the 10-year, 24-hour storm event (or lesser events) is discharged from the site.

[31] Examples of existing stormwater facilities may include either on-site or off-site treatment and flow control facilities/infrastructure to which a project can connect. This provision excludes connection to a municipal stormwater, storm sewer, or sewer conveyance and/or use of a municipal wastewater treatment facility to provide treatment and/or flow control. A civil engineer will need to assess any existing facilities to ensure its functionality and capacity.

Part C: Initiating Section 7 Consultation

If you completed the checklists in Part A and Part B of this document and determined your project cannot meet the criteria to make a *No Effect* determination, then you may need to initiate section 7 consultation with NMFS[32] and/or USFWS.

A project that does not meet the "*no effect*" determination criteria is considered a "*may affect*" action. There are two potential "*may affect*" determinations: "*may affect, not likely to adversely affect*" (NLAA) and "*may affect, likely to adversely affect*" (LAA). Contact USFWS and/or NMFS to determine whether the project can be modified to reach a "*no effect*" finding. If the project cannot be modified to avoid potential take of ESA-listed species or adversely effect on critical habitat/EFH, then additional consultation with USFWS and/or NMFS will be required to assist in making an appropriate determination.[33]

If the effects of the action, temporary or permanent, are insignificant, discountable, or entirely beneficial, the action is "*not likely to adversely affect"* ESA-listed or proposed species or designated critical habitats/EFH, and the section 7 consultation for the project will be informal. A "*May Affect, Not Likely to Adversely Affect"* determination is the most common outcome of consultation for HUD-funded projects with USFWS.

- *Discountable effects* are those extremely unlikely to occur. Based on the best available scientific and commercial data, and judgment, a person would not expect discountable effects to occur.
- *Insignificant effects* relate to the magnitude of the impact and should never reach the scale where "take" occurs. "Take" is defined to include "harass," and "harm." *Harm* can occur if habitat is altered in a manner that diminishes important species behavior, such as breeding, feeding, or sheltering, to the degree that it injures even a single individual of the species. *Harass* includes activities that alter an individual's behavior in a manner that increases the likelihood of it being injured. Based on best judgment, a person would not be able to meaningfully measure, detect, or evaluate insignificant effects.
- *Wholly beneficial effects* are very narrowly construed and cannot be interpreted to mean "better than before," and cannot involve an analysis of net effects. All effects must be positive. If any adverse effect occurs, then the project is not wholly beneficial.

If the effects of the action on ESA-listed or proposed species and/or critical habitats/EFH are not discountable, insignificant, or entirely beneficial (i.e., *likely to adversely affect*), formal consultation must be initiated. In such cases, a formal consultation must be initiated prior to committing HUD resources to the project, by which the USFWS and/or NMFS assess the action's potential to jeopardize the listed species, to result in the destruction or adverse modification of critical habitat/EFH, or to result in incidental take[34] of a listed species. Formal consultation will result in the USFWS and/or NMFS issuing a Biological Opinion for the project, including an incidental take statement for project actions, if appropriate. The Biological Opinion will also include terms and conditions to minimize and/or avoid project impacts to ESA-listed species.

Additional Information for Consultation with the National Marine Fisheries Service

NMFS's programmatic biological opinion is the result of HUD's formal consultation with NMFS on the potential effects of many common HUD projects, including actions to construct or redevelop housing and public facilities in Oregon, including single and multifamily housing units, commercial and public buildings

[32] Should you have questions regarding a finding of effect, please contact the NMFS branch where your project is located, listed on the next page. In some cases, a project can be modified to reach a No Effect finding.

[33] Please keep in mind that a beneficial effect is still an effect under the ESA, so a "*no effect*" finding is not appropriate for projects that may have wholly beneficial effects.

[34] "Incidental take" refers to takings of an ESA-listed species that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. [50 CFR 402.02]

(e.g., public services offices, libraries, community centers), mixed-use development, healthcare facilities (e.g., clinics, senior centers, other care facilities), associated minor infrastructure (e.g., sidewalks, street safety modifications, utility lines), and similar activities. This Opinion does not cover complex infrastructure such as new road systems or wastewater treatment facilities.

Use of this Opinion to document ESA/MSA compliance forgoes the need to prepare a BA/BE, as described in Section 2.1.3, above, requiring much less documentation be submitted to NMFS for review. Conformity with this Opinion fulfills the formal consultation requirements for all HUD actions, as described above, provided those projects comply with the terms and conditions listed in this Opinion's incidental take statement and further detailed in the Opinion's appendices. Specifically, if a covered project is designed to conform to the applicable stormwater design criteria detailed in Appendix A, Sections 3 or 4, and such conformity is demonstrated through the documentation and notification requirements detailed in Appendix C, Sections 1 and 2, the project may be deemed by NMFS to be consistent with this Opinion, thereby fulfilling the proposed action's ESA/MSA consultation obligations.

Review of projects submitted for consistency review through this Opinion commences with an email notification, detailed in Appendix C and upon NMFS determining a submittal package is complete. NMFS' review of a submitted action is typically completed within 30 days, at which time NMFS will issue a "consistency letter" or "non-consistency letter" via email. A consistency letter is NMFS' statement that the reviewed action is consistent with the requirements of this Opinion. The consistency letter should be included in the ERR as documentation of completion of ESA/MSA consultation with NMFS. If a non-consistency letter is received, HUD funds, vouchers, assurances, or permissions cannot be issued to advance the project. In the case of a non-consistency letter, NMFS encourages HUD (or its REs) to contact NMFS staff to discuss how the action can be brought into compliance with this Opinion or if an individual formal consultation will be necessary to comply with the ESA/MSA.

Projects not covered by this Opinion, and projects covered by this Opinion but unable to demonstrate compliance with the stormwater design criteria and administrative requirements detailed in the incidental take statement, cannot rely on this Opinion to fulfill its ESA/MSA consultation obligations. Consequently, HUD may not proceed with such actions until the ESA/MSA consultation obligations for those projects are fulfilled through a separate and new consultation with NMFS, as summarized in section 2.1 of Appendix B of the updated Biological Opinion.

Figure 2, on page 16, depicts the process for determining which ESA consultation method is appropriate for NMFS.

At any stage in making your determination, you may wish to contact the appropriate USFWS and NOAA Fisheries field offices for technical assistance. Contact information is available at:

USFWS, Oregon Fish and Wildlife Office
2600 SE 98th Ave, Suite 100
Portland, OR 97266
503-231-6179
http://www.fws.gov/oregonfwo/

USFWS, Klamath Falls Fish and Wildlife Office
1936 California Avenue
Klamath Falls, Oregon 97601
541-885-8481
http://www.fws.gov/klamathfallsfwo/

NMFS Contacts:

OREGON COAST
Jeff Young, (acting) Branch Chief
Oregon Coast Branch
jeff.young@noaa.gov
541-957-3383

INTERIOR COLUMBIA BASIN
Justin Yeager, Branch Chief
Columbia Basin Branch
justin.yeager@noaa.gov
509-240-9203

WILLAMETTE RIVER
Kate Wells, Branch Chief
Willamette Branch
kathleen.wells@noaa.gov
503-230-5400

LOWER COLUMBIA RIVER
David Price, Branch Chief
Washington Coast/Lower Columbia River Branch
david.price@noaa.gov
360-871-8300

NORTHERN SNAKE RIVER
Johnna Sandow, Branch Chief
Northern Snake Branch
johnna.sandow@noaa.gov
208-378-5696

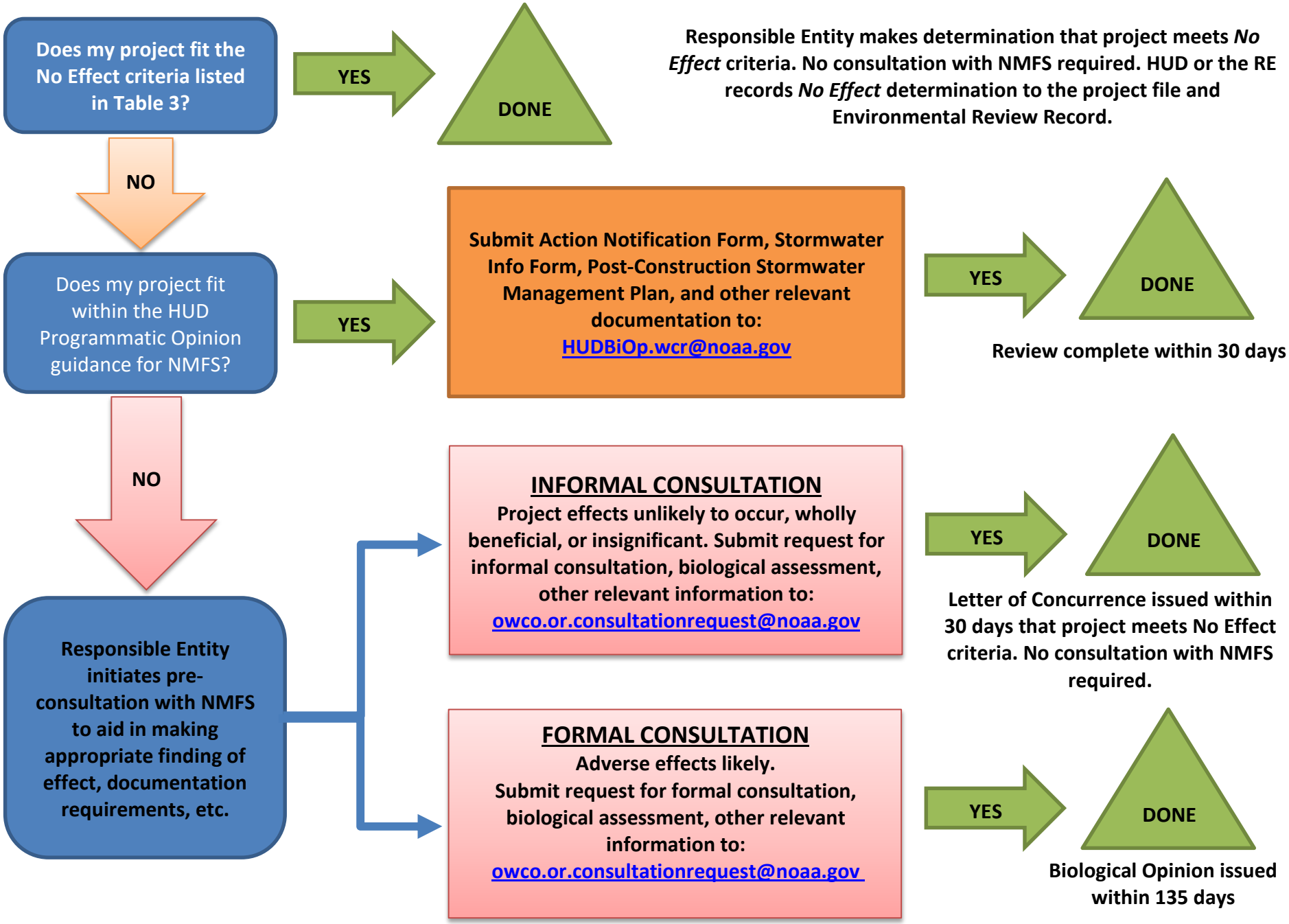
SOUTHERN SNAKE RIVER
Bill Lind, Branch Chief
Southern Snake Branch
bill.lind@noaa.gov
208-378-5696

KLAMATH RIVER
Jim Simondet, Branch Chief
Klamath Branch
jim.simondet@noaa.gov
707-825-5126

DISCLAIMER: This document is intended as a tool to help grantees and HUD staff complete ESA requirements. This document is subject to change. This is not a policy statement, and the Endangered Species Act, Magnuson-Stevens Act, and associated regulations take precedence over any information found in this document.

Questions concerning environmental requirements related to HUD programs can be addressed to Brian Sturdivant, Regional Environmental Officer, Region 10. [Brian.Sturdivant@hud.gov]

FIGURE 2: NMFS ESA Consultation Process for HUD Projects in Oregon



Part D: Selected Resource / Glossary of Terms

Links to Section 7 Handbook and additional Section 7 resources:

- Consultation Fact Sheet: https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-fact-sheet.pdf
- Section 7 Handbook: https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf
- Overview of the Section 7 Process: https://www.fws.gov/service/esa-section-7-consultation

Additional Resources for LID

- American Rivers, 2012, Banking on Green Report: Economic Benefits of Green Infrastructure Practices
- Clean Water Services, 2009, Low Impact Development Approaches (LIDA) Handbook
- ECO Northwest, 2009, LID at the Local Level - Developers' Experiences and City and County Support
- Herrera, 2013, Guidance Document: Western Washington LID Operation and Maintenance
- NCHRP, 2006, Evaluation of BMPs for Highway Runoff Control – LID Design Manual
- Oregon Department of Environmental Quality Template for LID Stormwater Manual for Western Oregon https://www.oregon.gov/deq/wq/tmdls/Pages/TMDLs-LID.aspx
- Prince George County, Maryland, 1999, Low-Impact Development Design Strategies
- Puget Sound Partnership, 2012, Low Impact Development: Technical Guidance Manual for Puget Sound
- US EPA, 2013, Stormwater to Street Trees: Engineering Urban Forests for Stormwater Management
- US EPA, 2005, Low Impact Development for Big Box Retailers
- Washington Department of Ecology Low Impact Development (LID) Guidance https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Stormwater-permittee-guidance-resources/Low-Impact-Development-guidance#tab2

Definitions & Terminology used in an ESA Review and Consultation

- **Action Area** includes all areas that will be affected directly or indirectly by the proposed action and not merely the immediate area involved in the action.
- **Built environment** includes all structures and paved areas like parking lots, patios, trails, retaining walls, sidewalks, streets, and amenities that prevent infiltration of rainwater into the water table.
- **Candidate Species** are plant and animal taxa considered for possible addition to the List of Endangered and Threatened Species. These are taxa for which the USFWS and NMFS have sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is currently precluded by higher priority listing actions.
- **Critical Habitat** means those specific areas that have been designated by USFWS or NMFS (in a rule-making in the *Federal Register*) as essential to the conservation of a listed species.
- **Effects of the action** are all consequences to listed species or critical habitat that are caused by the

proposed action, including the consequences of other activities that are caused by the proposed action (cumulative effects). A consequence is caused by the proposed action if it would not occur but for the proposed action occurring and if it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.

- ***No effect*** is the appropriate conclusion when the action agency determines its proposed action willnot affect listed species or critical habitat. A determination of '*no effect*' must be supported in the environmental review record but does not require consultation with NMFS or USFWS.
- ***May affect, not likely to adversely affect*** **(NLAA)** is the appropriate conclusion when effects on listedspecies are expected to be ***discountable***, or ***insignificant***, or completely ***beneficial***.
  - ✓ ***Beneficial effects*** are contemporaneous positive effects without any adverse effects to thespecies.
  - ✓ ***Insignificant effects*** relate to the size of the impact and should never reach the scale where takeoccurs. Based on best judgment, a person would not be able to meaningfully measure, detect, or evaluate insignificant effects.
  - ✓ ***Discountable effects*** are those extremely unlikely to occur. Based on best judgment, a personwould not expect discountable effects to occur.
- ***May affect, likely to adversely affect*** **(LAA)** is the appropriate conclusion if any adverse effect to listed species may occur because of the proposed action, and the effect is not discountable, insignificant,or beneficial. A determination of '*likely to adversely affect*' requires formal consultation under section 7 of the ESA; formal consultation results in a Biological Opinion from NMFS or USFWS. See Part C for additional information.

- **Impervious area** means artificial structures such as rooftops and pavements (e.g., driveways, parking lots, roads, sidewalks, trails) that are covered by impervious material like asphalt, brick, compacted soil, concrete, or stone.
- **Listed Species** means any species of fish, wildlife or plant that has been determined to be endangered or threatened under section 4 of the Endangered Species Act.
- **Nexus** means any action that is funded, authorized or carried out by a federal agency that may affect an ESA-listed species or habitats.
- **Post-construction runoff** means runoff from the built environment that extends off-site after a project's construction is complete.
- **Proposed Species** any species of fish, wildlife or plant that has been proposed by USFWS or NMFS in the *Federal Register* to be listed under section 4 of the Endangered Species Act.
- **Proximity** means areas or effects that occur near ESA-listed species or habitats in space or time, including areas where species roost, feed, nest, rear, overwinter, or migrate. NMFS considers projects that discharge post-construction stormwater to be in proximity with ESA-listedspecies or habitats that occur downstream of the discharge site.
- **Responsible entity** means the party authorized by HUD under 24 CFR Part 58 to complete any environmental review necessary for HUD to obligate funds.
- **Riparian area** means vegetation, habitats, or ecosystems that are associated with bodies of water, typically within 150-feet of a stream bank or the shoreline of a standing body of water.
- **Take** under the ESA is defined as actions that may harass, harm, pursue, hunt, shoot, wound, kill trap, capture, or collect, or to attempt to engage in any such conduct. The ESA also protects against interfering in vital breeding and behavioral activities or degrading critical habitat.