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National Oceanic and Atmospheric Administration**

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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,



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Regional Administrator

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