### ESA Section 7 Consultation Authority and Requirements



### ESA Acronyms

- ESA Endangered Species Act
- SLOPES Standard Local Operating Procedures for Endangered Species (Programmatic Biological Opinion)
- MSA and EFH (not to be confused with ESH) –
   Magnuson-Stevens Act, Essential Fish Habitat
- BO Biological Opinion
- LAA Likely to Adversely Affect
- NLAA Not Likely to Adversely Affect
- BA Biological Assessment

## ESA Section 7 – A Requirement for all Federal Agencies

- 7(a) 2 Requires Federal agencies, in consultation with the Services (USFWS/NMFS), to insure that any action it authorizes, funds or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction or modification of critical habitat
- 7(c) Requires a **Biological Assessment** if listed species or critical habitat may be present in the area affected by any major construction activity

#### Section 7 - Federal Agency Responsibilities

#### Action Agencies (All Federal agencies)

- Conservation of species, avoid jeopardy (to species) and adverse modification (of critical habitat)
- Determine if projects "may affect" listed or proposed species, or critical habitat
- Initiate consultation or conference with the Services (NMFS/USFWS)

#### Consulting Agencies (NMFS/USFWS)

- Conservation of species
- Assist Action Agency in meeting their responsibilities
- Evaluate effects of the action
- Determine jeopardy and adverse modification
- Estimate incidental take and issue take statement (take permit) if appropriate
- Section 7 consultation serves as consultation for the Magnuson-Stevens
   Act on Essential Fish Habitat (EFH)

#### Magnuson-Stevens Fishery Act – Essential Fish Habitat

- Essential Fish Habitat (EFH) for the Pacific salmon means those waters and substrate necessary for salmon production needed to support a long-term sustainable salmon fishery and salmon contributions to a healthy ecosystem.
- The definition for EFH includes currently viable aquatic habitat and most of the habitat historically accessible to Pacific Salmon.
- Chinook, coho and many groundfish (63 species) and Coastal pelagic (5 species) species are protected under EFH
- The federal action agency can use existing processes (such as ESA Section 7 consultation) to support EFH consultations.
- Rarely will an EFH only consultation be issued in the Willamette Basin

#### **Section 7 Consultation Requirements**

- Evaluate the Effects of the Proposed Action
- Make the Effects Determination
- Consultation choices include:
  - Informal Consultation
  - Formal Consultation
  - Biological Opinion (Non-Jeopardy Opinion)
  - Biological Opinion (Jeopardy Opinion)

# How to Write the Biological Assessment (BA)



### Basic Elements of the Biological Assessment

- Describe of the action and action area (including BMPs, erosion control, work isolation methods, etc.)
- List the status of listed species and/or critical habitat in the project area
- Describe the environmental baseline in the action area
- Describe the manner in which action may affect species or critical habitat
- Analyze the potential cumulative impacts resulting from the action (For formal consultations only)
- Describe the conservation measures that will be taken to ensure action will not harm listed species or their critical habitats

### What should the Biological Assessment focus on

- Detailed Description of the action and action area
- Include items such as:
  - Alternatives that avoid/minimize effects
  - BMPs
  - Conservation measures
  - If needed: Fish salvage, Stormwater treatment, Restoration and Mitigation plan
- Provide site specific information
  - Fish use of the area, habitat surveys
  - Historic use of the site, sediment quality

### Timeframes of the Section 7 Consultation Review

- Services (NMFS/USFWS) have 90 days to formulate their opinion
- Within 45 days after conclusion of consultation, Services will deliver a *Biological Opinion* (e.g., 90 + 45 = 135 days)
- If Service determines that additional data would be useful, Service can request 60 day extension and ask Federal Agency to obtain data

(e.g., 90 + 45 + 60 days = 195 days)

### SLOPES IV Programmatic Consultation

- Corps determines if project meets SLOPES IV criteria
  - Actions that require no NMFS review:
    - Corps submits notification to NMFS
  - Actions that require NMFS review:
    - Corps submits notification to NMFS and waits for response before ESA consultation concludes (30 day NMFS review)

## SLOPES IV Programmatic Biological Opinion - Websites

- Transportation Maintenance
  - (https://www.nwp.usace.army.mfl/op/g/docs/notices/SLOPES.TY Transportation.pdf)
- Restoration
  - (https://www.nwp.usace.army.mil/op/g/docs/notices/Slopes.pdf)
- Over-water and In-water Structures
  - ( https://pcts.nmfs.noaa.gov/pls/pcts-
  - pub/sxn7.pcts\_upload.download?p\_file=F10143/2012\_04-
  - 5 SLOPES%20IV inwater%20overwater 201105585.pdf)