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

March 3, 2004

Magalie Roman Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: Endangered Species Act - Section 7 Consultation Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Consultation on the Federal Energy Regulatory Commission's Approval of the Proposed Anadromous Fish Agreement and Habitat Conservation Plan License Amendment for the Wells Hydroelectric Project License (FERC No. 2149). NOAA Fisheries Consultation No. F/NWR/2003/01578.

Dear Secretary Salas:

In a letter dated December 9, 2003, the Federal Energy Regulatory Commission (FERC) requested formal consultation with the National Marine Fisheries Service (NOAA Fisheries) under Section 7(a)(2) of the Endangered Species Act (ESA) regarding license amendment applications filed with FERC on November 24, 2003, by Public Utility District No. 1 of Douglas County, Washington (Douglas PUD), related to the Anadromous Fish Agreement and Habitat Conservation Plan (HCP) for the Wells Hydroelectric Project (FERC No. 2149). This letter constitutes NOAA Fisheries' biological opinion in accordance with Section 7(b) of the ESA of 1973 (16 USC 1531-1544), as amended, on FERC's proposed action of incorporating, in its entirety, the HCP into the Wells Hydroelectric Project license articles. It also constitutes NOAA Fisheries' analysis with respect to fulfilling essential fish habitat (EFH) requirements under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended by the Sustainable Fisheries Act of 1996 (Public Law 104-267).

The purpose of this letter is to 1) determine whether amending the Wells Hydroelectric Project license articles to incorporate the terms of the HCP is likely to jeopardize the continued existence of ESA-listed Upper Columbia River (UCR) steelhead (*Oncorhynchus mykiss*) or UCR spring-run chinook salmon (*O. tshawytscha*),[1] and 2) determine whether the proposed action would adversely affect designated EFH.

[1]At this time, critical habitat designations for UCR steelhead and UCR spring-run chinook salmon have been vacated. For this reason, the proposed action will not affect designated critical habitat and thus this biological opinion will not determine whether the proposed action is likely to result in the destruction or adverse modification of any critical habitat, a separate substantive standard of ESA Section 7(a)(2).

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Background

Following ESA Section 10(a)(1)(B), NOAA Fisheries recently issued an Incidental Take Permit (ITP) to Douglas PUD based upon its HCP for the Wells Hydroelectric Project. Before it could issue this ITP, NOAA Fisheries was required to determine for purposes of ESA Section 7(a)(2) that its issuance of the ITP was not likely to jeopardize the affected listed species. This process culminated in a biological opinion issued on August 12, 2003 (NOAA 2003a; hereinafter referred to as the 2003 ITP Biological Opinion) which found that NOAA Fisheries' issuance of an ITP under Section 10(a)(1)(B) of the ESA for the lawful operation of the Wells Hydroelectric Project in accordance with the HCP was not likely to jeopardize the continued existence of ESA-listed UCR steelhead or UCR spring-run chinook salmon. NOAA Fisheries completed its National Environmental Policy Act process[2] by preparing a Record of Decision (NOAA 2003b) prior to issuance of the ITP (NOAA 2003c) to Douglas PUD for the Wells Hydroelectric Project on August 20, 2003.

On November 24, 2003, Douglas PUD filed an application with FERC requesting that the HCP be incorporated as an amendment to the project license. After reviewing the license amendment application, which included NOAA Fisheries' regulatory review documents cited above, FERC requested formal consultation with NOAA Fisheries on December 9, 2003, under Section 7 of the ESA, on its proposed action to amend the project license as requested. On January 15, 2004, NOAA Fisheries acknowledged receipt of FERC's request for ESA consultation and agreed that the referenced documents provided the information required to initiate formal consultation.

Relation of Proposed Action to 2003 ITP Biological Opinion

NOAA Fisheries finds that the analysis and conclusions presented in the 2003 ITP Biological Opinion regarding issuance of an ITP to Douglas PUD to operate the Wells Hydroelectric Project in accordance with the HCP are directly applicable to FERC's proposed action of adopting the HCP into the project license and thus requiring Douglas PUD to operate its project in accordance with the HCP. Although legally distinct, both NOAA Fisheries' issuance of the ITP and FERC's proposed license amendment are functionally equivalent, from the perspective of the listed populations. In both cases, the effect of each proposed action is to enable Douglas PUD to operate the Wells Hydroelectric Project in accordance with the committee structures and adaptive management processes, project survival standards, and tributary and hatchery programs designed to mitigate for unavoidable project mortality that are stipulated by the HCP for up to 50 years. NOAA Fisheries has already authorized incidental take of these listed fish that may result from such an operation. FERC proposes to authorize the licensee under the Federal Power Act to operate the project in the manner described in the application. The subject of each regulatory action is the same. Thus the effect of the proposed action (operation of the Wells Hydroelectric

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[2]NOAA Fisheries issued a Final Environmental Impact Statement titled "Anadromous Fish Agreements and Habitat Conservation Plans - Final Environmental Impact Statement for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects in December 2002 (NOAA 2002).

Project in accordance with the HCP) is the same effect of the ITP that has already been evaluated by NOAA Fisheries in its 2003 ITP Biological Opinion.

Consultation Determinations

For the proposed action under this consultation with FERC, the action area, as defined by NOAA Fisheries's ESA consultation regulations (50 CFR §402.02), is identical to that described for NOAA Fisheries' ITP in the 2003 ITP Biological Opinion (Section 3.1). NOAA Fisheries' consideration of the environmental baseline and cumulative effects for this FERC consultation will be focused on this action area.

In conducting this consultation, NOAA Fisheries must use the best scientific and commercial data available. As a starting point for this determination, NOAA Fisheries incorporates the findings of the 2003 ITP Biological Opinion into the record for this proceeding and incorporates, by reference, all of the documents relied upon for that analysis and conclusion. The key documents incorporated by this reference are already part of FERC's record submitted as exhibits to the license amendment application. In addition to the scientific and commercial data used by NOAA Fisheries for its 2003 ITP Biological Opinion, it is necessary to also consider any relevant information that has become available since this biological opinion was issued on August 12, 2003. NOAA Fisheries has searched for pertinent information that has become available in the intervening months that could potentially affect the analysis presented in the 2003 ITP Biological Opinion. NOAA concludes that there is no additional information now available that would alter the analysis or conclusions of that biological opinion.

NOAA Fisheries must also consider whether there are any changes to the environmental baseline for the action area, or any additional cumulative effects, as those terms are defined in the consultation regulations, that must be considered in addition to those effects which comprised the environmental baseline for the 2003 ITP Biological Opinion. Although the 2003 ITP Biological Opinion fully describes the environmental baseline and cumulative effects as of its issuance, there have been additional future Federal actions that have undergone ESA Section 7(a)(2) consultation and therefore are now added to the environmental baseline. A list of those additional Federal actions is enclosed with this letter as Exhibit A. A few of these Federal actions (issuing permits for water use in tributaries and for constructing overwater structures and docks) may have slightly negative impacts to the environmental baseline, however, the majority of these actions (operating hatcheries in the Middle Columbia River in accordance with the issued incidental take statements and permits, and minimizing the impacts of future road maintenance and culvert replacement activities) are expected to substantially improve the environmental baseline. Taken together, NOAA Fisheries finds that these actions improve the current environmental baseline compared to the environmental baseline described in the 2003 ITP Biological Opinion (Section 5) and concludes that the improved environmental baseline further reduces the level of risk to the ESA-listed species.

Similarly, NOAA Fisheries determines that there are no significant non-Federal actions in the action area that are now reasonably certain to occur, but which were not considered in the 2003 ITP Biological Opinion.

As noted previously, the 2003 ITP Biological Opinion concluded that the issuance of an ITP to Douglas PUD for the operation of the Wells Hydroelectric Project in accordance with the HCP for up to 50 years was not likely to jeopardize the continued existence of ESA-listed UCR steelhead or UCR spring-run chinook salmon. The 2003 ITP Biological Opinion, as incorporated herein, provides an adequate description of FERC's proposed action (Section 3) and a full and complete analysis of the effects of that proposed action (Section 6).

Conclusions

As discussed above, NOAA Fisheries has determined that the conclusion reached in the 2003 ITP Biological Opinion, which considered the aggregate effects of the factors analyzed under the environmental baseline, effects of the proposed action, and cumulative effects in the action area, when viewed against the current rangewide status of the species, equally applies to FERC's proposed action for the Wells Hydroelectric Project license amendment. The data used in the 2003 ITP Biological Opinion still constitutes the best scientific and commercial data currently available and is not affected by any changes in the environmental baseline since August 2003. Therefore, it is NOAA Fisheries's biological opinion that FERC's proposed action in this consultation is not likely to jeopardize the continued existence of UCR steelhead or UCR spring-run chinook salmon. Furthermore, although no critical habitat is currently designated for these species, NOAA Fisheries' analysis and no-jeopardy determinations are likely to be highly relevant for the consideration of the proposed action's effects on habitat should any be designated as critical for these species during the term of the proposed action.

Incidental Take Statement

The incidental take statement issued with the 2003 ITP Biological Opinion to NOAA Fisheries, together with its reasonable and prudent measures and terms and conditions, is incorporated in full into this biological opinion. NOAA Fisheries finds that the incidental take described in that statement, and authorized in NOAA Fisheries's ITP for this project, is the same take that is associated with FERC's proposed action considered here. Thus, so long as the Federal Power Act license for the Wells Hydroelectric Project contains articles necessary to achieve the reasonable and prudent measures and terms and conditions of that statement, any such taking in compliance with such license articles will not be considered a prohibited taking of the relevant listed species consistent with ESA Section 7(o)(2). Those measures, terms, and conditions generally direct Douglas PUD to fully comply with all the requirements of the HCP and ITP, as well as to perform additional administrative and reporting duties. To implement this incidental take statement, FERC's license articles should require the same compliance with the measures, terms, and conditions by the licensee as called for in the 2003 ITP Biological Opinion's incidental take statement (Section 9.3.1).

Magnuson-Stevens Fishery Conservation and Management Act

NOAA Fisheries also finds that the EFH consultation and requirements presented in the 2003 ITP Biological Opinion (Section 12) also apply to FERC in this consultation, as they did to NOAA Fisheries in the 2003 ITP Biological Opinion.

Literature Cited

NOAA Fisheries. 2002. Anadromous Fish Agreements and Habitat Conservation Plans - Final Environmental Impact Statement for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects in December 2002.

NOAA Fisheries. 2003a. Biological Opinion, Unlisted Species Analysis, and Magnuson-Stevens Fishery Conservation and Management Act Consultation for Proposed Issuance of a Section 10 Incidental Take Permit to Public Utility District No. 1 of Douglas County for the Wells Hydroelectric Project (FERC No. 2149) Anadromous Fish Agreement and Habitat Conservation Plan.

NOAA Fisheries. 2003b. Record of Decision.

NOAA Fisheries. 2003c. NOAA Fisheries Permit for Incidental Take of Endangered / Threatened Species - Permit Number 1391.

Comments or questions regarding this biological opinion and MSA consultation can be directed to Ritchie Graves of the NOAA Fisheries Hydropower Division at 503-231-6891, or email ritchie.graves@noaa.gov.

Sincerely,

Brian J. Brown

for Robert D. Lohn
Regional Administrator

Enclosure

cc: Original & 8 Copies to the Secretary
Service List

Exhibit A

Summary of Federal Actions That Have Undergone ESA Section 7(a)(2) Consultation Since August 12, 2003 That Affect the Environmental Baseline of UCR Steelhead and UCR Spring-Run Chinook Salmon As Described in the 2003 ITP Biological Opinion

Date	Subject	Action Agency
08/15/03	Proposed Qualification of the Regional Road Maintenance Program Submitted by 25 Jurisdictions in Washington State for 12 Threatened Salmonid ESUs, Pursuant to Limit No. 10(ii) of the NMFS 4(d) Rule	NOAA Fisheries
09/02/03	Programmatic Culvert Replacement Activities in Washington and Eastern Oregon	US Forest Service
09/12/03	Skyline Ditch Special Use Permit Amendment in Okanogan County, WA	US Forest Service
10/02/03	Issuance of Permits 1395 (WDFW / Chelan PUD / Douglas PUD), 1396 (USFWS), and 1412 (Colville Tribes) for ESA-Listed Steelhead Hatchery Programs	NOAA Fisheries
10/04/03	Regional General Permit for Overwater Structures	US Army Corps of Engineers
10/13/03	Proposed Howisey and Dantzler Dock Project	US Army Corps of Engineers
10/22/03	Issuance of two Incidental Take Statements (USFWS and BPA / Yakama Nation) and Permit 1347 (WDFW / Chelan PUD / Douglas PUD) for Unlisted Species Hatchery Programs	NOAA Fisheries
1/20/04	Issuance of Permit 1196 (WDFW / Chelan PUD / Douglas PUD) for ESA-Listed Spring-Run Chinook Salmon Hatchery Programs *permit not yet countersigned by all entities*	NOAA Fisheries