CHAPTER 7

SPECIES AND CRITICAL HABITAT NOT LIKELY TO BE ADVERSELY AFFECTED, SPECIES AND CRITICAL HABITAT LIKELY TO BE ADVERSELY AFFECTED

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7 EPA SPECIES AND CRITICAL HABITAT EFFECT DETERMINATIONS

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. A consequence is caused by the proposed action if it would not occur but for the proposed action and 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 (50 CFR 402.02). A 'No Effect' (NE) determination would be the appropriate conclusion when the action agency determines its proposed action will not affect a listed species or designated critical habitat.

Consistent with the definition of "Not Likely to be Adversely Affected" (NLAA), the National Marine Fisheries Service (NMFS) uses two primary analytical steps to identify the species or designated critical habitat that are NLAA by the Federal agency's proposed action. The first step is exposure, or some reasonable potential for co-occurrence, between one or more potential stressors associated with the proposed activities and Endangered Species Act (ESA)-listed species or designated critical habitat.

The second step is the likelihood of a response given exposure estimates and known toxicological end-points at concentrations that elicit a response. If we conclude that an ESA-listed species or designated critical habitat may be exposed to a potential stressor but is not likely to undergo a response to such exposure, an NLAA determination can be made.

An action warrants a NLAA finding when its potential effects or consequences are wholly *beneficial, insignificant* or *discountable. Beneficial* effects have an immediate positive effect without any adverse effects to the species or critical habitat. Beneficial effects are usually addressed when the project has a clear link to the ESA-listed species or its specific habitat needs and consultation is required because the species or its critical habitat may be affected.

Insignificant effects relate to the size or severity of the impact and include those potential effects that are undetectable, not measurable, or so minor that they cannot be meaningfully evaluated. Insignificant is the appropriate effect conclusion when effects are plausible, but are not sufficient to be determined to occur. That means the ESA-listed species will not be harmed or harassed and the conservation value of a physical or biological feature will not be diminished.

Discountable consequences are those that are extremely unlikely to occur. For a consequence to be discountable, there must be a plausible potential adverse effect (i.e., a credible possible effect that could result from the action and that would be an adverse effect if it did impact a listed species), but it is very unlikely to occur. The recently adopted ESA regulations clarify that where a potential consequence of the action is not "reasonably certain to occur", it is not considered an

"effect" of the action (See 50 CFR 402.02). Therefore, the term "discountable consequences" is more appropriate here than the term "discountable effects" that has been used by NMFS in earlier guidance and consultation documents.

'Likely to adversely affect' (LAA) is the appropriate conclusion when any effects of the action are not: discountable, insignificant, or wholly beneficial (not NLAA) and, therefore, adverse effects are possible to listed species or designated critical habitat as a result of the proposed action. If incidental take is anticipated (e.g. individuals may be harmed or harassed) as a result of the proposed action or the conservation value of a physical and biological feature may be diminished, an LAA determination should be made.

This section identifies the ESA-listed salmonid species and designated critical habitats for which the Environmental Protection Agency (EPA) has made the following effects determinations for this action (approval/registration of 1,3-D and metolachlor labelled uses and use sites) in its biological evaluations (BEs): no effect (NE), may affect but not likely to adversely affect (NLAA), or likely to be adversely affected (LAA).

EPA made NE and NLAA determinations in BEs for 1,3-D in 2004 and metolachlor in 2006. However, for both compounds, label information and approved use sites have changed in the interim. While EPA and registrants did provide new labels to NMFS for this Opinion, EPA indicated they will not otherwise be providing updates to their 2004 and 2006 BE's. Additionally, two species of salmon were listed as threatened after those BEs were developed. These are the Lower Columbia River Coho, and the Puget Sound Steelhead. Therefore, all of the species listed in Table 2, (regardless of EPA's earlier effect determinations) will be carried forward in this Biological Opinion for further analysis of effects of the action, the potential for jeopardy to the species, or destruction or adverse modification of critical habitat for these two compounds using the analyses described in Chapter 4. NMFS's determinations on effects to listed species and critical habitats listed in Table 2 will be presented in Chapters 12 and 15 of this Opinion.

On April 19, 2004 EPA finalized the biological evaluation for 1,3-D. The 2004 biological evaluation concluded that "the use of 1,3-Dichloropropene may affect but is not likely to adversely affect 11 ESUs when used according to labeled application directions and will have no effect on 15 ESUs in this assessment" (see **Table 1**).

Table 1. Summary of EPA 2004 conclusions on specific ESUs of listed Pacific salmon and steelhead for 1,3-Dichloropropene; adapted from EPA's biological evaluation of 1,3-D (Table 27). EPA did not make effects determinations to designated critical habitat.

Species	ESU	Finding (2004)
Chinook Salmon	California Coastal	No Effect

Chinook Salmon	Central Valley spring-run	No Effect
Chinook Salmon	Lower Columbia	May Affect, NLAA
Chinook Salmon	Puget Sound	May Affect, NLAA
Chinook Salmon	Sacramento River winter-run	May Affect, NLAA
Chinook Salmon	Snake River fall-run	May Affect, NLAA
Chinook Salmon	Snake River spring/summer-run	May Affect, NLAA
Chinook Salmon	Upper Columbia spring-run	May Affect, NLAA
Chinook Salmon	Upper Willamette	May Affect, NLAA
Chum Salmon	Columbia River	May Affect, NLAA
Chum Salmon	Hood Canal summer-run	No Effect
Coho Salmon	Central California	No Effect
Coho Salmon	Oregon Coast	No Effect
Coho Salmon	Southern Oregon/Northern California Coast	No Effect
Sockeye Salmon	Ozette Lake	No Effect
Sockeye Salmon	Snake River	No Effect
Steelhead	Central California Coast	No Effect
Steelhead	Central Valley, California	No Effect
Steelhead	Lower Columbia River	No Effect
Steelhead	Middle Columbia River	May Affect, NLAA
Steelhead	Northern California	No Effect
Steelhead	Snake River Basin	May Affect, NLAA
Steelhead	South-Central California	No Effect
Steelhead	Southern California	No Effect
Steelhead	Upper Columbia River	May Affect, NLAA
Steelhead	Upper Willamette River	No Effect

On June 19, 2006 EPA finalized the biological evaluation for metolachlor covering 26 listed salmonid species per Washington Toxics Coalition v. EPA, No. C-01-132 (W.D. Wash. July 2,

2002) Court Order. The 2006 assessment reached the following conclusions regarding metolachlor use and the 26 ESUs of listed salmonids in California and the Pacific Northwest:

1. Metolachlor is expected to have no direct effect on the listed salmonids.

2. Metolachlor is expected to have no appreciable effect on designated critical habitat for the listed salmonids.

3. Metolachlor is expected to have no effect on the listed salmonid prey.

4. Metolachlor is not likely to adversely affect listed salmonids through effects on aquatic plants.

5. Metolachlor is not likely to adversely affect listed salmonids through effects on riparian vegetation.

Table 2. Listed Species Status and Designated Critical Habitat within the action area.

Species	ESA Status	Critical Habitat Designated?
Chum Salmon, Columbia River	Threatened	Yes
Chum Salmon, Hood Canal summer-run	Threatened	Yes
Chinook Salmon, California Coastal	Threatened	Yes
Chinook Salmon, Central Valley spring-run	Threatened	Yes
Chinook Salmon, Lower Columbia River	Threatened	Yes
Chinook Salmon, Puget Sound	Threatened	Yes
Chinook Salmon, Sacramento River winter-run	Endangered	Yes
Chinook Salmon, Snake River fall-run	Threatened	Yes
Chinook Salmon, Snake River spring/summer run	Threatened	Yes
Chinook Salmon, Upper Columbia River spring-run	Endangered	Yes
Chinook Salmon, Upper Willamette River	Threatened	Yes
Coho Salmon, Central California Coast	Endangered	Yes
Coho Salmon, Lower Columbia River	Threatened	Yes
Coho Salmon, Oregon Coast	Threatened	Yes
Coho Salmon, South Oregon and North Calif. Coast	Threatened	Yes
Sockeye Salmon, Ozette Lake	Threatened	Yes
Sockeye Salmon, Snake River	Endangered	Yes

Steelhead, California Central Valley	Threatened	Yes
Steelhead, Central California coast	Threatened	Yes
Steelhead, Lower Columbia River	Threatened	Yes
Steelhead, Middle Columbia River	Threatened	Yes
Steelhead, Northern California	Threatened	Yes
Steelhead, Puget Sound	Threatened	Yes
Steelhead, Snake River Basin	Threatened	Yes
Steelhead, South Central California Coast	Threatened	Yes
Steelhead, Southern California	Endangered	Yes
Steelhead, Upper Columbia River	Endangered	Yes
Steelhead, Upper Willamette River	Threatened	Yes
Total species and designated critical habitats	**28 Species**	**28 Designated Critical Habitats**