

Mr. John F. Studt
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Operations, Construction
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Washington, D.C. 20314-1000

Dear Mr. Studt:

The National Marine Fisheries Service and the U.S. Fish and Wildlife Service (Services) have reviewed your November 7, 1997 request for initiation of formal consultation, regarding the U. S. Army Corps of Engineers Nationwide Permit (NWP) 29. Under certain conditions, NWP 29 authorizes discharges of dredged or fill materials into non-tidal waters of the United States for the construction or expansion of a single family home and attendant features.

The enclosed biological opinion and conference report addresses the potential adverse impacts to listed/proposed species and designated/proposed critical habitat from the Corps' implementation of NWP 29, with modified procedures to address endangered species concerns. These modified procedures include Corps' implementation of the "Framework for Standard Local Operating Procedures-Endangered Species (SLOPES) for NWP 29" (hereinafter referred to as Framework). The Services have concluded that with the caveats discussed in the accompanying biological opinion and conference report, overall the proposed action is not likely to jeopardize the continued existence of threatened, endangered, or proposed species or result in adverse modification of designated or proposed critical habitat within the United States.

We are pleased that the Corps will work with the Services to develop local procedures and/or regional permit conditions, as appropriate, and to review existing procedures to determine the need for any modifications. The conclusion reached in the biological opinion is based on the Corps' commitment to getting the Service's concurrence to any procedures utilized by the Corps, including existing procedures and those not yet developed. It is essential, therefore, that the Districts comply with the intent set forth in the Framework (*i.e.*, obtaining the Services written concurrences on existing or newly establish local procedures and/or regional permit conditions).

The Services are supportive of the concepts of SLOPES to facilitate compliance with section 7 when the Corps proposes to authorize minimal impact projects involving construction or expansion of single family homes and attendant features, using NWP 29. The Services continue to be concerned with the additive, long-term effects of individual authorizations on listed/proposed species and their designated/proposed critical habitats on a local scale. To better track this additive effect, we anticipate that the SLOPES may include monitoring to ensure that impacts are adequately assessed over time.

The Framework provides for the establishment of SLOPES and/or regional permit conditions no later than six months from the date of this opinion. During the interim period between date of receipt of the biological opinion, and the completion of SLOPES, there may not be adequate review of individual NWP 29 authorizations. This is a function of several factors: the inadequate amount of time typically afforded the

resource agencies to complete even a cursory review of pre-construction notifications (i.e., five calendar days); the possible assumption by the Corps that a non-response indicates no endangered species are present or that the Services have no concerns.; and the inadequacy of current procedures for consideration of the indirect effects of the Corps authorizations. Therefore, during this interim period, we suggest that the Districts work with the Services to extend the 5-day review period automatically if requested to do so by the Services. This provision will allow the Services additional time to assist the Corps in meeting its section 7 responsibilities, particularly with regard to indirect effects.

As requested, the enclosed biological opinion focuses only on one aspect of the Corp's NWP program, NWP 29. We are encouraged by the Corps' commitment to consult on the remainder of the NWP program and prefer this be accomplished through a single programmatic consultation. The Services are particularly concerned with those NWP activities that presently are "non-reporting." Non-reporting NWPs do not require Corps review and, therefore, do not ensure that the Corps is meeting its responsibilities under section 7 of the Endangered Species Act (ESA). Therefore, it is imperative that we conclude consultation on the Corps NWP program as soon as possible.

Your November 7, 1997 letter stated that the Corps would consider effects on candidate species consistent with the requirements of the ESA, Fish and Wildlife Coordination Act, other applicable laws and Corps regulations. Although the ESA does not require consideration of candidate species, we feel that your inclusion of candidate species is prudent. It would be appropriate also for the Corps to include consideration of effects to candidate species when developing the SLOPES.

A final recommendation regarding implementation of SLOPES and/or regional conditions as prescribed under this consultation is that headquarters-level evaluation be conducted jointly by the Corps and the Services on a biannual basis during the first six years of SLOPES use. The review would ensure that the program is working as anticipated in the biological opinion. We look forward to working with you on development of the SLOPES and on the future consultation for the NWP program.

Sincerely,

**Endangered Species Act - Section 7 Consultation
Biological Opinion and Conference Report**

Agencies: U.S. Department of the Army, Corps of Engineers

Activity: Implementing Regulations for Nationwide Permit 29 and the Framework for Standard Local Operating Procedures - Endangered Species (SLOPES)

Consultation Conducted by:

U.S. Department of the Interior, U.S. Fish and Wildlife Service
and
U.S. Department of Commerce, National Marine Fisheries Service

Date Issued: _____

Consultation History

The following is a brief history of correspondence among the U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), Department of the Interior (DOI), and the U.S. Army Corps of Engineers (Corps) relevant to this consultation:

May 20, 1996 USFWS provides comments to the Corps on the pre-publication draft of the Federal Register Notice proposing issuance, re-issuance, and modifications of Nationwide Permits (NWP).

September 3, 1996 NMFS provides comments to the Corps on the June 17, 1996 Federal Register Notice (61 FR 30780) proposing issuance, re-issuance, and modifications of NWPs.

September 3, 1996 USFWS recommends the Corps request initiation of formal consultation on the NWP program.

September 11, 1996 DOI provides comments to the Corps on the June 17, 1996 Federal Register Notice (61 FR 30780) proposing issuance, re-issuance, and modifications of NWP.

December 2, 1996 USFWS provides additional comments to the Corps on the draft Final Notice on the issuance, re-issuance and modification of the NWPs.

June 24, 1997 Corps requests formal consultation on the NWP program.

August 5, 1997 USFWS requests additional information and inclusion of Standard Local Operating Procedures - Endangered Species (SLOPES) prior to initiating consultation on the NWP program.

August 7, 1997 NMFS requests additional information and proposes possible program modifications to minimize adverse impacts to listed/proposed species and their designated/proposed critical habitat prior to initiating consultation on NWP program.

September 5, 1997 Corps provides requested additional information to USFWS and NMFS.

October, 27, 1997 USFWS informs the Corps that formal consultation cannot proceed until USFWS, NMFS and the Corps agree on a framework to evaluate potential effects to listed species and critical habitat and the Corps agrees that the terms of the consultation process include consideration of indirect effects and the effects of interrelated and interdependent activities.

November 7, 1997 Corps requests joint USFWS-NMFS formal programmatic consultation on NWP 29 Single-Family Housing with a proposed framework for SLOPES for NWP 29. Additionally, for NWP 29, the Corps interpretation of the scope of analysis for consultation with regard to indirect effects is the same as USFWS and NMFS interpretation regulations 50 CFR §402.

November 14, 1997 USFWS-NMFS inform the Corps that formal programmatic consultation on NWP 29 with the proposed “Framework for Standard Local Operating Procedures-Endangered Species (SLOPES)” (Framework) for NWP 29 has been initiated.

November 21, 1997 USFWS-NMFS request clarifications and edits to the Corps’ proposed Framework submitted with the November 7, 1997 request for formal programmatic consultation on NWP 29. Corps’ revises the proposed Framework and submits the revisions to the Services.

In addition, other informal discussions occurred among the USFWS, NMFS, and Corps. A complete administrative record of this consultation is on file with the USFWS and NMFS (Services).

Description of the Proposed Action

NWP 29 authorizes the discharge of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee provided that the activity meets all of the following criteria:

- a. The discharge does not cause the loss of more than ½ acre of non-tidal waters of the United States, including non-tidal wetlands;
- b. The permittee notifies the District Engineer in accordance with the “Notification” general condition;
- c. The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge. For example, the location of the home may need to be adjusted on-site to avoid flooding of adjacent property owners;
- d. The discharge is part of a single and complete project; furthermore, for any subdivision created on or after November 22, 1991, the discharges authorized under the NWP may not exceed an aggregate total loss of waters of the United States of ½ acre for the entire subdivision;
- e. An individual may use this NWP only for a single -family home for a personal residence;
- f. This NWP may be used only once per parcel;
- g. This NWP may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel; and,

h. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.

Also addressed in this biological opinion will be the “Framework for Standard Local Operating Procedures-Endangered Species (SLOPES) for NWP 29” (Framework) and/or regional conditions, which are procedures necessary to ensure consideration of potential impacts to listed/proposed species and designated/proposed critical habitat. The Framework was described in an attachment to the Corps November 7, 1997 letter with a modified version provided to the Services on 11/21/97 and is incorporated herein as Appendix A. This Framework states that the Corps and the Services will coordinate on review of NWP 29 to determine if procedures (i.e., SLOPES and/or regional conditions) are necessary to ensure consideration of potential impacts to listed/proposed species and designated/proposed critical habitat. The proposed Framework further states that the Corps Districts will ensure that the Services concur with the resultant local procedures or a determination that such procedures are not necessary. An acceptable alternative to not developing SLOPES and/or regional conditions is a decision by the Districts to revoke NWP 29 authorization in certain geographical areas in an effort to ensure appropriate coordination on any listed/proposed species or designated/proposed critical habitat. The effect of this action would be to require individual permit review, including standard coordination procedure with the resource agencies for projects which would otherwise have qualified for authorization using this NWP. If existing procedures are currently in place, the Corps will seek the Services concurrence on those procedures.

Status of the Species

This biological opinion and conference report addresses federally listed/proposed species and their designated/proposed critical habitat that may be affected by application of NWP 29. This opinion addresses all present and future federally listed/proposed species and their designated/proposed critical habitats. As the species change in status, the Framework requires conferences and consultations be conducted at the appropriate level. It is at this level that complete species lists will be maintained and updated as appropriate.

Detailed status information on species that may be affected by application of NWP 29 is contained in the proposed and final listing rules for each particular species, published in the Federal Register. A complete list of endangered and threatened wildlife and plants with reference to these listing rules is published in the Federal Register (50 CFR §17.11 and §17.12).

Environmental Baseline

General permits are a tool that the Secretary of the Army may utilize to authorize a category of activities similar in nature and impact upon the aquatic environment. General permits can be authorized for a category of activities that will have only minimal adverse effects when performed separately and only minimal cumulative adverse effects on the aquatic environment. When issued after proper consideration, general permits can be a useful tool in expediting project authorization while protecting the environment with a minimum of red tape and delay.

NWPs are a type of general permit; NWP 29 is one of 39 such permits currently authorized. The final

notice of issuance, reissuance, and modification for the current NWP was published in the Federal Register Notice dated December 13, 1996. These NWPs became effective February 11, 1997 and can remain in effect for five years thereafter. Conditions of application for the general permit program, including NWPs, are described in 33 CFR § 330.1-330.6. Those conditions specific to NWPs were modified in the most recent reauthorization, and are described in the Federal Register Notice dated December 13, 1996; however, not all the conditions listed in that notice apply to each NWP.

For the purposes of establishing this environmental baseline, only the following conditions are germane to this consultation:

Condition 11 - This condition states that no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or its designated critical habitat, or any proposed species or proposed designated critical habitat. This condition directs the non-federal permittee to “notify the District Engineer whether any listed species or critical habitat might be affected or is in the vicinity of the project, and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized.”

Condition 13 - This condition describes a notification process including timing, contents, and form of notification, the District Engineer’s decision, agency coordination, wetland delineation, and mitigation.

Timing - This section requires the prospective permittee to notify the District Engineer with a Preconstruction Notification (PCN) as early as possible and not begin the activity:

- 1) Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or
- 2) If notified by the District or Division Engineer that an individual permit is required; or
- 3) Unless 30 days have passed from the District Engineer’s receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee’s right to proceed under the NWP may be modified, suspended or revoked only in accordance with the procedure set forth in 33 CFR §330.5(d)(2).

After 30 days, the permittee may presume that he/she qualifies for the NWP unless otherwise notified by the District Engineer within that period of time. If the District Engineer notifies the permittee that the notification is incomplete, a new 30-day period will commence upon receipt of the revised notification. Again, the permittee may not proceed with the activity before expiration of the 30-day period unless otherwise notified by the District Engineer.

Contents of Notification: The PCN to the Corps must be in writing and include the following:

- 1) name, address, and phone number of the prospective applicant

- 2) location of the project
- 3) brief description of the proposed project, including the project's purpose; direct and indirect adverse environmental effects that the project would cause; and a list of any other nationwide(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. For NWP 29, the PCN must also include:
 - a) any past use of this NWP by the permittee, and/or the permittee's spouse
 - b) a statement that the single family housing is for a personal residence of the permittee;
 - c) a description of the entire parcel including its size and a delineation of wetlands for the purpose of this NWP. Parcels of land measuring 1/2 acre or less will not require a formal on-site delineation however the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exist on the property. For parcels greater than 1/2 acre, a formal wetland delineation must be prepared in accordance with the current method required by the Corps.
 - d) a written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse within 1 mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed.

Form of Notification - the standard individual application form may be used as the notification but must clearly indicate that it is an PCN and must include all of the information required in (b) (1)-(7) of General Condition 13. A letter that includes all of the germane information indicated under General Condition 13 may also be used in place of the standard application form.

District Engineer's Decision - In reviewing the PCN for the proposed activity, the District Engineer will determine whether 1) the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or 2) may be contrary to the public interest. Optionally, the prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. The District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. This condition further states that the mitigation must also be approved in advance of the proposed work and in writing.

Agency Coordination - This condition requires that the District Engineer considers any comments from the federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation. Once the District Engineer receives notification by PCN of a proposed use of NWP 29, a copy will be provided immediately to the resource agencies, including the

Services. Within five days of the transmittal, the resource agencies must notify the Corps that substantive comments are forthcoming. An additional 10 days will then be allotted in order to provide site-specific substantive comments. At the end of the 15-day review period, the District Engineer will make a decision regarding permit issuance. Although the District Engineer is required to fully consider resource agency comments, no direct response to the resource agencies is required.

NWP 29 authorizes certain discharges into non-tidal waters of the U.S. as described previously. According to information provided by the Corps, 331 NWP 29 verifications were offered and accepted nationwide in 1996. During that same time period, approximately 101.41 acres of impacts were proposed; modification of the proposed actions resulted in a reduction to 62.26 acres of impact. Approximately 4.13 acres of compensatory mitigation were offered and accepted to offset wetland losses.

In certain areas, such as six New England States, the Corps has developed programmatic general permits with States that effectively regulate the waters of the United States within their jurisdictions. When such permits are developed and issued, it is often appropriate for the Corps District to revoke the NWPs, including NWP 29, in order to minimize confusion of overlapping permits, while better protecting the environment. Further, the District and/or Division Engineer can regionalize the NWPs, in order to reflect the differences in aquatic ecosystem functions and values that exist across the country. Such conditions would be developed to best protect the environment while providing fair, reasonable, and timely decisions for the regulated public.

For an unquantified number of NWP 29 actions, the Corps relies on the applicant, per General Permit Condition 11, to determine presence or absence of listed species. Although the Services may provide information regarding listed species, that information must be provided within five calendar days. Due to staff limitations, it may require more than the allotted time to review a PCN and establish presence or absence of any listed species. However, if comments from the Services are not provided within the 5-day review period, the Corps may presume that there are no listed species concerns. However, some Corps Districts have already adopted local procedures to assist in identifying and addressing listed/proposed species and designated/proposed critical habitat concerns.

Habitat loss continues to be a primary cause of species endangerment in United States. A significant number of listed species are wetland-associated, including non-tidal waters. The following table (Boylan and MacLean 1997) illustrates the number of listed species that are either wetland-dependent or wetland-associated. Wetland-associated species are adversely affected to varying degrees by the loss or degradation of non-tidal waters, including wetlands. Many could probably survive in diminished form if the wetland or wetland type they are frequently associated with is lost. However, the survival of wetland-dependent species would be jeopardized by the loss or degradation of non-tidal waters, including wetlands.

Table 1. Summary of Wetland Associated Threatened and Endangered Species

as of May 31, 1997	Category
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Number of U.S. Endangered and Threatened Species as of May 31, 1997 that are Wetland Associated or Dependent	Total Number of U.S. Endangered and Threatened Species as of May 31, 1997	Percent of Total	Mammals
42	63	66.7	Birds
72	89	80.9	Reptiles
21	33	63.6	Amphibians
15	15	100	Fishes
107	107	100	Snails
10	22	45.5	Clams
62	62	100	Crustaceans
18	18	100	Insects
9	33	27.3	Arachnids
0	5	0	Plants
143	635	22.5	Totals
499	1082	46.1	

There has been significant decrease in wetland acreage in the United States since colonial times. Although wetlands occupy less than five percent of the land area in the lower 48 states, wetlands and wetland losses are unevenly distributed throughout the country. For example, in the southeast, wetland losses accounted for 89 percent of the national wetland losses from the mid-1970's to the mid-1980's (Boylan and MacLean 1997).

While the NWP program has streamlined the permitting process, there has been an additive or cumulative impact that remains unquantified. For the purposes of this consultation, the Services consider 'additive impacts' to be the summation of effects from individually minor but collectively significant NWP 29 activities within a given geographic area. Over time, a variety of direct, indirect, interdependent and interrelated effects have likely resulted in significant adverse additive impacts. These adverse impacts have been compounded by historic and ongoing insufficient federal agency review of the NWP program.

Effects of the Action

Projects authorized under NWP 29 affect non-tidal wetlands and open water habitats described in Cowardin, *et. al.*, 1979. These locations provide habitat for a broad array of migratory and resident, listed and proposed animals and plants. As described in Table 1, approximately 46% of listed species use aquatic habitat during all or a portion of their life history (Boylan and MacLean 1997). In addition, some aquatic plants, such as vernal pool species, rely on terrestrial habitats for their reproductive success. Examples of species with overlapping habitat needs include amphibians with both aquatic and terrestrial life stages and reptiles relying predominantly on aquatic environments but wintering in terrestrial habitat.

Some aquatic species require certain terrestrial habitat types for dispersal or other key life history periods.

Adverse effects on listed/proposed species and their designated/proposed critical habitats associated with the construction of single family homes and attendant features in waters of the United States consist primarily of habitat alteration by land-clearing and earth-moving operations, changes in hydrology, and other disturbances associated with lot development. Habitat loss is considered to be the most pervasive threat to biological diversity (Boylan and MacLean 1997). Generally, habitat alteration includes: loss or alteration of substrate character and its associated vegetative communities; siltation of waterbodies such as lakes, ponds, rivers, streams, and creeks; and increased suspended sediment in waterbodies, thus reducing primary productivity. While some of these effects are temporary, unique habitat features found in macro- and micro-environments such as old-growth forests, vernal pools, and seeps are difficult and sometimes impossible to replace.

Direct effects are generally associated with the actual habitat lost through filling of the wetland and related disturbance. Direct effects from fill operations associated with construction of a home or attendant features authorized under NWP 29 could result in permanent wetland loss of up to one half acre.

Indirect effects are those caused by the proposed action and are later in time, but are still reasonably certain to occur. Wetland fill for the purposes of lot development may indirectly affect listed/proposed species and their designated/proposed critical habitat by increasing human access to species and/or their habitats and by causing or contributing to long-term changes in land use and the local ecology. Improved access can result in increased site disturbance, poaching, and invasion of detrimental species. Lot development can interrupt migration corridors and habitat continuity, thus isolating populations and threatening their long-term viability by inhibiting genetic diversity and increasing susceptibility to genetic decline and catastrophic events. Habitat fragmentation and subsequent changes in land use may cause secondary degradation through increased predation and habitat degradation on adjacent, physically undisturbed sites. This may threaten the ecological integrity of those lands.

Interrelated actions are usually considered to be isolated events that become mutually related by implementation and can create cumulative impacts. Those impacts are often difficult to isolate and are more easily appreciated within an evaluation of some larger portion of the overall scenario. Interdependent actions are actions having no independent utility apart from the proposed action. Interrelated actions are part of a larger action and depend on the larger action for their justification. Interrelated and interdependent effects associated with activities authorized under NWP 29 could result in adverse impacts to listed/proposed species and their designated/proposed critical habitat through direct mortality, injury, disruption of normal feeding, breeding, rearing and roosting activity, and loss or modification of important habitats.

The Services are concerned with possible significant impacts to species and habitats from incremental wetland losses as a result of NWP 29. While the Corps' data summary suggests that NWP 29 was invoked relatively rarely in 1996, it is impossible to identify and quantify with any degree of confidence whether this pattern of use will change as Corps regulatory personnel and the public become more familiar

with NWP 29. These additive impacts may result in locally significant declines in species or available critical habitat. As specified within the Framework, the Services consider the mandatory periodic review as a mechanism to consider potential additive impacts of NWP 29.

As previously stated, the Framework allows for six months from the date of this opinion to establish SLOPES and/or regional conditions. During that interim period there may not be adequate review of individual NWP 29 authorizations. This is due to 1) the Corps reliance on the permittee to establish presence/absence of the listed species and designated critical habitats; 2) the amount of time allotted to the resource agencies for review (*i.e.*, five calendar days); and 3) the assumption by the Corps that non-response from the Services indicates no endangered species concerns.

Species specific effects associated with development of SLOPES and/or regional conditions cannot be assessed at this level. The Framework will provide a mechanism to assess, address and track potential effects of individual permitted actions or a related group(s) of actions under NWP 29.

Cumulative Effects

Cumulative effects include the effects of any future State, Tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion pursuant to 50 CFR § 402.02; however, future federal actions that are unrelated to the proposed action are not considered in this biological opinion because they require separate consultations pursuant to section 7 of the ESA.

It is impractical to analyze cumulative impacts from NWP 29 on a national scale because it is 1) impossible to evaluate the cumulative ecological impact of actions in different aquatic settings and 2) difficult to determine where future State, Tribal, local and private actions will occur and if such actions will have an effect on listed/proposed species and their designated/proposed critical habitat. A cumulative effects analysis will be more practical and meaningful at the local/regional level described in the Framework.

Conclusion

Having reviewed NWP 29, its implementing regulations, the Framework, and the environmental baseline for the action area, and having recognized a more meaningful analysis of cumulative effects should be conducted at the local/regional level, the Services' opinion is that the action, as proposed, for implementation is not likely to jeopardize the continued existence of listed or proposed species and is not likely to result in the destruction or adverse modification of designated or proposed critical habitat.

Incidental Take Statement

Section 9 of the ESA, and federal regulations issued pursuant to section 4(d) of the ESA, prohibit take of endangered and threatened species without a special exemption. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. Harm is further defined by the USFWS (the Services) to include significant habitat modification or degradation that actually kills or injures a listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the USFWS as an action that creates the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Incidental take is defined as take that

is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), such incidental taking is not considered to be a prohibited taking under the ESA provided that such taking is in compliance with this Incidental Take Statement.

Section 7(b)(4)(c) of the ESA specifies that in order to provide an incidental take statement for an endangered or threatened species of marine mammal, the taking must be authorized under section 101(a)(5) of the Marine Mammal Protection Act of 1972 (MMPA). Since no incidental take of marine mammals has been authorized under section 101(a)(5) of the MMPA, no statement on incidental take of marine mammals is provided.

Amount or Extent of Take

Any incidental take and measures to reduce such take cannot be effectively identified in this programmatic consultation on NWP 29 because of the generic nature and national scope of the biological opinion. The current NWP 29 implementing regulations and the Framework are broad, with general principles that do not identify specific or quantitative criteria, and whose effects cannot be measured upon particular regions of the country at this level. Rather, incidental take and reasonable and prudent measures will need to be identified through review of individual actions or a related group(s) of actions under NWP 29.

Conservation Recommendations

Section 7(a)1 of the ESA directs federal agencies to utilize their authorities to further the purposes of ESA by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat to help implement recovery plans, or to develop information.

Therefore, we suggest

- 1) the Corps to meet with the Services more frequently than at 5-year intervals required in the Framework to ensure the SLOPES/regional conditions are effective.
- 2) the Chief of Engineers issue a Regulatory Guidance Letter or other appropriate instrument, directing the Corps Districts to develop a policy that requires Corps project managers to give serious consideration to recovery plan goals for listed species within their geographic area of responsibility.
- 3) Corps consider effects to candidate species when developing the SLOPES (The Corps November 7, 1997 letter requesting initiation of consultation on NWP 29 stated that the Corps would consider effects on candidate species consistent with the requirements of the ESA, Fish and Wildlife Coordination Act, other applicable laws and Corps regulations. We applaud that commitment and base this recommendation on that statement.)

In order for the Services to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, the Services request notification of the implementation of any conservation recommendations.

Reinitiation of Consultation

This concludes formal consultation and conference on NWP 29 and the Framework for development of SLOPES, as outlined in the Corps November 15, 1997 request for initiation of formal consultation. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the proposed action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in this opinion; or (4) a new species is listed or critical habitat is designated that may be affected by the proposed action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

Literature Cited

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