



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, SEATTLE DISTRICT
4735 EAST MARGINAL WAY SOUTH, BLDG 1202
SEATTLE, WA 98134-2388

MAY 28, 2026

Regulatory Division

Ms. Sarah Bluvas
City of Mercer Island Public Works
9611 Southeast 36th Street
Mercer Island, Washington 98040

Reference: NWS-2022-832
Mercer Island, City of-
Luther Burbank Park
Waterfront Improvement

Dear Ms. Bluvas:

We have reviewed your application to repair and reconfigure portions of the existing dock structures, including repairs to the north dock structure, and replacing and reconfiguring the central, and south dock structures to accommodate waterfront programming and current and projected watercraft use in Lake Washington near Mercer Island, King County, Washington. Based on the information you provided to us, this "Letter of Permission" (LOP) permit authorizes to repair the north dock structure, replace and reconfigure the central and south dock structures, and upgrades to existing waterfront buildings and Nationwide Permit (NWP) 27, *Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities* (Federal Register January 8, 2026, Vol. 91, No. 5), authorizes expansion of the north beach by placing fish habitat gravel landward of the upland edge of the existing beach, relocation boulders and LWD along the shoreline, and enhancement of riparian vegetation as depicted on the enclosed drawings dated October 2022 which are made part of this permit. For this authorization to be valid, you must ensure the work is performed in accordance with the enclosed *Letter of Permission General Conditions, Nationwide Permit 27 Terms and Conditions* and the following special conditions:

a. This U.S. Army Corps of Engineers (Corps) permit does not authorize you to take a threatened or endangered species, in particular the Puget Sound (PS) Chinook salmon and PS steelhead. In order to legally take a listed species, you must have a separate authorization under the Endangered Species Act (ESA; e.g., an ESA Section 10 permit, or ESA Section 7 consultation Biological Opinion (BO) with non-discretionary "incidental take" provisions with which you must comply). The enclosed BO prepared by the National Marine Fisheries Service (NMFS) dated 16 April 2026, and the Letter of Concurrence from U.S. Fish and Wildlife Service (USFWS) dated 03 March 2025, contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with the specified "incidental take" in the BO (NMFS

Reference Number WCRO-2024-02799, USFWS Reference Number 2024-0140792). Your authorization under this Corps permit is conditional upon your compliance with all of the mandatory terms and conditions associated with incidental take of the enclosed BO. These terms and conditions are incorporated by reference in this permit. Failure to comply with the terms and conditions associated with incidental take of the BO, where a take of the listed species occurs, would constitute an unauthorized take, and it would also constitute non-compliance with your Corps permit. The USFWS/NMFS is the appropriate authority to determine compliance with the terms and conditions of its BO and with the ESA.

b. To be in compliance with Special Condition "a", you must request an invoice from the King County Mitigation Reserves Program (ATTN: Ms. Megan Webb, megan.webb@kingcounty.gov; In-lieu Fee Mitigation and Transfer of Development Rights, King County Water and Land Resources Division, Department of Natural Resources and Parks, 201 South Jackson Street, Room 600, Seattle, Washington, 98104-3855) and provide the U.S. Army Corps of Engineers a receipt that you have paid the required conservation fees of \$149,878.00 within 60 days from the date of permit authorization. This information must prominently display the reference number NWS-2022-833 and NWS-2022-832.

c. In order to meet the requirements of the Endangered Species Act and protect Puget Sound Chinook, Puget Sound steelhead, and Coastal-Puget Sound bull trout, the authorized in-water activities may be conducted from July 16 through April 30 in any year this permit is valid. The in-water activities authorized by this permit may not be conducted from May 1 through July 15 in any year.

d. You shall implement and abide by the Luther Burbank Waterfront Park Improvements Monitoring Plan dated December 2023.

e. You shall prepare and submit a summary report of the findings of the archaeological monitoring (positive or negative) to the U.S. Army Corps of Engineers, Seattle District, Regulatory Division within 60 days after monitoring has been completed. The report must prominently display the reference number NWS-2022-832.

f. If human remains, historic resources, or archaeological resources are encountered during construction, all ground disturbing activities shall cease in the immediate area and you shall immediately (within one business day of discovery) notify the U.S. Army Corps of Engineers (Corps), Seattle District, Regulatory Division. You shall perform any work required by the Corps in accordance with Section 106 of the National Historic Preservation Act and Corps regulations.

We have reviewed your project pursuant to the requirements of the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act regarding Essential Fish Habitat. The Corps has determined this project will comply

with the requirements of the above laws provided you comply with special conditions “a” through “c” listed above.

Please be reminded that Special Condition “a” of your permit requires you implement and abide by the Endangered Species Act (ESA) requirements set forth in the Biological Opinion (BO) for this project. The non-discretionary terms and conditions are listed in Section 2.8.4. In particular, you must provide photos of the project and report as-built information, as described in the BO.

Please note Seattle District NWP Regional General Condition 6, Cultural Resources and Human Burials found in the *Nationwide Permit Terms and Conditions* enclosure, details procedures to follow should an inadvertent discovery occur. You must ensure that you comply with this condition during construction of your project.

The authorized work complies with the Washington State Department of Ecology’s (Ecology) Water Quality Certification (WQC) requirements and Coastal Zone Management (CZM) consistency determination decision for this NWP. No further coordination with Ecology for WQC and CZM is required.

You have not requested a jurisdictional determination for this proposed project. If you believe the U.S. Army Corps of Engineers does not have jurisdiction over all or portions of your project you may request a preliminary or approved jurisdictional determination (JD). If one is requested, please be aware that we may require submittal of additional information to complete the JD and work authorized in this letter may not occur until the JD has been completed.

If you object to this LOP decision, you may submit your objection on the enclosed *Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA)* form. For your objection to be accepted, the form must be received by our office within 60 days from the date on the form. Should you decide to submit an objection, it must be received at our office by July 27, 2026. Please be advised that the special condition requiring you to implement the mandatory terms and conditions of the biological opinion for the project is not appealable.

Your authorization to conduct the proposed work under this LOP expires 3 years from the date of this letter.

Our verification of this NWP authorization is valid until March 15, 2031, unless the NWP is modified, reissued, or revoked prior to that date. If the authorized work for the NWP authorization has not been completed by that date and you have commenced or are under contract to commence this activity before March 15, 2031, you will have until March 15, 2032, to complete the activity under the enclosed terms and conditions of this NWP.

Within 30 days of completing the authorized work, you must fill out and return the enclosed *Certificate of Compliance with Department of the Army Permit* form. All compliance reports should be submitted to the U.S. Army Corps of Engineers, Seattle District, Regulatory Branch at nws.compliance@usace.army.mil. Your signature on this form is our assurance you have conducted the work and any required mitigation in accordance with the terms and conditions of this LOP and NWP, including all special conditions.

Any change in the plans for this work will require that you submit revised drawings to this office and receive our written approval of those changes prior to conducting the work. Failure to comply with all terms and conditions of this LOP and NWP verification invalidates this authorization and could result in a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act.

Thank you for your cooperation during the permit process. We are interested in your experience with our Regulatory Program and encourage you to complete a customer service survey form. This form and information about our program are available on our website at www.nws.usace.army.mil, select "Regulatory Branch, Permit Information" and then "Contact Us."

While this project will not require further authorization from us, please note that it must comply with all local, State, and other Federal requirements that may apply. A copy of this letter with permit drawings will be furnished to A copy of this letter with enclosure(s) will be furnished to Josh Jenson, of Anchor QEA, at jjensen@anchorqea.com. If you have any questions, please contact me at leeann.w.simmons@usace.army.mil or (206) 419-1172.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:



for Kathryn P. Sanborn, PhD, PE, PMP
Colonel, Corps of Engineers
District Commander

Enclosures

cc:

USFWS (wfwoclap@fws.gov)

Ecology (ecyrefedpermits@ecy.wa.gov)



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SEATTLE DISTRICT
4735 EAST MARGINAL WAY SOUTH, BLDG 1202
SEATTLE, WA 98134-2388

22 May 2026

Regulatory Division

Ms. Sarah Bluvas
City of Mercer Island Public Works
9611 Southeast 36th Street
Mercer Island, Washington 98040

Reference: NWS-2022-833
Mercer Island, City of-
Luther Burbank
Waterfront Park
(Overwater Viewing
Platform)

Dear Ms. Bluvas:

We have reviewed your application to install a new 560-square foot overwater platform supported by 6 pin piles in Lake Washington near Mercer Island, King County, Washington. Based on the information you provided to us, this "Letter of Permission" (LOP) permit authorizes your proposal as depicted on the enclosed drawings on Sheet 1 of 3 of the drawings dated October 2022.

In order for this LOP authorization to be valid, you must ensure the work is performed in accordance with the enclosed *Letter of Permission General Conditions* and the following special conditions:

- a. This U.S. Army Corps of Engineers (Corps) permit does not authorize you to take a threatened or endangered species, in particular the Puget Sound (PS) Chinook salmon and PS steelhead. In order to legally take a listed species, you must have a separate authorization under the Endangered Species Act (ESA; e.g., an ESA Section 10 permit, or ESA Section 7 consultation Biological Opinion (BO) with non-discretionary "incidental take" provisions with which you must comply). The enclosed BO prepared by the National Marine Fisheries Service (NMFS) dated April 16, 2026, and the Letter of Concurrence from U.S. Fish and Wildlife Service (USFWS) dated March 03, 2025, contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with the specified "incidental take" in the BO (NMFS Reference Number WCRO-2024-02799, USFWS Reference Number 2024-0140792). Your authorization under this Corps permit is conditional upon your compliance with

all of the mandatory terms and conditions associated with incidental take of the enclosed BO. These terms and conditions are incorporated by reference in this permit. Failure to comply with the terms and conditions associated with incidental take of the BO, where a take of the listed species occurs, would constitute an unauthorized take, and it would also constitute non-compliance with your Corps permit. The USFWS/NMFS is the appropriate authority to determine compliance with the terms and conditions of its BO and with the ESA.

- b. To be in compliance with Special Condition "a", you must request an invoice from the King County Mitigation Reserves Program (ATTN: Ms. Megan Webb, megan.webb@kingcounty.gov; In-lieu Fee Mitigation and Transfer of Development Rights, King County Water and Land Resources Division, Department of Natural Resources and Parks, 201 South Jackson Street, Room 600, Seattle, Washington, 98104-3855) and provide the U.S. Army Corps of Engineers a receipt that you have paid the required conservation fees of \$149,878.00 within 60 days from the date of permit authorization. This information must prominently display the reference number NWS-2022-833 and NWS-2022-832
- c. In order to meet the requirements of the Endangered Species Act and protect Puget Sound Chinook, Puget Sound steelhead, and Coastal-Puget Sound bull trout, the authorized in-water activities may be conducted from July 16 through April 30 in any year this permit is valid. The in-water activities authorized by this permit may not be conducted from May 1 through July 15 in any year.

We have reviewed your project pursuant to the requirements of the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act and the National Historic Preservation Act. We have determined this project complies with the requirements of these laws provided you comply with all of the permit general and special conditions.

Please be reminded that Special Condition "a" of your permit requires that you implement and abide by the Endangered Species Act (ESA) requirements set forth in the Biological Opinion (BO) for this project. The non-discretionary terms and conditions are listed in Section 2.8.4. In particular, you must provide photos of the project and report as-built information, as described in the BO.

Please note that National General Condition 21, *Discovery of Previously Unknown Remains and Artifacts*, found in the *Nationwide Permit Terms and Conditions* enclosure, details procedures that must be followed should an inadvertent discovery occur. You must ensure that you comply with this condition during the construction of your project.

The Washington State Department of Ecology determined your project does not trigger the need for a Water Quality Certification or a Coastal Zone Management consistency decision.

You have not requested a jurisdictional determination for this proposed project. If you believe the U.S. Army Corps of Engineers does not have jurisdiction over all or portions of your project you may request a preliminary or approved jurisdictional determination (JD). If one is requested, please be aware that we may require the submittal of additional information to complete the JD and work authorized in this letter may not occur until the JD has been completed.

If you object to this LOP decision, you may submit your objection on the enclosed *Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA)* form. For your objection to be accepted, the form must be received by our office within 60 days from the date on the form. Should you decide to submit an objection, it must be received at our office by July 20, 2026. Please be advised that the special condition requiring you to implement the mandatory terms and conditions of the biological opinion for the project is not appealable.

Your authorization to conduct the proposed work under this permit expires 3 years from the date of this letter. Within 30 days of completing the authorized work, you must fill out and return the enclosed *Certificate of Compliance with Department of the Army Permit*. Your signature on this form is our assurance you have conducted the work and any required mitigation in accordance with the terms and conditions of this LOP, including all special conditions. All compliance reports should be submitted to the U.S. Army Corps of Engineers, Seattle District, Regulatory Division at nws.compliance@usace.army.mil. Please remember that failure to comply with the terms and conditions of this LOP, including any special conditions, will invalidate your authorization and could result in a violation of Federal law.

While this project will not require further authorization from us, please note that it must comply with all local, State, and other Federal requirements that may apply. A copy of this letter with enclosure(s) will be furnished to Josh Jenson, of Anchor QEA, at jjensen@anchorqea.com. If you have any questions, please contact me at leeann.w.simmons@usace.army.mil or (206) 419-1172.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

A handwritten signature in dark ink, appearing to read "Leeann W. Simmons", is positioned below the text "BY AUTHORITY OF THE SECRETARY OF THE ARMY:". The signature is fluid and cursive.

for Kathryn P. Sanborn, PhD, PE, PMP
Colonel, Corps of Engineers
District Commander

Enclosure(s)

cc:
Ecology (ecyrefedpermits@ecy.wa.gov)



US Army Corps
of Engineers®
Seattle District

Letter of Permission General Conditions

April 15, 2021



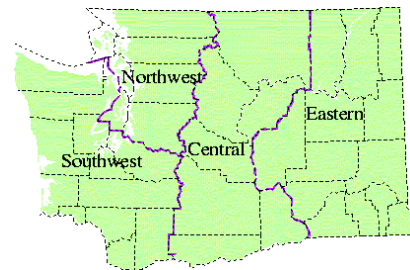
1. Reliance on Permittee's Information. In authorizing this work under this Letter of Permission (LOP), the Department of the Army has relied, in part, on the information provided by the permittee. If this information proves to be false, incomplete, or inaccurate, the permittee's authorization may be modified, suspended, or revoked, in whole or in part.
2. Compliance with Terms and Conditions. Projects authorized by this LOP shall comply with all terms and conditions herein and any case-specific conditions added or required by the District Engineer. Failure to abide by these terms and conditions invalidates this authorization and may result in a violation of federal law, which may require that the permittee restore the site or take other remedial action. Activities requiring Department of the Army authorization that are not specifically authorized by this LOP are prohibited unless authorized by another Department of the Army permit.
3. Contractor's Copy of Permit. The permittee shall provide a copy of the LOP (letter, drawings, and general conditions) to each contractor involved in the project and keep a copy of the LOP available for inspection at the project site.
4. Compliance Certification. Within 30 days of completing the authorized work, the permittee shall submit to the issuing office certification that the work, including any required compensatory mitigation, was conducted in accordance with the provisions of this LOP.
5. Access for Inspection. The permittee shall allow the District Engineer or his/her authorized representative to inspect the project whenever deemed necessary to assure that the work is being, or has been, accomplished in accordance with the terms and conditions of this permit.
6. Limits of Authorization. This permit does *not*:
 - a. Obviate the requirement to obtain all state, local, or other federal authorizations required by law for the activity authorized herein, including any authorization required from Congress;
 - b. Convey any property rights, either in real estate or material, or any exclusive privileges;
 - c. Authorize any injury to property, invasion of rights, or any infringement of federal, state, or local laws or regulations; or
 - d. Authorize the interference with any existing or proposed federal project.
7. Limits of Federal Liability. This permit is not an approval of the design features of any authorized project or an implication that such work is adequate for the intended purpose; a Department of the Army permit merely expresses the consent of the Federal Government to conduct the proposed work insofar as public rights are concerned. In issuing this LOP, the Federal Government does not assume any liability for the following:

- a. Design or construction deficiencies associated with the authorized work;
 - b. Damages to the permitted project or uses thereof as a result of other permitted activities or from natural causes, such as flooding;
 - c. Damages to persons, property, or to other permitted or unauthorized activities or structures caused by the activity authorized by this permit;
 - d. Damages associated with any future modification, suspension, revocation of this permit; or
 - e. Damage to the permitted project or uses thereof as a result of current or future activities undertaken by, or on behalf of, the United States in the public interest.
8. Obstruction of Navigation. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration. If the permittee fails to comply with the direction of the Corps of Engineers, the District Engineer may restore the navigable capacity of the waterway, by contract or otherwise, and recover the cost thereof from the permittee.
 9. Navigation. The authorized work shall not interfere with the public's right to free navigation on navigable waters of the United States.
 10. Tribal Rights. No activity authorized by this permit may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. Please be aware that certain Tribes assert a right to attach nets to piers, docks, wharves, and other structures that may have been authorized by Department of the Army permits.
 11. USACE Coordination. The permittee shall contact the appropriate office of the U.S. Army Corps of Engineers prior to commencing any construction in a federally maintained channel and/or waterway.
 12. Stability. The permittees shall design projects to be stable against the forces of flowing water, wave action, and the wake of passing vessels.
 13. Maintenance. The permittee must maintain all structures and work authorized by this LOP in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this responsibility if you abandon the authorized activity unless you complete a good faith transfer to a third party in compliance with General Condition 14, below. Should you wish to cease to maintain the authorized activity or abandon it without a good faith transfer, you must obtain a modification of this LOP from this office, which may require restoration of the area.
 14. Transfer of Ownership. If you sell the property associated with this permit, the new owner must agree in writing to comply with all terms and conditions of this permit. A copy of that written agreement must be submitted to the issuing office to validate the transfer of this authorization.

15. Marking Structures. Permittees shall install and maintain any lights, signals, or other appropriate markers necessary to clearly designate the location of structures or work that might pose a hazard to public safety. Permittees shall abide by U.S. Coast Guard requirements concerning the marking of structures and work in navigable waters of the United States.
16. Endangered Species. This LOP does not authorize any activity that is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Endangered Species Act (ESA). Prospective permittees must notify the District Engineer if any listed species or designated critical habitat might be affected by, or is in the vicinity of, the project and shall not begin work until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized.
17. Historic Properties. This LOP does not authorize any activity that may affect historic properties listed, or eligible for listing, in the National Register of Historic Places (NRHP) until the provisions of 33 CFR 325, Appendix C, have been satisfied. Historic properties include prehistoric and historic archeological sites, and areas or structures of cultural interest. A prospective permittee must notify the District Engineer if the proposed activity may affect an historic property that is listed, eligible for listing, or may be eligible for listing in the NRHP, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. If a previously unknown historic property is encountered during work authorized by this LOP, the permittee shall cease work immediately, notify the District Engineer of the situation within one day of discovering the impact, and avoid any further impact to the property until the District Engineer verifies that the requirements of 33 CFR Part 325, Appendix C, have been satisfied.
18. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status unless the federal agency (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service) with direct management responsibility for that river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.
19. Alternatives. Activities authorized by LOP shall be designed and constructed to avoid and minimize adverse impacts to waters of the United States to the extent practicable through the use of alternatives.
20. Minimization of Environmental Impact. Permittees shall make every reasonable effort to conduct the authorized work in a manner that minimizes the adverse impact of the work on water quality and stream flow, fish and wildlife, and the natural environment, including adverse impacts to migratory waterfowl breeding areas, spawning areas, shellfish beds, and aquatic resource buffer zones. Work should be limited to periods of low flow and/or low tide when practicable.
21. Compensatory Mitigation. Appropriate and practicable compensatory mitigation shall be required to the extent necessary to ensure that the authorized activities would not have more than a minor adverse impact on the aquatic environment.
22. Soil Erosion and Sediment Controls. Permittees shall use and maintain appropriate erosion and sediment controls in effective operating condition and permanently stabilize all exposed soil and other fills, including any work below the ordinary high water mark or high tide line (in Seattle District, the high tide line is located at the “mean higher high water” line), at the earliest

practicable date using native vegetation to the maximum extent practicable. The permittee shall remove all installed controls as soon as they are no longer needed to control erosion or sediment.

23. Water Quality. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.
24. Coastal Zone Management. If a conditioned Coastal Zone Management Act consistency determination has been made for your project, you must comply with the conditions specified in the determination as special conditions to this permit. For your convenience, a copy of the determination is attached if it contains such conditions.
25. Equipment. Permittees shall place heavy equipment working in wetlands on mats, and take all other appropriate measures to minimize soil disturbance.
26. Disposal of Construction Debris. Except as specifically authorized by this LOP, all construction debris and excess materials resulting from the authorized work shall be properly disposed of, and in a manner that does not allow it to enter into a waterway or otherwise degrade water quality.
27. Aquatic Life Movements. The work shall not substantially disrupt the necessary life-cycle movement of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area.
28. Skirting. The attachment of skirting to a pier, dock, float or similar structure is prohibited unless specifically authorized.
29. Water Supply Intakes. Permittees shall ensure that activities authorized by this LOP have no more than a minimal adverse impact on public water supply intakes.
30. Hazardous Materials. Permittees shall take all reasonable precautions to prevent any petroleum product, chemical, or other toxic or deleterious material from entering any waterbody. Should a spill occur, or if an oil sheen or distressed or dying fish are observed in the project vicinity, the permittee shall immediately cease work and contact the appropriate Washington Department of Ecology regional spill response office: 1-800-OILS-911 (Washington Emergency Management Division, 24/7), (360) 407-6300, Southwest Region; (425) 649-7000, (206) 594-0000 Northwest Region, (509) 575-2490 Central Region, (509) 329-3400 Eastern Region
31. Re-evaluation of Decision. The Corps may re-evaluate its decision to authorize the work by a LOP whenever circumstances warrant. Such circumstances may include, but are not limited to, a failure on the part of the permittee to comply with the terms and conditions of the LOP; the permittee having submitting information in support of the permittee's application that proves to be false, incomplete, or inaccurate; or this office receiving pertinent new information that it did not consider during its original public interest review. Subsequent to its re-evaluation, the Corps may suspend, modify, or revoke its authorization pursuant to 33 CFR 325.7 or initiate an enforcement action as provide for in 33 CFR 326.4 and 326.5.



32. Extension of Time. A permittee may request an extension of the time allowed to complete the authorized activity, providing the reasons for the extension. The request must be submitted to this office well in advance of the above expiration date. Unless there are circumstances requiring either a prompt completion of the authorized activity or a re-evaluation of the public interest decision, the Corps normally gives favorable consideration to a request for an extension of this time limit.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
1201 NE Lloyd Boulevard, Suite 1100
Portland, OR 97232

Refer to NMFS No:
WCRO-2024-02799

April 16, 2026

P. Allen Atkins
Chief, Regulatory Branch
U.S. Army Corps of Engineers, Seattle District
4735 East Marginal Way South, Bldg.1202
Seattle, Washington 98134-2388

Re: NWS-2022-832 Endangered Species Act Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Mercer Island Luther Burbank Park Waterfront Improvements (HUC 171100120400).

Dear Mr. Atkins:

This letter responds to your September 3, 2024, request for initiation of consultation with the National Marine Fisheries Service (NMFS) pursuant to Section 7 of the Endangered Species Act (ESA) for the Mercer Island Luther Burbank Park Waterfront Improvements (WCRO-2024-02799). Your request qualified for our expedited review and analysis because it met our screening criteria and contained sufficient information on, and analysis of, your proposed action and its potential effects to listed species and designated critical habitat.

We reviewed the Army Corps of Engineers (Corps) consultation request and related initiation package. Where relevant, we have adopted the information and analyses you have provided and/or referenced but only after our independent, science-based evaluation confirmed they meet our regulatory and scientific standards. In our biological opinion (Opinion) below, we indicate what parts of your documents we have incorporated by reference and where that information is being incorporated.

We adopt by reference sections of the project's Biological Evaluation (BE 2025; prepared in June, 2025) as follows:

- Sections 5, 6, and 11 for the proposed action;
- Section 7 for the action area;
- Sections 9.A-9.E for the environmental baseline; and
- Table 6 and section 10, subsections *Disturbance of Benthic Species*, *Turbidity*, *Removal and Replanting of Riparian Vegetation*, for the effects.



We also adopt by reference sections of the projects Critical Area Study (CAS; prepared in October 2022) as follows:

- Sections 5 for the proposed action;
- Section 2, 3.2-3.4.3, and 3.5 for the environmental baseline; and
- Sections 4.1.2 and 4.1.3.1 for the effects.

From the BE prepared in 2022 (BE₂₀₂₂) we adopt by reference:

- Appendix 1 for the proposed action.

Lastly, we adopt Nearshore Diagrams and NMFS's Implementation Guide (IG) for the Restoration and Permitting (RAP) Program for Lake Washington and Lake Sammamish for the proposed action.

Consultation History

On September 3, 2024, NMFS received the Corps request for formal consultation, submitting with their request a Biological Evaluation with appendices (BE₂₀₂₂; prepared in October, 2022), a revised Biological Evaluation (BE₂₀₂₅; relying on the previous appendices, prepared in June, 2025), and a Critical Areas Study (CAS; prepared in October 2022). Emails were exchanged between July 8, 2025 and July 9, 2025, to request additional information and determine if the proposed action fell under the purview of any programmatic consultations. The consultation was initiated on July 21, 2025 after concluding that the proposed action did not qualify for a programmatic consultation due to the scope required for the proposed action.

Emails were exchanged between initiation and February 2026 to clarify the project scope and design. On March 19, 2026, the Corps agreed to pay the deficit calculated by the RAP calculator (available upon request).

On March 30, 2026, in *Center for Biological Diversity v. Burgum*, No. 24-cv-04651 (N.D. Cal.), the U.S. District Court for the Northern District of California vacated aspects of four provisions from the 50 CFR part 402 regulations governing interagency consultation under section 7 of the Endangered Species Act and reinstated the provisions that were previously in effect. Consistent with the Court's ruling, these are the governing provisions for this consultation:

“Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.” (50 CFR 402.02 (2018)).

“Effects of the action” refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human

activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.¹” (50 CFR 402.02 (2018)).

50 CFR 402.14(g)(8): “In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.” (50 CFR 402.14(g)(8) (2018)).

50 CFR 402.16(a): “(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and....” (50 CFR 402.16(a) (2023)).

Proposed Action

Under the ESA, “action” means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies (see 50 CFR 402.02).

The Corps proposes to permit a multifaceted renovation to the Luther Burbank Park Waterfront, located at 2040 84th Avenue Southeast, Mercer Island, WA, 98040, (47.591034 latitude, - 122.224481 longitude). The recreational dock forks into three structures, a north, central, and southern dock, each of which would be repaired and/or rebuilt to new dimensions. The proposed action also includes offsets for the long-term habitat loss associated with this project via a payment to King County. Mitigation was determined by entering the project element into the Restoration and Permitting Calculator (dated Aug 22, 2025). Detailed descriptions of the proposed action are adopted by reference from BE 2025 sections 5, 6, and 11, Nearshore Diagrams, and BE 2022 Appendix 1.

Best Management Practices (BMPs) for construction are adopted by reference from section 5 of the CAS.

The proposed action also includes offsets for the long-term habitat loss associated with this project via a payment to King County. Mitigation was determined by entering the project

¹ This definition includes the second sentence of the definition of “effects of the action.” That sentence provided the definition of “environmental baseline” in effect as of 2018. In the 2019 rule amending the 50 CFR part 402 regulations, the Services established “environmental baseline” as a stand alone definition. 84 Fed. Reg. 44976, 45016 (August 27, 2019). In the 2024 rule, the Services made minor revisions to the “environmental baseline” definition. 89 Fed. Reg. 24268, 24298 (April 5, 2024). The Court’s ruling did not touch upon that definition of “environmental baseline,” and it therefore remains valid. The definition is also fully consistent with the definition of “effects of the action” from 2018.

element into the Restoration and Permitting Calculator (dated Aug 22, 2025). A full description of the methods for how offsets were calculated is adopted by reference from NMFS' 2017 Implementation Guide (IG) for the Restoration and Permitting (RAP) Program for Lake Washington and Lake Sammamish.

BIOLOGICAL OPINION

Status of the Species

We examined the status of each species that would be adversely affected by the proposed action to inform the description of the species' "reproduction, numbers, or distribution" as described in 50 CFR 402.02. Status is determined by the level of extinction risk that the listed species face, based on parameters considered in documents such as recovery plans, status reviews, and listing decisions. This informs the description of the species' likelihood of both survival and recovery, and informs our jeopardy analysis.

We also examined the condition of critical habitat throughout the designated area and discuss the function of the physical or biological features (PBFs) essential to the conservation of the species that create the conservation value of the various watersheds and coastal and marine environments that make up the designated critical habitat.

One factor affecting the status of ESA-listed species considered in this opinion, and aquatic animals and their habitats at large, is exposure to increasing environmental variation due to shifts in average weather conditions. Increasing environmental variation is likely to play a role in determining the abundance and distribution of ESA-listed species, and the conservation value of their designated critical habitats in the Pacific Northwest. These shifts will not be spatially homogeneous across the Pacific Northwest.

There is a large and growing body of literature on past, present, and future impacts of increasing environmental variation on sea level rise, frequency of severe weather events, and changes in air and water temperatures. Major ecological realignments are already occurring in response to these shifts (IPCC 2022). Long-term trends in warming have continued at global, national, and regional scales. The 10 warmest years in the historical record (1890-2023) have all occurred in the past decade, with NOAA (2025), Bardan (2025), and the WMO (2025) stating 2024 was the world's warmest year on record.

Increasing temperatures and the potential loss of biodiversity represent profound threats to ecosystem functionality (IPCC WGII 2022). These two factors are often examined in isolation, but likely have interacting effects on ecosystem function. Updated projections of increasing temperature are similar to or greater than previous projections (WGI 2021). Retaining and restoring habitat complexity, access to flow and cold-water refuges, and improving growth opportunities in both freshwater and marine environments are strongly advocated in the recent literature (Siegel and Crozier 2019; Siegel et al. 2020).

Upon review of the BE 2025, NMFS determined that the project was likely to adversely affect Puget Sound (PS) Chinook salmon (*Oncorhynchus tshawytscha*) and PS steelhead (*Oncorhynchus mykiss*) and their critical habitat. The following sufficient descriptions of listing and recovery information about species present in the action area was not provided in the request letter or other provided documents; therefore, NMFS supplements the BE 2025 with the following information:

Table 1. Listing classification and date, recovery plan reference, most recent status review, status summary, and limiting factors for each species considered in this opinion. More information can be found in recovery plans and status reviews for these species. Acronyms appearing in the table include DPS (Distinct Population Segment), DIP (Distinct Independent Population), ESU (Evolutionarily Significant Unit), MPG (Major Population Group), and TRT (Technical Recovery Team).

Species	Listing Classification and Date	Recovery Plan Reference	Most Recent Status Review	Status Summary	Limiting Factors
Puget Sound Chinook salmon	Threatened 6/28/05 (70 FR 37159)	Shared Strategy for Puget Sound 2007 NMFS 2006	NMFS 2017; Ford 2022	This ESU comprises 22 populations distributed over five geographic areas. All Puget Sound Chinook salmon populations continue to remain well below the TRT planning ranges for recovery escapement levels. Most populations also remain consistently below the spawner-recruit levels identified by the TRT as necessary for recovery. Across the ESU, most populations have increased somewhat in abundance since the last status review in 2016, but have small negative trends over the past 15 years. Productivity remains low in most populations. Overall, the Puget Sound Chinook salmon ESU remains at “moderate” risk of extinction.	<ul style="list-style-type: none"> • Degraded floodplain and in-river channel structure • Degraded estuarine conditions and loss of estuarine habitat • Degraded riparian areas and loss of in-river large woody debris • Excessive fine-grained sediment in spawning gravel • Degraded water quality and temperature • Degraded nearshore conditions • Impaired passage for migrating fish • Severely altered flow regime
Puget Sound Steelhead	Threatened 5/11/07	NMFS 2019	NMFS 2017; Ford 2022	This DPS comprises 32 populations. Viability of has improved somewhat since the PSTRT concluded that the DPS was at very low viability, as were all three of its constituent MPGs, and many of its 32 DIPs (Hard et al. 2015). Increases in spawner abundance were observed in a number of populations over the last five years within the Central & South Puget Sound and the Hood Canal & Strait of Juan de Fuca MPGs, primarily among smaller populations. There were also declines for summer- and winter-run populations in the Snohomish River basin. In fact, all summer-run steelhead populations in the Northern Cascades MPG are likely at a very high demographic risk.	<ul style="list-style-type: none"> • Continued destruction and modification of habitat • Widespread declines in adult abundance despite significant reductions in harvest • Threats to diversity posed by use of two hatchery steelhead stocks • Declining diversity in the DPS, including the uncertain but weak status of summer-run fish • A reduction in spatial structure • Reduced habitat quality • Urbanization • Dikes, hardening of banks with riprap, and channelization

Status of the Critical Habitat

The following definitions and descriptions of critical habitats present in the action area were not provided in the request letter or other provided documents.

This section utilizes the condition and trends of essential PBFs to describe the status of designated critical habitat affected by the proposed action within the designated area. These features are essential to the conservation of ESA-listed species because they support one or more of the species' life stages (e.g., sites with conditions that support spawning, rearing, migration, and foraging).

A summary of the status of PBFs considered in this opinion is provided in Table 2, below.

Table 2. PBFs of critical habitats designated for ESA-listed salmon and steelhead species considered in the opinion, and corresponding species life history events.

PBF Site Type	PBF Site Attribute	Species Life History Event
Freshwater spawning	Substrate Water quality Water quantity	Adult spawning Embryo incubation Alevin growth and development
Freshwater rearing	Floodplain connectivity Forage Natural cover Water quality Water quantity	Fry emergence from gravel Fry/parr/smolt growth and development
Freshwater migration	Free of artificial obstruction Natural cover Water quality Water quantity	Adult sexual maturation Adult upstream migration and holding Kelt (steelhead) seaward migration Fry/parr/smolt growth, development, and seaward migration
Estuarine areas	Forage Free of artificial obstruction Natural cover Salinity Water quality Water quantity	Adult sexual maturation and "reverse smoltification" Adult upstream migration and holding Kelt (steelhead) seaward migration Fry/parr/smolt growth, development, and seaward migration
Nearshore marine areas	Forage Free of artificial obstruction Natural cover Water quantity Water quality	Adult growth and sexual maturation Adult spawning migration Nearshore juvenile rearing

For most salmon and steelhead, NMFS's critical habitat analytical review teams (CHARTs) ranked watersheds within designated critical habitat at the scale of the fifth-field hydrologic unit code (HUC5) in terms of the conservation value they provide to each supported ESA-listed species (NMFS 2005). The conservation rankings were high, medium, or low. To determine the conservation value of each watershed to species viability, the CHARTs evaluated: the quantity and quality of habitat features, the watershed's significance to the population occupying that area, and compared the watershed to others within the species' range.

Even if a location had poor habitat quality, it could be ranked with a high conservation value if it were essential due to factors such as limited availability, a unique contribution of individuals from the population it served, or served another important role.

A summary of the status of critical habitats considered in this opinion is provided in Table 3, below.

Table 3. Critical habitat, designation date, federal register citation, and status summary for critical habitat considered in this opinion.

Species	Designation Date and Federal Register Citation	Critical Habitat Status Summary
Puget Sound Chinook salmon	9/02/05 70 FR 52630	Critical habitat for Puget Sound Chinook salmon includes 1,683 miles of streams, 41 square mile of lakes, and 2,182 miles of nearshore marine habitat in Puget Sounds. The Puget Sound Chinook salmon ESU has 61 freshwater and 19 marine areas within its range. Of the freshwater watersheds, 41 are rated high conservation value, 12 low conservation value, and eight received a medium rating. Of the marine areas, all 19 are ranked with high conservation value.
Puget Sound steelhead	2/24/16 81 FR 9252	Critical habitat for Puget Sound steelhead includes 2,031 stream miles. Nearshore and offshore marine waters were not designated for this species. There are 66 watersheds within the range of this DPS. Nine watersheds received a low conservation value rating, 16 received a medium rating, and 41 received a high rating to the DPS.

Species Determinations

NMFS concurs with the action agency's determinations that the project will result in a 'may affect' and 'likely to adversely affect' (LAA) determination for PS Chinook salmon and PS steelhead. NMFS also concurs with the determination that the proposed action is LAA critical habitat for PS Chinook salmon and PS steelhead.

Action Area

"Action area" means all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action (50 CFR 402.02).

NMFS adopts by reference the action area from section 7, subsection *In-water noise*, of BE 2025. As no part of the proposed action would create, or significantly increase the use of PGIS, in-water noise was determined to have the largest area of effect.

Environmental Baseline

The "environmental baseline" refers to the condition of the listed species or their designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and

present impacts of all federal, state, and/or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early section 7 consultations, and the impact of State and/or private actions which are contemporaneous with the consultation in process. The impacts to listed species or designated critical habitat from federal agency activities or existing federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline (50 CFR 402.02).

NMFS adopts by reference sections 9.A-9.E from the BE 2025 and section 2, 3.2-3.4.3, and 3.5 from the CAS.

Effects to Critical Habitat and Species

Under the ESA, "effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration" (50 CFR 402.02 (2018))

NMFS determined that various sections of the information provided meet the necessary regulatory and scientific standards regarding analysis of the effects of the proposed action, specifically, sections 4.1.2.2, 1.3.7, 4.1.2.3, and 4.1.3.1 from CAS and the bellow listed subsections from section 10 from the BE, which are adopted here in full [50 CFR 402.14(h)(3)]. In the following analysis we supplement this information already adopted where it was lacking, or, where no material is adopted, original analysis is provided.

Effects to Species

Effects to species range from ephemeral (those that last less than a day or week), to short-term (those that last days to weeks), to long-term (those that last for months, years, or decades).

Likely ephemeral effects from the proposed action are as follows:

Equipment Related Pollution

A description of the effects of potential equipment related spills are adopted by reference from section 4.1.2.2 of the CAS. Given the BMPs described in the project description, equipment related pollution is unlikely to occur, and, if it does, the effects from equipment related pollution on migrating or rearing PS Chinook salmon and/or PS steelhead are expected to be insignificant.

Dewatering and Fish Handling

Despite the proposed actions preferences for working when individuals are least likely to be in the action area, it is a possibility that PS Chinook salmon and PS steelhead would be handled or disturbed during de-watering to construct the irrigation intake, as described in CAS section 1.3.7. A coffer dam would be used during the dewatering and WDFW protocols would be adhered to (Anchor QEA 2025a).

Likely short-term effects from the proposed action are as follows:

Prey Disruption

A description of the effects of temporary disruption of prey species is adopted by reference from section 10, subsection *Disturbance of Benthic Species*, from the BE 2025. Given the short period of effect and the relatively small area of disturbance, the effects of forage disruption on any migrating and/or rearing PS Chinook salmon and/or PS steelhead are expected to be discountable.

Increased Turbidity

A description of the effects of increased turbidity, from the removal and installation of piles, are adopted by reference from section 10, subsection *Turbidity*, of the BE 2025. It is expected that migrating and/or rearing PS Chinook salmon and/or PS steelhead would be experience effects ranging from behavioral to physical by the sediment pulses required for the proposed action.

In-water Noise

A description of the effects from construction noise, including piling installation, are adopted by reference from section 10, subsection In-Water Noise from BE 2025. It is expected that migrating and/or rearing PS Chinook salmon and/or PS steelhead would experience effects ranging from behavioral to physical by the noise generated from construction required for the proposed action.

Loss of Vegetation

A description of the effects of temporary loss of vegetation are adopted by reference from section 10, subsection *Removal and Replanting of Riparian Vegetation*, from the BE 2025 and sections 4.1.2.3 and 4.1.3.1 of the CAS. Due to the relatively small section of shoreline that would be affected, and the eventual recovery of any lost natural cover, the effects of the temporarily loss in cover on migrating or rearing PS Chinook salmon or PS steelhead are likely to be discountable.

Likely long-term effects from the proposed action are as follows:

Shade

Continued presence of overwater structure would result in areal avoidance. The likely effects of areal avoidance are explained in detail in recent biological opinions for similar projects (NMFS 2020; NMFS 2023a & b; NMFS 2024; NMFS 2025), and in numerous other sources (Anderson et al. 2005; Celedonia et al. 2008; Heerhartz and Toft 2015; Kemp et al. 2005; Moore et al. 2013;

Munsch et al. 2014; Nightingale and Simenstad 2001; Ono et al. 2010; Southard et al. 2006; Tabor et al. 2006; Willette 2001).

It is expected that migrating and/or rearing juvenile PS Chinook salmon and/or PS steelhead would be affected by the shade created by the structure for the lifespan of the structure. PS Chinook salmon would likely be more affected than PS steelhead due to their increased preference for shallow waters near shorelines.

Polycyclic Aromatic Hydrocarbons

Creosote-treated piles contaminate the surrounding sediment up to two meters away with polycyclic aromatic hydrocarbons (PAHs) (Evans et al. 2009). The removal of the creosote-treated piles mobilizes these PAHs into the surrounding water and sediments (Parametrix Inc. 2011; Smith 2008). The action could also release PAHs directly from creosote-treated timber if any of the piles break during removal (Parametrix Inc. 2011). The concentration of PAHs released into surface water rapidly dilutes. Smith (2008) reported concentrations of total PAHs of 101.8 µg/l 30 seconds after creosote-pile removal and 22.7 µg/l 60 seconds after. However, PAH levels in the sediment after pile removal can remain high for six months or more (Smith 2008).

Romberg (2005) found a major reduction in sediment PAH levels three years after pile removal contaminated an adjacent sediment cap.

Because PAHs persist in environments across generations, they will likely affect PS Chinook salmon and PS steelhead (both adult and juvenile of multiple generations) throughout and beyond the lifespan of the proposed structure.

Effects to Critical Habitat

The proposed action, including full application of the planned conservation measures and BMPs, is likely to adversely affect designated critical habitat for PS Chinook salmon and PS steelhead as described below.

1. Freshwater spawning sites: Outside of the expected range of detectable effects.
2. Freshwater rearing sites:
 - a. Water quality would be degraded in the short term by the removal and installation of piles, and removal and planting of vegetation on shore. We adopt by reference the description of these effects from the BE 2025 section 10, subsections *Turbidity* and *Erosion and Upland Areas*, respectively and add the disturbance of contaminated sediment through movement of creosote treated timber. The polluted sediment and temporary removal of vegetation would affect water quality, degrading physical habitat conditions required to support fry/parr/smolt growth and development of both PS Chinook salmon and PS steelhead.
 - b. The disruption of the lake bed by the removal and addition of piles would disrupt existing forage a description of these effects are adopted by reference from BE 2025 section 10, subsection *Disturbance of Benthic Species*. The purpose of the

structure is to support recreational boating, therefore, potential for propeller wash disturbing benthic species is present. Additionally, the continued presence of a new overwater structure would continue to shade the Lake bed, impeding eel grass growth for the lifespan of the structure. Given the small area where forage would be disturbed, the effects of the disturbance on forage are expected to be discountable.

- c. Natural cover would be temporarily altered by the proposed action, a description of the effects of which are adopted by reference from BE 2025 section 10, subsection *Removal and Replanting of Riparian Vegetation*. Due to the relatively small section of shoreline that would be affected, and the eventual recovery of any lost natural cover, the effects of the temporarily loss in cover on fry/parr/smolt growth and development are expected to be discountable.
 - d. Floodplain connectivity, a critical feature of freshwater rearing sites, would not benefit from the proposed action. Given the history of urbanization and development on the shores of Lake Washington, access to floodplains is nonexistent; however, floodplain connectivity is an important PBF of freshwater rearing sites. Continuing the existence of the concrete bulkhead would block potential floodplain access for the life of the structure, creating long-term effects. Due to the relatively small portion of the shoreline that would be blocked, the effects on fry/parr/smolt growth and development are expected to be discountable.
 - e. Adequate water quantity and log jams, beaver dams, large rocks, boulders, side channels, and undercut banks are unlikely to be affected by the proposed action.
3. Freshwater migration corridors:
- a. As described above, the suspended sediment would degrade water quality, degrading physical habitat conditions required to support fry/parr/smolt growth and development of both PS Chinook salmon and PS steelhead.
 - b. The proposed action would take up space in the lake for the life of the structure, while not extending fully across the lake, it would still create an obstruction in the lake. Given that the structure takes up a relatively small footprint within the lake, the effects of the obstruction on physical habitat conditions required to support PS Chinook salmon and PS steelhead adult sexual maturation and upstream migration and holding, kelt (steelhead) seaward migration, and fry/parr/smolt growth, development, and seaward migration are expected to be discountable.
 - c. As described above, natural cover would be temporarily altered from the removal and replanting of vegetation along the shore, a description of the effects of which are adopted by reference from BE 2025 section 10, subsection *Removal and Replanting of Riparian Vegetation*. This degradation of physical habitat conditions required to support PS Chinook salmon and PS steelhead adult sexual maturation and upstream migration and holding, kelt (steelhead) seaward

migration, and fry/parr/smolt growth, development, and seaward migration is expected to be discountable.

- d. As described above, the continued presence of the bulkhead reduces available undercut banks, however, due to the small size of the bulkhead relative to the shoreline, the effects of the obstruction on physical habitat conditions required to support PS Chinook salmon and PS steelhead adult sexual maturation and upstream migration and holding, kelt (steelhead) seaward migration, and fry/parr/smolt growth, development, and seaward migration are expected to be discountable.
 - e. Adequate water quantity, large rocks and boulders, and side channels supporting juvenile and adult mobility and survival are unlikely to be affected by the proposed action.
- 4. Estuarine areas: Outside of the expected range of detectable effects.
 - 5. Nearshore marine areas: Outside of the expected range of detectable effects.
 - 6. Offshore marine areas: Outside of the expected range of detectable effects.

Cumulative Effects

“Cumulative effects” are those effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation (50 CFR 402.02). Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the ESA.

Some continuing non-federal activities are reasonably certain to contribute to environmental variation within the action area. However, it is difficult, if not impossible, to distinguish between the action area’s future environmental conditions caused by global anthropogenically driven weather variations that are part of the environmental baseline vs. cumulative effects. Therefore, all relevant future environmental variation in the action area is described earlier in the Opinion.

The current conditions of ESA-listed species and designated critical habitat within the action area are described in the Status of the Species and Critical Habitat and Environmental Baseline sections above. The non-federal activities in and upstream of the action area that have contributed to those conditions include past and on-going bankside development, vessel activities, and urbanization, as well as upstream forest management, agriculture, road construction, water development, subsistence and recreational fishing, and restoration activities. Those actions were, and continue to be, driven by a combination of economic conditions characterized by traditional natural resource-based industries, general resource demands associated with settlement of local and regional population centers, and the efforts of conservation groups dedicated to restoration and use of natural amenities, such as cultural inspiration and recreational experiences.

We are unaware of any specific future, non-federal activities that are reasonably certain to affect the action area. However, we are reasonably certain that future non-federal actions similar to the previously mentioned activities are all likely to continue, and increase, in the future as the human population continues to grow across the region. Continued habitat loss and degradation of water quality from development and chronic input from point- and non-point pollutant sources will likely continue and increase into the future. Recreational and commercial use of the waters within the action area are also likely to increase as the human population grows.

The intensity of these influences depends on many social and economic factors and, therefore, is difficult to predict. Further, the adoption of more environmentally acceptable practices and standards may gradually reduce some negative environmental impacts over time. Interest in restoration activities has increased as environmental awareness rises among the public. State, tribal, and local governments have developed plans and initiatives to benefit ESA-listed PS Chinook salmon and PS steelhead. However, the implementation of plans, initiatives, and specific restoration projects are often subject to political, legislative, and fiscal challenges that increase the uncertainty of their success.

Integration and Synthesis

The Integration and Synthesis section is the final step in our assessment of the risk posed to species and critical habitat as a result of implementing the proposed action. In this section, we add the effects of the action to the environmental baseline and the cumulative effects, taking into account the status of the species and critical habitat, to formulate the agency's biological opinion as to whether the proposed action is likely to: (1) Reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing its numbers, reproduction, or distribution; or (2) appreciably diminish the value of designated or proposed critical habitat as a whole for the conservation of the species.

The two ESA-listed salmonids that reside in the action area are PS Chinook salmon and PS steelhead. Both species are listed as threatened (Table 1), based on a combination of low abundance, productivity, spatial structure, and diversity. In the action area, the Sammamish/Cedar River population or subpopulation of each species are affected by the action. These populations are not identified as critical for recovery by their respective recovery plans, but no population or subpopulation's extirpation is supported by either recovery plan. Independently, both of these populations remain well below recovery targets. Limiting factors for both ESA listed species include presence of LWD and log jams, substrate that can support spawning, and altered flow regimes from bank revetments, culverts, anthropogenically driven weather variations, and other activities that create obstacles to flow and cut off access to floodplains and side channels.

All of these specific factors of decline are part of the systematic degradation of habitat features across the habitat for these ESA listed species, including the action area. The status of these species is due in part to the systematic degradation of habitat conditions, such as those as a result of the proposed action, throughout the species range.

Additionally, when considering cumulative effects, future development, together with anthropogenically driven weather variations, would continue to lower water quality, reduce

contributions of LWD and log jams, and continue to alter sediment distribution and flow regimes, applying continued pressure to already reduced critical habitat features required for salmonid survival.

To this context, we add the future effects of this project which, for this consultation, are those effects from the addition of shade to the system, as described above. Additionally, we consider the benefits of the proposed action, such as the net decrease in PGIS, net decrease in overwater coverage, net decrease in piles, and the removal of creosote treated timber.

We next consider the effects on species themselves, given the current status of threatened fish populations and the degraded environmental baseline within the action area. As the proposed action is a replacement of a currently existing structure, the proposed action would perpetuate obstructions in the channel and shade from anthropogenic sources. These effects are likely to impact both PS Chinook salmon and PS steelhead at all life stages for generations. The recovery goals related to Chinook salmon in the Sammamish River Basin all relate to urbanization, as well as many of the six of the seven recovery goals outlined for steelhead in Central and South Puget Sound (NMFS 2019; Shared Strategy for Puget Sound et al. 2007). The proposed action would add to urbanization in the region and would not aid in any of the established recovery goals.

The proposed action is not expected to decrease species abundance based on planned implementation of BMPs and offsets in the form of habitat credit banking. Individual fish will be affected by the proposed action via the routes of effects identified above; however, NMFS does not anticipate those effects would be detectable at the population level. The Sammamish or Cedar River DIP abundance would not significantly decrease as a result of this proposed action, e.g., diversity, or productivity of the DIP would not be impaired, even when cumulative effects are considered. Therefore, we do not anticipate effects detectable at the Central/South Sound Major Population Group (MPG), nor respective ESU or DPS levels.

After reviewing and analyzing the current status of the listed species and critical habitat, the environmental baseline within the action area, the effects of the proposed action, the effects of other activities caused by the proposed action, and cumulative effects, it is NMFS' biological opinion that the proposed action is not likely to jeopardize the continued existence of PS Chinook salmon or PS steelhead, or destroy or adversely modify their designated critical habitat.

INCIDENTAL TAKE STATEMENT

Section 9 of the ESA and federal regulations pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without a special exemption. "Take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. "Harm" is further defined by regulation to include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering (50 CFR 222.102). "Harass" is further defined by guidance as to "create the likelihood of injury to wildlife 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 by regulation as takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the federal agency or

applicant (50 CFR 402.02). Section 7(b)(4) and section 7(o)(2) provide that taking that is incidental to an otherwise lawful agency action is not considered to be prohibited taking under the ESA if that action is performed in compliance with the terms and conditions of this ITS.

Amount or Extent of Take

In the biological opinion, NMFS determined that incidental take is reasonably certain to occur as follows:

Harm of PS Chinook salmon and PS steelhead from exposure to:

1. Suspended turbidity from pile installation and removal that would alter light exposure through the water column, as well as add harmful particulates to the water column that could have short-term behavioral, physical, and/or chemical effects on individual fish.
2. In-water noise from pile installation and removal would have behavioral and physical effects on individual fish.
3. Shade across the water surface that would alter the light exposure through the water column and lake bed, resulting in altered behavior of species passing through the shadows and changes to predator/prey dynamics for the life of the structure.
4. Fish handling during dewatering.

We cannot predict with meaningful accuracy the number of PS Chinook salmon and PS steelhead that are reasonably certain to be injured or killed annually by exposure to any of these stressors, aside from the potential fish handling.

The distribution and abundance of the listed fish that occur within the action area are affected by numerous biotic and environmental processes, such as timing in relation to the life stage and typical behaviors of the species under consideration, intra- and inter-specific interactions such as competition and predation, habitat quality, and the interaction of processes that influence genetic, population, and environmental characteristics. These processes interact in ways that may be random or directional, and may operate across far broader temporal and spatial scales than are affected by the proposed action. Therefore, the distribution and abundance of listed fish in any given area are likely to vary greatly, and somewhat randomly, over time. Further, we know of no device or practicable technique that would yield reliable counts of individuals that may be injured or killed annually by exposure to the proposed action's impacts. In such circumstances, we use the causal link established between an activity and the likely extent and duration of changes in habitat conditions as surrogates to describe the extent of take as a numerical level of habitat disturbance. The most appropriate surrogates for take are action-related parameters that are directly related to the magnitude of the expected take. For this action,

- The number of piles to be removed and installed (69 removed, 27 installed, 96 total piles) is an appropriate surrogate for take as a result of turbidity and in-water noise, as both effects are a direct result of the removal and installation of piles; and
- The square footage of the dock (6,972 sq ft) and percentage of that structure that is grated (~27%) is an appropriate surrogate for take as a result of shade and changes to predator/prey dynamics, as the effects are directly related to the area of structure over the water.

Exceedance of any of the exposure limits described above would constitute an exceedance of authorized take that would trigger the need to reinitiate consultation.

Although these take surrogates could be construed as partially coextensive with the proposed action, they nevertheless function as effective reinitiation triggers. If the size and configuration of the structure exceeds the proposed characteristics, it could still meaningfully trigger reinitiation because the Corps has authority to conduct compliance inspections and to take actions to address non-compliance, including post-construction (33 CFR 326.4).

Effect of the Take

In the biological opinion, NMFS determined that the amount or extent of anticipated take, coupled with other effects of the proposed action, is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

Reasonable and Prudent Measures

“Reasonable and prudent measures” refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species (50 CFR 402.02).

The Corps shall require the applicant to:

1. Implement monitoring and reporting to confirm that the take exemption for the proposed action is not exceeded.

Terms and Conditions

In order to be exempt from the prohibitions of section 9 of the ESA, the federal action agency must comply (or must ensure that any applicant complies) with the following terms and conditions. The Corps or any applicant has a continuing duty to monitor the impacts of incidental take and must report the progress of the action and its impact on the species as specified in this ITS (50 CFR 402.14). If the entity to whom a term and condition is directed does not comply with the following terms and conditions, protective coverage for the proposed action would likely lapse.

1. To implement RPM Number 1, the Corps shall require the applicants to develop and implement plans to collect and report details about construction and structures, to then share that information with NMFS. Those plans shall:
 - a. Require the contractors to maintain and submit records to verify that all take indicators are monitored and reported. Minimally, the records shall include:
 - i. Documentation of the number of piles removed and installed;
 - ii. Documentation of the final dimensions of the overwater structure; and
 - iii. Documentation of fish handled, including number of fish, species, size, and condition at release (i.e. alive, injured, deceased, etc.);
 - iv. Documentation of the dates when in-water work begins, ends, and the total days of in-water work.
 - b. Require the applicant to establish procedures for the submission of the construction records and other materials to the appropriate Corps office; and

- c. Require the Corps to submit an electronic post-construction report to NMFS within six months of project completion. Send the reports to: projectreports.wcr@noaa.gov. Be sure to include Attn: WCRO-2024-02799.
2. The applicant must submit proof of payment of the amount calculated in the attached RAP calculator (\$149,878) to the following addresses within 60 Days of the date of permit issuance:

Megan Webb
 In-Lieu Fee Mitigation and Transfer of Development Rights
 King County Water & Land Resource Division
 Department of Natural Resources & Parks
 (206) 477-3865
Megan.Webb@Kingcounty.gov

Projectreports.wcr@noaa.gov
 Be sure to include Attn: WCRO-2024-02799

Conservation Recommendations

Section 7(a)(1) of the ESA directs federal agencies to use their authorities to further the purposes of the ESA by carrying out conservation programs for the benefit of the threatened and endangered species. Specifically, conservation recommendations are suggestions regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information (50 CFR 402.02).

- The Corps should replace creosote treated timber piles after they are damaged, rather than repair broken piles above the surface.
- The Corps should replace damaged solid decking with grated alternatives rather than replacing sections in kind.

Reinitiation of Consultation

Under 50 CFR 402.16(a): “Reinitiation of consultation is required and shall be requested by the federal agency or by the Service, where discretionary federal involvement or control over the action has been retained or is authorized by law and: (1) If the amount or extent of taking specified in the incidental take statement is exceeded; (2) If new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) If a new species is listed or critical habitat designated that may be affected by the identified action.”

ESSENTIAL FISH HABITAT RESPONSE

Thank you also for your request for essential fish habitat (EFH) consultation. NMFS reviewed the proposed action for potential effects on EFH pursuant to section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), implementing regulations at 50 CFR

600.920, and agency guidance for use of the ESA consultation process to complete EFH consultation.

NMFS also reviewed the proposed action for potential effects on essential fish habitat (EFH) designated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1855(b)). This review was pursuant to section 305(b) of the MSA, implementing regulations at 50 CFR 600.920, and agency guidance for use of the ESA consultation process to complete EFH consultation. NMFS concluded that the action would adversely affect EFH designated under the Pacific Coast Salmon FMP. Therefore, we have included the results of that review in this document.

Magnuson-Stevens Fishery Conservation and Management Act

Section 305(b) of the MSA directs federal agencies to consult with NMFS on all actions or proposed actions that may adversely affect EFH. Under the MSA, this consultation is intended to promote the conservation of EFH as necessary to support sustainable fisheries and the managed species' contribution to a healthy ecosystem. For the purposes of the MSA, EFH means "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity", and includes the associated physical, chemical, and biological properties that are used by fish (50 CFR 600.10). Adverse effect means any impact that reduces quality or quantity of EFH, and may include direct or indirect physical, chemical, or biological alteration of the waters or substrate and loss of (or injury to) benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality or quantity of EFH. Adverse effects may result from actions occurring within EFH or outside of it and may include direct, indirect, site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions (50 CFR 600.810). Section 305(b) of the MSA also requires NMFS to recommend measures that can be taken by the action agency to conserve EFH. Such recommendations may include measures to avoid, minimize, mitigate, or otherwise offset the adverse effects of the action on EFH (50 CFR 600.905(b)).

EFH Affected by the Proposed Action

Pacific coast salmon EFH includes those waters and substrate necessary for salmon production needed to support a long-term sustainable salmon fishery and salmon contributions to a healthy ecosystem. Out of the five FMP designated habitat areas of particular concern (HAPCs), one is likely to be affected by the proposed action:

1. Complex channels and floodplain habitats.

HAPCs are described in the regulations as subsets of EFH which are rare, particularly susceptible to human-induced degradation, especially ecologically important, or located in an environmentally stressed area. Designated HAPC are not afforded any additional regulatory protection under the MSA; however, federal projects with potential adverse impacts on HAPC would be more carefully scrutinized during the consultation process.

Adverse Effects on EFH

NMFS determined the proposed action would adversely affect EFH as follows:

Under the Pacific Coast Salmon FMP, the following HAPCs would be affected:

1. Complex channels and floodplain habitats - The proposed action would extend the life of the structure (dock and bank revetment), extending the disconnection of the floodplain over the lifespan of the structure.

EFH Conservation Recommendations

NMFS determined that the following conservation recommendations are necessary to avoid, minimize, mitigate, or otherwise offset the adverse effects of the proposed action on EFH.

- The Corps should replace creosote treated timber piles after they are damaged, rather than repair broken piles above the surface.
- The Corps should replace damaged solid decking with grated alternatives rather than replacing sections in kind.

As required by section 305(b)(4)(B) of the MSA, USCG must provide a detailed response in writing to NMFS within 30 days after receiving an EFH conservation recommendation. Such a response must be provided at least 10 days prior to final approval of the action if the response is inconsistent with any of NMFS' EFH conservation recommendations unless NMFS and the federal agency have agreed to use alternative time frames for the federal agency response. The response must include a description of the measures proposed by the agency for avoiding, minimizing, mitigating, or otherwise offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with the conservation recommendations, the federal agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action and the measures needed to avoid, minimize, mitigate, or offset such effects (50 CFR 600.920(k)(1)).

Supplemental Consultation

The Corps must reinitiate EFH consultation with NMFS if the proposed action is substantially revised in a way that may adversely affect EFH, or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations (50 CFR 600. 920(l)).

This letter underwent pre-dissemination review using standards for utility, integrity, and objectivity in compliance with applicable guidelines issued under the Data Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554). The biological opinion will be available through NOAA Institutional Repository <https://repository.library.noaa.gov/welcome>. A complete record of this consultation is on file at Oregon, Washington Coastal Office.

Please direct questions regarding this letter to Colleen McGee in the Lacey Field Office at Colleen.McGee@noaa.gov or (206) 526-4103.

Sincerely,

A handwritten signature in blue ink that reads "Kathleen Wells". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Kathleen Wells
Assistant Regional Administrator
Oregon-Washington Coastal Office

cc: LeeAnn.W.Simmons, USACE
Jjensen, Anchor QEA, Inc.

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