

4.0 PERTINENT FEDERAL, STATE, AND LOCAL REQUIREMENTS

This chapter addresses federal statutes, implementing regulations, and Executive Orders potentially applicable to the proposed project. This Draft EIS (DEIS) is being sent to tribes, federal agencies, and state and local governments as part of the consultation process for this project.

4.1 NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

This DEIS was prepared by Bonneville Power Administration (BPA) pursuant to regulations implementing the National Environmental Policy Act (NEPA) (42 USC 4321 et seq.), which requires federal agencies to assess the impacts that their actions may have on the environment. The NEPA was signed into law on January 1, 1970, and became effective immediately. NEPA is this country's basic national charter for environmental responsibility. It establishes an environmental policy for the nation, provides an interdisciplinary framework for environmental planning by federal agencies, and contains action-forcing procedures to ensure that federal agency decision-makers take environmental factors into account. NEPA allows federal agencies broad discretion concerning the degree of substantive environmental protection they may require when approving proposed actions. The specific purposes of NEPA as stated in the statute are:

- To declare a national policy and promote efforts that will encourage productive and enjoyable harmony between humans and their environment
- To promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate human health and welfare
- To enrich the understanding of the ecological systems and natural resources important to the nation
- To establish a Council on Environmental Quality (CEQ)

Under NEPA, congress authorizes and directs federal agencies to carry out their regulations, policies, and programs as fully as possible in accordance with the statute's policies on environmental protection. NEPA requires federal agencies to make a series of evaluations and decisions that anticipate adverse effects on environmental resources. This requirement must be fulfilled whenever a federal agency proposes an action, grants a permit, or agrees to fund or otherwise authorize any other entity to undertake an action that could possibly affect environmental resources. BPA will take into account potential environmental consequences and will take action to protect, restore, and enhance the environment.

4.2 ENDANGERED SPECIES ACT (ESA)

The Endangered Species Act of 1973 (ESA) (16 USC 1536) as amended in 1988, establishes a national program for the conservation of threatened and endangered species of fish, wildlife, plants, and the preservation of the ecosystems on which they depend. The purpose of ESA is to conserve the ecosystems upon which the endangered and threatened species depend and to conserve and recover listed species. Under the law, species may be listed as either "endangered"

or “threatened”. “Endangered” is defined as a species in danger of extinction throughout all or a significant portion of its range. “Threatened” is defined as a species likely to become endangered within the foreseeable future. All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. All federal agencies are to protect listed species and preserve their habitats. Federal agencies must utilize their authorities to conserve listed species and ensure that their actions do not jeopardize the continued existence of listed species. The Interior Department’s U.S. Fish and Wildlife Service (USFWS) and the National Oceanographic and Atmospheric Administration Fisheries Service (NOAA Fisheries) work with other agencies to plan or modify federal projects so that they will have minimal impact on listed species and their habitat.

The USFWS and NOAA Fisheries administer the act. The USFWS has primary responsibility for terrestrial and freshwater organisms, while NOAA Fisheries’ responsibilities are mainly for marine species such as salmon and whales. The act defines procedures for listing species, designating critical habitat for listed species, and preparing recovery plans. It also specifies prohibited actions and exceptions.

Section 7(a) requires federal agencies to ensure that the actions they authorize, fund, and carry out do not jeopardize endangered or threatened species or their critical habitats. In the relatively few cases where the USFWS determines that the proposed action will jeopardize listed species, they must issue a “biological opinion” offering “reasonable and prudent alternatives” about how the proposed action could be modified to avoid jeopardy to listed species.

The law provides for designations of “critical habitat” for listed species when judged to be “prudent and determinable”. Critical habitat includes geographical areas on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. Critical habitat may include areas not occupied by the species at the time of listing but that are essential to the conservation of the species. Critical habitat designations affect only federal agency actions or federally funded or permitted activities.

The law’s ultimate goal is to “recover” species so they no longer need protection under the ESA. The law provides for recovery plans to be developed describing the steps needed to restore a species to health. Appropriate public and private agencies, institutions, and other qualified persons assist in the development and implementation of recovery plans.

USFWS requires that a biological assessment is prepared if threatened or endangered species might be impacted by a federal action. If the project moves forward, a Biological Assessment will be prepared for the selected alternative.

Potential impacts to threatened and endangered plants, wildlife, and fish species are discussed in **Sections 3.1 through 3.5**.

4.3 FISH AND WILDLIFE CONSERVATION ACT

The Fish and Wildlife Conservation Act of 1980 (16 USC 2901 et seq.) encourages federal agencies to conserve and promote conservation of non-game fish and wildlife species and their habitats. In addition, the Fish and Wildlife Coordination Act (16 USC 661 et seq.) requires federal agencies undertaking projects affecting water resources to consult with the USFWS and the state agency responsible for fish and wildlife resources. These agencies are to be sent copies of this DEIS and their comments will be considered.

Mitigation designed to conserve fish and wildlife and their habitat is provided in the sections on **Fisheries** and **Wildlife** in **Chapter 3**. Standard erosion control measures would be used during construction to control sediment movement into streams, protecting water quality and fish habitat.

4.4 ESSENTIAL FISH HABITAT

Public Law 104-297, the Sustainable Fisheries Act of 1996, amended the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This established new requirements for essential fish habitat descriptions in federal fishery management plans and required federal agencies to consult with NOAA Fisheries on activities that may adversely affect essential fish habitat. The NOAA Fisheries issued a final rule on January 17, 2002 to revise the regulations implementing the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Federal Register 67, No. 12). The Magnuson-Stevens Act requires all fishery management councils to amend their fishery management plans to describe and identify Essential Fish Habitat for each managed fishery. The Pacific Fishery Management Council has issued such an amendment in the form of Amendment 14 (1999) to the Pacific Coast Salmon Plan. This amendment covers Essential Fish Habitat for all fisheries under NOAA Fisheries jurisdiction that would potentially be affected by the proposed action. Essential Fish Habitat includes all streams, lakes, ponds, wetlands, and other currently viable water bodies and most of the habitat historically accessible to salmon. Activities above impassible barriers are subject to consultation provisions of the Magnuson-Stevens Act.

Under Section 305(b)(4) of the act, NOAA Fisheries is required to provide Essential Fish Habitat conservation and enhancement recommendations to federal and state agencies for actions that adversely affect Essential Fish Habitat. Whenever possible, NOAA Fisheries uses existing interagency coordination processes to fulfill Essential Fish Habitat consultations with federal agencies.

No species administered under the amended Magnuson-Stevens Fishery Conservation and Management Act occurs in the vicinity of the proposed project. However, it is within the historical range of coho and Chinook salmon, therefore essential fish habitat will be addressed along with the ESA consultation.

4.5 HERITAGE CONSERVATION

Preserving cultural resources allows Americans to have an understanding and appreciation of their origins and history. A cultural resource can be an object, structure, building, site or district that provides irreplaceable evidence of natural or human history of national, state or local significance. Cultural resources include National Historic Landmarks, archeological sites, and other historic properties listed (or eligible for listing) on the National Register of Historic Places. Federal laws and regulations established for the management of cultural resources include:

- Antiquities Act of 1906 (16 U.S.C. 431-433)
- Historic Sites Act of 1935 (16 U.S.C. 461-467)
- Section 106 of the National Historic Preservation Act (NHPA) of 1966 (16 U.S.C. 470 et seq.), as amended
- National Environmental Policy Act of 1969 (42 USC Sections 4321-4327)
- Archeological Data Preservation Act (ADPA) of 1974 (16 U.S.C. 469 a-c)
- Archeological Resources Protection Act (ARPA) of 1979 (16 U.S.C. 470 et seq.), as amended
- American Indian Religious Freedom Act of 1978
- Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.)
- Executive Order 13007 Indian Sacred Sites

BPA has undertaken the Section 106 (NHPA) consultation process for this project with the State Historic Preservation Officer for Washington, the Advisory Council on Historic Preservation, and the Tribal Historic Preservation Officer (THPO) for the Confederated Tribes of the Colville Reservation. BPA's 1996 government-to-government agreement with 13 federally-recognized Native American tribes of the Columbia River basin identifies the roles and responsibilities of both parties and provides guidance for the Section 106 consultation process with the Tribes.

Projects described in this Salmon Creek Project DEIS would constitute a federal undertaking if funding is provided by the federal Bonneville Power Administration (BPA) or the proposed projects affect U.S. Bureau of Reclamation (BOR) facilities. The BPA has the responsibility to act as the lead agency for initiation of Section 106 of the NHPA for the DEIS, but will coordinate with BOR in analyzing potential effects to BOR facilities.

Under Section 106 of the NHPA, the federal agency must consider the effects of the undertaking on historic properties. The NHPA defines the term "historic properties" as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register of Historic Places..." (36 CFR 800.16). The term includes artifacts, records, and remains that are related to and located in such properties. It also includes properties of traditional religious and cultural importance, also referred to as "traditional cultural properties" (TCPs) that are eligible for inclusion in the National Register of Historic Places (NRHP).

The Office of Archaeology and Historic Preservation (OAHP) in Olympia, Washington, administers the state's NRHP program under the direction of the State Historic Preservation Officer (SHPO). The following NRHP criteria, identified in 36 CFR 60, serve as the basis for evaluating a historic property's eligibility for listing at the national, state, and local levels. The quality of significance in American history, architecture, archaeology, and culture is possible in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, material, workmanship, feeling, and association, and:

- that are associated with events that have made a significant contribution to the broad patterns of our history; or
- that are associated with the lives of persons significant in our past; or
- that embody the distinctive characteristics of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- that has yielded, or may be likely to yield, information important in prehistory or history.

Resources less than 50 years old do not meet the NRHP criteria unless they are of exceptional importance.

Consideration of effects for the undertaking must include the Area of Potential Effect (APE). The APE includes "the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects for an undertaking may be different for different kinds of effects caused by the undertaking." The intent of Executive Order 11593, Protection and Enhancement of the Cultural Environment, has been integrated into Section 110 of the NHPA through the 1980 amendments to the Act. Under NEPA, federal agencies must take into account impacts to historical resources, or those resources that are eligible for the NRHP, before a project is approved. The Section 106 process has been integrated with the NEPA process for this project.

Recent amendments to the NHPA specify that properties of traditional religious and cultural importance (also known as Traditional Cultural Properties) to a Native American tribe may be determined to be eligible for inclusion on the National Register of Historic Places (NRHP). In carrying out its responsibilities under Section 106, BPA is required to consult with any Native American tribe that attaches religious or cultural significance to any such properties.

The Native American Graves Protection and Repatriation Act (NAGPRA) requires consultation with appropriate Native American tribal authorities prior to the excavation of human remains or certain cultural items (including funerary objects, sacred objects, and cultural patrimony) on federal and tribal land. NAGPRA recognizes Native American ownership interests in some human remains and cultural items found on federal land and makes illegal the sale or purchase of Native American human remains, whether or not they derive from federal or tribal land. Upon request, federal agencies shall repatriate human remains to the culturally affiliated tribe.

Executive Order 13007 addresses "Indian sacred sites" on federal and tribal land. "Sacred site" means any specific, discrete, narrowly delineated location that is identified by a tribe or a tribal

individual determined to be an appropriately authoritative representative of a Native American religion. The site is sacred by virtue of its established religious significance to, or ceremonial use by, a Native American religion, provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site. This order calls on agencies to do what they can to avoid physical damage to such sites, accommodate access to and ceremonial use of tribal sacred sites, facilitate consultation with appropriate Native American tribes and religious leaders, and expedite resolution of disputes relating to agency action on federal lands.

Construction, operation, and maintenance of the proposed project could potentially affect historic properties and other cultural resources. A cultural resource technical report will be prepared to determine if any historic properties or cultural resources are present and if they would be impacted by the proposed project prior to any final decision (see **Cultural Resources** section in **Chapter 3**).

Through the design process, BPA and/or other implementing agencies will try to avoid cultural resource sites. If a site cannot be avoided, BPA and/or other implementing agencies will work with the THPO of the CCT to determine if the site is eligible for a listing in the NRHP. If they are eligible, effects to the property will be evaluated and appropriate mitigation measures will be applied.

If, during construction, previously unidentified cultural resources that would be adversely affected by the proposed project are found, BPA and/or other implementing agencies would follow all required procedures set forth in the following regulations, laws, and guidelines: Section 106 (36 CFR Part 800) of the National Historic Preservation Act of 1966, as amended (16 USC Section 470); the National Environmental Policy Act of 1969 (42 USC Sections 4321-4327); the American Indian Religious Freedom Act of 1978 (PL 95-341); the Archeological Resources Protection Act of 1979 (16 USC 470a-470m); and the Native American Graves Protection and Repatriation Act of 1990 (PL 101-601).

4.6 CONSISTENCY WITH FEDERAL, STATE, AREA-WIDE, AND LOCAL PLANS AND PROGRAMS

4.6.1 WASHINGTON STATE ENVIRONMENTAL POLICY ACT (SEPA)

The State Environmental Policy Act (SEPA) was first adopted in 1971. Prior to its adoption, the public had voiced concern that government decisions did not reflect environmental considerations. State and local agencies had responded that there was no regulatory framework enabling them to address environmental issues. SEPA, which is modeled after NEPA, was created to fill this need. It gives state and local agencies the tools to allow them to both consider and mitigate for environmental impacts of proposals. SEPA is intended to ensure that environmental values are considered during decision-making by state and local agencies.

SEPA provides information to agencies, applicants, and the public to encourage the development of environmentally sound proposals. The environmental review process involves the

identification and evaluation of probable environmental impacts, and the development of mitigation measures that will reduce adverse environmental impacts. This environmental information, along with other considerations, are used by agency decision-makers to decide whether to approve a proposal, approve it with conditions, or deny the proposal. SEPA applies to actions made at all levels of government within the state of Washington.

The SEPA rules provide the basis for implementing SEPA and establish uniform requirements for all agencies. A SEPA decision may be required by the Washington Department of Ecology (Ecology) if a decision is made by the lead or cooperating agencies of this EIS that would affect water rights. Either the Okanogan Irrigation District or Ecology, acting as lead agency for the project under SEPA, would need to make a threshold determination under SEPA guidelines prior to adoption of a plan to proceed with the project or to issue a permit to authorize it. This NEPA EIS could be adopted by the SEPA lead agency as part of the State's environmental review if it determines that the NEPA EIS satisfies all or part of its responsibilities to prepare an EIS or other environmental document.

4.6.2 FARMLAND PROTECTION

The Farmland Protection Policy Act (7 USC 4201 et seq.) directs federal agencies to identify and quantify adverse impacts of federal programs on farmlands. The Act's purpose is to minimize the number of federal programs that contribute to the unnecessary and irreversible conversion of agricultural land to non-agricultural uses.

Under Alternative 3, sufficient water rights would be purchased from OID to provide the 5,100 AF of water required for passage flows. This means approximately 1,470 acres, or 29 percent of District lands, would be retired from production.

4.6.3 FLOODPLAIN/WETLANDS ASSESSMENT

The Department of Energy mandates that impacts to floodplains and wetlands be assessed and alternatives for protection of these resources be evaluated in accordance with compliance with Floodplain/ Wetlands Environmental Review Requirements (10 CFR 1022.12), and Federal Executive Orders 11988 and 11990. Evaluation of project impacts on floodplains and wetlands is included in Chapter 3 of the DEIS and constitutes the floodplain/wetland assessment. BPA published a notice of floodplain/wetlands involvement for this project in the Federal Register as part of the Notice of Intent. The Record of Decision (ROD) will contain the statement of findings for floodplain/wetland impacts.

Portions of the project may be within the 100-year floodplain. In particular, this includes stream channel rehabilitation work, the feeder canal, and pump stations.

4.6.4 EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE

In February 1994, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, was released to federal agencies. This order states that

federal agencies shall identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. Minority populations are considered members of the following groups: American Indian or Alaska Native; Asian or Pacific Islander; Black, not of Hispanic Origin; or Hispanic if the minority population of the affected area exceeds 50 percent, or is meaningfully greater than the minority population in the project area.

The proposed project has been evaluated under Executive Order 12898 and would not have disproportionately high and adverse impacts on minority and low-income populations.

4.6.5 HYDRAULIC PROJECT APPROVAL (HPA) AND JOINT AQUATIC RESOURCES PERMIT APPLICATION FORM (JARPA)

Construction activity in or near the water has the potential to kill fish or shellfish directly. More importantly, this activity can also alter the habitat that fish and shellfish require. Direct damage or loss of habitat results in direct loss of fish and shellfish production. Direct killing of fish or shellfish is usually a one-time loss. Damaged habitat, however, can continue to cause lost production of fish and shellfish for as long as the habitat remains altered. Major construction projects individually have a large potential for damage, however, more habitat is lost through the cumulative effects of many smaller projects, each with a minimal level of impact.

The state legislature has given the Department of Fish and Wildlife the responsibility of preserving, protecting, and perpetuating all fish and shellfish resources of the state. To assist in achieving that goal, the state legislature in 1949 passed a state law now known as the "Hydraulic Code" (RCW 75.20.100-160). Although the law has been amended occasionally since it was originally enacted, the basic authority has been retained. The purpose of the law is to ensure that damage or loss of fish and shellfish habitat does not result in direct loss of fish and shellfish production. The enactment of RCW 75.20.100-160 by the state legislature was recognition that virtually any construction within the high water area of the waters of the state has the potential to cause habitat damage. It was also an expression of a state policy to preclude that potential from occurring. The law's purpose is to see that required construction activities are performed in a manner to prevent damage to the state's fish, shellfish, and their habitat. By applying for and following the provisions of the HPA issued under RCW 75.20.100-160, most construction activities around water can be allowed with little or no adverse impact on fish or shellfish.

The major types of activities in freshwater requiring an HPA include, but are not limited to:

- Streambank protection
- Construction of bridges, piers, and docks
- Pile driving
- Channel change or realignment
- Conduit (pipeline) crossing
- Culvert installation

- Dredging
- Gravel removal
- Pond construction
- Placement of outfall structures
- Log, log jam, or debris removal
- Installation or maintenance (with equipment) of water diversions
- Mineral prospecting

A Joint Aquatic Resources Permit Application (JARPA) consolidates seven permit application forms for federal, state, and local permits. A JARPA would be used on this project to apply for:

- The HPA from WDFW,
- Water quality certifications or modifications from Ecology,
- Aquatic resource use authorizations from the Department of Natural Resources,
- Section 404 permit from the Army Corps of Engineers,
- Shoreline Management Act permits from participating local city or county agencies.

Currently, not all local government agencies use JARPA. This form would need to be submitted and permits and authorizations received prior to any work occurring within the streams, floodplains, or wetlands associated with this project.

4.6.6 WASHINGTON HERITAGE REGISTER AND ARCHAEOLOGICAL RESOURCES

The Office of Archaeology and Historic Preservation (OAHP) administers the Washington Heritage Register, a Washington-specific list of properties – similar to the NRHP – that meet specific criteria within the State of Washington.

The Archaeological Sites and Resources Act, as amended, (RCW 27.53) provides for the conservation, preservation, and protection of the state's archaeological resources. It combines certain elements of the NHPA and the federal ARPA, but also provides specific penalties for the disturbance or destruction of archaeological materials on both public and private lands.