



Regulatory Issues Summary

Connor Creek Erosion Control Project
Grays Harbor County



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1. Introduction

Connor Creek is located between Ocean City and Copalis Beach, in Grays Harbor County (GHC), Washington. The lower reach of the creek parallels the shoreline and discharges into the Pacific Ocean. Historically unstable, the creek mouth has migrated a significant distance along the coast. Recent measurements place the mouth of the creek approximately 1.5 miles north of its 1987 location. The northerly migration of the creek has reduced pedestrian access and terminated two local beach access roads. The purpose of the research, investigation, and analysis conducted by Pacific International Engineering^{PLLC} (PI Engineering) is to provide GHC with critical information necessary to address the migrating creek issue.

2. Plant and Wildlife Surveys

Plant and wildlife surveys have been conducted within the portion of Connor Creek that runs parallel to the shoreline. In 1998, a field investigation was performed to assess habitat conditions within an unnamed wetland near the Ocean View and Surfcrest Condominiums. In 2001, a second round of habitat surveys was conducted from the mouth of Connor Creek up to the lagoon near Surfcrest. Vegetation plots surveyed during the initial effort were revisited and remeasured. The effort also involved delineation of wetland areas adjacent to the creek, and an assessment of the species and density of bank vegetation. A stream survey component assessed channel complexity, development of habitat features (e.g., pool and riffle complex), and abundance of aquatic life.

Habitat complexity is minimal along the lower reach of Connor Creek, relative to areas immediately upstream of the most southerly channel remnant, where a complex and diverse freshwater dominant wetland exists. Substrate in the lower reach is typically sand with no spawning gravel. Despite the low habitat quality, the lower reach continues to function as a migration corridor for coho salmon (*Oncorhynchus kisutch*), chum salmon, (*Oncorhynchus keta*), sea-run cutthroat (*Oncorhynchus clarkii clarkii*), and steelhead trout (*Oncorhynchus mykiss*). Noticeable increases in channel width, depth, percent cover of vegetation, organic material, and stability of banks is evident along the middle reach of the creek at 5,276 ft. The upper reach of the affected area from 5,276 ft to 9,276 ft (the lagoon at the end of the stream survey) is where the creek experiences significant increases in habitat complexity and offers the greatest amount of habitat.

Comparison of photographs taken in 1998 and 2001 suggests that sediment transport within the lagoon has shifted near Surfcrest. The lagoon supports diverse assemblages of aquatic and wetland vegetation. Small vegetated off-channel pools have also formed along the upper reaches of the action area and provide rearing habitat for anadromous fish and waterfowl. The complexity of these habitats also provides juvenile salmonids with refugia from piscivorous predators, such as great blue herons (*Ardea herodias*). Additional vertebrate species utilizing the lagoon area include sculpins (*Cottidae*), three-spine sticklebacks (*Gasterosteus aculeatus*), frogs (*Rana sp.*), beaver (*Castor canadensis*), mallard ducks (*Anas platyrhynchos*), Barrow's goldeneye (*Bucephala islandica*), belted kingfisher (*Ceryle alcyon*), wrens (Troglodytidae), and other songbirds.

The area adjacent to Connor Creek is also considered important wintering habitat for the American peregrine falcon (*Peregrinus falco*) and bald eagle (*Haliaeetus leucocephalus*). Marbled murrelets (*Brachyramphus marmoratus marmoratus*) are often observed offshore of Ocean Shores and in the spring and early summer in Grays Harbor. The area south of the affected area provides potential breeding and nesting habitat for the western snowy plover (*Charadrius alexandrinus*), as do the dunes north of the current creek mouth. Aleutian Canada goose (*Branta canadensis leucoparela*) may occur in the project area and brown pelican (*Pelecanus occidentalis*) have been noted during previous site visits to the area.

3. Regulatory and Permitting Considerations

3.1 Permitting

Several state, federal, and local regulatory and permitting considerations are applicable, should the County wish to re-establish pedestrian access to the beach.

3.1.1 Washington Department of Natural Resources (DNR) Aquatic Lease Permit

Anyone wishing to use state-owned aquatic lands (including owners of adjacent lands) must get authorization from DNR. Use of marinas, docks, and similar land/water connectors are typical authorized activities. Other activities for which authorization is commonly required include shellfish/aquaculture leases, geoduck harvest sales, dredge disposal, easements for bridges and utility crossings (including outfalls), and sand and gravel removal. If a future project is proposed, the project proponent must obtain necessary authorization.

3.1.2 Section 401 Water Quality Certification

A water quality certification is required of any applicant for a federal license or permit to conduct any activity that may result in any discharge into surface waters. This includes discharge of dredged and fill material into water or wetlands.

3.1.3 Coastal Zone Management (CZM) Certification

Certification through Washington's CZM Program is required for U.S. Army Corps of Engineers (Corps) authorized projects, and other federally licensed or permitted projects. Unlike other certifications that are issued by the State, the project proponent prepares the CZM Certification, which includes a project description, a brief assessment of the impacts, and a statement that the project complies with the CZM Program. The U.S. Department of Ecology (Ecology) reviews the CZM Certification and the proposed project for consistency with state environmental requirements, including shoreline permits. If the project is consistent, Ecology concurs with the CZM Certification in writing.

3.1.4 State Environmental Policy Act (SEPA)

The SEPA process is a mechanism by which local agencies assess the environmental impact of a given project prior to making a decision. The SEPA process is designed to work with other regulations to provide a comprehensive review of a proposal. It typically requires the project proponent to complete a SEPA checklist that asks a number of questions about the project. A review of the checklist by the lead agency, results in a decision whether the project is likely to cause any probable significant adverse impacts. If the project has probable significant adverse impacts, then an Environmental Impact Statement (EIS) is required prior to the agency reaching a final decision. If the project is not expected to result in significant adverse impacts, then the agency issues a Determination of Nonsignificance (DNS), followed by a comment period before it makes the final decision.

3.1.5 National Environmental Protection Act (NEPA)

The purpose of NEPA is to ensure that environmental information is available to public officials and citizens before decisions are made and before major federal action is taken. Compliance with NEPA is required on federal projects, any project involving a federal permit, and any project receiving federal funding. The environmental compliance NEPA requires can take several forms depending on the action proposed. An action might be exempt from NEPA, might require an EIS, or it might require an environmental assessment (EA). In addition to the NEPA process, any project involving a federal action will need to comply with the Endangered Species Act (ESA). The acting federal agency will consult with National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) concerning the impact of the project on listed or threatened species.

3.1.6 Shoreline Substantial Development Permit (Shoreline Permit)

This permit is required for any development or activity valued at \$2,500 or more that is located on the water or shoreline area. This requirement also applies to any use or activity that materially interferes with normal public use of the water or shorelines of the state, regardless of cost, for any activity listed as a conditional use in the local master program, and for any activity that requires a variance from the provisions of the local master program.

3.1.7 Hydraulic Project Approval (HPA)

Any form of work that uses, diverts, obstructs, or changes the natural flow or bed of any fresh or saltwater of the state, requires HPA from the Washington State Department of Fish and Wildlife (WDFW). A complete application package for an HPA must include a completed Joint Aquatic Resource Permit Application (JARPA) for general plans for the overall project, and complete plans and specifications of the proposed work within fresh or saltwater of the state. The application must also include complete plans and specifications for the protection of fish life.

3.1.8 Corps 404; Section 10 permits

A Corps permit is required when locating a structure, excavating, or discharging dredged or fill material in waters of the United States or transporting dredged material for the purpose of dumping it into ocean waters. Typical projects requiring these permits include the construction and maintenance of piers, wharfs, dolphins, breakwaters, bulkheads, groins, jetties, mooring buoys, and boat ramps.

3.1.9 Biological Assessment (BA)/Essential Fish Habitat (EFH)

These documents are prepared as a condition of Section 7 of the ESA process to determine whether a proposed major construction activity under the authority of a federal action agency is likely to adversely affect listed species, proposed species, or designated critical habitat. The EFH component is a condition of the Magnuson-Stevens Fishery Conservation and Management Act. It is intended to emphasize the importance of habitat protection to healthy fisheries and to strengthen the ability of the NMFS to protect the habitat needed by the fish they manage. The EFH process requires that EFH be defined and adverse effects and conservation measures be identified for species managed by NMFS that occur within the immediate vicinity of the project.

3.1.10 GHC Building Permit

Permits to construct permanent buildings or additions to existing facilities are required by local county and city offices, except under certain circumstances. The application requires detailed drainage plans, size and shape of lot and structures, setback of structure from property lines and drain field (if applicable), access, and size and shape of foundation walls and beams, if included in the design. Permits are issued upon GHC's approval of the plans. Public hearing requirements also vary depending on the activity proposed.

4. Regulatory Designation

In addition to permitting considerations, it is also important to consider the effects of a regulatory designation unique to lower Connor Creek. In 1998, lower Connor Creek was designated an Aquatic Resource of National Importance (ARNI). This section of the report outlines the legal and procedural processes followed by federal agencies to establish the designation in general, to establish lower Connor Creek as an ARNI, and whether the designation will affect future activities in the designated area.

4.1 Designation Process

Pursuant to the Clean Water Act, the Corps is responsible for issuing permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. The Clean Water Act also authorizes the Corps to enter into agreements with the EPA and the Departments of Agriculture, Commerce, Interior, Transportation, and other appropriate federal agencies to reduce delays in the issuance of such permits.

In 1992, the Corps and EPA entered into a Memorandum of Agreement (Agreement) to implement Section 404(q) of the Clean Water Act. The Agreement applies to federal agencies authorized to enforce Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act.

Under the Agreement, the Corps is required to fully consider the views of EPA or other appropriate federal agency when determining whether to issue a permit, to issue a permit with conditions and/or mitigation, or to deny a permit. The Corps is solely responsible for making final permit decisions. The Agreement sets forth procedures that allow for the elevation of certain policy issues or individual permit applications to each agency's Washington headquarters for resolution.

Only individual permit application issues related to aquatic resources of national importance may be elevated. The Agreement does not offer a clear definition of what are "aquatic resources of national importance", but the Agreement does offer the following guidance:

“More specifically, the elevation of individual permit cases should be limited to those cases where the net loss (i.e., after considering mitigation) from the project (i.e., within the scope of impacts being evaluated by the Corps), will result in unacceptable adverse effects to aquatic resources of national importance. As a basis for comparison, these cases will cause resource damages similar in magnitude to cases evaluated under Section 404(c) of the Clean Water Act.”

Cases that do not meet the above resource value threshold cannot be elevated based on a dispute of practicable alternatives. In order to elevate an individual permit application, the Regional Administrator of the federal agency is required to notify the District Engineer in writing that it is the opinion of the federal agency that the project “may result in substantial and unacceptable impacts to aquatic resources of national importance.” Within 25 calendar days after the end of the comment period, the federal agency must notify the District Engineer in writing that in the agency’s “opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance. The opinion will clearly state in detail: (1) why there will be substantial and unacceptable impacts to aquatic resource of national importance; and (2) why the specific permit must be modified, conditioned, or denied to protect the aquatic resource of national importance.” The opinion, which should explain how the agency determination was made, should be based on site-specific information and relate directly to matters within the agency’s authority and expertise.

4.2 Designation of Lower Connor Creek

On September 12, 1997, the Corps issued a Public Notice to notify interested parties that GHC submitted an application for a Section 10/404 Corps Permit for a project along Connor Creek that would restore and stabilize the outlet of Connor Creek at its 1993 location. The project as initially proposed would have resulted in the placement of 0.44 of an acre of fill in wetlands and 0.17 of an acre in waters of the United States. It would also have resulted in the excavation of 0.12 of an acre of wetlands and 0.05 of an acre in waters of the United States. Approximately one month later, the project was modified to relocate the mouth of Connor Creek to a position south of its existing location, between Rod’s Resort and Seaview Estates.

Two federal agencies, the EPA and the USFWS, both objected to the proposed project and recommended denial of the permit application because the resources impacted were an ARNI and the project failed to comply with Section 404(b)(1) Guidelines under the Clean Water Act. The Guidelines require demonstration that a proposed project will not cause significant adverse impact to the aquatic ecosystem and that impacts be mitigated to the extent appropriate and practicable.

In a letter from Elbert Moore, the Director of the Office of Ecosystems and Communities at the EPA, to Col. James Rigsby, District Engineer at the Corps, Seattle District, dated October 9, 1997, the EPA concluded that the project as modified posed a “substantial and unacceptable risk to resources of national importance.” The underlying basis for this conclusion is summarized below:

- Elimination of nearly a mile of aquatic and wetland habitat (approximately 10 acres) which supports juvenile rearing and migratory habitat for wild stocks of coho salmon, chum salmon, sea-run cutthroat trout, steelhead trout, and possibly Dolly Varden char.
- Direct loss of nearly 10 acres of aquatic habitat including tidal wetlands.
- Risks to an estimated 10 acres of fresh water tidal wetlands.
- Potential impact to habitat for a plant species listed as rare in Washington.

In detailing the above concerns, the EPA noted that it considered lower Connor Creek to be a high value river/estuary system that provides an important aquatic transitional habitat from fresh water to brackish and to near oceanic salinity conditions at the mouth of the river. This transitional habitat has high vegetation diversity, providing for species tolerant of higher salinities and tidal conditions in the downstream areas and species intolerant of saline water at the upstream areas. In a letter from the EPA to Col. James Rigsby dated November 3, 1997, the EPA stated that this type of habitat is essential for a “number of state and federal identified sensitive aquatic species in the Pacific Northwest.” The EPA estimated “that less than 50% and probably on the order of 20% of these systems remain in their natural setting in the Puget Sound trough coastal areas.” The EPA also believed the project was not in compliance with the Clean Water Act’s Section 404(b)(1) Guidelines and recommended the CORPS deny the permit.

The USFWS also concluded that the project as modified might result in substantial and unacceptable impacts to aquatic resources of national importance and recommended that a permit not be issued. The USFWS objected on multiple grounds. First, USFWS believed that less environmentally damaging, practicable alternatives exist. For example, USFWS noted that the project failed to consider bridging the creek, rather than redirecting it, as a viable alternative. The USFWS stated that it believed that bridging Connor Creek in several locations to provide private, public, and vehicular access to the beach was the least damaging alternative, and indeed a permanent solution. Second, the USFWS found that existing habitats such as high value freshwater tidal wetlands, estuarine wetlands, an anadromous fish-bearing stream, and coastal dunes, would be directly or indirectly affected by the proposed project. Third, there were concerns about the loss of habitat that protected four species of wild stock salmonid that, at the time, were being considered for listing under the ESA. Fourth, the USFWS believed that the project lacked a detailed, enforceable mitigation plan that fully reflected the value of the existing ecosystem and compensated for those losses. Fifth, the USFWS objected that the proposed mitigation was temporal in nature.

4.3 Impact of Designation on Future Activities

The ARNI designation is unusual in that it may arise at any time in response to an application to the Corps to conduct activities requiring a permit under Section 10 of the Rivers and Harbors Act, Section 404(a) of the Clean Water Act and Section 103 of the Marine Protection, Research, and Sanctuaries Act. There is no notice and comment process and no opportunity for appeal of the designation. The only avenue of challenge appears to be through appealing the denial of a Corps permit that is based on the rationale that the resources in question are ARNI. With respect to future permitting activities within the areas designated as ARNI, the key question is whether the resources meet the threshold for consideration as an ARNI. It is possible that Connor Creek no longer meets this threshold or that the action proposed does not create unacceptable adverse effects to the ARNI. Letters sent to the Corps from the EPA and USFWS provide an outline of the types of concerns that they will likely raise in the future, depending on the proposed course of action.