

# Kootenai River Habitat Restoration Project Master Plan



## Chapter 6 – Environmental Compliance and Consultation

Kootenai Tribe of Idaho  
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## Chapter 6: Table of Contents

<b>6</b>	<b>Environmental Compliance and Consultation .....</b>	<b>6-1</b>
6.1	National Environmental Policy Act.....	6-1
6.2	Probable Regulatory Steps .....	6-2
6.3	Endangered Species Act.....	6-6
6.4	Clean Water Act .....	6-7
6.5	Federal National Historic Preservation Act.....	6-8
6.6	Federal Farmland Protection Policy Act.....	6-8
6.7	State Approvals.....	6-8
6.8	Boundary County Approvals .....	6-9
6.9	Summary.....	6-9

## Chapter 6: Tables

Table 6-1.	Kootenai River Habitat Restoration Project general permitting schedule.....	6-3
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# 6 Environmental Compliance and Consultation

Various federal, state, and local environmental laws and administrative requirements will apply to the Kootenai River Habitat Restoration Project.<sup>1</sup> Chapter 6 provides an overview of anticipated environmental compliance and consultation requirements related to subsequent phases of the project. The applicability of each law, regulation, ordinance, or guideline, to this project is defined in this chapter. This information is not intended to be comprehensive; it is provided to identify major requirements that have the potential to substantially impact overall project feasibility, implementation timelines and costs, e.g., permits or processes requiring six months or more to complete.

Comprehensive permit requirements, schedule, and associated costs will be developed and refined in the preliminary and final design phases. Conceptual costs associated with environmental compliance are presented in Chapter 7. Table 6-1 provides a summary list of probable regulatory steps organized by category (i.e., water quality, instream work, planning approvals and construction).

## 6.1 National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969, as amended (42 USC 4321 et seq.), requires federal agencies to assess and disclose the effects of a proposed action on the environment prior to funding, approving, or implementing the action.

An Environmental Impact Statement (EIS) that assesses environmental consequences of implementing the Kootenai River Habitat Restoration Project will be prepared to address NEPA requirements. The NEPA process will include formal public scoping and outreach with interested and potentially affected parties to present the proposed project and potential alternatives, and most importantly, to identify the key issues that will guide the environmental analysis.

Several important steps must be completed before NEPA can effectively be initiated. Because of the array of potential habitat restoration actions presented in this Master Plan, it will not be practical or likely possible, to develop detailed designs and perform necessary environmental evaluations of all of the actions identified in this plan within a timeframe that will meet the immediate project needs (i.e., 2012 target date to initiate the first phase of construction activities). Therefore, shortly after completion of this Master Plan, the Tribe in coordination with their agency partners, and with input from regional co-managers and other stakeholders, will identify immediate implementation priorities and associated habitat actions, as well as a process for prioritizing and sequencing subsequent project actions (see discussion of next steps in

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<sup>1</sup> Tribal laws and administrative requirements are not detailed here, but will be addressed as the Tribe implements the Project.

Chapter 9). This phased approach will likely necessitate more than one NEPA process, with individual NEPA processes addressing independent project phases and/or groupings of actions.<sup>2</sup>

Each independent project phase or group of actions will be expected to provide significant biological and habitat benefits consistent with the goals and objectives presented in this Master Plan. Preliminary design of the initial project phase or grouping of habitat restoration actions will define the temporal and spatial scope of the treatments and will guide an environmental assessment team in determining the extent of natural and social resource effects that will be evaluated under NEPA. This information may reveal the need to collect additional baseline data to thoroughly examine the environmental effects of the first project phase or group of habitat treatments.

The NEPA process, beginning with scoping and ending with a Final EIS and Record of Decision, will be conducted under the supervision of the KTOI and BPA, with guidance from the USACE. A formal public scoping process will identify key issues of concern to agencies, organizations and the public that are relevant to the initial project phase or grouping of habitat treatments. Data collection will be completed and an environmental analysis of the effects of implementation of the identified project phase or grouping of habitat issues relative to specific scoping issues will be conducted.

At this time, the Tribe assumes that the Bonneville Power Administration (BPA) will be the lead agency on the NEPA effort. Additional cooperating agencies will be identified in the near term. Because the scope of the total habitat restoration project is extensive, the Tribe and BPA will conduct a robust analysis of cumulative effects in each NEPA undertaking. These effects analyses will link the potential independent habitat treatments, providing a larger-scale estimate of the overall benefits and risks of the restoration efforts.

## 6.2 Probable Regulatory Steps

Table 6-1 provides a summary list of probable regulatory steps organized by category, i.e., water quality, instream work, planning approvals and construction. In addition to these steps, if the proposed implementation scenario involves altering Kootenay Lake water management, consultation will be undertaken with British Columbia and the International Joint Commission through the appropriate forums.

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<sup>2</sup> In an earlier draft of this Master Plan the Kootenai Tribe suggested that given the nature of the conceptual framework presented in this Master Plan, a Programmatic EIS that considers the overall conceptual restoration framework and its effects would be more appropriate and efficient than a project-specific EIS that looks at specific effects of individual habitat actions or activities. The Tribe suggested that: 1) a programmatic approach would result in a baseline environmental analysis that would be referenced in future project-specific environmental documents; 2) implementation-level assessments would examine the environmental effects and design detail for specific restoration actions; 3) the magnitude of effects of individual restoration actions could vary greatly, therefore, subsequent NEPA documentation could range from Categorical Exclusions to Supplemental EIS' that tier off of the Programmatic EIS; and 4) a Programmatic EIS would be consistent with the adaptive management framework within which the project will be implemented. The Tribe's federal partners and members of the Kootenai Habitat Policy Team have indicated that they support a project-specific EIS approach, therefore that is the approach that has been presented in this Master Plan.

**Table 6-1. Kootenai River Habitat Restoration Project general permitting schedule.**

Permit	Data Needed	Expected Time to Receive	Required Submittal Date	Prerequisites	Notes
<b>Water Quality</b>					
<i>National Pollutant Discharge Elimination System (NPDES) General Construction Stormwater (U.S. Environmental Protection Agency)</i>	Contractor contact info, project location description, water bodies that will be discharged to, construction dates, area of disturbance, ESA compliance info; prepare Stormwater Pollution Prevention Plan (SWPPP).	2 months	Prior to start of construction.	Section 401 from IDEQ	Submit one combined application for all sites with ground disturbance exceeding one acre.
<i>Stormwater Pollution Prevention Plan</i>	Describe ground disturbing activities, affected areas, location map, measures proposed to reduce erosion and sediment runoff, exact construction dates, measures to divert flows, post-construction storm water management measures, waste management measures, steps to keep vehicles clean, describe other possible pollution sources and control measures. Also, document compliance with ESA.	2 months	Submit after the NPDES is filed or at the same time.		Submit SWPPP to support the construction NPDES for sites disturbing one acre or more.
<i>Water Quality Certification for Channel Modifications (Idaho Dept. of Environmental Quality)</i>	Water quality parameters to be affected and to what extent. Exact construction timing and extent.	3-6 months	Once final alternatives for all work below ordinary high water mark (OHWM) or in wetlands has been defined.		Included with 404. Will define mixing zone within which some degradation can occur.
<b>Instream Work</b>					
<i>USACE Section 404/10</i>	Location description, water body, shoreline/zoning designation, parcel numbers, description of work in wetlands and below ordinary high water mark (OHWM), project purpose, potential effects on water bodies, construction period/phasing, any permanent structure below OHWM. Fill volume/area below OHWM, composition of fill material, material source, volume/area of excavation or dredging	1-2 years	Once final design for all below OHWM features is available. Info must include results of sediment core contaminant analysis from June 2007. Likely to require wetland delineation and mitigation plan.	Need Section 401 conditions and ESA determination before 404 can be issued	Submit one combined application for all sites with features below OHWM or affecting wetlands (includes 401 certification). Coordinate alternatives analysis with NEPA process.

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Permit	Data Needed	Expected Time to Receive	Required Submittal Date	Prerequisites	Notes
	below OHWM, list other approvals, total cost of project, federal funding, names/addresses/phone numbers of all adjacent property owners, possibly wetland delineation and mitigation plan.				
<i>Dredged Material Management Plan (USACE)</i>	If habitat restoration involves sediment dredging or channel maintenance dredging, a Sampling and Analysis Plan may be required by the USACE. Required information could include documentation of contaminant sources, chemical and biological processes affected by sediment exposure; identification of receptors of concern; and exposure pathways and potential responses.	75+ days	File with Section 10/404 application. Processed simultaneously with Section 401 and Stream Alteration Permit.	Analysis of potentially contaminated sediment.	Conduct early pre-consultation with the USACE to determine if this approval is needed. If so, initiate studies well in advance of submittal target.
<i>Instream Alteration Permit (Idaho Dept. of Water Resources)</i>	Same as for 404/10 permit. State standards for construction and instream features: IDAPA 37.03.07 (055-065). If other approaches or procedures are proposed, they must be described.	60 days	Submit as joint application for permit with Section 404. Allow at least 60 days.		Joint application with USACE permit.
<i>Navigational Encroachment Permit (Idaho Dept. of Lands)</i>	Basic application is same as above with additional form required for Idaho Dept. of Lands addressing riprap or structures (if in navigable waters).	30 days	Submit as part of Joint Application for Permit with Section 404.	Consent of adjacent land owners.	Required if plans include riprap or docks in navigable waters.
<i>Boundary County Dept. of Land Conservation and Development – Floodway Development Permit</i>	Development permit required for fill (Section 4.1-1) and approval required prior to altering or relocating a watercourse (Section 4.3-4). Flood capacity may not be diminished. Must demonstrate proof of permit application to Idaho Dept. of Water Resources for Stream Channel Alteration. If work would occur within Bonners Ferry, need to show proof that City has been notified. Also, must notify FEMA.	TBD	Consult with Boundary County and City of Bonners Ferry.		Must comply with FEMA standards for floodway development. Diminishment of floodway capacity is not allowed. See Boundary County Flood Damage Prevention Ordinance, Section 4.1-1 thru 4.3-4.
<b>Planning Approvals</b>					
<i>NEPA Compliance and Record of Decision</i>	Purpose and need, project description, project alternatives, environmental, cultural and socioeconomic analysis. Public scoping and	2 years.	Initiate NEPA compliance following Master Plan approval, selection of	Define and design implementation measures	Most significant review process, examining a range of environmental and

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Permit	Data Needed	Expected Time to Receive	Required Submittal Date	Prerequisites	Notes
	comments shape this process.		implementation priorities, and preliminary design.		social resource values.
<i>USFWS Concurrence or Biological Opinion</i>	Biological Assessment (BA) is a description of the proposed action, status of species and critical habitat, environmental baseline, effects analysis, determination of effects	6-12 months	Prepare and submit to the USFWS concurrent with the NEPA EIS.		BA needed for independent suite of implementation measures. Consultation to be tailored to final project proposal and NEPA schedule.
<i>Section 106 Clearance</i>	Evaluation of effects of actions on historical and archaeological resources and traditional cultural properties. Consult with tribes, Idaho State Historic Preservation Office (Bureau of Indian Affairs).	2-3 months		Define area of potential effect.	Submit survey results on National Register of Historic Places (NRHP) listed or eligible properties.
<i>Boundary County Site Development Permit Application</i>	All affected parcel numbers; describe land use, duration of work, vehicle trips/day and mitigation; site plan with property boundaries, topo, access, etc. Expect two public hearings.	TBD	Consult with Boundary County	Won't issue until Floodway Development Permit approval obtained.	Determines consistency with County Comp Plan.
<i>Fugitive Dust Control (Idaho Dept. of Environmental Quality)</i>	Define reasonable precautions to take, such as applying dust suppressants, reducing speed limits, etc.	N/A	Permit not required, but planning should include a Fugitive Dust Prevention/Control Plan per IDAPA 50.01.01 Section 650-651.		No submittal required to IDEQ, but plan should be part of construction documents.
<b>Construction</b>					
<i>Boundary County road and bridge permits</i>	Location of proposed road access, proposed design, construction requirements, and drawing. Application to be signed by the owner of the land upon which the access is to be constructed. Must be prepared by a registered surveyor.	60 days	Approved SWPPP	Detailed design and surveys.	
<i>Consult with Idaho Dept. of Transportation</i>	If proposed habitat treatment could affect the I-95 bridge, design and mitigation information would be provided.	TBD	TBD	Detailed design and surveys.	Need for consultation to be determined.

## 6.3 Endangered Species Act

The Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. §§ 1531 et seq.), requires federal agencies to ensure that actions they authorize, fund or conduct are not likely to jeopardize the continued existence of any ESA-proposed or listed species or result in destruction or adverse modification of their designated critical habitat. Section 7(c) of the ESA requires that federal agencies consult with the USFWS and/or the National Marine Fisheries Service regarding endangered species. A Biological Assessment (BA) must be prepared if the USFWS determines that threatened or endangered species may occur in the vicinity of a proposed action. If the BA determines that the proposed project would likely adversely affect a listed species or result in destruction or adverse modification of critical habitat, then formal ESA Section 7 consultation is required. Under formal consultation, the USFWS will use the BA along with their own subsequent analysis as the basis of a Biological Opinion that will outline criteria to ensure the project does not further jeopardize the continued existence of an endangered species. The recently clarified Libby Dam BiOp addresses this proposed project; however, the scope and effect of proposed restoration actions were not considered in detail. The USFWS is likely to conclude that additional ESA compliance is necessary.

Endangered Species Act listed Kootenai River white sturgeon (endangered) and Columbia River bull trout (threatened) are present in the project area. As noted in Chapter 2, the USFWS designated the Kootenai River from RM 141.4 to RM 152.6 and RM 152.6 to 159.7 as sturgeon critical habitat (73 FR 39506). The lateral extent of critical habitat includes the river channel up to the ordinary high-water lines (as defined by the USFWS in 33 CFR 329.11) on each bank of the Kootenai River. No critical habitat for bull trout has been designated in the project area (70 FR 56211). Listed bull trout, sturgeon, and sturgeon critical habitat would be affected during habitat restoration actions. Even though the ultimate goal is to implement specific projects that would be beneficial to ESA listed sturgeon and bull trout, given the extent of likely restoration treatments described in previous chapters, a BA will be required and formal ESA Section 7 consultation with the USFWS may be necessary to ensure that negative effects from construction are minimized. The ESA Section 7 consultation would likely conclude with the issuance of a Biological Opinion by the USFWS.

Preparation of the BA would typically begin at the final design phase, which is the level of detail required by the USFWS to prepare a Biological Opinion. While a BA could be prepared within a month, preparation of a Biological Opinion by the USFWS can take as much as a year to complete due to factors such as a complicated multi-phased project and limited agency staff.

In addition, through the ESA consultation process, this project will be evaluated for consistency with the final recovery plan for Kootenai River white sturgeon (USFWS 1999) and for previously issued Biological Opinions with specific measures to protect sturgeon. The USFWS, Bureau of Reclamation, USACE, and BPA developed a Biological Opinion (BiOp) on Federal Columbia River Power System Operations in 2000 that recommended mitigation for Libby Dam operational effects on Kootenai River white sturgeon. Measures for sturgeon include implementing flow releases and a flood control approach to lessen the effects on sturgeon. In 2006, the USFWS Biological Opinion Regarding the Effects of Libby Dam Operations on the Kootenai River White Sturgeon, Bull Trout, and Kootenai Sturgeon Critical Habitat was published and was as clarified in 2008.

## 6.4 Clean Water Act

Uncontrolled water pollution led to enactment of the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977, this law, commonly known as the Clean Water Act, is the principal federal law regulating water quality in waters of the United States. In addition, the Rivers and Harbors Act regulates activities affecting navigable waters of the United States.

Work within the Kootenai River, a navigable waterway, will be subject to Section 10 of the Rivers and Harbors Act, administered by the USACE. In addition, habitat restoration measures involving work within wetlands and rivers are generally subject to Section 404 of the Clean Water Act. Application is made jointly to the USACE for both approvals. Section 404 requires evaluation of activities involving discharges of dredged or fill material into waters of the United States, which includes the Kootenai River and its associated riparian wetlands and tributaries. Most elements of this project may meet the requirements of several Nationwide Permits (NWP), which authorize various types of habitat restoration activities. For example, NWP 27 authorizes many stream and wetland restoration activities. Non-conforming activities would require the lengthier individual 404 permit review process.

Section 10 and Section 404 permitting, administered by the USACE, also involve review by the Idaho Department of Environmental Quality (IDEQ), the agency responsible for local compliance with Section 401 of the Clean Water Act. IDEQ issues Water Quality Certifications for work within and near waters of the United States. This component ensures that the project meets state water quality standards. For some 404 permits, certain Tribes must also provide Section 401 approval. Issuance of a Section 401 Water Quality Certification means that the certifying agency/tribe anticipates there is a reasonable assurance that a proposed action can be conducted in a manner that would not violate applicable water quality standards.

If the project involves sediment dredging from the Kootenai River, another process could be triggered if these sediments are contaminated. Section 10 review could initiate an evaluation under the Northwest Regional Sediment Evaluation Framework (Corps of Engineers et al. 2006). If contamination is documented, the potential effects of dredging on physical, chemical and biological processes may need to be identified in a Dredged Material Management Plan. The intent of this process is to ensure that dredging and disposal don't expose species and habitats to concentrations of contaminants that cause adverse effects. It also seeks to limit the effects of suspended sediments on water quality.

Section 404 permitting can require a year or more for complex projects. IDEQ has 60 days from issuance of the public notice to grant or deny a Section 401 certification request, but the USACE can specify a longer or shorter time frame if necessary (not exceeding one year). Often times Section 404 and 401 permits and ESA consultation for these permit approvals are the most time consuming permit processes. Preparation of Section 404 and 401 permit applications typically begin at the final design stage, when the required level of construction detail is available. Facilitating regular involvement of USACE, IDEQ, and Kootenai Tribal staff through the final design stages could help to reduce the processing duration.

Section 402 of the Clean Water Act authorizes storm water discharges from construction activities exceeding a one-acre area. A National Pollutant Discharge Elimination System (NPDES) permit authorizes construction projects, providing notice is given to the authorizing agency and appropriate erosion control plans and measures are implemented. The Kootenai Tribe will be

required to prepare and implement a Storm Water Pollution Prevention Plan that would be overseen and approved by the IDEQ. Application would need to be made to the IDEQ when final project design is advanced. Pertinent information will include construction schedules and quantities and quality of potential discharge. Generally NPDES permitting does not cause undue delay in project implementation.

## 6.5 Federal National Historic Preservation Act

Federal funding of a project is considered an undertaking within Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (P.L.89-665, 16 U.S.C. 470). Section 106 requires that every federal agency take into account how each of its undertakings could affect historic properties. Historic properties are districts, sites, structures and traditional cultural places and properties that are eligible for inclusion on the National Register of Historic Places (NRHP). The Kootenai Tribe will need to identify whether cultural resources are present within areas affected by restoration actions and if so, assess their eligibility for listing under the NRHP. Appropriate protective actions to take on NRHP eligible properties will be identified in consultation with the Idaho State Historic Preservation Office (SHPO).

A cultural resources survey and report of findings for the proposed undertaking must be submitted to the Idaho SHPO, and SHPO must provide concurrence before construction can be implemented. Such surveys may take considerable time, especially if sites are identified; therefore, the Kootenai Tribe's Cultural Resource Office intends to implement investigations and consultation as soon as specific project affected areas are identified. Depending on survey results, compliance with Section 106 of the NHPA may take several months to over one year.

## 6.6 Federal Farmland Protection Policy Act

The Farmland Protection Policy Act (7 U.S.C. 4201 et seq.) directs federal agencies to identify and quantify adverse effects of federal programs on farmlands. The intent of this Act is to minimize the number of programs that unnecessarily contribute to the conversion of agricultural land to non-agricultural purposes. Agriculture is a major economic base in Boundary County and restoration actions could affect agricultural lands within the Kootenai River Valley. For example, the Boundary County Comprehensive Plan recognizes and appreciates that farming and other agricultural practices are subject to special protection as stated in the Idaho Right to Farm Act, and that precedence in land use decisions should weigh in favor of agricultural pursuits. Agricultural issues will likely be important NEPA scoping issues, and Farmland Protection Policy Act compliance would be addressed in detail through the NEPA process. While compliance with this Act may take considerable time, evaluation can begin during preliminary design.

## 6.7 State Approvals

In addition to Section 401 Water Quality Certification by the IDEQ and NPDES permitting, implementing the habitat restoration project may require various other regulatory approvals from State of Idaho agencies. Permitting requirements will be verified during preliminary design and compliance initiated during the preliminary or final design phases as appropriate.

A stream channel alteration permit will be required for several potential proposed actions; this permit is issued by Idaho Department of Water Resources (IDWR) for stream crossings or streamside work conducted below the ordinary high water mark of a stream or river. This permit is applied for simultaneously with the Section 404 permit by using Idaho's Joint Permit Application process. Lands below the ordinary high water line are considered public trust lands and may be under the jurisdiction of the Idaho Department of Lands, which issues a Navigational Encroachment Permit. A state water permit may be needed if irrigation of plantings and restored riparian areas is proposed; however, alternatives could include paying a landowner for use of an existing water right. Gaining such state permits is not expected to cause undue delay in project implementation.

## 6.8 Boundary County Approvals

Boundary County approvals may include a site development permit to ensure consistency with the Boundary County Comprehensive Plan; a Floodway Development Permit to ensure that flood capacity is not diminished and to approve alternations in watercourses; as well as approvals to excavate or grade lands, for road and bridge access, etc. Special consideration and approval for actions on farm lands, especially lands designated as prime farmland under the County's Comprehensive Plan, may be needed. Permitting requirements will be verified during the preliminary design phase and approvals sought during the final design phase. Coordination with Boundary County and the City of Bonners Ferry throughout both design stages may improve permitting timeline efficiencies.

## 6.9 Summary

As the next phases of the Kootenai River Habitat Restoration Project mature, this environmental compliance and permitting framework will be refined into a detailed roadmap that ensures all required approvals are clearly understood and properly scheduled. Planning will initially focus on the long lead-time processes, particularly NEPA, which will further refine the final suite of treatments to be implemented. When implementation measures are clearly established, ESA compliance and in-water work approvals from the USACE will be pursued. Other identified steps will overlap with these long duration reviews.