

<i>NATIONAL MARINE FISHERIES SERVICE PROCEDURE 03-201-04</i> Effective on: July 13, 2000	
To be reviewed on: October 1, 2023	
Habitat Conservation and Restoration Essential Fish Habitat Policy	
Guidance on Essential Fish Habitat Conservation Recommendations	
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Signed _____ Patricia A. Montanio Director, Office of Habitat Conservation	
Date _____	

I. Introduction¹

Clearer guidance on how to convey Essential Fish Habitat (EFH) Conservation Recommendations to action agencies can help in a number of ways: ensuring that we use the statutory and regulatory requirements for EFH as convincingly as possible to persuade action agencies to heed our recommendations; clarifying that NMFS is making recommendations to fulfill its statutory requirements; and providing a measure of consistency in implementation of the program; and avoiding situations that might prompt confusion or criticism of the program.

II. Objective

The following items highlight desirable components of a NMFS letter that transmits EFH Conservation Recommendations to a state or federal action agency. Note that not all of the items will be applicable in every circumstance (e.g., items 3 and 10 would not be appropriate for a letter to a state agency).

¹ Procedure 03-201-04 was originally conveyed via Memorandum entitled *Guidance on EFH Conservation Recommendations* from Jon Kurland to Regional EFH Coordinators on July 13, 2000.

III. Guidance

1. Statement at the beginning of the letter clearly listing the major statutes under which NMFS is commenting (Magnuson-Stevens Fishery Conservation and Management Act, Fish and Wildlife Coordination Act (FWCA), Endangered Species Act, Federal Power Act, etc.) - Since NMFS often provides comments under a number of legal authorities in the same letter, a statement listing those statutes up front can clarify for the action agency which laws are the foundation for our comments on a particular action. For instance, if we are commenting under the Magnuson-Stevens Act and the FWCA, listing both statutes up front clarifies the authority for all of our comments, even though a portion of the letter (under a subheading) may apply specifically to EFH.
2. Distinct heading for the EFH recommendations labeled "EFH Conservation Recommendations" - A heading for EFH Conservation Recommendations helps to distinguish these recommendations from other comments, which is important since federal action agencies are required to respond in writing to the EFH Conservation Recommendations, but not to other types of comments (e.g., FWCA comments).
3. Reference to the action agency's EFH Assessment - If the federal action agency completed an EFH Assessment, we should refer to that assessment and indicate whether NMFS agrees with the conclusions, if appropriate.
4. Statement that the proposed action "would adversely affect EFH" – Our determination on potential impacts to EFH should be based upon NMFS' own evaluation, which may differ from a federal action agency's EFH Assessment. If NMFS believes that an action would adversely affect EFH our letter should say so, since "would adversely affect EFH" is the statutory trigger for us to provide EFH Conservation Recommendations. Our letter should also describe how the action would affect EFH, if possible.
5. Description of the EFH that would be adversely affected, including the species and life stages for which EFH would be adversely affected – EFH must be designated for individual species and life stages of fish, and actions may affect EFH for different species/stages in different ways. In some cases it is important to specify exactly which species and life stage(s) would be affected (e.g., juvenile summer flounder) and tailor our recommendations accordingly. In other cases it may suffice to generalize the description of affected species (e.g., stating that the action "would adversely affect EFH for numerous species of Pacific groundfish"). Either way, it is best to describe the habitat features or functions that would be affected and indicate the animals for which the affected area has been designated EFH, rather than saying generically that an action "would destroy two acres of EFH."
6. Citation to Section 305(b)(4)(A) of the Magnuson-Stevens Act as the authority for NMFS to provide EFH Conservation Recommendations – NMFS is required by Section 305(b)(4)(A) of the Magnuson-Stevens Act to provide EFH Conservation Recommendations for any Federal or state agency action that would adversely affect EFH, and Federal agencies are required to respond to such recommendations in writing. Citing this section of the Act clarifies that NMFS is providing recommendations as required by law, and also clarifies to

Federal action agencies that these are the recommendations that require a written response under the Act (as distinct from other recommendations NMFS may make in the same letter).

7. Clear and specific recommendations – EFH Conservation Recommendations should be clear and specific to make it easier for the action agency and NMFS to judge whether the agency’s final decision is consistent with the recommendations. It is best to avoid vague recommendations (e.g., “The project should be revised as necessary to ensure that adequate migration pathways are maintained for fish”), and instead to state exactly what modifications to the action NMFS believes are necessary.

8. A rationale for each recommendation – Providing a brief rationale for each EFH Conservation Recommendation helps to explain why the recommendation is needed, making it harder for the action agency to reject the recommendation and possibly making it easier for the action agency to craft an acceptable surrogate in the event the agency is not able to accept NMFS’ recommendations exactly as written.

9. Language appropriate to the type of response – If NMFS is recommending denial of a permit or major modifications to an action, more detail and justification may be warranted than if we are seeking minor modifications.

10. Citation to Section 305(b)(4)(B) of the Magnuson-Stevens Act and 50 CFR 600.920(j) to remind action agencies of the type of detailed written response that is required – Section 305(b)(4)(B) of the Magnuson-Stevens Act contains very specific language describing the type of written response an action agency must provide for EFH Conservation Recommendations, and 50 CFR 600.920(j) contains additional requirements in the event a response is inconsistent with the recommendations. Including these citations in our letters clarifies that there are statutory and regulatory requirements that Federal action agencies need to follow when responding to EFH Conservation Recommendations, and may prompt better compliance with those requirements.

11. Separate discussion of any comments or recommendations NMFS is providing under other statutory authorities – Any comments or recommendations not pertaining to EFH should be clearly labeled and included in a separate section of the letter (e.g., an Endangered Species Act “not likely to adversely affect” determination might be included under a heading labeled “Endangered Species Act Section 7 Consultation”) to minimize confusion for action agencies.

12. The appropriate signature block for the NMFS official who has the delegated authority to provide EFH Conservation Recommendations – All EFH Conservation Recommendation letters should carry the signature block of a NMFS official who has been delegated the authority to provide such recommendations.

Appendix 1 is an example of a NMFS letter conveying EFH Conservation Recommendations to an action agency, to help illustrate some of the points discussed above.

APPENDIX 1

Sample Comment Letter with EFH Conservation Recommendations 7/13/00

Chief, Regulatory Branch
U.S. Army Corps of Engineers Barnegat Bay, New Jersey 07777

Dear ACOE Chief:

The National Marine Fisheries Service (NMFS) has reviewed Public Notice #199800000-01, which describes an application by the Wealthy Economic Development Corporation to develop an 85 slip marina and associated facilities in uplands and wetlands adjacent to Barnegat Bay, New Jersey. The proposed project includes the following activities: dredging 1.8 acres of shallow subtidal muddy bottom for the boat basin and channel and filling 1.5 acres of tidal estuarine emergent wetlands associated with the bulkhead for a parking lot, roadways, and fuel tank storage area. To compensate for the loss of wetlands, the applicant proposes to restore 3.5 acres of tidal wetlands in Barnegat Bay. We offer the following comments and recommendations on this project pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and the Fish and Wildlife Coordination Act.

General Comments

Barnegat Bay is a highly productive estuary that supports numerous important living marine resources. The proposed project could adversely affect the habitat value of the Bay near the project site by eliminating tidal wetlands that export nutrients and filter runoff from upland sources. Additionally, the proposed mooring basin may accumulate fine grained sediments and hydrocarbons and other vessel-related contaminants. NMFS is also concerned that the applicant has not provided sufficient information about the proposed mitigation plan.

Essential Fish Habitat Conservation Recommendations

As noted in the Essential Fish Habitat (EFH) Assessment included in the public notice, this portion of Barnegat Bay has been designated as EFH under the Magnuson-Stevens Act for winter flounder (all life stages), windowpane flounder (all life stages), Atlantic sea herring (juveniles and adults), bluefish (juveniles and adults), Atlantic butterfish (juveniles), summer flounder (larvae, juveniles, and adults), scup (juveniles), and black sea bass (juveniles and adults). The proposed project would adversely affect EFH by filling tidal wetlands and dredging shallow subtidal habitats. NMFS recommends pursuant to Section 305(b)(4)(A) of the Magnuson-Stevens Act that the Corps of Engineers adopt the following EFH Conservation Recommendations for any permit issued for this project:

1. Require the applicants to demonstrate that they have minimized the dredging and filling of tidal wetlands to the extent practicable. This recommendation is necessary to ensure that the applicants have evaluated options to reduce impacts to the salt marsh and that any remaining impacts are unavoidable.
2. Require the applicants to submit a complete mitigation plan before the Corps of Engineers decides whether to authorize the project. NMFS requests an opportunity to review a draft mitigation plan and suggest modifications before the final version is approved by the Corps. This recommendation is necessary to ensure that the mitigation plan is technically

sound and fully compensates for the unavoidable impacts of this project.

3. Require the applicants to shift the orientation of the entrance channel approximately 150 feet to the south (and reconfigure the marina accordingly) to avoid impacting the large eelgrass bed that exists near the end of the proposed channel to the marina. This recommendation is necessary to avoid impacts to eelgrass, which has been designated as a Habitat Area of Particular Concern for summer flounder, and also provides important habitat functions for other federally managed species such as winter flounder and bluefish.

4. Condition the permit to prohibit dredging between April 1 and June 30 of any year to protect spawning and juvenile flounders. This recommendation is necessary to avoid entrainment and/or smothering of flounder eggs and vulnerable young-of-year flounder.

Section 305(b)(4)(B) of the Magnuson-Stevens Act requires the Corps of Engineers to provide NMFS with a detailed written response to these EFH Conservation Recommendations, including a description of measures adopted by the Corps for avoiding, mitigating, or offsetting the impact of the project on EFH. In the case of a response that is inconsistent with NMFS' recommendations, the Corps must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects (50 CFR 600.920(j)).

Fish and Wildlife Coordination Act Recommendations

The portion of Barnegat Bay immediately adjacent to the proposed marina functions as a migratory corridor for anadromous alewives, American shad, and blueback herring that spawn in the Hypothetical Tributary. Given the silty mud sediments that predominate in this portion of the estuary, dredging for the proposed boat basin would create turbidity that may impede the spring migration of alosids. Therefore, in addition to the seasonal restriction recommended above for EFH, we recommend that you prohibit all dredging between March 1 and April 30 of any year to avoid conflicts with alosids migrating toward their spawning grounds.

Conclusions

In summary, NMFS recommends that the applicants pursue less environmentally damaging alternatives to the proposed project, including relocating the entrance to the marina and minimizing wetland impacts. We also recommend that the applicants provide additional details on the proposed mitigation plan, and that no dredging occur between March 1 and June 30 of any year to avoid interrupting the migration of river herring and to prevent adverse impacts to EFH for spawning and juvenile flounders. We look forward to your response to our EFH Conservation Recommendations as well as our other recommendations on this project. Should you have any questions about this matter, please contact xxxxxx.

Sincerely, NMFS