

III. Guidance

Federal agencies must consult with NMFS under section 305(b)(2) of the Magnuson-Stevens Act regarding any action they authorize, fund, or undertake that may adversely affect EFH. For purposes of EFH consultation, “adverse effect” is defined at 50 CFR 600.910 to include any impact that reduces the quality and/or quantity of EFH, and should be interpreted to include both temporary and permanent impacts. For any action requiring an EFH consultation, except for those covered by a General Concurrence, Federal agencies are required by 50 CFR 600.920(g) to provide NMFS with a written EFH Assessment that discusses the effects of the action on EFH. There is no provision that allows NMFS to waive either the EFH consultation or EFH Assessment requirement for actions that are expected to cause insignificant or discountable adverse effects to EFH (although the General Concurrence process at 50 CFR 600.920(f) provides a means to handle consultations categorically for actions that have no more than minimal adverse effects). However, the level of detail in an EFH Assessment should be commensurate with the potential adverse effects on EFH, so the assessment may be very brief for relatively simple actions involving only minor adverse effects.

If NMFS has made a finding regarding the use of an existing environmental review process to handle EFH consultations, the EFH Assessment may be combined with that other review process, as specified in the applicable finding. The February 28, 2001 finding for the use of the ESA consultation process specifies that the information prepared by an action agency for an informal or formal ESA consultation may also serve as the EFH Assessment, provided it is clearly labeled as such and it includes all of the required components of an EFH Assessment as outlined in 50 CFR 600.920(g).

For cases where the Magnuson-Stevens Act managed species and ESA listed species are identical, or when some (but not all) of the managed and listed species are the same, and the Federal agency concludes the action is not likely to adversely affect ESA listed species, the guidance attached to the February 28, 2001 finding notes that no NMFS EFH Conservation Recommendations are necessary in most cases. However, in those situations action agencies are still required to complete an EFH consultation with NMFS, including an EFH Assessment, and NMFS should review that information to verify whether to provide EFH Conservation Recommendations under section 305(b)(4)(A) of the Magnuson-Stevens Act. Since the action agency must write to NMFS and request written concurrence with its “not likely to adversely affect” determination for ESA listed species under 50 CFR 402.13(a), the action agency should include in that letter a brief description of effects to EFH, and NMFS should state in the response letter whether NMFS is providing EFH Conservation Recommendations. If NMFS does not concur with the agency’s evaluation of effects to EFH, or if NMFS needs additional information, NMFS can request a more detailed EFH Assessment, as appropriate.

In summary, as detailed in the February 28, 2001 guidance, EFH consultations for actions involving minor adverse effects may be combined with informal ESA consultations. In cases where the managed and listed species are identical, or if some (but not all) managed and listed species are the same, the action agency’s letter requesting concurrence with a “not likely to adversely affect” determination for listed species should also include a brief assessment of effects to EFH. NMFS’ response should state whether NMFS agrees with the action agency’s effect determinations under both the ESA and the Magnuson-Stevens Act and whether NMFS is providing EFH Conservation Recommendations.