

timely notification of actions that may adversely affect EFH; 2) notification must include an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH Assessments discussed in section 600.920(g); and 3) NMFS must have made a finding pursuant to section 600.920(e)(3) that the existing process satisfies the requirements of section 305(b)(2) of the MSA. This guidance describes the conditions whereby MSA EFH consultation requirements can be met when combined with an ESA section 7 consultation process.

III. Guidance: National Finding

NMFS finds that the ESA section 7 consultation process may be used by NMFS and any Federal action agency to satisfy the MSA EFH consultation requirements, provided consultations are implemented consistent with this procedure and directive 03-201-05. NMFS Regional Offices should convey this finding to Federal agencies, as appropriate. If NMFS has made a finding for another environmental review process that meets the requirements for completing EFH consultations, the Federal action agency may decide which process to use for any given EFH consultation. The basis for this finding is discussed below.

1. Notification

The ESA regulations prescribe specific time limits for completing section 7 consultation. If the Federal action agency clearly states that it is notifying NMFS regarding a proposed action that may adversely affect EFH at the same time that informal or formal ESA consultation is initiated, then the existing ESA consultation process would provide NMFS with sufficient notification to analyze the effects of the proposed action on EFH and provide EFH Conservation Recommendations.

2. EFH Assessment

As described in the attached "Guidance for Integrating EFH Consultations with ESA Section 7 Consultations," the information prepared by the Federal agency for informal or formal ESA consultation as outlined in 50 CFR 402.14 may also serve as the EFH Assessment provided it is clearly labeled as such and includes all the required components of an EFH Assessment as outlined in 50 CFR 600.920(g).

3. EFH Conservation Recommendations

Under section 305(b)(4)(A) of the MSA, NMFS is required to provide EFH Conservation Recommendations to Federal and state agencies for actions that would adversely affect EFH. For any Federal action requiring consultation under both statutes, the results of the ESA and EFH consultations should be provided in a single transmittal from NMFS to the Federal agency. As detailed in directive 03-201-05, if EFH consultation is integrated with informal ESA consultation, EFH Conservation Recommendations should be transmitted in a separate, clearly defined section of the informal ESA concurrence letter. If EFH consultation is integrated with formal ESA consultation, EFH Conservation Recommendations should be presented either within the cover letter or at the end of the transmittal following all the components of the ESA biological opinion.

4. Federal Agency Response

As required by section 305(b)(4)(B) of the MSA and 50 CFR 600.920(j), the Federal agency must provide a detailed response in writing to NMFS within 30 days after receiving NMFS' EFH Conservation Recommendations. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS' EFH Conservation Recommendations, the Federal agency 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.

If the Federal agency is not able to respond fully within 30 days, the Federal agency should provide NMFS with an interim written response stating that it has received NMFS' EFH Conservation Recommendations and will respond in detail at least 10 days prior to a final decision on the action.

5. Dispute Resolution

If the Federal action agency decision is inconsistent with a NMFS' EFH Conservation Recommendation, the NOAA Assistant Administrator for Fisheries may request a meeting with the head of the Federal action agency to discuss the proposed action and opportunities for resolving any disagreements (50 CFR 600.920 (j)(2)). NMFS will endeavor to resolve any such issues at the field level wherever possible.