Department of Commerce $ National Oceanic & Atmospheric Administration $ National Marine Fisheries Service

NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 03-201-11 December 16, 2004
Habitat Conservation and Restoration ***Essential Fish Habitat Policy***
GUIDE TO EFH CONSULTATIONS
NOTICE: This publication is available at: http://www.nmfs.noaa.gov/directives/.
OPR: F/HC Certified by: F/HC Type of Issuance: Renewed August 2014
SUMMARY OF REVISIONS: Signed _____ [Approving Authority name] Date [Approving Authority title]

ESSENTIAL FISH HABITAT CONSULTATION GUIDANCE

Version 1.1

April 2004

National Marine Fisheries Service
Office of Habitat Conservation
Silver Spring, Maryland

Table of Contents:

Introduction..... ii

Definitions..... iv

1. Affect Determinations and Consultation..... 1.1

2. Use of Existing Procedures for EFH Consultation..... 2.1
   - Developing a Finding 2.1
   - National Environmental Policy Act..... 2.2
   - Endangered Species Act..... 2.4
   - Clean Water Act/Rivers and Harbors Act/Marine Protection, Research, and Sanctuaries Act..... 2.7
   - Federal Power Act..... 2.8
   - Fish and Wildlife Coordination Act..... 2.10

3. EFH General Concurrences..... 3.1

4. Abbreviated and Expanded Consultation..... 4.1

5. Programmatic EFH Consultations 5.1

6. Coordination with the Fishery Management Councils..... 6.1

7. EFH Conservation Recommendations to State Agencies..... 7.1

Appendix A - Statutory and Regulatory Language..... A.1

Appendix B - Examples of Consultation Documents B.1

Appendix C - Guidance for Integrating EFH with ESA Section 7 Consultations..... C. 1

Appendix D - Guidance for EFH Consultations on Fishery Management Actions..... D. 1

Appendix E - EFH Consultation Agreements..... E. 1

Introduction

The consultation requirements of §305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA;16 U.S.C. 1855(b)) provide that:

- Federal agencies must consult with the Secretary on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect essential fish habitat (EFH);

- the Secretary shall provide recommendations (which may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH) to conserve EFH to Federal or state agencies for activities that would adversely affect EFH.

- the Federal action agency must provide a detailed response in writing to the National Marine Fisheries Service (NOAA Fisheries) and to any Council commenting under §305(b)(3) of the MSA within 30 days after receiving an EFH Conservation Recommendation

The Department of Commerce's guidelines for implementing the EFH coordination and consultation provisions of the MSA are at 50 CFR 600.905 - 930. These guidelines provide definitions and procedures for satisfying the EFH consultation requirements, that include the use of existing environmental review processes, General Concurrences, programmatic consultations or individual EFH consultations (i.e., abbreviated, expanded) when an existing process is not available. The EFH guidelines also address coordination with the Fishery Management Councils (Councils), NOAA Fisheries EFH Conservation Recommendations to Federal and state agencies, and Council comments and recommendations to Federal and state agencies.

This document was developed to provide additional guidance on the procedures that have been developed to assist NOAA Fisheries and other Federal agencies in addressing the EFH coordination and consultation requirements established by MSA and the EFH consultation guidelines. This document also establishes a consistent, efficient approach to conducting consultations. Specifically, this guidance is meant to facilitate the use of existing environmental review procedures as the primary mechanism for EFH consultations, streamline the consultative requirements for activities minimally affecting EFH, and establish a consistent, efficient approach to conducting programmatic and individual consultations.

This guidance does not set absolute criteria for EFH consultation, but does suggest how the EFH consultation requirements should be met by NOAA Fisheries and Federal action agencies. Regional situations will inevitably result in regional differences in how EFH consultations are conducted. However, the fundamental concept of minimizing duplication while fully complying with the requirements of the MSA, embodied in this guidance, should be applied to all EFH consultations.

Examples of typical EFH documents are included in Appendix B. These examples should be adapted to meet specific circumstances, and do not represent all possible permutations of the EFH consultation process. NOAA Fisheries staff who develop EFH documents, such as findings, General Concurrences, and programmatic EFH Conservation Recommendations, should coordinate with the appropriate General Counsels, other regions, and the Office of Habitat Conservation to encourage consistency, where appropriate, and to allow staff to learn from each other as this new program is implemented. National EFH findings and guidance documents are provided in Appendices C-E. The procedures in these documents should be utilized, when applicable, to streamline EFH consultations completed in the regions.

This guidance will be updated as needed to provide clarification, revisions, or additional information and examples. Revised or new material will be sent to every NOAA Fisheries staff person who receives a copy of this guidance from the Office of Habitat Conservation in Silver Spring, Maryland. Anyone providing copies of this guidance to other interested parties should ensure that guidance updates are provided to them also.

This guidance was developed by National Oceanic and Atmospheric Administration (NOAA) staff: Jon Kurland and Jeanne Hanson, Habitat Conservation Division in the Alaska Regional Office; Susan-Marie Stedman, Office of Habitat Conservation (HC) in Silver Spring, Maryland; Jane Hannuksela, General Counsel, Seattle, Washington; revisions were made by David MacDuffee, HC; with input from other NOAA staff throughout the agency. Comments, questions, or suggestions should be addressed to David MacDuffee at (301) 713-4300 or David.MacDuffee@noaa.gov.

Definitions[1]

Adverse effect - any impact which reduces the quality and/or quantity of essential fish habitat. Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of essential fish habitat (EFH). Adverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions. (50 CFR 600.810)

Essential fish habitat (EFH) - those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity (MSA § 3(10)). For the purpose of interpreting the definition of essential fish habitat: "Waters" include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; "substrate" includes sediment, hard bottom, structures underlying the waters, and associated biological communities; "necessary" means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle. EFH is described by the Councils in amendments to Fishery Management Plans, and is approved by the Secretary of Commerce acting through NOAA Fisheries. (50 CFR 600.10)

EFH Assessment - an analysis of the effects of a proposed action on EFH. The level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. Mandatory contents are: a description of the proposed action; an analysis of the potential adverse effects of that action on EFH and the managed species; the Federal action agency's conclusions regarding the effects of the action on EFH; and proposed mitigation, if applicable. If appropriate, the assessment should also include: the results of on-site inspections; the views of recognized experts on affected habitat or fish species; a review of pertinent literature; an alternatives analysis; and any other relevant information. (50 CFR 600.920 (e)). For additional details, see "Preparing Essential Fish Habitat Assessments: A Guide for Federal Action Agencies" (available at: http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm).

EFH Conservation Recommendation - a recommendation provided by NOAA Fisheries to a Federal or state agency pursuant to section 305(b)(4)(A) of the MSA regarding measures that can be taken by that agency to conserve EFH. EFH Conservation Recommendations may be provided as part of an EFH consultation with a Federal agency, or may be provided independently by NOAA Fisheries to any Federal or state agency whose actions would adversely affect EFH.

---

[1]Unless noted, these definitions are not quotes from statute or regulation.

EFH consultation - the process of satisfying the Federal agency consultation and response requirements of section 305(b)(2) and 305(b)(4)(B) of the MSA, and the EFH Conservation Recommendation requirement of section 305(b)(4)(A) of that Act. When completed, an EFH consultation generally consists of: 1) notification to NOAA Fisheries of a Federal action that may adversely affect EFH, 2) an EFH assessment provided to NOAA Fisheries, 3) EFH Conservation Recommendations provided by NOAA Fisheries to the Federal action agency, and 4) the Federal agency's response to NOAA Fisheries' EFH Conservation Recommendations.

Federal action - any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by a Federal agency. (50 CFR 600.910; MSA § 305(b)(2))

Finding - a determination by NOAA Fisheries that an existing or modified consultation/coordination process satisfies the Federal agency consultation requirements of section 305 of the MSA.

1. Affect Determinations and Consultation

The MSA requires Federal agencies to consult with NOAA Fisheries on actions that may adversely affect EFH. Generally, EFH consultation consists of a Federal agency notifying NOAA Fisheries regarding an action that may adversely affect EFH (50 CFR 600.920(a)(3)) and providing NOAA Fisheries with an EFH Assessment (50 CFR 600.920(e)), NOAA Fisheries providing EFH Conservation Recommendations to avoid and/or minimize adverse effects to EFH (MSA § 305(b)(4)(A)), and the Federal agency responding to NOAA Fisheries' EFH Conservation Recommendations (50 CFR 600.920(k)(1)). Federal agencies may use one of the five following approaches to fulfill the EFH consultation requirements:

- use of existing environmental review procedures
- general concurrence
- abbreviated consultation
- expanded consultation
- programmatic consultation

These approaches are discussed in detail in subsequent chapters of this guidance document.

Federal Action Agency Affect Determinations

The trigger for EFH consultation is a Federal action agency's determination that an action or proposed action, funded, authorized or undertaken by that agency *may adversely affect EFH*. If a Federal agency makes such a determination, then EFH consultation is required.

If a Federal action agency determines that an action does not meet the *may adversely affect EFH* test (i.e., the action will not adversely affect EFH), no consultation is required. If an agency does submit a "no effect on EFH" letter, NOAA Fisheries is under no obligation to concur. If an action agency asks for concurrence, NOAA Fisheries may inform the Federal action agency that the MSA and EFH guidelines do not require NOAA Fisheries to concur on "no effect on EFH" determinations (an example of this language is provided in Appendix B). NOAA Fisheries may also provide concurrence, if appropriate.

If, as a result of the agency's request for concurrence or through other means, NOAA Fisheries becomes aware of potential adverse effects on EFH, NOAA Fisheries should so inform the Federal action agency and take action as described in the following section.

NOAA Fisheries Affect Determinations

If NOAA Fisheries receives information regarding a Federal action that *may adversely affect EFH*, and the action agency has not initiated EFH consultation, NOAA Fisheries may inform the action agency of the MSA requirement to consult on actions that may adversely affect EFH. If the action agency has determined that their action will not adversely affect EFH, and NOAA

Fisheries disagrees, NOAA Fisheries may ask the Federal agency to initiate EFH consultation. However, the Federal agency is not required to agree to NOAA Fisheries' request. If NOAA Fisheries believes that a Federal agency action would adversely affect EFH, NOAA Fisheries is required by the MSA to provide EFH Conservation Recommendations regardless of whether the Federal agency has initiated EFH consultation. The Federal action agency is required to respond to these recommendations in writing regardless of whether the action agency initiated consultation.

In the context of determining whether an action "may adversely affect" EFH, it is appropriate to consider avoidance and minimization measures that are incorporated into the proposed action. Measures such as careful alternatives analysis, design stipulations, and "best management practices" can lessen or eliminate potential adverse effects to EFH, and thus can narrow the scope of necessary EFH Conservation Recommendations. Nevertheless, it is difficult to conceive of situations involving active construction in EFH without crossing the "may adversely affect" threshold that requires Federal agencies to consult. In contrast to avoidance and minimization, proposals for compensatory mitigation should not be used to counterbalance or buy down potential adverse effects to EFH below the "may adversely affect" threshold. EFH consultations need to evaluate potential adverse effects of actions separately from any proposed compensatory mitigation, even though the net effect of a particular project could be considered neutral or even positive for EFH if sufficient compensatory mitigation is attached to the action.

Consultation is required for emergency Federal actions that may adversely affect EFH, such as hazardous material clean-up, response to natural disasters, or actions to protect public safety. Federal agencies should contact NOAA Fisheries early in emergency response planning, but may consult after-the-fact if consultation on an expedited basis is not practicable before taking the actions.

Consultation Initiation and EFH Assessment

An EFH consultation is generally initiated when notification and an EFH Assessment are provided to NOAA Fisheries for a Federal action that may adversely affect EFH, although agencies may (and should be encouraged to) discuss EFH concerns in pre-application planning and other early phases of project development.

Completion of Consultation

An EFH consultation generally is concluded when a Federal agency provides a response to NOAA Fisheries' EFH Conservation Recommendations. However, in the case of programmatic consultations and General Concurrences, additional consultation for specific types of activities may be required after an agency responds to the EFH Conservation Recommendations.

Furthermore, the EFH guidelines allow the NOAA Fisheries Assistant Administrator to request further review of Federal action agency decisions that are contrary to NOAA Fisheries' recommendations (50 CFR 600.920(k)(2)). The Federal agency response must be provided

within 30 days after receiving an EFH Conservation Recommendation and at least 10 days before final action on the project if the response is inconsistent with any of the conservation recommendations (50 CFR 600.920(k)(1)).

Finally, supplemental consultation is required for renewals, reviews, or substantial revisions of actions if through the renewal, review, or revision adverse effects on EFH resulting from the action are changed, or if new information becomes available that affects the basis for NOAA Fisheries' EFH Conservation Recommendations (50 CFR 600.920(l)).

2. Use of Existing Procedures for EFH Consultation

Background

EFH consultations should be consolidated with existing environmental review procedures to the greatest extent possible. In order to use an existing procedure the following criteria must be met: NOAA Fisheries must make a finding that the existing process will satisfy the MSA requirements, the process must provide NOAA Fisheries with timely notification (sufficient to develop EFH Conservation Recommendations), and the Federal agency must provide NOAA Fisheries with an assessment of the impacts on EFH (50 CFR 600.920(f)(1)).

Many existing environmental review procedures include some or all of the EFH consultation elements, but most require some modifications or additions to fully comply with MSA and the EFH guidelines. The following are descriptions of the four most common environmental review procedures used for coordination between NOAA Fisheries and other Federal agencies on activities in aquatic habitat, and how those procedures can be used for EFH consultation.

In many cases, a Federal activity requiring consultation will be subject to more than one existing consultation process (e.g., Endangered Species Act (ESA) section 7 consultation as well as the National Environmental Policy Act (NEPA)). In this instance, NOAA Fisheries and the Federal action agency may decide which existing process provides the most efficient and effective coordination with the Federal agency, and thus, should be used to complete EFH consultation.

Developing a Finding

NOAA Fisheries must issue a finding before an existing environmental review process may serve as the means for EFH consultation. Either NOAA Fisheries or a Federal agency may initiate discussions on using an existing procedure to accomplish EFH consultation. After discussions regarding the Federal agency's existing process and the EFH consultation requirements, NOAA Fisheries and the Federal agency should agree on how to fulfill the requirements of EFH consultation using the existing process. At this point, the Federal agency could write a letter requesting that NOAA Fisheries make a finding that the existing process can be used to meet the EFH consultation requirements. NOAA Fisheries would respond with a letter that details how the existing process will be used for EFH consultation. Alternatively, NOAA Fisheries could send the Federal action agency a letter detailing how the two agencies have agreed to use an existing procedure for EFH consultation, and the Federal agency responds in writing, confirming that agreement. A finding should include four essential elements:

1) How the action agency will notify NOAA Fisheries of projects with the potential to adversely affect EFH;
2) How the EFH Assessment will be provided;
3) How NOAA Fisheries will provide EFH Conservation Recommendations; and
4) How the action agency will respond to those comments.

If NOAA Fisheries and the Federal agency can agree, the finding could also include a process for further review of projects when a Federal action agency disagrees with NOAA Fisheries' EFH Conservation Recommendations. Sample findings are included in Appendix B.

If NOAA Fisheries finds that an agency's existing process will not meet the EFH consultation requirements, NOAA Fisheries should respond with a letter containing language similar to the sample provided in Appendix B.

Because many existing processes are implemented somewhat differently in different regions, the NOAA Fisheries regions will usually be the most appropriate level for developing a finding. There may be cases, however, when NOAA Fisheries headquarters office (i.e., Office of Habitat Conservation) will develop a finding, with input from the regions. A number of national and regional findings have been completed to date. A list of completed findings is provided at: http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm.

Most Commonly-Used Existing Processes

National and/or Regional EFH findings have been developed for most of the following processes. NOAA Fisheries staff should verify that appropriate findings are in place before using existing processes to complete EFH consultations. An updated list of EFH findings is available on the NOAA Fisheries website.

National Environmental Policy Act (NEPA):

The Environmental Impact Statement (EIS) process:

1) **Notification** - Notification occurs when NOAA Fisheries receives a draft EIS. The action agency should clearly state in the draft EIS that the NEPA process is being used for EFH consultation. Informally, the scoping process will often provide early notification before the draft EIS is prepared.

2) **EFH Assessment** - Impact on EFH should be addressed in the draft EIS, in a chapter or section clearly titled "EFH" so that a reader can identify the EFH information from the table of contents. This section may reference pertinent information in the Affected Environment and Environmental Consequences chapters. The information should include both an identification of affected EFH and an assessment of impacts, including all of the information outlined at 50 CFR 600.920(e). For additional details, see "Preparing Essential Fish Habitat Assessments: A Guide for Federal Action Agencies" (available at: http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm).

3) **EFH Conservation Recommendations** - NOAA Fisheries provides EFH Conservation Recommendations as part of NOAA's comments on the draft EIS in a separate section of NOAA's comment letter called "EFH Conservation Recommendations." Under existing NOAA procedures, EIS comments are normally

provided to NOAA for forwarding to the Federal agency, but may also be provided directly to the Federal agency by NOAA Fisheries at the same time.

4) **Agency response** - Within 30 days of receiving EFH Conservation Recommendations, the Federal agency sends a preliminary response stating that the agency has received NOAA Fisheries' EFH Conservation Recommendations, will consider them fully, has not yet made a decision on the project, but will respond fully when the agency has made a decision in approximately ## days. The agency then provides a final response in the final EIS, in a section or chapter clearly labeled as such. If the final EIS comes out within 30 days of the agency receiving NOAA Fisheries' recommendations, the preliminary letter is not needed. Under NEPA regulations, the Record of Decision (ROD) cannot be signed until 30 days after the final EIS goes out, so NOAA Fisheries will have time to request further review, if necessary.

Alternatively, the Federal agency may send a final response prior to the issuance of the final EIS. This would allow time for NOAA Fisheries to request further review before the EIS is finalized.

The Environmental Assessment (EA) Process:

1) **Notification** - Notification occurs when NOAA Fisheries receives a draft EA. It should be clearly stated in the EA or transmittal letter that the agency is initiating EFH consultation. Many agencies do not normally circulate draft EAs for comment, but if the agency wants to use the EA process for EFH consultation, they must give NOAA Fisheries a draft EA. If an agency does not wish to provide a draft EA to NOAA Fisheries, they may use some other process for EFH consultation.

2) **EFH Assessment** - Effects on EFH should be addressed in the EA, in either a chapter or a section clearly titled "EFH." This section may reference pertinent information in other sections. The information must include all the information required in an EFH Assessment as outlined at 50 CFR 600.920(e).

3) **EFH Conservation Recommendations** - NOAA Fisheries provides EFH Conservation Recommendations as part of the comments on the EA, in a separate section of the comment letter called "EFH Conservation Recommendations." Under existing NOAA procedures, EA comments are normally provided from NOAA Fisheries directly to the Federal agency.

4) **Agency response** - Within 30 days of receiving EFH Conservation Recommendations, the Federal agency sends a preliminary response stating that the agency has received NOAA Fisheries' EFH Conservation Recommendations, will consider them fully, has not yet made a decision on the project, but will respond fully when a decision has been made, in approximately ## days. The agency then provides a final response in a detailed letter to NOAA Fisheries. The response must be provided at least 10 days before the agency

signs a FONSI if the response is inconsistent with any of NOAA Fisheries' conservation recommendations. If the agency makes a decision within 30 days of receiving NOAA Fisheries recommendations, the preliminary letter is not necessary.

Endangered Species Act (ESA)

There are many situations where designated EFH overlaps with the habitat (including critical habitat) of species listed as threatened or endangered under the ESA. Thus, a proposed Federal action could affect both a listed species and its designated critical habitat and adversely affect EFH, necessitating consultation under both section 7 of the ESA and section 305(b)(2) of the MSA. Because of this dual obligation, the Federal action agency and NOAA Fisheries can find efficiencies by integrating EFH and ESA consultations. The process for combining ESA and EFH consultation depends upon the extent to which the action involves effects to EFH and species listed under the ESA within the action area, and the number of affected species in common between the two statutes. Three scenarios exist: the MSA managed species and ESA listed species are identical; some (but not all) of the MSA managed species and ESA listed species are the same (other affected species may be listed but not managed, or managed but not listed); or none of the MSA managed species are listed under the ESA. When integrating ESA and EFH consultations for each of the three scenarios, care should be taken by NOAA Fisheries to avoid confusing the action agency on the different components of ESA and EFH consultations.

In addition to section 7 consultation, NOAA Fisheries takes several types of internal actions related to ESA, including approving Habitat Conservation Plans, issuing section 10 incidental take and scientific research or enhancement permits, and developing Recovery Plans. If any of these actions may have an adverse effect on EFH, an EFH consultation will be required.

<u>Early Coordination:</u>

ESA and EFH consultations often involve discussions with Federal action agencies at early stages in the project planning process prior to initiation of consultation. When an action agency requests information on the presence of ESA listed species or critical habitat in a particular location, that agency should also be informed of the presence of EFH and the associated MSA managed species and life stages, if applicable. Likewise, if an action agency requests information on the presence of EFH in a particular location, that agency should also be informed of the presence of ESA listed species and critical habitat, if applicable. Many times, issues related to adverse effects on ESA listed species and their critical habitat can be resolved through early planning and coordination efforts. Similarly, issues related to potential adverse effects on the EFH should be discussed along with ESA concerns during preliminary planning and coordination.

<u>ESA Section 7 consultation</u>:

In many cases, ESA consultation and EFH consultation can be integrated in order to streamline the environmental review process for both NOAA Fisheries and the Federal action agency. A

National Finding and Guidance for Integrating EFH and ESA section 7 consultation was issued by NOAA Fisheries in January 2001 (see Appendix C). Additional Regional Findings have also been completed by some of the NOAA Fisheries regions (see Appendix E).

If the Federal action agency determines that the proposed action "may affect" listed species or critical habitat, then the Federal action agency must request section 7 consultation with NOAA Fisheries. Through informal consultation, projects that would have an adverse effect as proposed can be altered to avoid adverse effects on listed species or critical habitat. If, based on information provided by the Federal action agency, NOAA Fisheries finds that the proposed action "may affect" but is "not likely to adversely affect" listed species or critical habitat, NOAA Fisheries completes informal consultation by providing the Federal action agency with a concurrence letter (50 CFR 402.13(a)). If NOAA Fisheries finds that an action "is likely to adversely affect" listed species or critical habitat, NOAA Fisheries completes formal consultation by providing the Federal action agency with a Biological Opinion (BO). Where applicable, EFH consultation may be combined with the ESA consultation process.

The following process is intended to help integrate these consultation processes, and is based on the national EFH finding and guidance for integrating EFH and ESA consultation (Appendix C):

1) **Notification** - The Federal agency should clearly state that it is notifying NOAA Fisheries regarding a proposed action that may adversely affect EFH at the same time that informal or formal ESA consultation is initiated.

2) **EFH Assessment** - 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 at 50 CFR 600.920(e).

3) **EFH Conservation Recommendations** - The results of the ESA and EFH consultations should be provided in a single transmittal from NOAA Fisheries to the Federal agency. If EFH consultation is integrated with informal ESA consultation, EFH Conservation Recommendations should be transmitted in a separate, clearly labeled 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 BO.

4) **Agency response** - Within 30 days of receiving EFH Conservation Recommendations, the Federal agency sends a preliminary response stating that the agency has received NOAA Fisheries' EFH Conservation Recommendations, will consider them fully, has not yet made a decision on the project, but will respond fully when a decision is made, in approximately ## days. The agency then provides a final response in a detailed letter to NOAA Fisheries. The response must be provided at least 10 days before the agency signs a FONSI if the response is inconsistent with any of

NOAA Fisheries' Conservation Recommendations. If the agency makes a decision within 30 days of the agency receiving the Conservation Recommendations, the preliminary letter is not needed.

ESA Section 10 Permits:

Section 10(a)(1)(A) permits are issued to Federal and non-Federal entities by NOAA Fisheries for activities involving take of listed species otherwise prohibited by section 9 if such taking is for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations. Section 10(a)(1)(B) permits are issued to non-Federal entities for any other activities involving take of listed species otherwise prohibited by section 9 if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. NOAA Fisheries' issuance of both a section 10(a)(1)(A) and section 10(a)(1)(B) permit are Federal actions subject to section 7 of the ESA and NEPA. At present, all non-salmonid section 10(a)(1)(A) permits and section 10(a)(1)(B) permits are issued from NOAA Fisheries HQ.

Section 10(a)(2)(A) requires applicants for a section 10(a)(1)(B) incidental take permit to submit a "conservation plan" - referred to as a Habitat Conservation Plan or HCP. NOAA Fisheries approves HCPs in a process that involves both NEPA and the ESA section 7 consultation process. Ideally, EFH concerns for listed and non-listed species should be identified during the HCP development phase when the applicant's proposed activity is being integrated with listed species protection needs and early section 7 consultation is in progress. This phase is typically conducted by the applicant with technical assistance from NOAA Fisheries and ends when a "complete application package" is submitted. If the applicant does not agree to include non-listed species in the HCP, non-listed species must still be addressed in NOAA Fisheries' NEPA analysis supporting issuance of the section 10 permit.

NOAA Fisheries' issuance of the permits constitutes a Federal action subject to EFH consultation. Thus, NOAA Fisheries should incorporate the EFH Assessment into the draft NEPA document and then issue EFH Conservation Recommendations during the public comment period, rather than waiting for the section 7 consultation process to conclude. If EFH Conservation Recommendations are adopted for a species that is listed under the ESA, and those recommendations are also incorporated into the proposed action for which an ESA section 7 consultation is performed, any deviation from them would trigger re-initiation of ESA consultation. To comply with the response requirement of the MSA, NOAA Fisheries should respond to the record within 30 days of receiving the EFH Conservation Recommendations. This response must be provided at least 10 days before issuance of the section 10 permit if it is inconsistent with any of the recommendations.

Recovery Plans:

Recovery Plans for listed species are sent out for public comment in a draft form and then finalized. Although EFH consultation could occur during the public comment period, coordination between regional PR and HC staff during development of the draft Recovery Plan is preferable. If PR staff determine that the Recovery Plan may have an adverse effect on EFH, a preliminary draft of the Recovery Plan should be sent to HC staff, along with the information required for an EFH Assessment. HC staff should then provide EFH Conservation Recommendations on the preliminary draft, to which PR should respond.

Clean Water Act/Rivers and Harbors Act/Marine Protection, Research, and Sanctuaries Act

Individual Permits:

On July 15, 1999 NOAA Fisheries issued a national finding that the individual permit process (IP) used by the ACOE to authorize projects under Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act (RHA), and Section 103 of the Marine Protection Research and Sanctuaries Act (MPRSA) can be used to meet the EFH consultation requirements of the MSA. The national finding outlines a process for incorporating information needs and other elements of EFH consultation into the IP process. At the District and Regional level, NOAA Fisheries and ACOE staff are encouraged to meet to develop a regional finding tailored to local procedures. As part of developing that finding, NOAA Fisheries and ACOE should discuss the information needs for EFH Assessments and the project types likely to require expanded consultation (i.e., substantial adverse effects on EFH).

Just as the ACOE makes the initial determination of whether or not a proposed project "may adversely affect" EFH, the ACOE should also make the initial determination of whether abbreviated or expanded consultation is appropriate. However, if NOAA Fisheries believes that expanded consultation is required for a particular project, NOAA Fisheries should inform the ACOE of this conclusion at the earliest opportunity. Under the 1999 national finding with the ACOE, the procedure for using the IP process for completing EFH consultation is:

1) **Notification** - Notification occurs when NOAA Fisheries receives a public notice from the ACOE on the project.

2) **EFH Assessment** -
a) For those projects that require abbreviated consultation, the ACOE will put a brief EFH Assessment in the public notice (e.g., "This project will fill 1.3 acres of EFH for juvenile summer flounder. Loss of this nursery habitat may adversely affect summer flounder, but the ACOE has made a preliminary determination that the adverse effect on EFH will not be substantial.") The EFH Assessment will also address cumulative effects if such information is available.

b) For those projects that the ACOE determines require expanded consultation, the ACOE will provide NOAA Fisheries with a detailed EFH Assessment. This Assessment may be a separate document or it may be a component of another document, such as a draft Statement of Findings (SOF) or draft EA, as long as the EFH Assessment is clearly identified. The EFH Assessment will be provided to NOAA Fisheries in a time frame sufficient for developing EFH Conservation Recommendations (generally 30 days, but more or less time may be needed depending on the complexity of the project).

c) If, upon receiving a public notice (or in pre-application consultation), NOAA Fisheries concludes that a project has the potential for substantial adverse impacts on EFH, NOAA Fisheries will so inform the ACOE and request that the ACOE conduct expanded EFH consultation and provide a detailed EFH Assessment. This request may occur after ACOE has initiated abbreviated EFH consultation, or before any EFH consultation has occurred. If a public comment period for the project has already begun, NOAA Fisheries may request an extension of the comment period (under Part II. 4 of the 404(q) MOA with Army) to allow time for the ACOE to provide the EFH Assessment, and for NOAA Fisheries to develop EFH Conservation Recommendations. If the ACOE does not agree to conduct expanded consultation, NOAA Fisheries will provide EFH Conservation Recommendations based on whatever information has been provided.

3) **EFH Conservation Recommendations** - NOAA Fisheries provides EFH Conservation Recommendations in response to the public notice.

4) **Response** - The ACOE responds to NOAA Fisheries' EFH Conservation Recommendations in either a letter or a revised SOF or EA, at least 10 days before the permit is issued. If the ACOE will not be making a decision within 30 days of receiving NOAA Fisheries' recommendations, the ACOE will send a preliminary response within 30 days stating that the ACOE has received the EFH Conservation Recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NOAA Fisheries fully when a decision is made in approximately ## days.

<u>General Permits (State Programmatic, Regional, or Nationwide)</u>

General permits usually authorize, after very short comment periods, actions that should have minimal adverse impact, both individually and cumulatively. In some cases a General Concurrence or programmatic consultation is appropriate for actions authorized by those permits. In other cases, abbreviated consultation might be appropriate, particularly with state programmatic general permits, if the ACOE and NOAA Fisheries can agree on acceptable time frames. In that case, the process would be similar to that for individual permits.

Federal Power Act (for non-Federal hydropower projects)

The Federal Power Act authorizes NOAA Fisheries (via delegation from Commerce) to provide mandatory fishway prescriptions (under FPA section 18), and recommendations under sections

10(j) and 10(a), when non-federal hydropower projects receive a new license from the Federal Energy Regulatory Commission (FERC). Projects receive 30-50 year licenses, and the licensing process takes several years to complete. Generally, FERC and the applicant coordinate the process, with extensive consultation among federal and state agencies, Indian tribes, and other stakeholders. FERC has the responsibility to generate balanced license conditions, and can reject many recommendations that are supplied by stakeholders, including federal agencies.

However, section 18 fishway prescriptions are mandatory under the FPA, and must be incorporated into the license terms, as long as the administrative record supports them. The federal action is considered to be FERC's (because FERC issues the license), although NOAA Fisheries (and the U.S. Fish and Wildlife Service) develop and submit section 18 prescriptions.

FERC implemented a new licensing process in October 2003, with a two-year transition period. During this transition period, applicants will have the choice between using the Traditional Licensing Process (TLP), the Alternative Licensing Process (ALP) and the new Integrated Licensing Process (ILP). After two years, the ILP will become the default process. Regardless of the chosen processes, FERC must complete an EFH consultation if the action may adversely affect EFH.

Steps for adding EFH consultation to FERC's licensing process:

1) **Notification** - Notification occurs when FERC receives the completed application from the applicant and issues a public notice soliciting comments, interventions, and preliminary terms and conditions. Under the TLP and ILP this notice is called the ready for environmental analysis (REA) notice. Under the ALP, it is simply a notice requesting the above item. In all three cases, the notice follows receipt and acceptance of the application by FERC. The notice should include a statement that the proposed action may adversely affect EFH and that FERC is initiating EFH consultation.

2) **EFH Assessment** - FERC should include an EFH Assessment in the EA or draft EIS developed during the licensing process. The EFH Assessment information must either be clearly identified in a separate section of the EA or draft EIS, or clearly referenced. The level of detail in the EFH Assessment should be commensurate with the anticipated extent of adverse impacts on EFH.

3) **EFH Conservation Recommendations** - At NOAA Fisheries' discretion, "preliminary" EFH Conservation Recommendations may be submitted to FERC along with the 10(j) recommendations and preliminary section 18 prescriptions within 60 days of receiving the REA notice. FERC is not required to, but will normally provide a response to the preliminary EFH Recommendations. NOAA Fisheries will provide final EFH Conservation Recommendations to FERC within 30 days of receiving the EA or within 45 days of receiving the draft EIS.

4) **Agency response** - Consistent with the MSA, FERC will provide the commenting NOAA Fisheries Regional Office a detailed response in writing within 30 days after receiving EFH Conservation Recommendations. If the final license order is issued within this time frame, the response can be included or attached to the order. If the order is not issued within 30 days, FERC will provide a separate interim response acknowledging receipt of the EFH Conservation Recommendations, addressing them to the extent possible, and stating that a final response will be forthcoming. Once the Commission acts, the final response should be provided in a letter to NOAA Fisheries accompanied by a copy of the Commission Order.

5) **Request for Rehearing** - According to FERC's regulations, parties have 30 days to appeal a license order by requesting a rehearing. NOAA Fisheries may appeal FERC's treatment of the EFH recommendations, if warranted.

Post-Licensing

If a post-licensing action may adversely affect EFH, the need for EFH consultation will depend on whether consultation has already been conducted, and whether the action was anticipated during the original licensing. If possible adverse effects on EFH have already been analyzed and addressed in the EFH consultation completed for the existing licensing, additional consultation may not be necessary. If possible adverse effects on EFH have not been previously analyzed, then FERC should complete EFH consultation following the procedures outlined above, with the following modifications:

1) **Notification** - FERC's post-licensing process does not always include an REA notice. Thus, FERC should notify NOAA Fisheries regarding a proposed action that may adversely affect EFH in the "Notice Soliciting Comments or Motions to Intervene."

2) **EFH Conservation Recommendations** - NOAA Fisheries may issue "preliminary" EFH Conservation Recommendations during the comment period (30-45 days) for the "Notice Soliciting Comments or Motions to Intervene."

Fish and Wildlife Coordination Act (FWCA)

The FWCA (16 U.S.C. 661-666c) requires that wildlife, including fish, receive equal consideration and be coordinated with other aspects of water resource development. This is accomplished by requiring consultation with the U.S. Fish and Wildlife Service, NOAA Fisheries, and appropriate state agencies whenever any body of water is proposed to be modified in any way and a Federal permit or license is required. These agencies determine the possible harm to fish and wildlife resources, the measures needed to both prevent the damage to and loss of these resources, and the measures needed to develop and improve the resources, in connection with water resource development. NOAA Fisheries submits comments to Federal licensing and

permitting agencies on the potential harm to living marine resources caused by the proposed water development project, and recommendations to prevent harm.[2]

Comments submitted under the authority of the FWCA may be integrated with the EFH consultation process. In many circumstances Federal actions may impact habitat of a fish species that does not have EFH described and identified for it, and therefore an EFH consultation is not warranted. However, recommendations on ways to avoid, minimize, or mitigate impacts on these habitats under the FWCA may be appropriate. In situations where an action may impact both EFH and non-EFH habitats, one document identifying the EFH Conservation Recommendations and the FWCA comments should be used. When both EFH Conservation Recommendations and FWCA comments are provided in the same document, specific headings titled "EFH Conservation Recommendations" and "Fish and Wildlife Coordination Act Comments" should be used to avoid confusing the Federal action agency. In situations where no EFH correspondence will be sent to the action agency, FWCA comments should be provided in a separate document.

[2] Buck, Eugene H., Summaries of Major Laws Implemented by the National Marine Fisheries Service, Congressional Research Service, March 24, 1995.

3. EFH General Concurrences

Background

Section 305(b)(2) of the MSA requires each Federal agency to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect EFH. The General Concurrence process is used to identify specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because NOAA Fisheries has determined that the identified types of actions will likely result in no more than minimal adverse effects to EFH individually and/or cumulatively. The development of General Concurrences must adhere to specific regulatory criteria, which are codified at 50 CFR 600.920(g).

General Concurrences may be developed at either the national or regional level. They should be used for categories of Federal actions that are similar in nature and similar in their impact on EFH. A General Concurrence is comparable to a categorical exclusion under NEPA in that it dispenses with the need for more formal environmental review for identified types of actions with minimal effect that can be evaluated as a group and for which NOAA Fisheries can conclude, based on an evaluation of potential effects to EFH, that case-by-case consultation is not necessary. All General Concurrences must include a tracking provision to ensure that cumulative adverse effects on EFH are no more than minimal.

Criteria for General Concurrences

NOAA Fisheries must determine that the actions to be covered by a General Concurrence meet these three criteria: (A) The actions must be similar in nature and similar in their impact on EFH; (B) The actions must not cause greater than minimal adverse effects on EFH when implemented individually; and (C) The actions must not cause greater than minimal cumulative adverse effects on EFH. The following guidelines should be used by NOAA Fisheries personnel to determine whether proposed actions meet the criteria for a General Concurrence:

- Actions considered "similar in nature" will typically be activities of a common type, size, and purpose, such as the construction of boat docks of certain dimensions.

- Actions that are "similar in their impact on EFH" should result in physical, chemical, and/or biological effects of a common extent and duration.

- Actions that would cause "minimal adverse effects on EFH when implemented individually" should be of such limited effect on EFH that Conservation Recommendations are generally not necessary to ensure that the quality and quantity of EFH are not diminished.

- Actions that do not "cause greater than minimal cumulative adverse effects on EFH" should not cause incremental impacts that would result in a substantive reduction in the quality and quantity of EFH when considered collectively.

NOAA Fisheries may also determine that certain categories of Federal actions meet the criteria in 50 CFR 600.920(g)(2) contingent upon project size limitations, seasonal restrictions, or other conditions necessary to ensure that the effects on EFH are minimal individually and cumulatively. In such cases, these conditions must be stated explicitly in the General Concurrence.

A higher level of scrutiny may be warranted if NOAA Fisheries is considering the development of a General Concurrence for actions affecting a Habitat Area of Particular Concern, particularly when determining whether the actions may cause greater than minimal adverse effects on EFH individually and/or cumulatively.

NOAA Fisheries may include a "kick-out" provision in a General Concurrence that would require notification for actions that may result in more than minimal impact, and for which further consultation may be required.

Process for Developing General Concurrences

A Federal agency may request that NOAA Fisheries develop a General Concurrence for specific types of agency actions, or NOAA Fisheries may develop a General Concurrence on its own initiative. If a Federal agency requests a General Concurrence, the agency should provide NOAA Fisheries with an EFH Assessment including a written description of the nature and approximate number of the proposed actions, an analysis of the effects of the actions on EFH, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects.

Whether the development of a General Concurrence is initiated by another Federal agency or by NOAA Fisheries, early coordination between NOAA Fisheries and the action agency will help to ensure that the General Concurrence addresses appropriate types of actions and contains workable conditions. NOAA Fisheries personnel should work with the action agency to identify candidate activity categories for General Concurrences and to develop suitable bounds or thresholds that enable NOAA Fisheries to differentiate minimal impact actions from actions that warrant more detailed EFH consultation.

If NOAA Fisheries determines that the actions proposed by a Federal agency do not meet the regulatory criteria for a General Concurrence, NOAA Fisheries should notify the Federal agency in writing that a General Concurrence will not be issued and that EFH consultation may be required for each action individually. Such individual consultations may use existing environmental review procedures (rather than the procedures for abbreviated and expanded consultation described in 50 CFR 600.920(h) and (i)), if NOAA Fisheries has issued a finding that such processes are sufficient to address the EFH consultation requirements. Another option for handling consultations may be use of a programmatic consultation.

After completing a General Concurrence, NOAA Fisheries will provide a copy to the appropriate Council(s) and will make the General Concurrence available to the public by posting the document on the internet or through other appropriate means.

Format of General Concurrences

A General Concurrence must be a written document, signed by the appropriate NOAA Fisheries official, that specifically identifies the Federal actions covered by the General Concurrence and includes NOAA Fisheries' determination that the types of actions covered by the General Concurrence meet the applicable regulatory criteria; therefore, further consultation for individual actions covered by the General Concurrence is not required. Typically the General Concurrence will take the form of a letter from the NOAA Fisheries Regional Administrator to the appropriate official in another Federal agency.

General Concurrences should include the following information: a description of the types of actions covered; the approximate number (e.g., annually) of individual actions that would occur; a list of the specific actions (if known); the species and life stages for which EFH may be affected; a conclusion that the actions meet the criteria in 50 CFR 600.920(g)(2); and any applicable requirements for notifying NOAA Fisheries of individual actions or pursuing further consultation pursuant to 50 CFR 600.920(g)(4). Actions that qualify for a General Concurrence would not cause more than minimal adverse effects to EFH, and therefore normally would not warrant EFH Conservation Recommendations pursuant to Section 305(b)(4) of the MSA. However, EFH Conservation Recommendations may be provided as part of the General Concurrences in cases where actions would normally cause more than minimal effect but, if modified (e.g., a seasonal restriction) according to the Conservation Recommendations, would not cause more than a minimal effect.

If a General Concurrence includes a requirement for the Federal agency to notify NOAA Fisheries of individual actions, the General Concurrence should state that after receiving such notification, NOAA Fisheries may require further consultation on a case-by-case basis and/or may provide additional EFH Conservation Recommendations to the agency, if warranted. Finally, each General Concurrence should include a statement that NOAA Fisheries will periodically review its findings of General Concurrence and may revise or revoke a General Concurrence if new information indicates that the covered actions are having more than minimal adverse effects on EFH. The General Concurrence should state that NOAA Fisheries will notify the Federal agency as early as possible if any such modifications become necessary. The General Concurrence must include a statement regarding how actions qualifying for the General Concurrence will be tracked.

Tracking, Changes, and Review

Actions qualifying for a General Concurrence must be tracked to ensure that their cumulative effects are no more than minimal. In most cases, tracking should be the responsibility of the Federal action agency because the information is most readily available to that agency. However, NOAA Fisheries may agree to track actions covered by a General Concurrence if the General Concurrence includes a requirement for the agency to notify NOAA Fisheries of individual actions. Tracking should include a tally of the number of actions, amount of habitat adversely affected, type of habitat adversely affected, and the baseline against which an assessment of cumulative impacts can be made. The agency responsible for tracking such actions should make the information available to NOAA Fisheries, the applicable Council(s), and the public on an annual basis; the process for doing so should be included in the General Concurrence.

NOAA Fisheries should contact the action agency if new information becomes available or if environmental conditions change such that the covered actions are having more than minimal adverse effects on EFH. NOAA Fisheries should review all General Concurrences periodically, at least once every five years, to ensure that they are up to date. NOAA Fisheries may want to set an expiration date of five years or less for a General Concurrence to ensure that it is reviewed and that the effects on EFH are reevaluated. NOAA Fisheries should also review all General Concurrences if new EFH is designated in areas where General Concurrence activities occur.

4. Abbreviated and Expanded Consultation

Background

If a specific Federal action may adversely affect EFH, but no existing environmental review process is available (or if project timing does not allow for the development of a Finding for an existing process) and no General Concurrence or programmatic consultation has been completed that applies to that action, then an individual EFH consultation must be completed.

Individual EFH consultations can be abbreviated (50 CFR 600.920 (h))or expanded (50 CFR 600.920(i)), depending on the extent of the anticipated adverse effects to EFH. Abbreviated consultation allows NOAA Fisheries to determine quickly whether, and to what degree, a Federal action may adversely affect EFH. Abbreviated consultation procedures should be used when the adverse effects of an action can be alleviated through minor modifications to the action. Expanded consultation allows maximum opportunity for NOAA Fisheries and the Federal agency to work together to review the action's impacts on EFH and to develop EFH Conservation Recommendations. Expanded consultation procedures must be used for Federal actions that would result in substantial adverse effects to EFH.

Generally, the action agency determines the appropriate level of consultation. If NOAA Fisheries determines, contrary to the Federal agency's assessment, that a proposed action will have substantial adverse effects on EFH, NOAA Fisheries may request expanded consultation. Such a request will be in writing and will explain why NOAA Fisheries believes expanded consultation is needed. The determination of substantial adverse effects should be based on project-specific considerations, such as the ecological importance or sensitivity of an area, the type and extent of EFH affected, and the type of activity. Substantial adverse effects are effects that may pose a relatively serious threat to EFH and typically could not be alleviated through minor modifications to a proposed action. For example, a harbor development project that requires significant dredging and filling, channel realignments, or shoreline stabilization near EFH would likely be considered to have substantial adverse effects to EFH. Federal agencies are encouraged to contact NOAA Fisheries at the earliest opportunity to discuss whether the adverse effects of an action makes expanded consultation appropriate.

Procedures

The EFH guidelines provide specific schedules for completion of abbreviated and expanded consultation. The guidelines state, however, that NOAA Fisheries and the Federal agency may agree to a modified schedule. For example, NOAA Fisheries and the Federal agency may agree to use a compressed schedule or to conduct EFH consultation earlier in the planning cycle for actions with lengthy approval processes or for cases where regulatory approvals or emergency situations cannot accommodate the following schedules. Alternatively, NOAA Fisheries and the Federal agency may agree to extend the consultation schedule to allow for further analysis of the effects of the action.

Abbreviated EFH Consultation

1) **Notification** - Notification generally would occur when NOAA Fisheries receives an EFH Assessment from the Federal agency.

2) **EFH Assessment** - The Federal agency must submit its EFH Assessment to NOAA Fisheries as soon as practicable, but at least 60 days prior to a final decision on the action. The level of detail in the EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. For relatively simple actions involving minor adverse effects on EFH, the assessment may be very brief. For additional guidance see: "Preparing Essential Fish Habitat Assessments: A Guide for Federal Action Agencies" (available at: http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm).

3) **EFH Conservation Recommendations** - NOAA Fisheries will provide the Federal agency with EFH Conservation Recommendations, if appropriate, within 30 days of receiving the EFH Assessment. If NOAA Fisheries determines that an action would not adversely affect EFH or that no EFH Conservation Recommendations are needed, NOAA Fisheries will notify the Federal agency either informally or in writing of its determination.

4) **Federal Agency Response** - The Federal agency must provide a detailed response in writing to NOAA Fisheries within 30 days of receiving EFH Conservation Recommendations. The response must include the information described at 50 CFR 600.920(k)(1). If a response is inconsistent with NOAA Fisheries' recommendations, it must be provided at least 10 days prior to final approval of the action.

Expanded EFH Consultation

1) **Notification** - Expanded consultation begins when NOAA Fisheries receives an EFH Assessment and a written request for expanded consultation from the Federal agency.

2) **EFH Assessment** - The Federal agency must submit its EFH Assessment to NOAA Fisheries as soon as practicable, but at least 90 days prior to a final decision on the action. In addition to the information identified at 50 CFR 600.920(e)(3), Federal agencies are encouraged to provide in the EFH Assessment the additional information identified under 50 CFR 600.920(e)(4) to facilitate review of the effects of the action on EFH. If NOAA Fisheries believes that additional analysis is needed to assess the effects of the action, NOAA Fisheries will specify in a letter to the Federal agency any new information needed. The Federal agency should provide the additional information to NOAA Fisheries, to the extent practicable. For additional guidance see: "Preparing Essential Fish Habitat Assessments: A Guide for Federal Action Agencies" (available at: http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm).

3) **Review of Effects to EFH -** NOAA Fisheries will review the EFH Assessment and any additional, relevant information and conduct a site visit, if appropriate, to assess the quality of the habitat and to clarify the impacts of the Federal agency action. NOAA Fisheries will coordinate the review of the action and any site visits with the appropriate Council(s).

4) **EFH Conservation Recommendations** - Generally, NOAA Fisheries will provide the Federal agency with EFH Conservation Recommendations within 60 days of receiving the completed EFH Assessment. However, if NOAA Fisheries determines that additional data or analysis would provide better information for development of EFH Conservation Recommendations, NOAA Fisheries may request additional time for expanded consultation. If NOAA Fisheries and the Federal agency do not agree to extend consultation, NOAA Fisheries must provide the Federal agency with EFH Conservation Recommendations based on the best scientific information available.

5) **Federal Agency Response** - The Federal agency must provide a detailed response in writing to NOAA Fisheries within 30 days of receiving EFH Conservation Recommendations. The response must include the information described at 50 CFR 600.920(k)(1). If a response is inconsistent with NOAA Fisheries' recommendations, it must be provided at least 10 days prior to final approval of the action.

5. Programmatic EFH Consultations

Background

Use of programmatic consultations is a mechanism for implementing the EFH consultation requirements efficiently and effectively by incorporating many individual actions that may adversely affect EFH into one consultation. Section 600.920(j)(1) of the EFH guidelines describes programmatic consultation as appropriate if sufficient information is available to develop EFH Conservation Recommendations that will address all reasonably foreseeable adverse impacts on EFH of an entire program, parts of a program, or a number of similar individual actions occurring within a given geographic area.

Programmatic consultations allow NOAA Fisheries and other Federal agencies to take a comprehensive review of Federal programs for their potential adverse effects on EFH. Some examples of programs that would likely be appropriate for a programmatic EFH consultation are: funding programs, such as grants by Federal agencies to states to carry out activities that could adversely affect EFH; U.S. Forest Service forest plans; and Minerals Management Service regional 5-year plans. The goal of a programmatic consultation should be to address as many adverse effects as possible through programmatic EFH Conservation Recommendations. Accordingly, a programmatic consultation results in a letter from NOAA Fisheries to the Federal agency containing programmatic EFH Conservation Recommendations, as well as identification of any adverse impacts that could not be addressed by the programmatic EFH Conservation Recommendations (additional components of a programmatic consultation letter are addressed below). Any adverse effect that cannot be addressed through programmatic EFH Conservation Recommendations will have to be addressed through individual consultation (preferably by using existing procedures) of a General Concurrence.

Programmatic consultations may occur at a headquarters or regional level. It is essential that offices conducting programmatic consultations inform other NOAA Fisheries offices (i.e., Habitat Divisions in other regions and at Headquarters) that these consultations are occurring, in case the results of the programmatic consultation could affect other regions or national policy.

Program Size

Any size program may be addressed through a programmatic consultation, depending on the nature of the actions conducted in the program. Whether a particular program should be subdivided, or whether some programs should be lumped together for the consultation, should be determined jointly by NOAA Fisheries and the Federal action agency, keeping in mind the goal of developing programmatic EFH Conservation Recommendations. Priority should be given to those programs or actions within programs for which programmatic Conservation Recommendations are most appropriate, e.g., for which a substantial portion of the adverse effects can be addressed with programmatic EFH Conservation Recommendations, without information on a specific site or project. If a substantial number of the agency's actions would

require additional EFH Conservation Recommendations on a case-by-case basis, the programmatic consultation should be restricted to those actions for which programmatic EFH Conservation Recommendations are appropriate.

All actions that are part of the program (or specific part of a program) should be addressed in the consultation, including reasonably foreseeable but unplanned actions (e.g., oil spills or other accidental discharges) and actions that are authorized but may not be reported to the action agency (e.g., non-reporting activities covered by general permits).

Outcomes

There are five potential outcomes of a programmatic consultation:

- programmatic Conservation Recommendations that cover all program actions
- programmatic Conservation Recommendations that cover program actions, but individual consultation also required for some or all actions
- a determination that no programmatic EFH Conservation Recommendations can be developed and all program actions will require individual consultation
- a determination that all program actions qualify for a General Concurrence
- a determination that although it initially appeared that there may be an adverse effect on EFH, additional assessment showed that there is no adverse effect and therefore no EFH Conservation Recommendations are needed

Since programmatic consultations will often cover several types of activities, a combination of these outcomes may result from a programmatic consultation.

If site- or project-specific information is required to adequately address adverse impacts, the programmatic consultation may end with the conclusion that individual consultations are needed for some or all of the Federal actions in the program. If existing processes may be used to accomplish the individual consultations, NOAA Fisheries should work with the Federal action agency to develop a "finding" (see section on "Use of Existing Processes"). If any of the actions in the program have minimal effects, both individually and cumulatively, a General Concurrence should be developed for those actions. If it is determined that no adverse effects will occur, the programmatic consultation should state that conclusion. To comply with the MSA, the conclusions reached as a result of a programmatic consultation must be documented, even if no programmatic EFH Conservation Recommendations are developed.

Process

Notification and EFH Assessment

A programmatic consultation may be initiated by a Federal action agency or by NOAA Fisheries, on any Federal program that will require EFH consultation, and for which either agency thinks programmatic consultation might be the best manner of accomplishing that consultation. To

initiate programmatic consultation, the Federal agency should send NOAA Fisheries an EFH Assessment that describes the specific activities, the EFH and managed species affected by those activities, and the nature of those effects. Although a programmatic EFH Assessment will be broader in scope and less specific than an EFH Assessment for an individual action, the essential elements of an EFH Assessment should still be addressed in as much detail as is appropriate. NOAA Fisheries may work with the Federal agency in the development of the EFH Assessment.

EFH Affected

For some programs it may be possible to specify the affected EFH, e.g., in U.S. Forest Service forest plans. For other programs, particularly funding programs, it may not be possible to identify specific locations of affected EFH. In the latter case, the most appropriate approach may be to describe the scope of the program with respect to the scope of EFH, and develop a table that correlates program activities to fishery management plans, such as the example below. Other approaches may be more appropriate depending on the information available.

Example - EFH affected by Funding Program XXZZ

Council/species	Subtidal vegetated	Subtidal unvegetated	Intertidal vegetated	Intertidal unvegetated	Intertidal or subtidal shellfish beds
Council 1 - species or plan 1	X	X	X		
species or plan 2	X				X
Council 2 - species or plan 1	X	X	X	X	

*Note that Council represents Fishery Management Council; species or plan represents a federally managed fish species or fishery management plan; and the column headings are types of EFH.

Effects on EFH

Depending on the nature of the program (a specific land management plan vs a funding program), effects on EFH may be difficult to quantify at a programmatic level. At a minimum, effects on EFH should be described generally and the following information included: number of actions (actual or estimated); range of impact size; type of impacts, both direct and indirect; and any proposed mitigation measures. If available, additional information should be included on the following: cumulative effects of the program; cumulative (of program and non-program) effects within watersheds; and effects on fish populations.

EFH Conservation Recommendations

After receiving the programmatic EFH Assessment, NOAA Fisheries develops programmatic EFH Conservation Recommendations and, if applicable, identifies any potential adverse effects

that can not be addressed programmatically and require project-specific consultation. NOAA Fisheries may work with the Federal agency in developing these recommendations.

Scope

Programmatic EFH Conservation Recommendations should be developed for as many identified adverse impacts as possible. Monitoring may also be considered a Conservation Recommendation. Some examples of programmatic EFH Conservation Recommendations follow:

- For adverse impacts (shading) of docks and piers: minimum board spacing and height above MLW.

- For adverse impacts (fish passage and hydrology) of culverts: minimum size with respect to flow, use of bottomless arcs wherever possible.

- For adverse effects (turbidity and loss of benthic organisms) of dredging: time-of-year restrictions; avoidance of SAV and shellfish beds; post-dredging restoration of gravel spawning beds and other provisions in the 1996 NOAA Fisheries National Gravel Extraction Policy.

- For adverse effects of logging (changes in turbidity, temperature, dissolved oxygen): buffer zones along anadromous fish streams.

Many Federal programs already include habitat conservation measures that are in some cases developed in cooperation with NOAA Fisheries. If the Federal agency already implements habitat conservation measures as part of the program, NOAA Fisheries may adopt these measures as EFH Conservation Recommendations (in which case they should be specifically listed as EFH Conservation Recommendations). Programmatic EFH Conservation Recommendations may be characterized as requiring revision or augmentation during an individual consultation, if certain thresholds are exceeded (i.e., above a certain acreage, in certain habitats).

Contents of Document Transmitting EFH Conservation Recommendations

When the EFH Conservation Recommendations are final, NOAA Fisheries must provide them to the Federal agency in writing. The document containing NOAA Fisheries' EFH Conservation Recommendations for a programmatic consultation should contain:

- a description of the program
- a description of the EFH affected by program activities
- a description of the adverse effects on EFH
- programmatic EFH Conservation Recommendations
- how the EFH Conservation Recommendations will address adverse effects

- any additional consultation required of the agency, e.g., individual consultation for certain projects
- a concluding section or statement that clarifies that the programmatic consultation satisfies the MSA consultation requirement and that the agency must respond to the EFH Conservation Recommendations within 30 days as per the MSA
- the format and schedule of the agency report listing activities authorized under the program
- the signature of the appropriate NOAA Fisheries person, which could be regional or headquarters staff, depending on the level at which the consultation was done.

The description of the program, affected EFH, and adverse effects on EFH should be addressed by the action agency's programmatic EFH Assessment. The NOAA Fisheries' document containing the EFH Conservation Recommendations should briefly summarize the EFH Assessment, and may contain the entire EFH Assessment as an attachment. The programmatic consultation may contain other attachments such as a General Concurrence or a finding, if they were developed as a result of the programmatic consultation.

Federal Agency Response

Once the action agency receives the programmatic EFH Consultation Recommendations, that agency must respond within 30 days as required by section 305(b)(4)(B) of the MSA.

If the action agency adopts the NOAA Fisheries EFH Conservation Recommendations as a requirement of the program, no further EFH consultation is required (except for those cases identified in the consultation document where individual consultation has been specified).

If the action agency does not adopt the programmatic EFH Conservation Recommendations as a requirement of their program, one of two options may be pursued: the agency and NOAA Fisheries may conduct an individual EFH consultation on each of the program actions; or the agency may agree to consider adopting the programmatic Conservation Recommendations on a case-by-case basis. If the agency decides on a case-by-case basis whether or not to implement the EFH Conservation Recommendations, NOAA Fisheries may include as an EFH Conservation Recommendation that any time the agency does not implement one of the programmatic EFH consultation recommendations for a specific project, that agency should conduct an individual EFH consultation. This would allow NOAA Fisheries the opportunity to propose alternative EFH Conservation Recommendations when the programmatic recommendations are not implemented. Alternatively, if individual EFH consultation probably would not result in EFH Conservation Recommendations that are different from those made programmatically, NOAA Fisheries may simply require the action agency to provide a response letter for each of the program actions. This response letter would indicate whether or not the programmatic EFH Conservation Recommendations were being implemented for individual program actions.

Changes, Tracking, and Review

The action agency should be advised to contact NOAA Fisheries if the program changes, so that the Conservation Recommendations can be revised as necessary. NOAA Fisheries should contact the action agency if new information becomes available or if environmental conditions change such that revised or additional EFH Conservation Recommendations are needed. Even if an agency does not agree to reinitiate consultation in light of changes or new information, NOAA Fisheries must provide additional EFH Conservation Recommendations, to which the agency must respond, if NOAA Fisheries determines that there would be an adverse effect on EFH.

The action agency should send NOAA Fisheries a report (generally annually, but other time periods may also be appropriate) listing actions authorized under the program. The format and schedule of the report should be specified in the consultation document.

NOAA Fisheries should review all programmatic EFH Conservation Recommendations periodically, at least once every five years, to ensure that they are based on the best scientific information. NOAA Fisheries may want to set an expiration date of five years or less for a programmatic consultation to ensure that it is reviewed and that the EFH Conservation Recommendations are reevaluated. NOAA Fisheries should also review all programmatic consultations if EFH designations are changed in areas where activities covered by the programmatic consultation occur.

6. Coordination with Fishery Management Councils

The EFH guidelines direct the Councils and NOAA Fisheries to cooperate as closely as possible to identify actions that may adversely affect EFH, to develop comments and EFH Conservation Recommendations to Federal and state agencies, and to provide EFH information to Federal or state agencies. NOAA Fisheries is further directed to work with each Council to share information and to coordinate Council and NOAA Fisheries comments and recommendations on actions that may adversely affect EFH (50 CFR 600.905(c)). Throughout the EFH guidelines, NOAA Fisheries is required to coordinate with the Councils for specific actions such as: sending the appropriate Council(s) a copy of EFH Conservation Recommendations (50 CFR 600.925(d)), sending the appropriate Council(s) a copy of General Concurrences (50 CFR 600.920 (g)(5)), coordinating with the Council on site visits (50 CFR 600.920(i)(3)(ii)), and requesting further review of a Federal agency decision if it is contrary to Council EFH Conservation Recommendations (50 CFR 600.920(k)(2)).

7. EFH Conservation Recommendations to State Agencies

State agencies are not required to consult with NOAA Fisheries or the Councils on state actions that may adversely affect EFH. However, NOAA Fisheries is required to provide EFH Conservation Recommendations on any Federal or state action that would adversely affect EFH.

Each NOAA Fisheries Region should use existing coordination procedures under statutes such as the Coastal Zone Management Act or establish new procedures to identify state actions that may adversely affect EFH, and for determining the most appropriate method for providing EFH Conservation Recommendations to the state agency.

When an action that would adversely affect EFH requires authorization or funding by both Federal and state agencies, NOAA Fisheries will provide the appropriate state agencies with copies of EFH Conservation Recommendations developed as part of the Federal consultation procedures. NOAA Fisheries will also seek agreements on sharing information and EFH Conservation Recommendations with Federal or state agencies conducting similar consultation and recommendation processes, e.g., review by a state fish and wildlife agency, to ensure coordination of these efforts.

Appendix A - Statutory and Regulatory Language

The following material contains selected text from the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Code of Federal Regulations (CFR) applicable to EFH consultations. Note that these excerpts do not represent all of the EFH consultation statutory and regulatory language. To view all of the EFH consultation text in the MSA and CFR, see 16 U.S.C. 1855 and 50 CFR §§ 600.905 - 600.930

Statutory (MSA) Language for EFH Consultation with Federal Agencies

16 U.S.C. 1855(b)(2); MSA § 305(b)(2)
Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act.

16 U.S.C. 1855(b)(4)(A); MSA § 305(b)(4)(A)
If the Secretary receives information from a Council or Federal or State agency or determines from other sources that an action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any Federal or state agency would adversely affect any essential fish habitat identified under this Act, the Secretary shall recommend to such agency measures that can be undertaken by such agency to conserve such habitat.

16 U.S.C. 1855(b)(4)(B); MSA § 305(b)(4)(B)
Within 30 days after receiving a recommendation under subparagraph (A), a Federal agency shall provide a detailed response in writing to any Council commenting under paragraph (3) and the Secretary regarding the matter. The response shall include a description of the measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat. In the case of a response that is inconsistent with the recommendations of the Secretary, the Federal agency shall explain its reasons for not following the recommendations.

Guidelines (CFR) for Consultation in General

50 CFR § 600.920(a)
(1) Actions requiring consultation. Pursuant to section 305(b)(2) of the Magnuson-Stevens Act, Federal agencies must consult with NOAA Fisheries regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect EFH. EFH consultation is not required for actions that were completed prior to the approval of EFH designations by the Secretary, e.g., issued permits. Consultation is required for renewals, reviews, or substantial revisions of actions if the renewal, review, or revision may adversely affect EFH. Consultation on Federal programs delegated to non-Federal entities is required at the time of delegation, review, and renewal of the delegation. EFH consultation is required for any Federal funding of actions that may adversely affect EFH. NOAA Fisheries and Federal agencies responsible for funding actions that may adversely affect EFH should consult on a programmatic level under paragraph (j) of this section, if appropriate, with respect to these

actions. Consultation is required for emergency Federal actions that may adversely affect EFH, such as hazardous material clean-up, response to natural disasters, or actions to protect public safety. Federal agencies should contact NOAA Fisheries early in emergency response planning, but may consult after-the-fact if consultation on an expedited basis is not practicable before taking the action.

Guidelines (CFR) for Use of Existing Procedures

50 CFR § 600.920(f)

(1) Purpose and criteria. Consultation and commenting under sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act should be consolidated, where appropriate, with interagency consultation, coordination, and environmental review procedures required by other statutes, such as NEPA, the Fish and Wildlife Coordination Act, Clean Water Act, ESA, and Federal Power Act. The requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act, including consultations that would be considered to be abbreviated or expanded consultations under paragraphs (h) and (i) of this section, can be combined with existing procedures required by other statutes if such processes meet, or are modified to meet, the following criteria:

> (i) The existing process must provide NOAA Fisheries with timely notification of actions that may adversely affect EFH. The Federal agency should notify NOAA Fisheries according to the same time frames for notification (or for public comment) as in the existing process. Whenever possible, NOAA Fisheries should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in substantial adverse impacts. NOAA Fisheries and the action agency may agree to use shorter time frames provided they allow sufficient time for NOAA Fisheries to develop EFH Conservation Recommendations.
>
> (ii) Notification must include an assessment of the impacts of the action on EFH that meets the requirements for EFH Assessments contained in paragraph (e) of this section. If the EFH Assessment is contained in another document, the Federal agency must identify that section of the document as the EFH Assessment.
>
> (iii) NOAA Fisheries must have made a finding pursuant to paragraph (f)(3) of this section that the existing process can be used to satisfy the requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act.

(2) NOAA Fisheries response to Federal agency. If an existing environmental review process is used to fulfill the EFH consultation requirements, the comment deadline for that process should apply to the submittal of NOAA Fisheries' EFH Conservation Recommendations under section 305(b)(4)(A) of the MSA, unless NOAA Fisheries and the Federal agency agree to a different deadline. If NOAA Fisheries' EFH Conservation Recommendations are combined with other agency comments on a Federal action, such as NOAA comments on a draft Environmental Impact Statement, the EFH Conservation Recommendations will be clearly identified as such (e.g., a section in the comment letter entitled "EFH Conservation Recommendations") and a Federal agency response pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act is required for only the identified portion of the comments.

(3) NOAA Fisheries finding. A Federal agency with an existing environmental review process should contact NOAA Fisheries at the appropriate level (regional offices for regional processes, headquarters office for national processes) to discuss how to combine the EFH consultation

requirements with the existing process, with or without modifications. If, at the conclusion of these discussions, NOAA Fisheries determines that the existing or modified process meets the criteria of paragraph (f)(1) of this section, NOAA Fisheries will make a finding that the process can be used to satisfy the EFH consultation requirements of the Magnuson-Stevens Act. If NOAA Fisheries does not make such a finding, or if there are no existing consultation processes relevant to the Federal agency's actions, the agency and NOAA Fisheries should follow one of the approaches for consultation discussed in the following sections.

Guidelines (CFR) for General Concurrences

50 CFR § 600.920(g)

(1) Purpose. A General Concurrence identifies specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because NOAA Fisheries has determined, through an analysis of that type of action, that it will likely result in no more than minimal adverse effects individually and cumulatively. General Concurrences may be national or regional in scope.

(2) Criteria.

(i) For Federal actions to qualify for General Concurrence, NOAA Fisheries must determine that the actions meet all of the following criteria:

(A) The actions must be similar in nature and similar in their impact on EFH.

(B) The actions must not cause greater than minimal adverse effects on EFH when implemented individually.

(C) The actions must not cause greater than minimal cumulative adverse effects on EFH.

(ii) Actions qualifying for General Concurrence must be tracked to ensure that their cumulative effects are no more than minimal. In most cases, tracking actions covered by a General Concurrence will be the responsibility of the Federal agency. However, NOAA Fisheries may agree to track such actions. Tracking should include numbers of actions and the amount and type of habitat adversely affected, and should specify the baseline against which the actions will be tracked. The agency responsible for tracking such actions should make the information available to NOAA Fisheries, the applicable Council(s), and to the public on an annual basis.

(iii) Categories of Federal actions may also qualify for General Concurrence if they are modified by appropriate conditions that ensure the actions will meet the criteria in paragraph (g)(2)(i) of this section. For example, NOAA Fisheries may provide General Concurrence for additional actions contingent upon project size limitations, seasonal restrictions, or other conditions.

(iv) If a General Concurrence is proposed for actions that may adversely affect habitat areas of particular concern, the General Concurrence should be subject to a higher level of scrutiny than a General Concurrence not involving a habitat area of particular concern.

(3) General Concurrence development. A Federal agency may request a General Concurrence for a category of its actions by providing NOAA Fisheries with an EFH Assessment containing a description of the nature and approximate number of the actions, an analysis of the effects of the actions on EFH, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects. If NOAA Fisheries agrees that the actions fit the criteria in paragraph

(g)(2)(i) of this section, NOAA Fisheries will provide the Federal agency with a written statement of General Concurrence that further consultation is not required. If NOAA Fisheries does not agree that the actions fit the criteria in paragraph (g)(2)(i) of this section, NOAA Fisheries will notify the Federal agency that a General Concurrence will not be issued and that another type of consultation will be required. If NOAA Fisheries identifies specific types of Federal actions that may meet the requirements for a General Concurrence, NOAA Fisheries may initiate and complete a General Concurrence.

(4) Further consultation. NOAA Fisheries may request notification for actions covered under a General Concurrence if NOAA Fisheries concludes there are circumstances under which such actions could result in more than a minimal impact on EFH, or if it determines that there is no process in place to adequately assess the cumulative impacts of actions covered under the General Concurrence. NOAA Fisheries may request further consultation for these actions on a case-by-case basis. Each General Concurrence should establish specific procedures for further consultation, if appropriate.

(5) Notification. After completing a General Concurrence, NOAA Fisheries will provide a copy to the appropriate Council(s) and will make the General Concurrence available to the public by posting the document on the internet or through other appropriate means.

(6) Revisions. NOAA Fisheries will periodically review and revise its General Concurrences, as appropriate.

Guidelines (CFR) for Abbreviated Consultations

50 CFR § 600.920(h)

(1) Purpose and criteria. Abbreviated consultation allows NMFS to determine quickly whether, and to what degree, a Federal action may adversely affect EFH. Federal actions that may adversely affect EFH should be addressed through the abbreviated consultation procedures when those actions do not qualify for a General Concurrence, but do not have the potential to cause substantial adverse effects on EFH. For example, the abbreviated consultation procedures should be used when the adverse effect(s) of an action could be alleviated through minor modifications.

(2) Notification by agency and submittal of EFH Assessment. Abbreviated consultation begins when NMFS receives from the Federal agency an EFH Assessment in accordance with paragraph (e) of this section and a written request for consultation.

(3) NMFS response to Federal agency. If NMFS determines, contrary to the Federal agency's assessment, that an action would not adversely affect EFH, or if NMFS determines that no EFH Conservation Recommendations are needed, NMFS will notify the Federal agency either informally or in writing of its determination. If NMFS believes that the action may result in substantial adverse effects on EFH, or that additional analysis is needed to assess the effects of the action, NMFS will request in writing that the Federal agency initiate expanded consultation. Such request will explain why NMFS believes expanded consultation is needed and will specify any new information needed. If expanded consultation is not necessary, NMFS will provide EFH Conservation Recommendations, if appropriate, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

(4) Timing. The Federal agency must submit its EFH Assessment to NMFS as soon as practicable, but at least 60 days prior to a final decision on the action. NMFS must respond in writing within 30 days. NMFS and the Federal agency may agree to use a compressed schedule in

cases where regulatory approvals or emergency situations cannot accommodate 30 days for consultation, or to conduct consultation earlier in the planning cycle for actions with lengthy approval processes.

Guidelines (CFR) for Expanded Consultations

50 CFR § 600.920(i)

(1) Purpose and criteria. Expanded consultation allows maximum opportunity for NMFS and the Federal agency to work together to review the action's impacts on EFH and to develop EFH Conservation Recommendations. Expanded consultation procedures must be used for Federal actions that would result in substantial adverse effects to EFH. Federal agencies are encouraged to contact NMFS at the earliest opportunity to discuss whether the adverse effects of an action make expanded consultation appropriate.

(2) Notification by agency and submittal of EFH Assessment. Expanded consultation begins when NMFS receives from the Federal agency an EFH Assessment in accordance with paragraph (e) of this section and a written request for expanded consultation. Federal agencies are encouraged to provide in the EFH Assessment the additional information identified under paragraph (e)(4) of this section to facilitate review of the effects of the action on EFH.

(3) NMFS response to Federal agency. NMFS will:

(i) Review the EFH Assessment, any additional information furnished by the Federal agency, and other relevant information.

(ii) Conduct a site visit, if appropriate, to assess the quality of the habitat and to clarify the impacts of the Federal agency action. Such a site visit should be coordinated with the Federal agency and appropriate Council(s), if feasible.

(iii) Coordinate its review of the action with the appropriate Council(s).

(iv) Discuss EFH Conservation Recommendations with the Federal agency and provide such recommendations to the Federal agency, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

(4) Timing. The Federal agency must submit its EFH Assessment to NMFS as soon as practicable, but at least 90 days prior to a final decision on the action. NMFS must respond within 60 days of submittal of a complete EFH Assessment unless consultation is extended by agreement between NMFS and the Federal agency. NMFS and Federal agencies may agree to use a compressed schedule in cases where regulatory approvals or emergency situations cannot accommodate 60 days for consultation, or to conduct consultation earlier in the planning cycle for actions with lengthy approval processes.

Guidelines (CFR) for Programmatic Consultations

50 CFR § 600.920(j)

(1) Purpose. Programmatic consultation provides a means for NOAA Fisheries and a Federal agency to consult regarding a potentially large number of individual actions that may adversely affect EFH. Programmatic consultation will generally be the most appropriate option to address funding programs, large-scale planning efforts, and other instances where sufficient information is available to address all reasonably foreseeable adverse effects on EFH of an entire program,

parts of a program, or a number of similar individual actions occurring within a given geographic area.
(2) Process. A Federal agency may request programmatic consultation by providing NOAA Fisheries with an EFH Assessment in accordance with paragraph (e) of this section. The description of the proposed action in the EFH Assessment should describe the program and the nature and approximate number (annually or by some other appropriate time frame) of the actions. NOAA Fisheries may also initiate programmatic consultation by requesting pertinent information from a Federal agency.
(3) NOAA Fisheries response to Federal agency. NOAA Fisheries will respond to the Federal agency with programmatic EFH Conservation Recommendations and, if applicable, will identify any potential adverse effects that could not be addressed programmatically and require project-specific consultation. NOAA Fisheries may also determine that programmatic consultation is not appropriate, in which case all EFH Conservation Recommendations will be deferred to project-specific consultations. If appropriate, NOAA Fisheries' response may include a General Concurrence for activities that qualify under paragraph (g) of this section.

Guidelines (CFR) Describing Responsibilities of Federal Agencies Following Receipt of EFH Conservation Recommendations

50 CFR § 600.920(k)
(1) Federal agency response. As required by section 305(b)(4)(B) of the Magnuson-Stevens Act, the Federal agency must provide a detailed response in writing to NMFS and to any Council commenting on the action under section 305(b)(3) of the, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS Conservation Recommendations, the Federal agency Magnuson-Stevens Act within 30 days after receiving an EFH Conservation Recommendation from NMFS. Such a response must be provided at least 10 days prior to final approval of the action if the response is inconsistent with any of NMFS' EFH Conservation Recommendations, unless NMFS and the Federal agency have agreed to use alternative time frames for the Federal agency response. The response must include a description of measures proposed by the agency for avoiding, mitigating must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action and the measures needed to avoid, minimize, mitigate, or offset such effects.
(2) Further review of decisions inconsistent with NMFS or Council recommendations. If a Federal agency decision is inconsistent with a NMFS EFH Conservation Recommendation, the Assistant Administrator for Fisheries may request a meeting with the head of the Federal agency, as well as with any other agencies involved, to discuss the action and opportunities for resolving any disagreements. If a Federal agency decision is also inconsistent with a Council recommendation made pursuant to section 305(b)(3) of the Magnuson-Stevens Act, the Council may request that the Assistant Administrator initiate further review of the Federal agency's decision and involve the Council in any interagency discussion to resolve disagreements with the Federal agency. The Assistant Administrator will make every effort to accommodate such a request. NMFS may develop written procedures to further define such review processes.

Appendix B - Examples of EFH Documents

Example of a Finding for NEPA

Example of language indicating that NOAA Fisheries cannot make an EFH Finding

Example of Response to a Request For Concurrence

Example of an interim response letter

Example of a Programmatic Consultation on a Forest Plan

Example of a Request for a General Concurrence

Example of a General Concurrence for Corps Projects

Example of a General Concurrence for Corps Permits

Example of an EFH Assessment for abbreviated consultation

NOAA Fisheries Decision Tree for EFH Consultation

EXAMPLE OF A FINDING FOR NEPA

General xxxx
U.S. Army Corps of Engineers
North Atlantic Division
New York, NY

Dear General xxxx:

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires Federal agencies such as the Army Corps of Engineers (ACOE) to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH) identified under the Act. The first designations of EFH will become effective in March 1999 after they are approved by the Secretary. National Marine Fisheries Service (NOAA Fisheries) personnel have discussed the new EFH requirements with your staff and both agencies have agreed to use the National Environmental Policy Act (NEPA) process to carry out EFH consultations for ACOE civil works projects throughout the North Atlantic Division as described below.

The EFH guidelines, 50 CFR 600.920(f), enable Federal agencies to use existing consultation/environmental review procedures to satisfy the MSA consultation requirements if the existing procedures meet the following criteria: 1) the existing process must provide NOAA Fisheries with timely notification of actions that may adversely affect EFH (50 CFR 600.920(f)(1)(i)); 2) notification must include an assessment of impacts of the proposed action on EFH (50 CFR 600.920(f)(1)(ii)); and, 3) NOAA Fisheries must have made a finding pursuant to 50 CFR 600.920(f)(3) that the existing process satisfies the requirements of section 305(b)(2) of the MSA (50 CFR 600.920(f)(1)(iii).

NOAA Fisheries finds that the NEPA process used by the ACOE North Atlantic Division for civil works projects (navigation, shoreline stabilization, environmental remediation, flood control, etc.) may be used to satisfy the consultation requirements of the MSA provided the ACOE and NOAA Fisheries adhere to the following steps:

1. Notification

The ACOE will provide NOAA Fisheries with timely notification of actions that may adversely affect EFH. Wherever possible, NOAA Fisheries should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in a substantial adverse impact to EFH. These time frames will allow NOAA Fisheries to develop EFH Conservation Recommendations.

Although NOAA Fisheries and the ACOE typically coordinate early in the project planning, notification for the purposes of the EFH consultation will usually occur when NOAA Fisheries receives a draft Environmental Impact Statement (EIS) or Environmental Assessment (EA). This notification must clearly state that the ACOE is initiating EFH consultation, and it must be

accompanied by an EFH Assessment. In order for the EA process to serve as the EFH consultation, ACOE must provide NOAA Fisheries a draft EA and delay signing a Finding of No Significant Impact until after the agency responds to NOAA Fisheries' EFH recommendations.

2. EFH Assessment

The draft NEPA document will include an assessment of the impacts of the proposed action on EFH in a chapter or section titled "EFH" or something similar enough to be easily identified within the document.

The EFH assessment will include 1) a description of the proposed action; 2) an analysis of individual and cumulative effects of the action on EFH, the managed species, and associated species such as major prey species, including affected life history stages; 3) the ACOE's views regarding effects on EFH; and, 4) a discussion of proposed mitigation, if applicable.

The draft NEPA document may incorporate such information by reference to another EFH Assessment prepared for a similar action, supplemented with any relevant new project-specific information, provided that the proposed action involves similar impacts to EFH in the same geographic area or a similar ecological setting. It may also incorporate by reference other relevant assessment documents. These documents will be provided to NOAA Fisheries with the draft EIS or EA.

In cases where there is an existing NEPA document for a civil works project, an EFH consultation should be completed prior to a new action such as maintenance dredging of a Federal navigation project. At that time, the EFH consultation can be accomplished through the development of a supplemental EIS or EA.

3. NOAA Fisheries EFH Conservation Recommendations

Upon review of the draft EIS or EA, NOAA Fisheries will develop EFH Conservation Recommendations as part of its comments on the draft NEPA document, in a separate section of the NOAA Fisheries comment letter titled "EFH Conservation Recommendations." NOAA Fisheries will provide its recommendations during the established comment period under NEPA.

4. ACOE Response

Under section 305(b)(4)(B) of the MSA, the ACOE has a statutory requirement to provide a written response to NOAA Fisheries within 30 days after receiving EFH Conservation Recommendations. If the ACOE is not able to respond fully within 30 days, the ACOE may send a preliminary response stating that they have received NOAA Fisheries' recommendations, will consider them fully, have not yet made a decision on the project, but will respond to NOAA Fisheries recommendations in detail, in a letter or within the final EIS or EA. The ACOE then must respond to the recommendations by letter or within the final EIS or EA in a section or chapter clearly labeled as such. If the ACOE's response is inconsistent with any of NOAA Fisheries' Conservation Recommendations, the response must be provided to NOAA Fisheries at

least 10 days before the ACOE signs a Finding of No Significant Impact or a Record of Decision, to allow time for dispute resolution if necessary.

The ACOE response must include a description of measures proposed by the ACOE for avoiding, mitigating, or offsetting the impact of the activity on EFH, as required by section 305(b)(4)(B) of the MSA and 50 CFR 600.920(k). In the case of a response that is inconsistent with NOAA Fisheries' Conservation Recommendations, the ACOE must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NOAA Fisheries over the anticipated effects of the action or the measures needed to avoid, minimize, mitigate, or offset such effects.

5. Dispute Resolution

If an ACOE decision is inconsistent with the EFH Conservation Recommendations, NOAA Fisheries will endeavor to resolve any such issues at the field level wherever possible, typically in a meeting between the NOAA Fisheries Regional Administrator and the ACOE District Engineer. However, 50 CFR 600.920(k)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with an ACOE headquarters official to discuss the proposed action and opportunities for resolving any disagreements.

Conclusion

If you agree with the procedures described in this finding, please indicate your agreement in writing.

If you have any questions on this matter, please contact xxxx for assistance.

Sincerely,

Regional Administrator

EXAMPLE OF LANGUAGE INDICATING THAT NOAA FISHERIES CANNOT MAKE A FINDING

Dear Federal agency staff:

NOAA Fisheries has determined that your agency's current environmental review process pursuant to **(identify the statute**) does not meet the consultation requirements of the MSA and EFH guidelines because **(explain reasons, such as insufficient documentation of effects, actions that are not covered by the existing process (CEs under NEPA), etc.)** Accordingly, NOAA Fisheries does not concur with your conclusion that this process will adequately serve as a means to conduct EFH consultation.

We would like to discuss with you possible changes to your process that will allow us to use this existing process for EFH consultations. One approach might be to **(make a suggestion on how to modify the process to meet the MSA and IFR requirements).** We may identify other options in additional discussions. Please contact my office so we can continue **(or initiate)** efforts to develop a procedure that will allow efficient implementation of the EFH consultation requirements.

Sincerely,

NOAA Fisheries staff

EXAMPLE OF RESPONSE TO A REQUEST FOR NOAA FISHERIES CONCURRENCE WITH AN AGENCY'S "NO EFFECT ON EFH" DETERMINATION

Dear Corps staff:

In your letter of March 31, 1999, you asked for NOAA Fisheries's concurrence with your conclusion that the proposed Myway Highway Bypass in Tampa, Florida, will have no adverse effects on EFH. Neither the EFH consultation provisions of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) nor NOAA Fisheries's EFH guidelines have any provisions regarding such a concurrence. Therefore, NOAA Fisheries is not required to provide the requested concurrence. The Army Corps of Engineers (ACOE), as the lead Federal action agency, must make the initial determination of whether the action may adversely affect EFH, and then proceed with consultation if, in the ACOE's view, the project may adversely affect EFH. If the ACOE determines that the action would not adversely affect EFH, then it has no statutory obligation to consult pursuant to the MSA EFH consultation requirements.

EXAMPLE OF A PRELIMINARY RESPONSE LETTER

Joe Fishmann
NOAA Fisheries
Swampville, LA

Dear Mr. Fishmann:

On April 1, 1999, the National Park Service (NPS) received your EFH Conservation Recommendations for the Angel Bend Recreation Center. The NPS will give your recommendations full consideration as we develop the final Environmental Impact Statement (EIS) for this project. Pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation Management Act (MSA), NPS is required to respond to your EFH Conservation Recommendations within 30 days of receiving them. However, the final decision on this project will not be made until all public comment has been reviewed and appropriate changes made to the document. We anticipate that will occur in December of 1999. At that time, NPS will provide the response required by the MSA, in the "Response to Comments" section of the final EIS, which will be provided to you at least 10 days before the Record of Decision is signed if the response is inconsistent with any of the EFH Conservation Recommendations.

Sincerely,

Mark Myword
National Park Service

EXAMPLE OF A PROGRAMMATIC CONSULTATION DOCUMENT ON A FOREST PLAN
Note: Sections 1-3 were written by the Forest Service as the EFH Assessment that was sent to NOAA Fisheries. The FS EFH Assessment was incorporated into this document by NOAA Fisheries. Sections 4-6 were written by NOAA Fisheries as the EFH Conservation Recommendations and other information needed to document a programmatic consultation.

Essential Fish Habitat Programmatic Consultation - Hundred-Acre-Wood Forest Management Plan

1.0 Program Description: The Hundred-Acre-Wood Forest Management Plan (HAW Plan), developed by the US Department of Agriculture, Forest Service (USFS), describes the five-year plan for management of the HAW. The essential elements of the plan are:

- Timber Harvest: 25% of the forest (25 acres) is designated as suitable timber land for harvest of oak and pine. Harvest methods may include selective harvest (thinning) or clear cuts followed by replanting. Fifty-foot no-cut buffers are proposed along all streams.

- Road construction: the proposed harvest plan will require construction of 5 miles of new dirt roads in the HAW. The roads will be approximately 20 feet wide. There are 12 stream crossings associated with these roads. Stream crossings will consist of box culverts placed on the bottom of the existing stream, temporary wooden bridges, or permanent steel bridges.

- Recreation areas: 50% (50 acres) of the forest is designated as the HAW Recreational Area. Existing hiking trails will be maintained, and primitive campsites will be established along the trails. A cross-country skiing information center and support facility is also proposed.

- Wilderness Areas: 25% (25) acres of the forest is designated as the HAW Wilderness Area. No trails or camp sites will be maintained in this area. No timber harvest will occur in this area.

2.0 Essential Fish Habitat in the HAW

Based on the North Pacific Fishery Management Council (NPFMC) EFH descriptions for this area, twelve of the streams in the HAW and their associated riverine wetlands are EFH for woozelfish larvae, juveniles, and spawning adults (Figure 1). These streams and wetlands serve as spawning areas for adults and refuge areas for larval and juvenile woozelfish. In addition, the NPFMC has designated Tyre Creek as a Habitat Area of Particular Concern (HAPC) because the stream contains numerous gravel bars that support woozelfish spawning in an area where gravel bars are scarce.

3.0 Assessment of Effects on Essential Fish Habitat (EFH)

Impacts associated with timber harvest -The direct impacts of timber harvest on aquatic habitat include increased turbidity and temperature in the stream itself, and loss of the riparian habitat structures within the stream, such as large woody debris (LWD) and gravel beds. The indirect impacts of timber harvest include increased flooding. These impacts result in both the permanent loss of habitat as well as habitat degradation (Murphy, 1995). Of the 25 acres designated for timber harvest, 8 acres contain 4 streams designated as EFH (including Tyre Creek, a HAPC). If timber harvest occurs adjacent to these streams, their function as EFH could be impaired through loss of LWD, increased water temperature caused by reduced shading, and increased turbidity caused by runoff from the cleared areas. The important spawning areas in Tyre Creek could be degraded by fine sediment deposition, and possibly rendered unusable by spawning fish. The 50-foot buffers proposed along these streams will reduce the impacts of timber harvest, but measurable adverse effects are still likely.

Impacts associated with roads and stream crossings - Of the 12 stream crossings proposed, only two occur in EFH. However, one of those crossings (HAWRC-6) is proposed for Tyre Creek, and the other (HAWRC-8) is immediately downstream of the confluence of Tyre Creek and Sanders Stream. Although these crossings can be designed to minimize their effect on the stream bank, increased turbidity in the area of the crossing is likely to result because forest roads tend to concentrate runoff and direct it to road stream crossings.

Effects of recreational use - the current hiking trails cross EFH, but no adverse impacts are anticipated from their continued use. The exact location of the primitive campsites has not been specified, but even if they are located next to streams, minimal adverse effects are anticipated. The proposed cross country ski center will be located in the Sanders Stream watershed, where it could adversely affect EFH, depending on its design and exact location (details not yet developed).

Effects of Wilderness Designation - the 25 acres designated as the HAW Wilderness Area contain 10 streams identified as EFH. Designation as a Wilderness Area will afford considerable protection to these areas.

Cumulative Effects - The HAW is located in a region where timber harvest occurs in approximately 40% of the existing forest, which is predominantly privately-owned. Clear cutting along some streams in the lower part of the watershed has resulted in degraded riparian habitat for several of the streams in the county, but the adoption of minimum 25-ft no-harvest buffers along perennial streams by the Platt County Planning Board in 1992 has reduced further damage from clear cuts. Woozelfish runs appear to be stable, based on annual counts over the past decade at Sable Bridge. The cumulative effect of implementation of the HAW Plan will probably be minimal in a regional context, but there could be significant localized adverse effects on streams already affected by clear cutting adjacent to the streams, and on the Tyre Stream HAPC, which would be adversely affected by both timber harvesting and a road crossing under the proposed HAW Plan.

4.0 EFH Conservation Recommendations

Roads and stream crossings -

1)Relocate HAWRC-6 0.5 miles north, above Tyre Creek, to avoid impacts on the HAPC.

2) No other roads should be constructed in the watershed of the Tyre Creek HAPC.

3) Construct HAWRC-8 as a temporary bridge with no structures in the stream itself, and remove it as soon as timber harvest west of the crossing is completed.

Relocation of HAWRC-6 and a prohibition on road construction in the Tyre Creek watershed will protect this important spawning area from the increased sedimentation associated with forest road construction. Construction of a temporary bridge at HAWRC-8 will minimize impacts on Sanders Stream, which provides access to Tyre Creek for migrating fish.

Timber harvest -

4) A 125-ft no-harvest buffer should be established along all streams identified as EFH.

5) A 50-ft no-harvest buffer should be established along all other streams in timber harvest area.

No-harvest buffers will protect streams against increased sedimentation and loss of riparian habitat. Research has shown that buffers greater than 100 ft are adequate to protect most riparian functions, and that buffers of 50-100 ft afford minimal protection (Johnson and Ryba, 1992).

Recreational use - Due to a lack of information on the specific design and location of the cross-country ski center, no EFH Conservation Recommendations can be provided at this time. When specific designs for the center are developed, the USFS should determine if adverse impacts on EFH may occur, and complete an individual EFH consultation with NOAA Fisheries at that time. The USFS should be able to incorporate EFH consultation into USFS's existing National Environmental Policy Act (NEPA) process, as described in NOAA Fisheries' February 14, 1999 finding on the use of the USFS's NEPA process to conduct EFH consultation.

5.0 Conclusion

Based on our review of the information provided by USFS on the HAW Plan and its effects on EFH, NOAA Fisheries has provided the EFH Conservation Recommendations above regarding stream crossings and timber harvest. NOAA Fisheries has also determined that one proposed project, the cross-country ski center, may require individual consultation.

As required by section 305(b) of the MSA, USFS must respond in writing within 30 days of receiving these EFH Conservation Recommendations. USFS must include in this response a description of measures USFS proposes implementing to avoid, minimize, or mitigate adverse impacts on EFH. If USFS's response is inconsistent with NOAA Fisheries' EFH Conservation Recommendations, USFS must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NOAA Fisheries over the

anticipated effects of the proposed actions and the measures needed to avoid, minimize, mitigate, or offset such effects.

If USFS adopts the NOAA Fisheries EFH Conservation Recommendations as management area prescriptions, no further EFH consultation is required (except in the case of the ski center, where individual consultation may be needed when design details are available). If USFS does not adopt these EFH Conservation Recommendations as management area prescriptions, any time a specific project will be authorized without these Conservation Recommendations, USFS must notify NOAA Fisheries that the EFH Conservation Recommendations will not be implemented and explain why.

6.0 Revision, Tracking, and Review

If any changes are made to the HAW Plan program such that there may be different adverse effects on EFH, USFS must notify NOAA Fisheries and the agencies will discuss whether the programmatic Conservation Recommendations should be revised. USFS will provide NOAA Fisheries with an annual report of all timber harvest, bridge construction, and road construction activities undertaken under the HAW Plan. Every five years, NOAA Fisheries will review these programmatic EFH Conservation Recommendations and determine whether they should be updated to account for new information or new technology.

Christopher Roberts
Fishery Biologist, NOAA Fisheries

References

Johnson, A.W. and D.M. Ryba. 1992. A literature review of recommended buffer widths to maintain various functions of stream riparian areas. King County Surface Water Management Division, Seattle, WA.

Murphy, M.M. 1995. Forestry impacts on freshwater habitat of anadromous salmonids in the Pacific northwest and Alaska — requirements for protection and restoration. NOAA Coastal Ocean Program Decision Analysis Series No. 7, NOAA Coastal Ocean Office, Silver Spring, MD. 156 pp.

Figure 1. Map of Hundred-Acre-Wood, including proposed management areas, EFH, and HAPC
Appendix 1. Consultation History (chronology of when the agencies met or otherwise consulted)

EXAMPLE OF A REQUEST FOR GENERAL CONCURRENCE

David Larsen
Regional Administrator
National Marine Fisheries Service
Fishville, Tennessee 44444

Dear Mr. Larsen:

The Army Corps of Engineers Memphis District (ACOE-MD) requests that the National Marine Fisheries Service grant a General Concurrence to avoid the need for project-by-project Essential Fish Habitat (EFH) consultations between our agencies for a number of our Federal navigation projects. Specifically, we request a General Concurrence for routine maintenance dredging of six small Federal channels and anchorages throughout the Memphis District, as well as the repair and maintenance of breakwaters, jetties, and revetments associated with these Federal navigation projects. The six projects are:

Jackson Rock Harbor	Twelve Rocks Harbor
Dog Inlet	Pigeon Harbor
Turtle Harbor	Donut Harbor

For purposes of the General Concurrence, routine maintenance dredging would include dredging of all or portions of an authorized Federal navigation project that has been dredged within the previous 5 years. We also request that the General Concurrence cover disposal of the dredged material at the previously-used disposal site for each project. These actions are all similar in nature and in their impact on EFH. These projects and disposal locations are described on pages 35-46 of the 1997 edition of Overview of Federal Navigation Projects in the Memphis District. A copy of this document has previously been provided to your Habitat Conservation Division staff, but we will provide another copy at your request.

Based on the EFH descriptions and maps distributed by the regional fishery management council, these six projects include EFH for juvenile king flounder and adult jewel crabs. As is detailed in the attached* report, because these six small harbors are dynamic, sandy areas that shoal quickly and have been dredged regularly for many years, we believe that continuing to maintain the harbors on a periodic basis will cause minimal impacts to flounder, crabs, and their habitat, both individually and cumulatively. *{*note: we would expect a justification for this "minimal impact" determination that has a level of detail comparable to what's in the FMPs}*

Thank you very much.

Sincerely,

L. Virgil Preston
Colonel, Corps of Engineers

attachment *{this would be the analysis that justifies the "minimal impact" determination.}*

EXAMPLE OF A GENERAL CONCURRENCE
FOR PROJECTS CONDUCTED BY THE CORPS OF ENGINEERS
(CORRESPONDS TO THE EXAMPLE OF A REQUEST FOR A GC)
WHERE NOAA FISHERIES AGREES TO DO TRACKING

Colonel L. Virgil Preston, District Engineer
U.S. Army Corps of Engineers, Memphis District
252 Harris Lane
Winston, Tennessee 44444

Dear Colonel Preston:

Thank you for your March 5, 1999 request for the National Marine Fisheries Service (NOAA Fisheries) to develop a General Concurrence to cover the required essential fish habitat (EFH) consultations between our agencies for certain operation and maintenance activities conducted by the Army Corps of Engineers (ACOE) for Federal navigation projects. Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act requires an EFH consultation for any action or proposed action authorized, funded, or undertaken by a Federal agency that may adversely affect EFH. For certain types of actions that are similar in nature and impact on EFH, and will result in no more than minimal adverse effects to EFH individually and cumulatively, NOAA Fisheries may issue a statement of General Concurrence and further consultation is not required. NOAA Fisheries grants a General Concurrence in accordance with the requirements of 50 CFR 600.920(g) after appropriate consultation with the Federal agency, the relevant fishery management council, and the public.

You requested that NOAA Fisheries provide a General Concurrence for routine maintenance dredging of ten specific Federal channels and anchorages throughout the ACOE Memphis District, as well as the repair and maintenance of breakwaters, jetties, and revetments associated with these Federal navigation projects. Routine dredging would include dredging of all or portions of an authorized Federal navigation project that has been dredged within the previous 5 years. In most cases, these are predominantly sandy channels and anchorages that shoal rather rapidly after being dredged. You also requested that the General Concurrence cover disposal of the dredged material at the previously-used disposal site for each project.

As noted in your letter, the 1997 edition of Overview of Federal Navigation Projects in the Graceland District provides the names, locations, and descriptions of each affected Federal navigation project and dredged material disposal site, including a description of the type of dredging equipment typically used for each project. Your letter also identified the species and life stages of fish and shellfish whose EFH would be affected by maintaining these projects, and concluded that the specified actions individually and cumulatively would cause minimal adverse effects to EFH and associated species.

NOAA Fisheries has reviewed your request and the supporting environmental analysis that you provided. In that analysis you indicate that effects of these activities will be no more than minimal individually and cumulatively because {*summarize supporting information, which*

should include the specific baseline environmental conditions against which the effects are being evaluated}. Based on this information, we agree that routine maintenance of the projects you listed would normally result in no more than minimal adverse effects on EFH, either individually or cumulatively. However, to protect the EFH of spawning and juvenile king flounder, NOAA Fisheries has determined that these actions only meet the criteria in 50 CFR 600.920(g)(2) and qualify for a General Concurrence if they are modified by prohibiting all dredging during the king flounder spawning and incubation season, which in most years spans the months of March, April, and May.

A recent study indicates that in years of an El Niño event, the spawning of king flounder is delayed by one to two months (Cousteau 1998). Therefore, pursuant to 50 CFR 600.920(g)(4), NOAA Fisheries requests notification in advance of planned maintenance dredging of these projects so that we can determine whether modifications to the above seasonal restrictions are necessary to ensure that the actions covered under this General Concurrence will result in no more than minimal adverse effects to EFH. Such notification would also enable NOAA Fisheries to track individual actions to gauge potential cumulative effects, so the ACOE would not need to track the actions separately. Upon notification of pending actions by the ACOE, NOAA Fisheries may require further consultation on a case-by-case basis. If additional consultation on an action is necessary, NOAA Fisheries will inform the ACOE in writing within 15 days of receiving your notification of upcoming dredging. Based on coordination with your staff, we understand that this time frame is workable from the ACOE's perspective.

NOAA Fisheries will review this General Concurrence every three years and may revise or revoke it if new information indicates that the covered actions are having more than minimal adverse effects on EFH. Should any such modifications become necessary, we will notify you as early as possible. If you or your staff have any questions about this General Concurrence, please contact Alan Fergus in our Memphis field office at 999-555-8888.

Sincerely,

David Larsen
Regional Administrator

Reference:

Cousteau, J. 1998. El Niño really messes up spawning seasons. *Flounder journal* 25:16-32.

EXAMPLE OF A GENERAL CONCURRENCE
FOR PROJECTS PERMITTED BY THE CORPS OF ENGINEERS
WHERE ACOE AGREES TO DO TRACKING

Colonel Elmer Foster, District Engineer
U.S. Army Corps of Engineers, New York District
1234 Mouse Way
Haddocktown, New York 99999

Dear Colonel Foster:

Thank you for your March 16, 1999 request for the National Marine Fisheries Service (NOAA Fisheries) to develop a General Concurrence to cover the required essential fish habitat (EFH) consultations between our agencies for certain minor construction projects authorized by the Corps of Engineers (COE) under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act requires an EFH consultation for any action, or proposed action, authorized, funded, or undertaken by a Federal agency that may adversely affect EFH. For certain types of actions that are similar in nature and impact on EFH, and will result in no more than minimal adverse effects to EFH individually and cumulatively, NOAA Fisheries may issue a statement of General Concurrence that further consultation is not required. NOAA Fisheries may grant a General Concurrence in accordance with the requirements of 50 CFR 600.920(g) after appropriate coordination with the Federal agency, the relevant fishery management council, and the public.

You requested that NOAA Fisheries provide a General Concurrence for the following categories of activities authorized through the COE regulatory program: (1) pile-supported docks with maximum dimensions of 100 feet long and 4 feet wide, provided the deck surface is elevated at least 5 feet above any special aquatic site; (2) individual boat moorings; (3) maintenance dredging of up to 5000 cubic yards of material with upland disposal; and (4) repair and/or replacement of currently serviceable coastal structures (excluding culverts) with no expansion in size. The repair and/or replacement of culverts was excluded from the list of covered actions because individual review of these projects is necessary to determine whether it may be appropriate to increase culvert diameters to improve hydrology at existing tidal restrictions.

Your request indicated that on an annual basis, the COE New York District authorizes approximately 150 docks meeting the above specifications, 200 moorings, 40 reconstruction projects, and 75 small maintenance dredging projects with upland disposal. Based on coordination with NOAA Fisheries personnel, the COE determined that projects involving these specific types of work typically cause minimal adverse effects to aquatic resources, both individually and cumulatively. Therefore, you requested that NOAA Fisheries provide a General Concurrence for these activities.

NOAA Fisheries has reviewed your request and the supporting environmental analysis that you provided. In this analysis you conclude that impacts of these activities will be no more than

minimal because {*summarize supporting information, which should include the specific baseline environmental conditions against which the effects are being evaluated*}. Based on this information, we agree that the categories of actions you identified meet the criteria in 50 CFR 600.920(g)(2), provided that the COE tracks individual actions and submits to us an annual summary of the number and locations of projects authorized pursuant to this General Concurrence. EFH for Atlantic cod, northern halibut, and brown shrimp is located throughout the New York District and may be affected by these actions, but for the reasons explained in the analysis that accompanied your request for a General Concurrence, the effects of these actions on EFH is expected to be negligible.

NOAA Fisheries requests that you provide to the Metropolis field office the information you collect as a result of tracking the actions covered by this General Concurrence. This information should be provided to NOAA Fisheries by June 1 of each year and published in the Metropolis Daily News. The information provided should include the number and type of actions, as well as the amount of EFH adversely affected.

NOAA Fisheries will review this General Concurrence every five years and may revise or revoke it if new information indicates that the covered actions are having more than minimal adverse effects on EFH. Should any such modifications become necessary, we will notify you as early as possible. If you or your staff have any questions about this General Concurrence, please contact Clark Kentrel in our Metropolis field office at 999-555-8888.

Sincerely,

Donald Dawson, Ph.D.
Regional Administrator

EXAMPLE OF EFH ASSESSMENT
FOR ABBREVIATED CONSULTATION

PROJECT DESCRIPTION: Construct an 85 slip marina and associated facilities in Barnegat Bay, New Jersey. The proposed project includes: excavation of 1.8 acres of shallow sub-tidal muddy bottom area for boat basin and channel creation (basin to be dredged to -6.0 MLW and channel to -7.5 MLW); and filling of 1.5 acres of tidal estuarine emergent wetlands associated with the bulkhead for a parking lot, roadways, walkways, and fuel tank storage area.

EFH IDENTIFICATIONS: The area of the proposed action (Barnegat Bay) has been identified as EFH for several species of fish: summer flounder (larvae, juvenile and adults), scup (all life stages), black sea bass (larvae, juveniles and adults), bluefish (juveniles and adults), Atlantic herring (juveniles and adults), windowpane flounder (all life stages), winter flounder (all life stages, particularly spawning adults).

The above fish species are not estuarine-resident species and therefore only utilize this area on a seasonal basis, primarily in the summer months. During the summer months the estuary is typically utilized as a forage area for juveniles and adults and as a nursery area for larvae and juveniles. The only exception to this trend is that winter flounder generally spawn in the estuary from February through June.

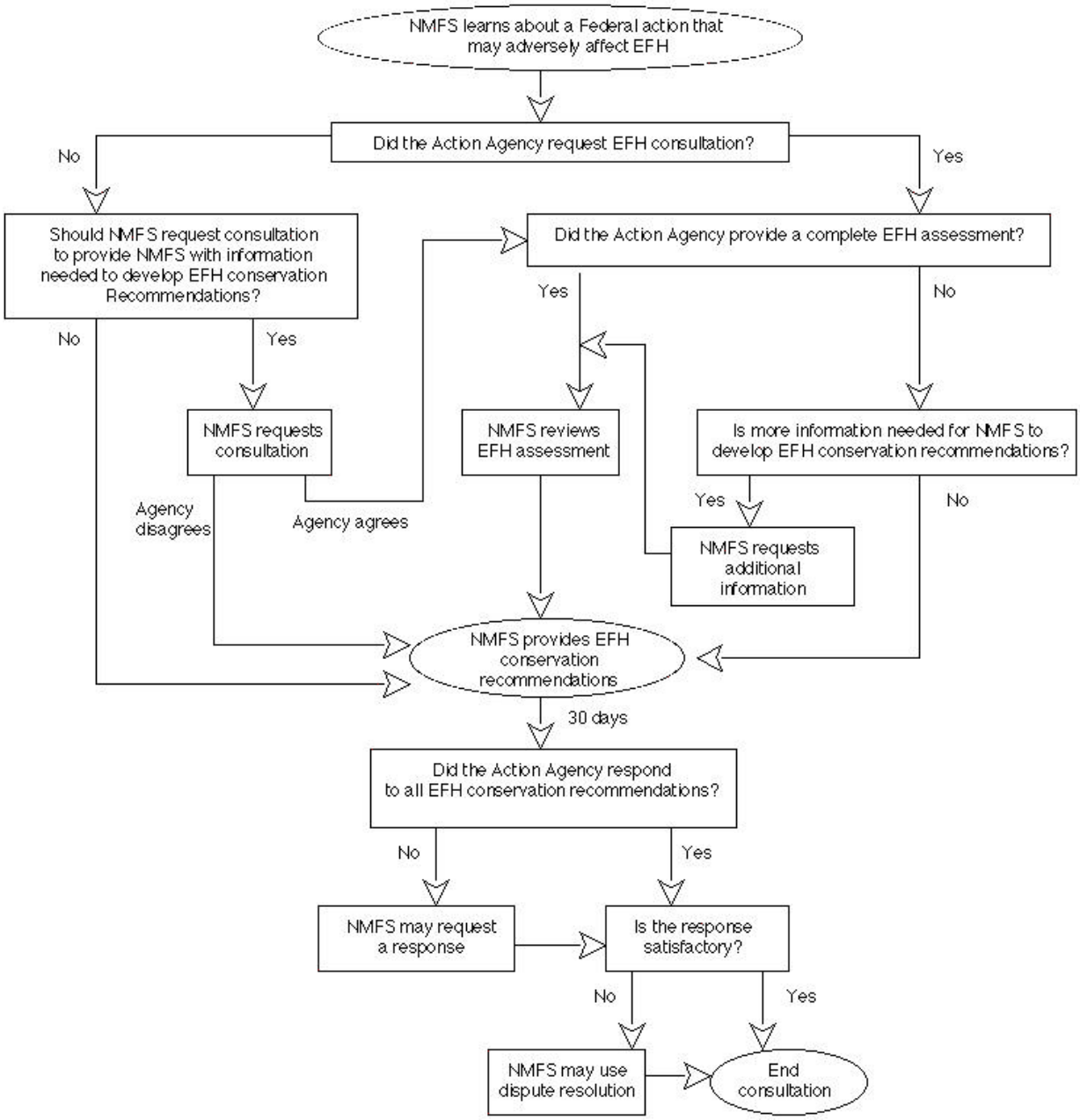
EFFECTS ON EFH: The dredging of 1.8 acres of subtidal areas will result in the temporary loss of benthic invertebrates, which will recolonize within a few seasons. The project proposes to fill 1.5 acres of wetlands, for which the project sponsor will provide compensatory mitigation in the form of 3.5 acres of tidal wetland restoration in Barnegat Bay.

The proposed in-water work is scheduled to be undertaken from September 1, 1999 through March 31, 2000. All in-water work will be conducted at times when most of the above species are not expected to be present, with the exception of winter flounder. Therefore, it is reasonably well assured that there will be no impact to those species not present at the time of the dredging and construction. Winter flounder, however, spawn during the months that dredging and boat basin construction will be occurring. Since the adults are motile, it is expected that they will avoid the areas of disturbance and therefore will not be affected. However, winter flounder lay demersal eggs, so there is a potential that the construction activities will adversely affect eggs in the proposed areas of disturbance by removing the eggs or smothering the eggs with increased siltation caused by the dredging. The area of disturbance is relatively small in scale compared to similar habitat available to winter flounder within Barnegat Bay.

Because of the temporary nature of the effects on benthic invertebrates (the dredged area will re-colonize) and the compensation provided for the permanent wetland fill, the cumulative effects of this project on EFH are negligible. Additionally, it is anticipated that the dredging of the channel into the boat basin will increase tidal flushing to the surrounding wetland, thereby improving the health of that ecosystem. Finally, the timing of the construction in winter months also minimizes any potential impacts to the majority of the species of concern.

CONCLUSION: Direct adverse effects on EFH will be limited to the temporary disturbance of 1.8 acres of subtidal aquatic habitat due to dredging during, and permanent loss of 1.5 acres of wetlands due to the placement of fill. Because the dredging will occur during the winter, adverse effects from the dredging will be limited to one species, winter flounder. Compensation for the wetland fill will consist of 3.5 acres of tidal estuarine emergent marsh restoration. As a result of the limited nature of this project, the restriction of the dredging to the winter, and the compensation for the permanent loss of aquatic habitat, the "Action Agency" concludes there will be only minor adverse impacts to EFH.

NMFS Decision Tree for EFH Consultations



Appendix C - Guidance for Integrating EFH Consultations with Endangered Species Act Section 7 Consultations

Guidance for Integrating
Magnuson-Stevens Fishery Conservation and Management Act
EFH Consultations with Endangered Species Act
Section 7 Consultations

National Marine Fisheries Service
January 2001

Introduction

The 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA)(16 U.S.C. 1801 et seq.) require the identification of Essential Fish Habitat (EFH) for Federally managed fishery species and the implementation of measures to conserve and enhance this habitat. The MSA requires Federal agencies to consult with the National Marine Fisheries Service (NOAA Fisheries) on activities that may adversely affect EFH (MSA section 305(b)(2))[3]. There are many situations where designated EFH overlaps with the habitat (including critical habitat) of species listed as threatened or endangered under the Endangered Species Act (ESA). Thus, a proposed Federal action could affect both a listed species and its designated critical habitat and adversely affect EFH, necessitating consultation under both section 7 of the ESA and section 305(b)(2) of the MSA. Because of this dual obligation, the Federal action agency and NOAA Fisheries can find efficiencies by integrating EFH and ESA consultations. As explained in this guidance, EFH consultations can be completed using the ESA section 7 consultation process provided that the Federal action agency supplies the information required by 50 CFR 600.920(e) for an EFH Assessment, and NOAA Fisheries clearly distinguishes its EFH Conservation Recommendations from ESA conservation recommendations under 50 CFR 402.14(j) or any other ESA measures or conditions. If NOAA Fisheries 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.

EFH Consultation Requirements

The EFH guidelines encourage the use of existing interagency consultation or environmental review procedures for EFH consultations. If an existing procedure allows appropriate notification to NOAA Fisheries regarding proposed actions and includes an assessment of the effects of the proposed actions on EFH, then NOAA Fisheries can make a finding that the existing process can be used for EFH consultation. If no appropriate procedures exist, then the consultation process outlined in 50 CFR 600.920 should be used.

For all Federal actions, the lead Federal agency determines the effects of the proposed action on EFH. If the action will have no adverse effect, then no EFH consultation is necessary. If the

[3] EFH designations and associated requirements for federal agencies to consult with NOAA Fisheries on actions which "may adversely affect" EFH are in effect once the Secretary of Commerce approves the EFH provisions of federal fishery management plans (FMPs).

action may have an adverse effect, then the Federal action agency must notify NOAA Fisheries and provide an EFH Assessment. The length of the EFH Assessment can vary depending on the magnitude of the potential impacts to EFH, but all EFH Assessments must include the following information: (1) a description of the proposed action; (2) an analysis of the effects, including cumulative effects, of the proposed action on EFH, the managed species, and associated species, such as major prey species, including affected life history stages; (3) the Federal agency's views regarding the effects of the action on EFH; and (4) proposed mitigation, if applicable (50 CFR 600.920(e)(3)).

Once NOAA Fisheries has reviewed the EFH Assessment and analyzed possible adverse effects to EFH resulting from the proposed action, NOAA Fisheries must develop EFH Conservation Recommendations (MSA section 305(b)(4)(A)). These recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. EFH Conservation Recommendations will not include actions beyond the statutory authority of the Federal action agency (50 CFR 600.925(a)). Fishery Management Councils (Councils) may also comment on actions that may adversely affect EFH (MSA section 305(b)(3)). Thus, it may be necessary for NOAA Fisheries to coordinate with the Council(s) regarding NOAA Fisheries' EFH Conservation Recommendations. The Federal action agency must provide a detailed response in writing to NOAA Fisheries regarding the EFH Conservation Recommendations within 30 days of their receipt (MSA section 305(b)(4)(B)). The response must include a description of measures proposed by the Federal action agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. If the response is inconsistent with NOAA Fisheries' EFH Conservation Recommendations, the Federal action agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NOAA Fisheries over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects. If there are future changes to the proposed action that may have adverse impacts on EFH, or if new information becomes available that affects the basis for NOAA Fisheries' EFH Conservation Recommendations, the Federal action agency must re-initiate EFH consultation with NOAA Fisheries (50 CFR 600.920(l)).

ESA Consultation Requirements

For all Federal actions, the Federal action agency is required to determine the effects of the proposed action on any species listed as "threatened" or "endangered" under the ESA, including any modifications to critical habitat. If the action will have no effect, then no consultation is necessary. If the Federal action agency determines that the proposed action "may affect" listed species or critical habitat, then the Federal action agency must request section 7 consultation with NOAA Fisheries. If, based on information provided by the Federal action agency, NOAA Fisheries finds that the proposed action "may affect" but is "not likely to adversely affect" listed species or critical habitat, NOAA Fisheries provides the Federal action agency with a concurrence letter and consultation is complete (50 CFR 402.13(a)). If the Federal action agency or NOAA Fisheries determines that the proposed action is "likely to adversely affect" listed species or critical habitat, the Federal agency must request initiation of formal consultation[4] and

[4]Formal consultation determines whether a proposed agency action(s) is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification). It also determines the amount or extent of anticipated incidental take. Formal consultation follows a structured process for

provide the information outlined in 50 CFR 402.14. After reviewing the status of the species, the environmental baseline for the action area, the effects of the proposed action and the cumulative effects, NOAA Fisheries issues a biological opinion (BO) (50 CFR 402.14(h)), including in most cases an incidental take statement with reasonable and prudent measures to minimize the impact of incidental take of listed species (50 CFR 402.14(i)) and, if jeopardy is found, any reasonable and prudent alternatives to the proposed action (50 CFR 402.14(h)(3)).

Integrating EFH Consultations with ESA Consultations

The process for combining ESA and EFH consultation depends upon the extent to which the action involves effects to EFH and species listed under the ESA within the action area, and the number of affected species in common between the two statutes. Three scenarios exist: the MSA managed species and ESA listed species are identical; some (but not all) of the MSA managed species and ESA listed species are the same (other affected species may be listed but not managed, or managed but not listed); or none of the MSA managed species are listed under the ESA. When integrating ESA and EFH consultations for each of the three scenarios, care should be taken to avoid confusion by the Federal action agency between the different components of ESA and EFH consultations.

The information prepared by the Federal action agency for the informal or formal ESA consultation (50 CFR 402.14) may also serve as the EFH Assessment if it includes all the components required in an EFH Assessment (50 CFR 600.920(e)). If the document contains information that is specific to the EFH Assessment, that information must be clearly identified in a separate section of the document.

The results of the ESA and EFH consultations should be provided in a single transmittal from NOAA Fisheries to the Federal agency. 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 in the cover letter or at the end of the transmittal following all of the components of the ESA BO. All of the EFH Conservation Recommendations must be clearly labeled to distinguish them from ESA conservation recommendations under 50 CFR 402.14(j) or any other ESA recommendations or conditions. NOAA Fisheries should cite section 305(b)(4)(A) of the MSA as the authority for providing EFH Conservation Recommendations, and should remind the Federal action agency of its obligation to respond to the recommendations in writing pursuant to section 305(b)(4)(B) of the MSA and 50 CFR 600.920(k). This is important to clarify since Federal action agencies are not required to respond to ESA conservation recommendations. Any conflicts between NOAA Fisheries' determinations, information needs, or recommendations for ESA and EFH must be resolved within NOAA Fisheries before being provided to the Federal action agency.

ESA/EFH Early Planning/Coordination and Determination of Effect

---

meeting section 7 consultation requirements and culminate in the preparation of a biological opinion (ESA Consultation Handbook 1998).

ESA and EFH consultations often involve discussions with Federal action agencies at early stages in the project planning process prior to initiation of consultation. When an action agency requests information on the presence of ESA listed species or critical habitat in a particular location, that agency should also be informed of the presence of EFH and the associated MSA managed species and life stages, if applicable. Likewise, if an action agency requests information on the presence of EFH in a particular location, that agency should also be informed of the presence of ESA listed species and critical habitat, if applicable. Many times, issues related to adverse effects on ESA listed species and their critical habitat can be resolved through early planning and coordination efforts. Similarly, issues related to potential adverse effects on the EFH should be discussed along with ESA concerns during preliminary planning and coordination.

In determining whether an action is likely to adversely affect ESA listed species/critical habitat, and/or may adversely affect EFH, it is appropriate during this early coordination to consider project modifications that may avoid and/or minimize adverse effects. Completing a careful alternatives analysis and incorporating design stipulations and "best management practices" can lessen or eliminate potential adverse effects to EFH and listed species/critical habitat under the ESA. Incorporating such measures can result in a "not likely to adversely affect" determination for ESA-listed species/critical habitat, and narrowing the scope of necessary EFH Conservation Recommendations or even obviating the need for EFH consultation. In contrast to avoidance and minimization, compensatory mitigation should have no bearing on determinations of potential adverse effects on EFH and whether an action requires an EFH consultation.

Process for Combining ESA and EFH Consultations

Scenario 1: The MSA Managed Species and ESA Listed Species Are Identical (e.g., projects with adverse effects to freshwater areas designated as both EFH and critical habitat for salmonid species)

The simplest scenario for combining EFH and ESA consultations occurs when the MSA managed species and ESA listed species are identical in the action area (i.e., all of the MSA managed species are also listed as threatened or endangered under ESA, and no non-managed listed species are involved), and EFH overlaps with ESA listed species and their critical habitat. In such cases, a thorough analysis of ESA listed species and critical habitat potentially affected by a proposed action would also encompass all potential adverse effects to EFH. The ESA and MSA use different standards and terminology to trigger consultation and determine the appropriate level of consultation. Since in this scenario the affected species are identical, and because in most cases an action that would adversely affect an ESA listed species would be attributable to adverse effects on the habitat, the standards for determination of effects would generally be treated as functionally equivalent under the two statutes. However, there could be cases when adverse effects to habitat occur without any corresponding effects to a listed species or vice versa. In such cases, NOAA Fisheries should evaluate potential adverse effects to EFH and listed species/critical habitat separately.

- If NOAA Fisheries finds that the proposed action is not likely to adversely affect ESA listed species or their critical habitat, in most situations NOAA

Fisheries would also conclude that the action would not adversely affect EFH, and no EFH Conservation Recommendations are necessary. The results of informal ESA consultation and EFH consultation should be transmitted in separate sections of a single letter from NOAA Fisheries to the Federal action agency. If the ESA "not likely to adversely affect" determination is based upon NOAA Fisheries' understanding that the Federal agency will implement the action with specific measures to avoid and/or minimize adverse effects, the EFH section of the document should refer to those measures as the basis for determining that no EFH Conservation Recommendations are necessary.

- If NOAA Fisheries determines that formal ESA consultation is necessary because the proposed action is likely to adversely affect listed species or adversely modify critical habitat, in most situations NOAA Fisheries would conclude that the action would adversely affect EFH and provide EFH Conservation Recommendations. The EFH Conservation Recommendations may be similar to, or reference, the reasonable and prudent alternatives (RPAs) contained in the BO and/or the reasonable and prudent measures and the associated terms and conditions (TCs) of the incidental take statement. If the EFH Conservation Recommendations are identical to measures (i.e., RPAs, TCs) required by the ESA consultation, the cover letter may notify the Federal action agency that the ESA measures are also serving as EFH Conservation Recommendations, rather than repeating the measures in a separate section of the transmittal. The cover letter must clearly state that the measures are satisfying both the ESA and the MSA, two separate statutory authorities. If additional measures that do not apply to EFH are included in the ESA consultation, the cover letter must specify which of the ESA measures apply as EFH Conservation Recommendations. Any EFH Conservation Recommendations that supplement specific measures of the ESA consultation should be clearly stated within the cover letter or presented at the end of the transmittal following all of the components of the BO. The transmittal must clearly notify the Federal action agency of its responsibility to respond to NOAA Fisheries' EFH Conservation Recommendations, whether or not they overlap with ESA RPAs and/or TCs.

SCENARIO 1: COMBINED EFH-ESA CONSULTATION WHEN THE MSA MANAGED SPECIES AND ESA LISTED SPECIES ARE IDENTICAL		
ESA EFFECTS DETERMINATION	TYPE OF ESA CONSULTATION	RESULT OF EFH CONSULTATION
Not likely to adversely affect ESA listed species that are also MSA managed	Informal	No EFH Conservation Recommendations necessary in most cases.
Likely to adversely affect ESA listed species that are also MSA managed	Formal	EFH Conservation Recommendations provided or referenced in the cover letter to the BO or at the end of the transmittal following all the components of the BO. Federal action agency responds to EFH Conservation Recommendations within 30 days.

Scenario 2: Some But Not All MSA Managed Species and ESA Listed Species Are the Same

A second scenario involves situations where there is partial overlap between EFH and ESA listed species/critical habitat in the action area (i.e., some of the MSA managed and ESA listed species are the same, but some of the managed species are not listed and/or some of the listed species are not managed). In this case, additional information beyond what would be required for ESA consultation would be necessary to evaluate potential adverse effects on EFH for any non-listed species, if the action may adversely affect EFH for those species. For non-listed species, the Federal action agency should provide the EFH Assessment information to NOAA Fisheries along with its biological assessment or analysis of effects to listed species and critical habitat (either as a discrete clearly labeled section of the same document or as a separate EFH Assessment), to facilitate combined EFH and ESA review.

- If NOAA Fisheries concurs that the proposed action is not likely to adversely affect listed species or their critical habitat, in most situations NOAA Fisheries would also conclude that the action would not adversely affect EFH for those MSA managed species that are also listed under ESA. However, NOAA Fisheries must still determine whether the action would adversely affect EFH for any MSA managed species that are not listed under ESA, and whether EFH Conservation Recommendations are necessary for those species' EFH. The results of the informal ESA consultation and EFH consultation should be transmitted in separate sections of a single letter from NOAA Fisheries to the Federal action agency. If the ESA "not likely to adversely affect" determination is based on NOAA Fisheries' understanding that the Federal action agency will implement the action with specific measures to avoid and/or minimize adverse effects, the EFH section of the document should also refer to those

measures as the basis for determining that no EFH Conservation Recommendations are necessary for the species that are both MSA managed and ESA listed.

- If NOAA Fisheries determines that formal ESA consultation is necessary because the proposed action is likely to adversely affect listed species or adversely modify critical habitat for the species that are both ESA listed and MSA managed, in most situations NOAA Fisheries would conclude that the action would adversely affect EFH and provide EFH Conservation Recommendations for those species. NOAA Fisheries must still determine whether the action would adversely affect EFH for any MSA managed species that are not listed under ESA, and whether EFH Conservation Recommendations are necessary for those species' EFH. The results of the ESA and EFH consultations should be provided under a single cover letter with the EFH Conservation Recommendations pertaining to both ESA listed and non-listed species presented either in the cover letter or at the end of the transmittal following all the components of the BO. The EFH Conservation Recommendations may be similar to, or reference, the reasonable and prudent alternatives contained in the BO and/or the reasonable and prudent measures and the associated terms and conditions of the incidental take statement.

SCENARIO 2: COMBINED EFH-ESA CONSULTATION WHEN SOME BUT NOT ALL MSA MANAGED SPECIES AND ESA LISTED SPECIES ARE THE SAME		
ESA EFFECTS DETERMINATION	TYPE OF ESA CONSULTATION	RESULT OF EFH CONSULTATION
Not likely to adversely affect ESA listed species that are also MSA managed	Informal	In most cases, no EFH Conservation Recommendations necessary for species that are both listed and managed. EFH Conservation Recommendations pertaining to non-listed species, if appropriate, provided in the informal concurrence letter. Federal action agency responds to any EFH Conservation Recommendations within 30 days.
Likely to adversely affect ESA listed species that are also MSA managed	Formal	EFH Conservation Recommendations for species that are listed and managed, and for non-listed species that are managed, if appropriate, provided either in the cover

		letter to the BO or at the end of the transmittal following all of the components of the BO. Federal action agency responds to any EFH Conservation Recommendations within 30 days.

Scenario 3: None of the MSA Managed Species and ESA Listed Species Are the Same

If none of the MSA managed species and ESA listed species are the same in the action area, but consultation is required nevertheless under both statutes, the EFH and ESA consultations should still be coordinated to facilitate the consultation process for the Federal action agency (i.e., one-stop shopping). Regardless of whether informal or formal ESA consultation is necessary for ESA listed species/critical habitat, NOAA Fisheries must still determine whether the action would adversely affect EFH, and thus whether NOAA Fisheries must provide EFH Conservation Recommendations. The results of the ESA and EFH consultations should be provided under a single cover letter with the EFH Conservation Recommendations provided either in the cover letter to the BO or at the end of the transmittal following all of the components of the BO.

SCENARIO 3: COMBINED EFH-ESA CONSULTATION WHEN NONE OF THE MSA MANAGED AND ESA-LISTED SPECIES ARE THE SAME		
ESA EFFECTS DETERMINATION	TYPE OF ESA CONSULTATION	RESULT OF EFH CONSULTATION
Not likely to adversely affect ESA listed species	Informal	EFH Conservation Recommendations for non-listed species, if appropriate, provided in the informal concurrence letter. Federal action agency responds to any EFH Conservation Recommendations within 30 days.
Likely to adversely affect ESA listed species	Formal	EFH Conservation Recommendations for non-listed species, if appropriate, provided either in the cover letter to the BO or at the end of the transmittal following all of the components of the BO. Federal action agency responds to any EFH Conservation Recommendations within 30 days.

Internal Consultations on NOAA Fisheries Actions

NOAA Fisheries consults internally on internal actions related to ESA, including approving Habitat Conservation Plans and issuing section 10 take permits. If any of these actions may have an adverse effect on EFH, an EFH consultation is required. These consultations may require developing new internal procedures and should be coordinated with the appropriate Regional EFH Coordinators.

Appendix D - Guidance for EFH Consultations on Fishery Management Actions

Guidance for EFH Consultations on Fishery Management Actions Under the Magnuson-Stevens Act, Atlantic Coastal Fisheries Cooperative Management Act, and Atlantic Striped Bass Conservation Act

May 2001

Background

Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires Federal agencies to consult with the National Marine Fisheries Service (NMFS) regarding any action that may adversely affect essential fish habitat (EFH). This mandate applies to all federal actions, including fishery management actions taken by NMFS under the Magnuson-Stevens Act, Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), and Atlantic Striped Bass Conservation Act (ASBCA). NMFS completes a wide array of fishery management actions, usually in conjunction with Fishery Management Councils (Councils). The processes used for completing those actions can vary. This document outlines an efficient method for incorporating EFH consultation for fishery management actions into existing National Environmental Policy Act (NEPA) procedures. In general, EFH coordination should be initiated as early as possible so that NMFS and Councils can work together to evaluate and minimize potential adverse effects on EFH.

This document elaborates on the NMFS Assistant Administrator's September 27, 1999 memorandum (see attached) regarding assessment of impacts of fishery management actions on EFH. The 1999 memorandum directs NMFS to comply with the EFH consultation requirements when completing fishery management actions and to "analyze impacts of the proposed action in the context of the fishery as a whole" on all EFH directly and indirectly affected by the action. Under the 1999 memorandum, an EFH consultation on a fishery management action should not be limited to the new or modified activities resulting from the management action. Rather, all adverse effects to EFH resulting from activities under the relevant Fishery Management Plan, as modified by the management action triggering the EFH consultation, must be analyzed. If NMFS previously completed a thorough consultation on the effects of the fishery, the new consultation should focus on how those effects may change with the proposed action.

The EFH regulations encourage the use of existing environmental review procedures for EFH consultations (50 CFR 600.920(e)). NMFS satisfies NEPA requirements for most fishery management actions by completing either an Environmental Assessment/Finding

of No Significant Impact (EA/FONSI) or an Environmental Impact Statement (EIS). NMFS can minimize staff workload for a given action by incorporating the EFH consultation into the NEPA process for that action. There may be alternative processes available that meet the requirements for completing EFH consultations; NMFS should use the process that is most efficient and appropriate for a particular action. For those fishery management actions where the use of NEPA procedures does not allow for efficient completion of EFH consultation, and for which no other environmental review process is available, the consultation processes outlined in 50 CFR 600.920 should be used. Regardless of the process used, EFH coordination should begin as early as possible to allow full consideration and incorporation of EFH Conservation Recommendations into final fishery management decisions.

EFH consultations for NMFS fishery management actions should be completed by the appropriate NMFS Division (e.g., regional Sustainable Fisheries Division, headquarters Highly Migratory Species Division) consulting with the associated NMFS regional Habitat Conservation Division (HCD). In many cases a Council, or other non-NMFS entity, as appropriate, takes the lead in developing management action documents and completing NEPA analyses. To simplify the environmental review process, NMFS may arrange for the Council or other entity to also develop the EFH Assessment and/or take the lead for the EFH consultation.

To improve efficiency, programmatic consultations (PC) and General Concurrences (GC) should be considered if appropriate. A PC may be used to complete consultation for a range of similar actions implemented under a program(50 CFR 600.920(a)(2)). A GC may be used to consult on those actions that result in no more than minimal adverse effects to EFH, both individually and cumulatively, and thus, do not require further consultation (50 CFR 600.920(f)).

Process for Consultation

Council Actions

1. Council begins consideration of an action.
2. NMFS Region (SFD and/or HCD) works with Council regarding EFH implications of the action under consideration.
3. SFD, or Council in coordination with SFD, makes determination as to whether the proposed action may adversely affect EFH.
4. If there is no adverse effect on EFH, then there is no need for an EFH consultation. The reason for this decision

should be included in the Decision Memorandum for the action, or in the Information Memorandum if a Decision Memorandum is not required.

5. If there may be an adverse effect on EFH, then HCD, SFD and the Council will work together to develop steps to avoid adverse impacts.
6. If all adverse impacts are avoided during the development of the proposed action, the administrative record should document the steps NMFS and the Council took to avoid the adverse impacts to EFH. This will be provided in the decision document submitted to Headquarters.
7. If there are still adverse impacts to EFH, then SFD or the Council must consult with HCD on the proposed action. An EFH Assessment must be completed by SFD or the Council. The EFH Assessment should be included in the draft or final[1] EA/EIS. When incorporated into an EA/EIS, all EFH information must be clearly identified in a separate section of the document or clearly referenced.
8. SFD or Council must provide HCD with the draft or final EA/EIS in a sufficient amount of time before the final action to allow HCD to fully analyze possible adverse affects to EFH.
9. HCD will provide EFH Conservation Recommendations to SFD and/or the Council in time to be incorporated into the EA before it is finalized or within the comment period for the draft or final EIS.
10. SFD or Council must respond to the Conservation Recommendations within 30 days. If the Council has not made a decision on the action within 30 days, SFD should provide an interim response within 30 days. The final response should be incorporated into the final EA/EIS or elsewhere in the administrative record, and should be summarized in the Decision Memorandum.
11. Any disagreements between SFD and HCD will be resolved by the appropriate Regional Administrator.

Atlantic Highly Migratory Species (HMS) Actions

For Atlantic HMS actions the process for completing EFH consultations should be similar to the process outlined above for the Councils, with NMFS Office of Sustainable Fisheries (HMS Division) consulting with the appropriate regional HCD office(s). For actions that may affect EFH in both the Northeast Region and

---

[1] Use of the term "final" signifies that the NEPA document has been completed by SFD or the Council(including incorporation of public comment, if required) but has not yet been given final approval by the NMFS Regional Administrator.

the Southeast Region, the NMFS Regional Offices should coordinate and decide who will take the lead in completing the EFH consultation.

NMFS Regional Actions

NMFS completes a number of fishery management actions under the Magnuson-Stevens Act without direct Council involvement, including (but not limited to) Exempted Fishing Permits, emergency rules, interim rules, Secretarial FMPs, and Secretarial Amendments. The process for completing EFH consultations should be similar to the process outlined above for the Councils, with the EFH consultation being completed by SFD and HCD at the Regional Office. If the use of NEPA procedures does not allow for efficient completion of EFH consultation, the region should utilize an alternative process to handle EFH consultations efficiently (e.g., Endangered Species Act consultations). If no other process is suitable, then SFD should consult with HCD following the process outlined in 50 CFR 600.920.

Atlantic Coastal Fisheries Conservation and Management Act (ACFCMA) and Atlantic Striped Bass Conservation Act (ASBCA) Actions

There are three types of actions that NMFS takes under the ACFCMA and ASBCA: (1) actions in response to formal recommendations from the Atlantic States Marine Fisheries Commission (Commission); (2) actions without a Commission recommendation; and (3) NMFS moratorium on fishing in state waters in response to a finding of non-compliance by the Commission. NMFS Office of Intergovernmental and Recreational Fisheries (IRF) in headquarters is involved with both ASBCA and ACFCMA actions. The Southeast Region (SER)and the State, Federal, and Constituent Programs Office (SFCP) in the Northeast Region are involved with ACFCMA actions.

For actions with or without formal recommendations from the Commission, EFH consultation should be completed as follows:

1. Commission begins consideration of an action.
2. NMFS Region (HCD) works with Commission regarding EFH implications of the action under consideration.
3. IRF/SFCP/SER, in coordination with Commission, makes determination as to whether the proposed action may adversely affect EFH.
4. If there is no adverse effect on EFH, then there is no need for an EFH consultation. The reason for this decision should be included in the Decision Memorandum for the

action, or in the Information Memorandum if a Decision Memorandum is not required.

5. If there may be an adverse effect on EFH, then HCD and IRF/SFCP/SER will work together, in coordination with Commission to develop steps to avoid adverse impacts.
6. If all adverse impacts are avoided during the development of the proposed action, the administrative record should document the steps NMFS and the Commission took to avoid the adverse impacts to EFH. This will be provided in the decision document submitted to Headquarters.
7. If there are still adverse impacts to EFH, IRF/SFCP/SER must consult with HCD on the proposed action. An EFH Assessment must be completed by IRF/SFCP/SER. The EFH Assessment should be included in the draft or final[1] EA/EIS. When incorporated into an EA/EIS, all EFH information must be clearly identified in a separate section of the document or clearly referenced.
8. IRF/SFCP/SER must provide HCD with the draft or final EA/EIS in a sufficient amount of time before the final action to allow HCD to fully analyze possible adverse affects to EFH.
9. HCD will provide EFH Conservation Recommendations to IRF/SFCP/SER in time to be incorporated into the EA before it is finalized or within the comment period for the draft or final EIS.
10. IRF/SFCP/SER must respond to the Conservation Recommendations within 30 days. If a final decision on the action has not been made, IRF/SFCP/SER should provide an interim response within 30 days. The final response should be incorporated into the final EA/EIS or elsewhere in the administrative record, and should be summarized in the Decision Memorandum.

For moratoria on fishing in state waters, IRP/SFCP/SER would consult with HCD following the outline above, except neither the Council nor the Commission would be involved formally with EFH issues.

If use of NEPA procedures does not allow for efficient completion of EFH consultation, an alternative process to handle EFH consultations efficiently should be utilized (e.g., Endangered Species Act consultations). If no other process is suitable, then the appropriate NMFS office should consult with HCD following the process outlined in 50 CFR 600.920.

Furthermore, if NMFS, through its participation in ASMFC meetings, learns about a proposed action to be authorized, funded, or undertaken by a state agency that would adversely

affect EFH, NMFS must provide that agency with EFH Conservation Recommendations, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

Appendix E - EFH Consultation Agreements

The following list summarizes the EFH consultation agreements between NOAA Fisheries and other federal agencies, including other offices within NOAA Fisheries. Types of agreements include findings (F), programmatic consultations (P), and general concurrences (GC). NOAA Fisheries Headquarters' agreements can be found at: http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm.

Agency	Type	Status/Description
NOAA Fisheries Headquarters		
COE [reg]	**F - §10/404/103**	signed 7/15/99
COE	**P - Nationwide permits**	signed 9/21/99
All Federal Agencies	**F - ESA**	signed 2/28/2001
EPA (Office of Wastewater Mgmt.)	**F - §402 (NPDES)**	signed 5/25/01
Interior/Minerals Management Service	**F - NEPA**	signed 3/12/02
NOAA Fisheries Northeast Region		
COE (N. Atlantic Div.) [c/w]	**F - NEPA**	signed 1/18/00
COE (Baltimore) [reg]	**F - §10/404/103**	signed 11/5/99
COE (New England) [reg]	**F - §404**	signed 4/16/99
COE (New England) [PGP]	**GC - §404/10**	signed 3/3/00
COE (New York) [reg]	**F - §10/404/103**	signed 11/5/99
COE (Norfolk) [reg]	**F - §404**	signed 4/16/99
COE (Philadelphia) [reg]	**F - §10/404/103**	signed 11/5/99
NMFS (Restoration Center)	**P**	signed 8/8/01
NOAA Fisheries Southeast Region		
COE (Charleston) [c/w]	**F - NEPA**	signed 3/30/00
COE (Charleston) [reg]	**F - §10/404**	signed 4/6/00
COE (Galveston) [c/w]	**F - NEPA**	signed 7/10/00
COE (Galveston) [reg]	**F - §10/404**	signed 8/6/99
COE (Jacksonville) [c/w]	**F - NEPA**	signed 5/3/99
COE (Jacksonville) [reg]	**F - §10/404**	signed 3/23/00
COE (Mobile) [c/w]	**F - NEPA**	signed 2/17/00

COE (Mobile) [reg]	**F - §10/404**	signed 3/17/00
COE (New Orleans)	**F - CWPPRA**	signed 6/30/98 [*includes USDA, DOC, DOI & EPA*]
COE (New Orleans) [c/w]	**F - NEPA**	signed 3/31/99
COE (New Orleans) [reg]	**F - §10/404**	signed 7/29/99
COE (Savannah) [c/w]	**F - NEPA**	signed 7/1/99
COE (Savannah) [reg]	**F - §404**	signed 11/30/99
COE (Wilmington) [reg]	**F - §404**	signed 4/17/00
COE (Wilmington) [c/w]	**F - NEPA**	signed 9/6/00
EPA (Region 6)	**F - §402 (NPDES)**	signed 7/17/00
Interior/MMS (New Orleans)	**F - NEPA**	signed 3/17/00 [*for GOM OCS Region lease sales*]
Interior/MMS (New Orleans)	**P**	signed 7/1/99 [*for central & western GOM operations*]
Transportation/FHWA [FL]	**F - NEPA**	signed 7/19/00
Transportation/FHWA [NC]	**F - NEPA**	signed 11/15/00
Transportation/FHWA [TX]	**F - NEPA**	signed 9/5/01
NMFS (Restoration Center)	**P**	signed 8/22/01
NOAA Fisheries Southwest Region		
COE (Honolulu) [reg]	**F - §10/404/103**	signed 9/1/99
COE (Pacific Ocean Div.) [c/w]	**F - NEPA**	signed 9/1/99
COE (S. Pacific Div.) [reg]	**F - §10/404/103**	signed 11/2/99
COE (S. Pacific Div.) [c/w]	**F - NEPA**	signed 11/2/99
Defense/Navy (Southwest Div.)	**F - NEPA**	signed 4/4/00
COE (Los Angeles Div) [reg/cw]	**GC-§10/404**	signed 8/5/03
Federal Highways Administration	**F-NEPA/ESA**	signed 8/19/03
NOAA Fisheries Northwest Region		
Bonneville Power Administration	**F - NEPA/ESA**	signed 3/29/00
COE (Northwestern Div.) [reg]	**F - §10/404/103/ESA**	signed 6/20/00
COE (Northwestern Div.) [c/w]	**F - NEPA/ESA**	signed 11/4/99
Interior/Bureau of Reclamation	**F - NEPA/ESA**	signed 3/29/00

NOAA Fisheries Alaska Region		
Agriculture/FS	**F - NEPA**	signed 5/1/00
COE (Alaska) [reg]	**F - §10/404/103**	signed 7/12/99
COE (Alaska) [c/w]	**F - NEPA**	signed 7/26/99
COE (Alaska)	**P**	signed 7/28/00 [*for Alt. Permit Proc. Procedure 93-1*]
COE (Alaska)	**P**	signed 3/31/00 [*for Anchorage Wetlands MP GP*]
Transportation/FHWA [AK]	**F - NEPA/§404**	signed 1/7/00 [*incorp. ext. Merged Agency Agree.*]
EPA (Region 10)	**F - §402 (NPDES)**	signed 11/7/00
EPA (Region 10)	**F - NEPA**	signed 6/8/01
FAA (Alaska)	**F - NEPA/FAA Order 5050.4(A)**	signed 7/31/02 [for state sponsored aviation projects in AK]
MMS (Alaska OCS Region)	**P**	signed 7/8/03 [Cook Inlet Planning Area]

* Updated December 22, 2003; Reg. = Regulatory Division, C/W = Civil Works Division; §10 = Rivers and Harbors Act section 10 permit process; §§404 & 402 = Clean Water Act section 404 & 402 permit process; §103 = Marine Protection Research and Sanctuaries Act section 103 permit process; NEPA = National Environmental Policy Act process; ESA = Endangered Species Act consultation or permit process.