NOAA FISHERIES
Habitat Conservation - Southeast Region

What is an Essential Fish Habitat Consultation?

An essential fish habitat (EFH) consultation is the process used by federal agencies and the National Marine Fisheries Service (NOAA Fisheries) to protect and conserve habitats determined to be especially important to commercial and recreational marine fish and shellfish.

Why is an EFH Consultation Required?

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) was amended in 1996 creating a requirement for federal agencies to consult with the NOAA Fisheries (as the Secretary of Commerce's representative) when their actions or activities may adversely affect habitat identified by federal regional fishery management councils or NOAA Fisheries as EFH. Through this consultation process, measures are identified to avoid, reduce, or compensate for adverse impacts to EFH.

What is EFH and why is habitat protection important?

In the Magnuson-Stevens Act Congress declared, "One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States." The Act defined EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." In 2002, NOAA Fisheries issued final regulations establishing procedures for identifying and describing EFH in federal fishery management plans.

Who determines what habitat is identified as EFH?

Regional Fishery Management Councils (Councils) are responsible for determining what habitats meet the definition of EFH for fish and shellfish species managed under their jurisdiction. Three Councils occur in the Southeast United States: the Gulf of Mexico, South Atlantic, and U.S. Caribbean. NOAA Fisheries must ensure EFH designations comply with the regulations when approving fishery management plans. NOAA Fisheries is responsible for identifying and describing EFH in fishery management plans for highly migratory species which cross Council boundaries, such as sharks, tunas, and billfish.

Do I have to consult with NOAA Fisheries?

Federal agencies have the sole responsibility to consult with NOAA Fisheries, if the federal agency determines their activity or action may adversely affect EFH. In the Southeast U.S. the majority of EFH consultations are conducted by the district offices of the U.S. Army Corps of Engineers in association with their regulatory authorities over wetlands and navigable waters of the U.S. and their civil works programs. Other federal agencies which frequently consult with NOAA Fisheries in the Southeast include: the U.S. Coast Guard, Federal Highways Administration, Environmental Protection Agency, Bureau of Ocean Energy Management, and Bureau of Safety and Environmental Enforcement.

What if a project benefits EFH?

Projects with a positive net environmental outcome may require EFH consultation due to temporary or permanent impacts occurring during construction or implementation. For example, EFH consultation would be required if one type of EFH is lost by converting it to another type of EFH during construction of a wetland restoration or habitat improvement project. Although consultation may be required, projects with a positive net environmental outcome typically do not require additional mitigation for the temporary impacts to EFH or the conversion of one type of EFH to another, more productive, habitat type.

Is the EFH consultation a permit?

No. The EFH consultation is a process used by federal agencies and NOAA Fisheries to protect and conserve important fish habitat. Importantly, it should be noted the process can result in NOAA Fisheries providing the federal action agency non-prescriptive EFH conservation recommendations to avoid, reduce, or compensate impacts to EFH.

Doesn't the EFH consultation duplicate other environmental reviews?

No. Other environmental reviews generally do not address specific habitat considerations for species of fish and shellfish managed under the Magnuson-Stevens Act. However, in many instances the EFH consultation is incorporated into other environmental review processes and runs concurrent with those evaluations.

How is an EFH consultation started?

EFH consultation generally begins when NOAA Fisheries receives the federal agency's EFH Assessment.

What is an EFH Assessment?

An EFH Assessment is a critical review of the proposed project and its potential impacts to EFH. As outlined in the regulation, EFH Assessments must include: (1) a description of the proposed action, (2) an analysis of the potential adverse effects of the action on EFH and the managed species, (3) the federal agency's conclusions regarding the effects of the action on EFH, and, (4) proposed mitigation, if applicable. If appropriate and depending on the scale of the proposed action, the assessment should also include the results of an on-site inspection, the views of recognized experts on the habitat or species affected, a literature review, an analysis of alternatives to the proposed action, and any other relevant information.

What are EFH Conservation Recommendations?

The Magnuson-Stevens Act requires NOAA Fisheries to recommend measures to conserve EFH when a federal action would adversely affect EFH. NOAA Fisheries may include comments and recommendations pursuant to other authorities (such as the Fish and Wildlife Coordination Act) at the same time; however, EFH conservation recommendations will be clearly identified.

Must EFH Conservation Recommendations be followed?

EFH conservation recommendations are not prescriptive. Federal agencies must respond, in writing, within 30 days of receiving EFH conservation recommendations describing measures proposed by the agency for avoiding, reducing, or compensating the impact of the activity on EFH. Agencies may provide an interim response if their evaluation will take longer than 30 days.

What happens if a federal agency does not agree with the EFH Conservation Recommendations?

If an agency's decisions are not consistent with NOAA Fisheries' EFH conservation recommendations, the agency must provide a response at least 10 days before taking final action. The agency must explain its reasons for not following the EFH conservation recommendations and include scientific rationale for any disagreements with NOAA Fisheries over the anticipated effects of the proposed action and the measures needed to offset those affects. The Assistant Administrator for NOAA Fisheries may also request a meeting with the head of the federal action agency to further discuss the project and attempt to resolve disagreements.

When should I contact you?

NOAA Fisheries welcomes the public and federal agencies to contact us at any time with questions regarding EFH and the EFH consultation process. Permit applicants are also encouraged to contact us for assistance and guidance before applying for permits. However, once a permit application is in process, applicants should follow the advice of the project manager at the federal regulatory agency who must evaluate a wide range of public interest review factors in addition to EFH.

EFH Consultations

In the regulatory context, one of the most important provisions of the Magnuson-Stevens Act for conserving fish habitat is the consultation required by federal agencies involved in permitting, funding, or undertaking actions that may adversely impact EFH. The Magnuson-Stevens Act does not require state or local agencies to consult. However, NMFS is directed to comment and provide conservation recommendations if we become aware of non-federal activities that may have an adverse affect on EFH.

The Consultation Process

At its most basic, an EFH consultation consists of a federal agency providing NMFS with an EFH Assessment, NMFS responding with EFH Conservation Recommendations followed by the federal agency's response to NMFS recommendations.

Generally a consultation begins when NMFS receives the federal action agency's EFH Assessment. An EFH Assessment is a critical review of the proposed project and its potential impacts to EFH. As outlined in the regulation, EFH Assessments must include:

(1) a description of the action;
(2) an analysis of the potential adverse effects of the action on EFH and the managed species;
(3) the federal agency's conclusions regarding the effects of the action on EFH; and,
(4) proposed mitigation, if applicable.

If appropriate, the assessment should also include the results of an on-site inspection, the views of recognized experts on the habitat or species affects, a literature review, an analysis of alternatives to the proposed action, and any other relevant information.

Types of EFH Consultation

Most EFH consultations are project specific because sufficiently detailed information for development of EFH conservation recommendations does not exist at a programmatic level.

Project Specific Consultations: The vast majority of EFH consultations are project specific consultations incorporated into existing environmental review procedures because consultation and coordination is already required by other statutes. To incorporate EFH consultations three criteria must be met:

(1) the existing process must provide NMFS with timely notification of the action;
(2) notification of the action must include an EFH Assessment of the impacts of the proposed action as outlined in the EFH rules; and
(3) NMFS must have completed a written finding that the existing coordination process satisfies the requirements of the Magnuson-Stevens Act.

To facilitate project-specific consultations, NMFS and the action agency should discuss how existing review or coordination processes can be used to accomplish the EFH consultation. With agreement on how existing coordination mechanisms will be used, the NMFS will transmit a letter to the action agency describing the process of EFH consultation within existing project review frameworks.

Abbreviated and Expanded Consultations: When an agreement to use an existing procedure is not in place, project specific consultations must follow procedures in the EFH Final Rule. Abbreviated consultations allow NMFS to quickly determine to what degree a federal action may adversely impact EFH and should be used when impacts to EFH are expected to be minor. For example, the abbreviated consultation procedure would be used when the adverse effect of an action or proposed action could be alleviated through minor design or operational modifications, or the inclusion of measures to offset unavoidable adverse impacts.

Expanded consultations allow NMFS and a federal action agency the maximum opportunity to work together in the review of an activity's impact on EFH and the development of EFH conservation recommendations. Expanded consultation procedures must be used for federal actions that would result in substantial adverse effects to EFH. Federal action agencies are encouraged to contact NMFS at the earliest opportunity to discuss whether the adverse effect of a proposed action makes expanded consultation appropriate. In addition, it may be determined after review of an abbreviated consultation that a greater level of review and analysis would be appropriate and that review through expanded consultation procedures should be employed. Expanded consultation procedures provide additional time for the development of conservation recommendations, and may be appropriate for actions such as the construction of large marinas and port facilities, or activities subject to preparation of an environmental impact statement.

Programmatic Consultation: Evaluation at a programmatic level may be appropriate when sufficient information is available to develop EFH conservation recommendations and address all reasonably foreseeable adverse impacts under a particular program area. The NMFS Southeast Region has a programmatic consultation in place with the Department of Interior for the siting and removal of oil and gas structures on the outer continental shelf of the Gulf of Mexico.

General Concurrences: The EFH rule allows a General Concurrence to be utilized for categories of similar activities having minimal individual and cumulative impacts such as activities authorized under the U.S. Army Corps of Engineers' Nationwide Permit program. Consultation occurs at the Corps' District level authorizing a variety of activities with minimal impacts.

Programmatic and General Concurrence consultations minimize the need for individual project consultation in most cases because NMFS has determined that the actions will likely result in no more than minimal adverse effects, and conservation measures would be implemented.

Designating a Non-Federal Representative:

Federal agencies may designate a non-federal representative (e.g., a consultant) to conduct an EFH consultation. However, the federal action agency remains ultimately responsible for compliance with the consultation requirements of the Magnuson-Stevens Act.

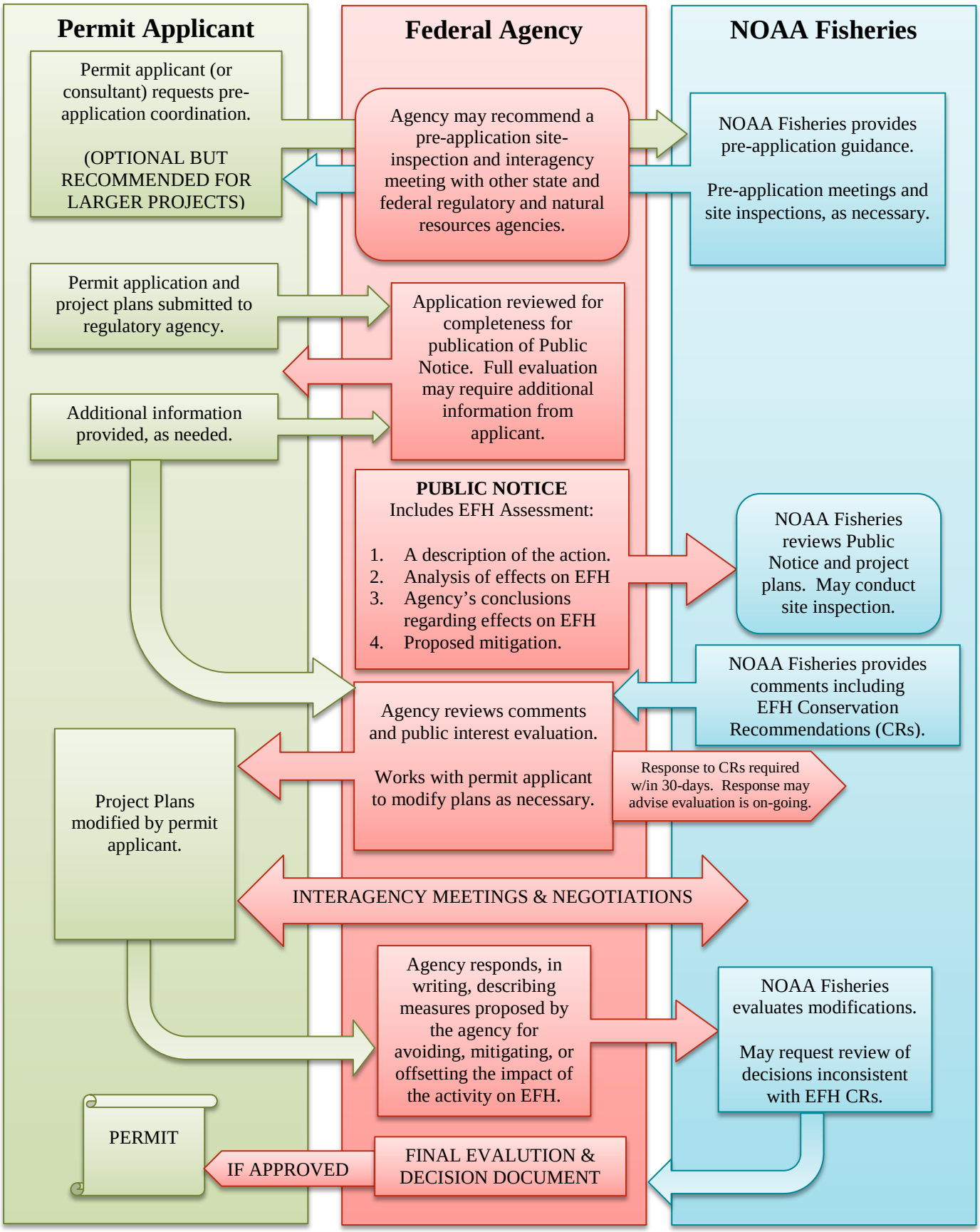
Federal Agency Response to EFH Conservation Recommendations

Regardless of what consultation method is used the Magnuson-Stevens Act requires federal agencies to respond in writing to NMFS EFH conservation recommendations within 30 days of receiving those recommendations. The EFH Final Rule requires the response to include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In cases where a response is inconsistent with NMFS recommendations, the agency must provide its response 10 days before taking final action. This response must explain reasons for not following NMFS recommendations, including the scientific rationale for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to offset the adverse impacts.

Responses Inconsistent with NMFS EFH Conservation Recommendations

The consultation process provides an important opportunity to resolve critical and outstanding EFH issues prior to an action agency rendering a final decision. When an agency decision is inconsistent with NMFS EFH conservation recommendations, the NMFS Assistant Administrator may request a meeting with the head of the federal action agency to further discuss the project and attempt to achieve a greater level of protection for EFH and federally managed fisheries. The process for higher-level review of proposed actions is not specified in the regulations; rather it is to be addressed on an agency-by-agency basis.

General EFH Consultation Process



NOAA Habitat Program

Conserving Habitats for the Future

For more information, please visit us on the internet at:

http://sero.nmfs.noaa.gov/habitat_conservation

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Rev. 082013