



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office
9721 Executive Center Drive N.
St. Petersburg, Florida 33702
(727)570-5317, FAX 570-5300

August 6, 1999

Colonel Nicholas Buechler
District Engineer, Galveston District
Department of the Army, Corps of Engineers
Post Office Box 1229
Galveston, Texas 77553-1229

Dear Colonel Buechler:

The National Marine Fisheries Service (NMFS) has received your April 15, 1999, letter requesting our finding that procedures proposed by the Galveston District (District) would be adequate to meet the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). Your request and this response address the District's regulatory activities subject to provisions of the Clean Water Act, Rivers and Harbors Act, and Fish and Wildlife Coordination Act (FWCA) and the consultative requirements of the MSFCMA.

The EFH regulations (50 CFR 600.920) specify that after discussion with a Federal action agency, the NMFS may make a finding that an agency's review processes are adequate, or can be modified, to satisfy EFH consultation requirements. Section 600.920(e)(3) enables NMFS to find that existing consultation/environmental review procedures can be used to satisfy the MSFCMA consultation requirement. To meet the requirement, the existing procedures must fulfill the following criteria: 1) the existing process must provide NMFS with timely notification of actions that may adversely affect EFH; 2) notification must include an assessment of impacts of the proposed action as discussed in section 600.920 (g); and, 3) NMFS must have made a finding pursuant to section 600.920(e)(3) that the existing process satisfies the requirements of section 305(b)(2) of the MSFCMA.

Timely Notification

The District's regulatory process, involving the issuance of Section 10/404 public notices and various types of interagency coordination letters, provides the NMFS with timely notification of proposed actions. Your District's public review process often includes preapplication permit screening meetings, and generally allows up to 30 days for public notice or coordination letter review. Normally, 45 to 90 days are required before a final decision is rendered on individual permit requests.

EFH Assessment

Our staffs have agreed that public notices and coordination letters prepared by the District could be modified to contain sufficient information to satisfy the requirements of an EFH assessment described in Section 600.920(g). To fulfill the EFH assessment requirement, after a determination by the



District that a proposal may adversely impact EFH, the documents must include: 1) a description of the proposed action; 2) an analysis of individual and cumulative effects on EFH, Federally managed fisheries, and associated species such as major prey species, including affected life history stages; 3) the District's views regarding effects; and, 4) proposed mitigation, if applicable. The level of detail contained in each assessment should be commensurate with the anticipated degree of adverse impact to EFH resources.

Alternatively, regulatory documents could incorporate such information by reference to a NEPA document or other documentation prepared for a similar or related action, supplemented with any relevant new project specific information. Incorporation of information by reference meets EFH consultation requirements provided the proposed action involves similar adverse impacts to EFH in the same geographic area or similar ecological setting, and the referenced document has been provided to NMFS.

Finding

Consultation Initiation

NMFS finds that your agency's regulatory process for Section 10/404 activities can be used to satisfy the consultation requirements of the MSFCMA. Specifically, EFH consultation and notification of potential adverse impacts to EFH will occur when the District sends NMFS a public notice or letter of coordination. Impacts to EFH will be addressed in the documents in a section or paragraph which clearly indicates that its intent is to initiate EFH consultation and provides an assessment of EFH impacts. Where appropriate this may be accomplished by reference to companion or background documents. The information should include both an identification of affected EFH and an assessment of impacts.

In some cases, the District may determine, prior to public notice issuance, that potential impacts to EFH are so great as to merit an expanded EFH consultation (50 CFR 600.920(i)). A decision on the appropriateness of expanded consultation may also be made after public notice issuance and consideration by the District of comments provided by the NMFS, other resource agencies, and the public. When expanded consultation is requested, procedures for consultation specified in subpart 920(i)(1 - 5) of the regulations will be followed.

Coordination

After consultation is initiated and within the specified public comment period, or a mutually agreeable extension to the comment period, NMFS will provide the District with a written project evaluation which will include EFH conservation recommendations, when the proposed action will adversely affect EFH. NMFS will provide such recommendations as a part of our overall FWCA comments. When EFH issues are raised and NMFS provides conservation recommendations, they will be contained in a separate section titled "EFH Conservation Recommendations." Written concurrences with District determinations that a project would not adversely impact EFH will not be provided, although consistent with past practice, NMFS normally will provide a written response indicating that we have no objection to permit issuance.

Under Section 305(b)(4)(B) of the MSFCMA, the Galveston District has a statutory requirement to respond in writing within 30 calendar days of the date of the NMFS letter transmitting EFH recommendations. If the District will not be able to render a decision (e.g., provision of a letter of authorization or signed permit or other final action) within 30 calendar days of NMFS EFH Conservation Recommendations, the District should provide NMFS with an interim written response within 30 days. That response should indicate that the 30-day response requirement of the MSFCMA can not be met and that a final response will be provided in a timely manner. In either event, the District should provide a detailed response at least 10 calendar days prior to taking final action.

Higher Level Review

If a District decision is inconsistent with NMFS EFH conservation recommendations, NMFS will endeavor to resolve conflicting views at the field level wherever possible. Issue resolution could involve discussions between the District and the NMFS Galveston office and, if appropriate, the permit applicant. However, 50 CFR 600.920(j)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with the appropriate Army Corps of Engineers headquarters official to discuss the proposed action and opportunities for resolving any disagreements.

In an abbreviated format, the overall consultation process is outlined in enclosure 1. This summarizes the procedures you have proposed and is based on discussions between District and NMFS staffs. Enclosure 2 is a modification of the detailed procedures attached to your April 15, 1999, letter. This enclosure incorporates several minor revisions proposed and agreed upon by Galveston District and Southeast Regional Office personnel.

Conclusion

If you agree with the procedures described in this finding and the referenced enclosures, a response letter to that effect is requested. Please contact Mr. Rickey Ruebsamen, the Southeast Region's EFH Coordinator, at 727/570-5317, if you have any questions or wish to discuss this finding.

Sincerely,



Andreas Mager, Jr.
Assistant Regional Administrator

Enclosures

Outline of NMFS - Galveston District Process for EFH Consultation for Regulatory Activities

- ▶ **COE provides the NMFS with a public notice, coordination letter, or PCN notification. In cases where the project may adversely affect EFH:**
 - ▶ **The COE document indicates that it is intended to initiate EFH consultation**
 - ▶ **Document includes the required components of an EFH assessment**
 - ▶ **NMFS is allowed sufficient time to review and comment**
- ▶ **NMFS provides EFH conservation recommendations, as appropriate, within specified time frames**
- ▶ **COE responds to NMFS EFH conservation recommendations**
 - ▶ **A final response is provided to the NMFS within 30 days, or an interim response may be transmitted if final action on the project can not be completed within that time**
 - ▶ **Final response is provided to the NMFS at least 10 days prior to final action/approval (e.g., signing of a permit, letter of authorization, etc.)**
 - ▶ **If NMFS recommendations are not accepted, the COE response includes a detailed explanation of why NMFS recommendations are not being followed and a justification for any disagreements over anticipated EFH impacts or mitigation requirements**
- ▶ **NMFS may seek headquarters-level review of those Galveston District decisions contrary to NMFS conservation recommendations**

Essential Fish Habitat (EFH) Consultation Procedures
and the
Galveston District Corps of Engineers - Regulatory Process

1. EFH Consultation will be initiated the following ways:

- **Actions Requiring A Public Notice:** To initiate consultation, the following statement will be included in public notices for activities that may adversely impact EFH in the coastal region of Texas:
"This notice initiates the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The proposal would impact approximately ## acres of estuarine substrates and emergent wetlands utilized by various life stages of red drum, Spanish mackerel, and shrimp. Our initial determination is that the proposed action would not have a substantial adverse impact on EFH or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the National Marine Fisheries Service."

- **Actions Requiring Coordination Letters:** To initiate consultation, the following statement will be included in letters of coordination for non-public notice activities (e.g., Section 10 Letter of Permission Activities) that may adversely impact EFH in the coastal region of Texas:
"This coordination letter initiates the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The proposal would impact approximately ## acres of estuarine substrates and emergent wetlands utilized by various life stages of red drum, Spanish mackerel, and shrimp. Our initial determination is that the proposed action would not have a substantial adverse impact on EFH or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the National Marine Fisheries Service."

- **Actions Requiring PCN Coordination Notices:** To initiate consultation, the following statement will be included in PCN Coordination letters for nationwide permit activities may adversely impact EFH within the coastal region of Texas:
"This PCN coordination notice initiates the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The proposal would impact approximately ## acres of estuarine substrates and emergent wetlands utilized by various life stages of red drum and shrimp. Our initial determination is that the proposed action would not have a substantial adverse impact on EFH or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the National Marine Fisheries Service."

2. Actions Not Expected To Adversely Impact EFH:

- In cases where adverse impacts to EFH are not anticipated, the following statement may be included in public notices and various coordination letters and memoranda transmitted to the NMFS:
"The Galveston District has determined that the proposed action would not adversely impact EFH or associated fisheries managed by the Gulf of Mexico Fishery Management Council or the NMFS."
- Independent of the preliminary determination of no adverse affect, the NMFS may conclude that EFH and dependent resources would be adversely impacted and provide EFH Conservation Recommendations.

3. Corps response to EFH Comments:

- If EFH conservation recommendations are received from NMFS during the comment period and a final permit decision is unlikely to be made within 30 calendar days, the Corps will send a letter to or correspond electronically with the NMFS acknowledging receipt of comments. This interim response should indicate that

the District has received NMFS's EFH recommendations, will consider them fully, has not yet made a decision on the application, but will provide a final response as promptly as possible. Because of the time required to fully consider the merits of permit issuance, interim responses may be sent immediately after receiving EFH comments and/or recommendations.

- When the District has made a decision on the permit application, the final response letter will address NMFS recommendations and contain a description of any measures proposed by the Corps to conserve EFH. In the case of a response that is inconsistent with NMFS EFH conservation recommendations, the District shall explain its reasons for not following the recommendations.
- If no EFH comments are received, or a "no objection" letter is received from NMFS during the comment period, further coordination with the NMFS is unnecessary, and the Corps will proceed with next stage of evaluation.

4. Resolution of EFH concerns:

- The Corps will attempt to resolve EFH concerns through negotiations with the NMFS and applicant and revisions to project plans. If appropriate revisions can be made, and the NMFS considers its concerns resolved, it will provide written or electronic correspondence to the Corps indicating no further objection to permit issuance. This will end the consultation process for the subject action.
- If NMFS EFH concerns cannot be resolved and the Corps intends to issue a permit inconsistent with NMFS EFH conservation recommendations, the Corps will so advise NMFS and provide its rationale in writing, at least 10 calendar days prior to the finalization of the action. That response will include a justification for any disagreements with the NMFS over the anticipated effects of the proposed action and a discussion of the reasons for not following NMFS recommendations or requiring measures needed to avoid, minimize, mitigate, or offset adverse impacts to EFH.

5. Higher Level Review:

Standard Permits

- If the NMFS maintains that issuance of a permit and project implementation will result in an unacceptable adverse impact to EFH, NMFS may choose to seek higher level review of the permit action (procedure pending). NMFS will notify the Corps in writing of this decision within the aforementioned 10-day time frame.
- If no response is received from the NMFS within 10 days of the Corps' notification letter, it will be assumed that the NMFS does not wish to seek higher level review of the permit action. Lack of NMFS's intent to elevate also may be signified by letter from the NMFS indicating that additional EFH consultation is unnecessary. After 10 days or receipt of a NMFS response that elevation will not be pursued, the Corps will proceed with the issuance of the permit.

PCN Coordination under Nationwide Permits

- If NMFS maintains that a proposed permit activity will result in more than minimal adverse impact to EFH, the NMFS may choose to seek higher level review of the permit action (procedure pending). The NMFS will notify the Corps in writing of this decision within the aforementioned 10-day time frame.

6. General Comments:

- All EFH coordination between the Corps and NMFS (comments, recommendations, correspondence, final decisions, etc.) will be documented in the decision document for each regulatory action. If no impacts to EFH were identified (e.g., no objection letters were received from the NMFS), the following statement will be placed in the decision document: *"Essential Fish Habitat - No adverse impacts to Essential Fish Habitat will result from the proposed project."*
- Consultation will not be initiated at this time, for any of the existing Galveston District General Permits. Individual actions to be authorized pursuant to an existing general permit will not require consultation. However, consultation will be conducted each time a general permit is renewed (every 5-years) or a new general permit is proposed.

- **The summary statements in item 1 of this enclosure specify EFH assessment language to be included in various regulatory actions requiring consultation. Regulatory staff should exercise judgement in determining the level of detail provided and identifying specific types of EFH and Federally managed fisheries which could be impacted by any proposed development activity.**



DEPARTMENT OF THE ARMY
GALVESTON DISTRICT, CORPS OF ENGINEERS

P.O. BOX 1229

GALVESTON, TEXAS 77553-9229

April 15, 1999

REPLY TO
ATTENTION OF:

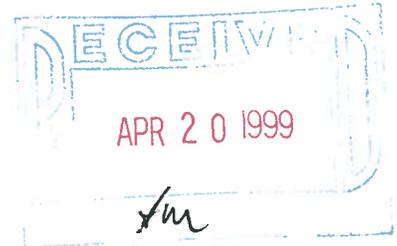
Executive Office

RECEIVED

APR 20 PM 12:34

NMFS-SERG
ST. PETERSBURG, FL.

Dr. Andrew J. Kemmerer
Regional Administrator
National Marine Fisheries Service
9721 Executive Center Drive, North
St. Petersburg, Florida 33702



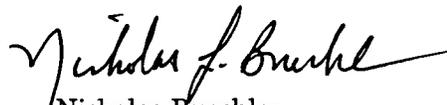
Dear Dr. Kemmerer:

This letter is in reference to the National Marine Fisheries Service (NMFS) Interim Final Rule (50 CFR Part 600), Subpart K - Essential Fish Habitat (EFH) Coordination, Consultation, and Recommendations (§ 600.920). The rule, as it addresses Federal agency consultation with the Secretary of Commerce, allows NMFS to make a finding, pursuant to § 600.920(e)(3), that existing consultation/ environmental review procedures may be used to meet the consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA).

We ask NMFS to issue a finding for Department of the Army regulatory activities, conducted by the Galveston District, pursuant to the Clean Water Act and the Rivers and Harbors Act. This District's existing procedures routinely include consultation with NMFS on individual permit actions, some actions subject to Nationwide Permit authorization, and general permit development. I believe that a minor modification of those procedures would allow the Galveston District to meet the requirements for the use of existing procedures for EFH consultations, as specified at § 600.920(e)(1). The enclosure to this letter outlines our proposed procedural modifications.

We believe that the existing regulatory processes, with modification, are adequate to meet the consultation requirements of the MSFCMA and would appreciate your review and findings in support of this conclusion. If you have any questions, or need additional information, please contact Ms. Janet Thomas at 409-766-3095.

Sincerely,


Nicholas Buechler
Colonel, Corps of Engineers
District Engineer

Enclosure

Essential Fish Habitat (EFH) Consultation Procedures
and the
Galveston District Corps of Engineers - Regulatory Process

1. EFH Consultation will be initiated the following ways:

- **Actions Requiring A Public Notice:** To initiate consultation, the following statement will be included in public notices for activities that occur within the coastal zone of Texas:
"This notice initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Our initial determination is that the proposed action would (or would not) have a substantial adverse impact on Essential Fish Habitat or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the National Marine Fisheries Service."
- **Actions Requiring Coordination Letters:** To initiate consultation, the following statement will be included in letters of coordination for non-public notice activities (eg. Section 10 Letter of Permission Activities) that occur within the coastal zone of Texas:
"This coordination letter initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Our initial determination is that the proposed action would (or would not) have a substantial adverse impact on Essential Fish Habitat or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the National Marine Fisheries Service."
- **Actions Requiring Pre-Construction Coordination (PCN) Notices:** To initiate consultation, the following statement will be included in PCN Coordination letters for nationwide permit activities proposed within the coastal zone of Texas:
"This PCN coordination notice initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Our initial determination is that the proposed action would (or would not) have a substantial adverse impact on Essential Fish Habitat or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the National Marine Fisheries Service."

2. Corps response to EFH Comments:

- If EFH recommendations are received from NMFS during the comment period and a final permit decision is unlikely to be made within 30 days, the Corps will send a letter to the NMFS acknowledging receipt of comments. This may be a generic response letter (refer to Attachment No. 2). Because of the time required to fully consider the merits of permit issuance, it is likely that the interim response will be sent immediately after receiving EFH comments and/or recommendations.
- If no EFH comments were received, or a "no objection" letter was received from NMFS during the comment period, the Corps will proceed with next stage of evaluation.

3. Resolution of EFH concerns:

- The Corps will attempt to resolve EFH concerns through negotiations with the NMFS and applicant and revisions to project plans. If appropriate revisions can be made, and the NMFS considers its concerns resolved, it will send the Corps a "no objection" letter. This will end the consultation process for the subject action.
- If NMFS EFH concerns cannot be resolved and the Corps intends to issue a permit inconsistent with NMFS EFH conservation recommendations, the Corps will provide the NMFS its rationale in writing at least 10 days prior to the finalization of the action. That response will include the reasons for not following the recommendations, including the justification for any disagreements with the NMFS over the

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

4. Next Action:

Standard Permits - (scenario: The Corps is proposing to issue a permit over NMFS EFH recommendations)

- If NMFS maintains that a proposed project will result in more than minimal adverse impacts to EFH, the NMFS may choose to elevate the permit action for higher level review (procedures pending). The NMFS will notify the Corps in writing, of this decision, within the aforementioned 10-day time frame.
- If no response is received from the NMFS within 10 days of the Corps notification letter, it will be assumed that the NMFS does not wish to elevate the permit action. Lack of NMFS's intent to elevate may also be signified by letter from the NMFS indicating that additional EFH consultation is unnecessary. After 10 days or receipt of a NMFS response that elevation will not be pursued, the Corps will proceed with the issuance of the permit.

PCN Coordination under Nationwide Permits

- If NMFS maintains that a proposed project will result in more than minimal adverse impacts to EFH, the NMFS may choose to elevate the permit action for higher level review (procedures pending). The NMFS, will notify the Corps in writing, of this decision, within the aforementioned 10-day time frame.

5. General Comments:

- All EFH coordination between the Corps and NMFS (comments, recommendations, correspondence, final decisions etc...) will be documented in the decision document for each permit action. If no impacts to EFH were identified (e.g., no objection letters were received from the NMFS), the following statement will be placed in the decision document: "Essential Fish Habitat - No adverse impacts to Essential Fish Habitat will result from the proposed project."
- Consultation will not be initiated at this time, for any of the existing Galveston District General Permits. Actions evaluated pursuant to a General Permit will not require consultation. However, consultation will be conducted each time a general permit is renewed (every 5-years) or a new general permit is proposed.