



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southeast Regional Office
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November 30, 1999

Colonel Joseph K. Schmitt
District Engineer, Savannah District
Department of the Army, Corps of Engineers
Post Office Box 889
Savannah, Georgia 31402-0889

Dear Colonel Schmitt:

Staff of the National Marine Fisheries Service (NMFS) and the Savannah District have met to discuss Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). The EFH regulations (50 CFR part 600) 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 meet EFH consultation requirements. This letter concerns the District's regulatory activities subject to provisions of the Clean Water Act, Rivers and Harbors Act, and Fish and Wildlife Coordination Act, and the requirement that coordination with the NMFS be undertaken when an activity (e.g., permit issuance) may adversely impact EFH.

Section 600.920(e)(3) of the regulations enables NMFS to find that existing consultation/environmental review procedures can be used to satisfy the Act's consultation requirement. To be used in such a manner, 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 Savannah 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 sometimes includes preapplication coordination meetings and discussions, 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 found in Section 600.920(g). To fulfill the EFH assessment requirement, 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.



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 impacts on 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 by your District, 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 we determine that the proposed action will have unacceptable adverse effects on EFH. NMFS will provide such recommendations as a part of our overall public notice comments. When EFH issues are raised and NMFS provides conservation recommendations, they will be contained under a heading titled "EFH Conservation Recommendations." Written concurrences with District determinations that a project would not adversely impact EFH are not required, although consistent with past practice, NMFS normally will provide a written response on all proposed actions indicating our position on permit issuance.

Under section 305(b)(4)(B) of the MSFCMA, the District has a statutory requirement to respond in writing within 30 days to EFH recommendations made by the NMFS. If the District will not be able to render a decision [e.g., complete a signed Finding of No Significant Impact (FONSI), Record of Decision (ROD), or take other final action] within 30 days of receiving 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 days prior to taking final action (e.g., provision of an authorization letter or proposed permit to an applicant).

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 appropriate NMFS field office and, if appropriate, the permit applicant. If conflicts can not be resolved at the local level, 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 based on prior discussions between District and NMFS staffs. Enclosure 2 provides the EFH consultation procedure in detail and address various types of authorizations, review and response actions, and general comments.

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

✓ CC: F/SE45
F/HC2 (John Kurland)
SAFMC

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

- ▶ COE provides the NMFS with a public notice, coordination letter, or PCN notification
 - ▶ 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., permit issuance or letter of authorization)
 - ▶ If NMFS recommendations are not accepted, the COE response includes a detailed explanation of why NMFS recommendations are not being followed and a scientific justification for any disagreements over anticipated EFH impacts
- ▶ NMFS may seek headquarters-level review of those Savannah District decisions contrary to NMFS conservation recommendations

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

1. EFH Consultation will be initiated the following ways:

- **Actions Requiring an Individual Public Notice:** To initiate consultation a statement, similar in content to the following, will be included in public notices for activities that occur in the coastal region of Georgia:

"This notice initiates the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Implementation of the proposed project would impact estuarine substrates, water columns, and emergent wetlands (see project description) utilized by various life stages of red drum and species of the shrimp and snapper-grouper management complexes. Our initial determination is that the proposed action would not have a substantial individual or cumulative adverse impact on EFH or fisheries managed by regional Fishery Management Councils and the National Marine Fisheries Service (NMFS). Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the NMFS."
- **Actions Requiring Coordination Letters:** To initiate consultation a statement, similar in content to the following, will be included in letters of coordination for non-public notice activities (e.g., Section 10 Letter of Permission Activities) that occur in the coastal region of Georgia:

"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, water columns, and emergent wetlands utilized by various life stages of species of red drum and species of the shrimp and snapper-grouper management complexes. Our initial determination is that the proposed action would not have a substantial individual or cumulative adverse impact on EFH or fisheries managed by regional Fishery Management Councils and the National Marine Fisheries Service (NMFS). Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the NMFS."
- **Actions Requiring PCN Coordination Notices:** To initiate consultation a statement, similar to the following, will be included in PCN Coordination letters for nationwide permit activities proposed within the coastal zone of Georgia:

"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, water columns, and emergent wetlands utilized by various life stages of species of red drum and species of the shrimp and snapper-grouper management complexes. Our initial determination is that the proposed action would not have a substantial individual or cumulative adverse impact on EFH or fisheries managed by regional Fishery Management Councils and the National Marine Fisheries Service (NMFS). Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the NMFS."

2. 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 days, the Corps will send a letter or electronic message to 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.
- 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.

- All written responses will be provided to both the local field office and the regional office of the NMFS.
- If no EFH comments are received, or a "no objection" letter is 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 negotiation 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 so advise the Corps by sending a "no objection" letter or other established means. This will terminate 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 its rationale in writing to the NMFS, at least 10 days prior to the finalization of the action. That response will include the reasons for not following the recommendations, including the scientific 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. Higher Level Review:

- If the NMFS maintains that issuance of a permit (or other form of authorization) 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 request review 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 higher level review will not be pursued, the Corps will proceed with the issuance of the permit.

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 adverse impacts to EFH were identified (e.g., a no objection letter was 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 Savannah District General Permits. Individual actions to be authorized pursuant to an existing general permit will not require consultation. However, consultation will be undertaken each time a general permit is renewed or a new general permit is proposed.
- The summary statements in item 1 of this document specify EFH assessment language to be included in various regulatory actions requiring consultation. Such generic assessments are acceptable for abbreviated consultations, however, 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 particular permit action.