



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southeast Regional Office
9721 Executive Center Drive North
St. Petersburg, Florida 33702

February 17, 2000

DX R
08 PD - EC
Coordinate w/
S: 17 MAR
EF
KOP
WH

Colonel J. David Norwood
District Engineer, Mobile District
Department of the Army, Corps of Engineers
Post Office Box 2288
Mobile, Alabama 36628-0001

Dear Colonel Norwood:

Staff of the National Marine Fisheries Service (NMFS) and the Mobile District (District) have met and discussed Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). This letter concerns the District's planning and operations (non-regulatory) activities subject to provisions of the National Environmental Policy Act (NEPA). 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.

The regulations under Section 600.920(e)(3) enable the NMFS to find that existing consultation/environmental review procedures 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 NEPA process, involving the preparation of environmental assessments, and impact statements and letters of coordination associated with operational activities, provides the NMFS with timely notification of proposed actions. Your District's public review process normally is conducted in conjunction with the affected state. The process generally provides 30 to 90 days before a final decision is rendered on a project; however, circumstances exist where a review period as short as 15 days may be employed. EFH consultation also can be initiated prior to NEPA document preparation or public notice in order to include information from the consultation in subsequent documentation.



EFH Assessment

Our staffs have agreed that draft NEPA documents and letters of coordination prepared by the District could be modified to contain sufficient information to satisfy the requirements in Section 600.920(g). For purposes of an EFH assessment the documents would 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 draft documents could incorporate such information by reference to a NEPA document 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.

For many project maintenance activities, where project changes are not proposed, a new environmental assessment or impact statement may not be prepared by the Mobile District. Routine and ongoing project activities are recertified on a periodic basis through written coordination with appropriate agencies. In such cases the District prepares interagency coordination letters or notices to supplement the prior NEPA actions. The coordination letters or notices could be modified to include an EFH assessment, reference EFH assessments contained in a companion environmental document. EFH also could be addressed through a separate EFH consultation request. Where possible, EFH assessments for similar projects being recertified on or about the same time can be combined in a single coordination letter.

Finding

The NMFS finds that your agency's NEPA process for non-regulatory, Civil Works activities can be used to satisfy the consultation requirements of the MSFCMA. An outline of the proposed process is included as Enclosure 1. Notification of potential impacts on EFH will occur when the District sends NMFS a draft NEPA document, coordination letter, or other project notification. Impact on EFH will be addressed in the documents (see Enclosure 2), or by reference to companion documents. The EFH discussion may reference pertinent information on the affected environment and environmental consequences where they are provided in other sections, chapters, or companion documents. The information must be easily found, and should include both an identification of affected EFH and an assessment of impacts.

MSFCMA Coordination Process/Activities

Within the public or agency review comment period, NMFS will provide the District with a written project evaluation which will include EFH conservation recommendations, when appropriate. NMFS will provide such recommendations as a part of our overall project comments. When EFH issues are raised, they will be contained in a separate section titled "EFH Conservation Recommendations." While NMFS will endeavor to respond to all consultation requests, a non-response within the public or agency review period should be considered to be concurrence in the determination of the Mobile District.

Under Section 305(b)(4)(B) of the MSFCMA, the Mobile District has a statutory requirement to respond in writing within 30 days to the NMFS recommendations. If the District will not be able to

complete a signed Finding of No Significant Impact (FONSI), Record of Decision (ROD), or 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. District personnel should then provide a detailed response at least 10 days prior to taking final action (e.g., signing a FONSI or ROD).

The District's response to the EFH conservation recommendations provided by the NMFS, normally, will terminate the consultation process. However, 50 CFR 600.920(j)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with a Department of the Army headquarters official to discuss the proposed action and opportunities for resolving any outstanding disagreements. Until a formal process for seeking higher level is established, any review request will be made within 10 days of the final Mobile District response to EFH conservation recommendations.

Conclusion

If you agree with the procedures described in this finding, we request a response letter to that effect within 30 days. 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,

A handwritten signature in black ink, appearing to read "Andreas Mager, Jr.", written in a cursive style.

Andreas Mager, Jr.
Assistant Regional Administrator

Enclosures

Outline of NMFS - Mobile District Process for EFH Consultation for Federal Project Planning and Operations (Non-Regulatory)

- ▶ COE provides the NMFS with an environmental document, coordination letter and/or Federal project notice
 - ▶ 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 FONSI or ROD)
 - ▶ 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 impacts¹

- ▶ NMFS, within 10 days of notification of the District's response, may seek headquarters-level review of those Mobile District decisions contrary to the EFH conservation recommendations

¹This step completes EFH consultation unless higher level review is sought after notification and prior to final project action

**Recommended Contents of an EFH Assessment
as Part of a Draft NEPA Document (Non-Regulatory)**

- I. The NEPA document transmittal letter, introduction, summary, or abstract should state that the document and information contained therein represent the agency's initiation of EFH consultation
- II. Description of the proposed action - use existing agency format and requirements
- III. Analysis of effects -
 - A. The description of fish and wildlife resources and vegetative communities contained in the chapter describing the existing environment should be expanded to specifically identify Federally managed fisheries and EFH in the project area. For activities expected to minimally impact EFH, these can be brief inserts. For example, in the fisheries description, the text might read: *Juvenile and adult red drum and postlarval and juvenile brown and white shrimp are common in the project area and are managed under the Magnuson-Stevens Fishery Conservation and Management Act (PL 94-265)*. As part of the description of vegetative communities, the text could be supplemented with statements similar to the following: *The generic amendment to Gulf of Mexico Fishery Management Plans (GMFMC 1999) identifies Essential Fish Habitat in the project area to be intertidal wetlands, submerged aquatic vegetation, unvegetated bottoms, shell reefs, and the estuarine water column. Habitat Areas of Particular Concern have not been identified for the project area*. Note that EFH may include open water and non-vegetated habitats, therefore, the Federal agency may find it more appropriate to describe EFH separately from vegetative communities.

More complex projects or those potentially having substantial EFH impacts should include a greater level of detail on life stages, seasonality of occurrence, environmental requirements, etc. of managed and associated fisheries. Similarly, the description of EFH should be discussed in more depth. The action agency may determine prior to initiation of consultation that expanded consultation should be requested pursuant to 50 CFR 600.920(i).

Information descriptive of EFH and federally managed fisheries, within the area of the Mobile District's Civil Works jurisdiction, is included in the fishery management plans prepared by the Gulf of Mexico and the Caribbean Fishery Management Councils. The information contained in the management plans, much of which is available on the worldwide web, should be used to describe the resources potentially impacted by the proposed action.

- B. The discussion of environmental consequences portion of the document should include a separate section entitled “**EFH Assessment**” which includes an evaluation of project and cumulative effects, the action agency’s evaluation of those effects, and any mitigation proposed. The scope of this section should be determined by the anticipated level of impact. For projects expected to have minimal impacts, this assessment could be a one paragraph section similar to the following: *The “Big Levee Realignment project” would affect xx acres of coastal habitat identified as EFH. Impacts to bay bottom, intertidal marsh, and submerged aquatic vegetation and Federally managed species are addressed in Section 5.2 of the environmental assessment. We consider these impacts to be minimal on an individual project and cumulative affects basis. Because those impacts are minor, mitigation is not being proposed.*

In instances where impacts would be more than minor, the “**EFH Assessment**” should be discussed in sufficient detail (by reference to other sections of the report or other environmental documents, where appropriate) to fully describe project impacts, effects on EFH and dependent resources, and mitigation to offset the unavoidable impacts to the managed resources. Consideration also should be given to supplementing the assessment with information from site inspections and evaluations, pertinent literature, expert opinion, and discussion of less damaging alternatives (or reference to such discussion presented elsewhere in the document).

- IV. Federal agency views - agency views regarding EFH impacts can be specified as a part of the “**EFH Assessment**” and/or included and highlighted in the section of the environmental document which presents the agency’s conclusions about the subject action.
- V. Proposed mitigation - if mitigation is appropriate and proposed, it should be identified in the “**EFH Assessment**” and described in detail in the section of the environmental document reserved for such discussion. The discussion of mitigation of EFH impacts should be presented separately from the discussion of other proposed mitigative measures.

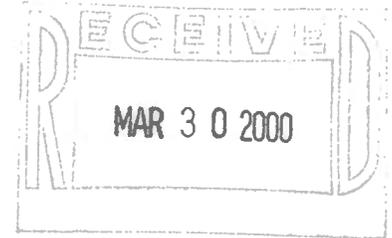


DEPARTMENT OF THE ARMY
MOBILE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 2288
MOBILE, ALABAMA 36628-0001
27 MAR 2000

REPLY TO
ATTENTION OF:

**Coastal Environment Team
Planning and Environmental Division**

**Mr. Andreas Mager, Jr.
Assistant Regional Administrator
National Marine Fisheries Service
Southeast Regional Office
9721 Executive Center Drive North
St. Petersburg, Florida 33702**



Dear Mr. Mager:

Reference is made to your letter dated February 17, 2000, concerning our agencies Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. The specifics detailed in your letter were developed jointly by Mr. Rickey Ruebsamen and Dr. Susan Ivester Rees of our respective staffs and represent an efficient and timely process for the required consultation.

We look forward to working with your agency on this important issue. Should you have questions or need additional information please feel free to contact Dr. Rees at 334-694-4141.

Sincerely,

A handwritten signature in black ink, appearing to read "J. David Norwood".

**J. David Norwood
Colonel, Corps of Engineer
District Engineer**

Enclosure