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

May 3, 1999

Colonel Joe R. Miller
District Engineer, Jacksonville District
Department of the Army, Corps of Engineers
Post Office Box 4970
Jacksonville, Florida 32232-0019

Dear Colonel Miller:

Staff of the National Marine Fisheries Service (NMFS) and the Jacksonville District (District) have met to discuss 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 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 existing consultation/environmental review processes are adequate, or can be modified, to satisfy EFH consultation requirements.

Three criteria must be achieved to meet the consultation provisions of the regulations. These provisions are: 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 planning for and preparation of environmental assessments and impact statements and your coordination associated with operational activities, provides the NMFS with timely notification of proposed actions. Your District's public review process generally provides 30 to 90 days before a final decision is rendered on a project.

EFH Assessment

Our staffs have agreed that draft NEPA documents 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 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 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.

In some cases the District prepares notices to supplement NEPA actions or may coordinate on environmental issues prior to initiation of the NEPA review process. When supplemental notices are prepared, they could be modified to reference EFH assessments contained in a companion environmental document or EFH could be addressed separately. Similarly, the District could accomplish "pre-NEPA" consultations by providing NMFS a separate request for EFH consultation and an EFH assessment. In this latter case, a summary of the consultation should be included in any resulting NEPA document.

Finding

Consultation Initiation

The NMFS finds that your agency's NEPA process for Federal works activities can be used to satisfy the consultation requirements of the MSFCMA. Specifically, notification of potential impacts on EFH will occur when the District sends NMFS a draft NEPA document, a project notification, or a separate request for consultation prior to initiating formal NEPA action. In cases involving maintenance activities (especially navigation channels) EFH consultation normally will not be conducted for each event. Rather, consultation will be incorporated into the District's NEPA compliance or public notification events which occur no more frequently than every 5 to 10 years, unless project design parameters change.

Assessment

The evaluation of project impacts on EFH will be addressed in the draft documents in a section or chapter titled "EFH Assessment" or by reference to companion documents. The EFH assessment may also be presented as a separate request for consultation. The information should include both an identification of affected EFH and an assessment of impacts. The EFH discussion may reference pertinent information on the affected environment and environmental consequences when they are provided in other sections, chapters, or companion documents.

Coordination

After receiving an EFH consultation request and assessment, and within the specified public 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." Written concurrences with District determinations that a project would not adversely impact EFH are not required and will not be provided, although consistent with past practice, NMFS normally will provide a written response indicating that we have no recommendations to offer.

Under Section 305(b)(4)(B) of the MSFCMA, the Jacksonville 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 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).

Higher Level Review

If a District decision is inconsistent with NMFS EFH conservation recommendations, NMFS will endeavor to resolve any such issues at the field level wherever possible. 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 disagreements.

The overall consultation process is briefly outlined in enclosure 1. Also, to assist you in document preparation, I have included, as enclosure 2, a summary of information necessary for an EFH assessment.

Conclusion

If you agree with the procedures described in this finding, 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
Habitat Conservation Division

Enclosures

Enclosure 1

Outline of NMFS - Jacksonville District Process for EFH Consultation for Federal Project Planning and Operations

- COE provides the NMFS with an environmental document, Federal project notice, or "pre-NEPA" 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., 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 impacts

- NMFS may seek headquarters-level review of those Jacksonville District decisions contrary to NMFS conservation recommendations

Recommended Contents of an EFH Assessment as Part of a Draft NEPA Document or Consultation Request Letter

I. The consultation request letter or 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 - EFH assessments can be prepared in a letter or report format, provided the required information (see 50 CFR 600.920(g)) is included, or incorporated in a NEPA document in a manner similar to the following:

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).

B. The discussion of the 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 sufficiently detailed (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
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P. O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

REPLY TO ATTENTION OF
Planning Division
Environmental Branch

JUL 23 1999

Mr. Andreas Mager, Jr.
Habitat Conservation Division
National Marine Fisheries Service
9721 Executive Center Drive North
St. Petersburg, Florida 33702

Dear Mr. Mager:

I am writing you concerning your letter of May 3, 1999, on procedures for Essential Fish Habitat (EFH) consultation with your office. This procedure provides for two ways for us to conduct an EFH Assessment with your office. This is either as part of a National Environmental Policy Act document (Environmental Assessment or Environmental Impact Statement) or as a separate coordination at an earlier stage of planning.

I agree with the procedures identified in your letter. If you have any questions, please contact Mr. Bill Lang of my staff at 904-232-2615.

Sincerely,

for Jim Strain
James C. Duck
Chief, Planning Division