



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southeast Regional Office
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March 17, 2000

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 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 deliberative processes are adequate, or can be modified, to meet EFH consultation requirements. This letter addresses the District's regulatory activities subject to provisions of the Clean Water Act, Rivers and Harbors Act, and Fish and Wildlife Coordination Act (FWCA), as a mechanism to meet the consultative requirements of the MSFCMA for actions (e.g., permit issuance) which may result in adverse EFH impacts.

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, various types of interagency coordination letters, and preconstruction notification, provides the NMFS with timely notification of proposed actions. Your District's public review process sometimes includes pre-application permit screening meetings, and can allow up to 30 days for individual public notice review. Expedited review procedures are used for certain categories of activities. 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; 3) the District's views regarding effects; and, 4) proposed mitigation, if applicable. To avoid unnecessarily burdening the assessment process, 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 existing regulatory process, with minor modification and as outlined in Enclosure 1, can be used to satisfy the consultation requirements of the MSFCMA. Normally, 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 (see Enclosure 2). 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. The evaluation 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 Mobile 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., issue a letter of authorization or signed permit) within 30 days of NMFS EFH Conservation Recommendations, the District should provide NMFS with an interim written response within the required time frame. 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.

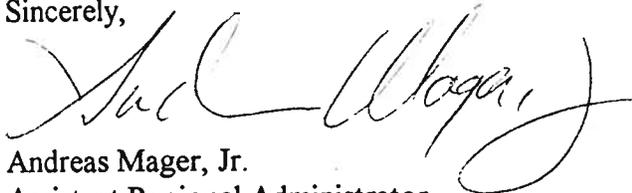
Higher Level Review

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 Panama City 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.

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 - Mobile District Process for EFH Consultation for Regulatory Activities

- ▶ COE provides the NMFS with a public notice, coordination letter, PCN, or other form of notification. In cases where the project may adversely affect EFH
 - ▶ The COE document indicates that it is intended to initiate EFH consultation
 - ▶ The consultation request 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 Mobile District decisions contrary to NMFS conservation recommendations

Consolidated Essential Fish Habitat (EFH) Consultation Procedures
and
Mobile District Corps of Engineers - Regulatory Activities

1. EFH Consultation Will Be Initiated The Following Ways:

- **Actions Requiring an Individual Public Notice:** To initiate consultation, a statement similar to the following will be included in public notices for activities that may adversely impact EFH in the coastal region of the Mobile District:

"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. 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 or a similar statement will be included in letters of coordination for activities that may adversely impact EFH in the coastal region of the Mobile District (e.g., Section 10 Letters of Permission):

"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. 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 or a similar statement will be included in PCN Coordination letters for nationwide permit activities that may adversely impact EFH within the coastal region of the Mobile District:

"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. 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 Mobile 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, require consultation, and provide EFH Conservation Recommendations.

3. Receipt Of NMFS Review Comments

- Written responses to NMFS letters of comment, as specified below, are only required if the NMFS letter contains EFH recommendations which are labeled "EFH Conservation Recommendations."
- NMFS comment letters may be received which contain both "EFH Conservation Recommendations" and other measures to conserve marine fishery resources and habitats. Only those recommendations specific to conservation of EFH, and labeled as such, require a written response.
- Even though the District may initiate EFH consultation, the NMFS may find that adverse impacts are of such a nature that recommendations are not provided or a letter of no objection is issued. In this event, further EFH consultation is not required.

4. Corps Response To NMFS 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.
- 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 fully detail 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 project evaluation.

5. Resolution Of EFH Concerns:

- The Corps will attempt to resolve EFH concerns through negotiations with the NMFS, discussion with the applicant (if appropriate), and revisions to project plans. If revisions to avoid or offset adverse EFH impacts 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 EFH 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.

6. Action Following Notification Of Intent To Issue:

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 following notification of intent to issue and prior to permit issuance or other final action.

Terminate Consultation Without Further Review

- 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 further review will not be pursued, the Corps will proceed with the issuance of the permit.

7. 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 may 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 Mobile 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 or a new general permit is proposed.
- The summary statements in item 1 of this enclosure provide examples of EFH assessment language to be included in various regulatory actions requiring consultation. Regulatory staff should exercise judgement in determining the level of detail provided in the assessment and identifying specific types of EFH and Federally managed fisheries which could be impacted by specific proposed development activities.