



**UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration**

NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office

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St. Petersburg, Florida 33702

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April 17, 2000

Colonel James W. DeLony  
District Engineer, Wilmington District  
Department of the Army, Corps of Engineers  
Post Office Box 1890  
Wilmington, North Carolina 28402-1890

Dear Colonel DeLony:

Staff of the National Marine Fisheries Service (NMFS) and the Wilmington 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 (FWCA), and the requirement of the MSFCMA that coordination with the NMFS must be undertaken when an activity (e.g., permit issuance) may adversely impact EFH.

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 be used in such a manner, the following criteria must be met: 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 Wilmington District's regulatory process, involving the issuance of Section 10/404 public notices, various types of interagency coordination letters, and notifications through the state coastal zone management program, 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 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**

The NMFS agrees 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, these notices and letters 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. 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.

Regulatory documents may incorporate EFH information by reference to a NEPA document or other documentation prepared for a similar or related action. Referenced material should be 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 for Section 10 and 404 activities, with minor modification, 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 interagency coordination, 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 agency review has been initiated and the District has considered 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 or agency review 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 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." While the MSFCMA does not require written concurrences with determinations that a project would not adversely impact EFH, consistent with past practice in the Southeast Region,

NMFS 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 Wilmington 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 substantively respond to NMFS EFH Conservation Recommendations within 30 calendar days, the District will 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 (e.g., provision of an authorization letter or proposed permit to an applicant).

#### Higher Level Review

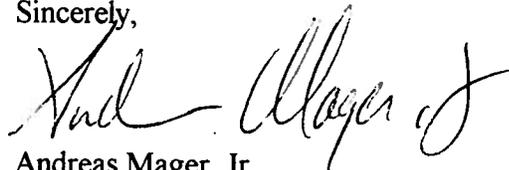
If a District decision is inconsistent with NMFS EFH conservation recommendations, NMFS will endeavor to resolve conflicting views at the field level wherever possible. Issue resolution may involve discussions between the District and the NMFS Beaufort office and, if appropriate, the permit applicant. If conflicts cannot 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 specified in the regulations is outlined in enclosure 1. Enclosure 2 provides details of the EFH consultation procedure and address various types of authorizations, review and response actions, and general comments.

#### **Conclusion**

We request a letter of response, indicating your acceptance of these procedures or requesting revisions thereto, by May 26, 2000. You or your staff may 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 - Wilmington 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 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
  - ▶ A 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 justification for any disagreements over anticipated EFH impacts or mitigation requirements
- ▶ NMFS may seek headquarters-level review of those Wilmington District decisions contrary to NMFS conservation recommendations

**Integrated Essential Fish Habitat (EFH) Consultation Procedures**  
**and**  
**Wilmington District Corps of Engineers - Regulatory Program**

**1. EFH Consultation Will Be Initiated The Following Ways:**

- **Actions Requiring an Individual 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 North Carolina:

"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 (see project description) utilized by various life stages of red drum, Spanish mackerel, summer flounder, 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 statement will be included in letters of coordination for activities that may adversely impact EFH in the coastal region of North Carolina (CAMA - Corps General Permits, Section 10 Letters of Permission Activities, etc.):

"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, summer flounder, 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 statement will be included in PCN Coordination letters for nationwide permit activities that may adversely impact EFH within the coastal region of North Carolina:

"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 Wilmington District has determined that the proposed action would not adversely impact EFH or associated fisheries managed by the South Atlantic or Mid Atlantic Fishery Management Councils or the NMFS."
- Independent of the District's 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 the 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 EFH conservation 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 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.
- The Corps will attempt to resolve EFH concerns through negotiations with the NMFS, the North Carolina Department of Environment and Natural Resources and applicant (if appropriate), and revisions to project plans. If revisions to avoid or offset adverse EFH impacts are 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 for not requiring measures needed to avoid, minimize, mitigate, or offset adverse impacts to EFH.
- If no EFH comments are received, or a "no objection" letter is provided by NMFS during the comment period, further coordination with the NMFS is unnecessary, and the Corps will proceed with next stage of project evaluation.

### 5. Action Following The District's Final Reply To Comments:

- **Higher Level Review:** If the NMFS maintains that issuance of a permit, or other form of authorization, and project implementation will result in unacceptable adverse impacts to EFH, NMFS may choose to seek higher level review of the proposed action. NMFS will notify the Corps in writing of this decision within the aforementioned 10-day time frame.
- **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 may proceed with the issuance of the permit.

### 6. General Comments:

- All EFH coordination between the Corps and NMFS (comments, recommendations, correspondence, final decisions, etc.) should be documented in the decision document for each regulatory action.
- Consultation will not be initiated at this time, for any of the existing Wilmington 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. Generalized assessments such as these 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 regulatory action.