



**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

November 15, 2000

Mr. Roy Shelton  
North Carolina Division Office  
Federal Highway Administration  
310 New Bern Avenue, Suite 410  
Raleigh, North Carolina 27601

Mr. William D. Gilmore  
Project Development & Environmental Analysis Branch  
North Carolina Department of Transportation  
P.O. Box 25201  
Raleigh, North Carolina 27611

Dear Messrs. Shelton and Gilmore:

With your cooperation, the National Marine Fisheries Service (NMFS), North Carolina Division Office of the Federal Highway Administration (FHWA), and North Carolina Department of Transportation (NCDOT) have met to discuss Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). This letter concerns the joint planning, funding, and operational activities subject to provisions of both the MSFCMA and 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 EFH consultation requirements can be combined with an agency's existing coordination processes.

The regulations under Section 600.920(e)(3) enable the NMFS to find that existing consultation/environmental review procedures satisfy, or can be modified 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 joint planning processes of the FHWA and NCDOT, involving the preparation of advanced notifications, wetland and fish/wildlife evaluation reports, and environmental assessments and impact statements, provides the NMFS with timely notification of proposed actions. The public review process employed by your agencies generally provides 30 to 90 days before a final decision on a highway project is reached.



### **EFH Assessment**

Our staffs have agreed that evaluation reports or related documents, prepared by NCDOT during the Project Development and Environment Analysis phase, or draft NEPA documents 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) your agencies' views regarding effects; and, 4) proposed mitigation, if applicable. The draft documents could incorporate such information by reference to environmental documents 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.

### **Delegation**

MSFCMA implementing regulations allow a federal agency to designate a non-federal representative to conduct abbreviated consultations and prepare EFH assessments (50 CFR Section 600.920(c)). For highway construction projects in North Carolina, NCDOT normally will be the non-federal representative of the FHWA. Furthermore, NMFS encourages NCDOT and FHWA to confer with the Corps of Engineers and the U.S. Coast Guard to determine whether the agencies' EFH consultation responsibilities can be consolidated and all interests can be considered through FHWA/NCDOT. By designation of a lead agency (Section 600.920(b)), EFH issues can be identified during early phases of project planning and late-stage delays associated with bridge or wetland permitting can be minimized.

### **Finding**

The NMFS finds that the joint planning and review process for highway projects in North Carolina can be used to satisfy the consultation requirements of the MSFCMA. Specifically, notification of potential impacts on EFH will occur when the FHWA or NCDOT, on behalf of the FHWA, sends NMFS a letter requesting consultation and provides an EFH assessment. The assessment may be a stand-alone document or incorporated in another environmental document. Impacts to EFH will be addressed in the draft document, in a section or chapter titled "EFH Assessment," 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 specified public comment period, NMFS will provide the FHWA and NCDOT 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."

Under Section 305(b)(4)(B) of the MSFCMA, the FHWA or its designated representative has a statutory requirement to respond in writing within 30 days to the NMFS recommendations. If a signed Finding of No Significant Impact (FONSI), Record of Decision (ROD), or other final action cannot be completed within 30 days of receiving NMFS EFH Conservation Recommendations, the FHWA or NCDOT should provide NMFS with an interim written response within 30 days. If an interim response is provided, a detailed, written response should be made available to the NMFS at least 10 days prior to taking final action (e.g., signing a FONSI or ROD).

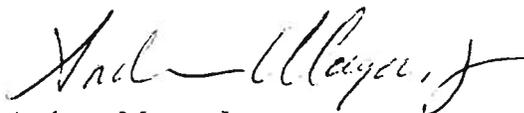
If the proposed final decision is inconsistent with NMFS EFH conservation recommendations, NMFS will endeavor to resolve any such issues at the field level wherever possible. However, 50 CFR 600.920(j)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with a FHWA headquarters 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

Enclosures

## **Outline of NMFS - FHWA/NCDOT Process for EFH Consultation for Highway Project Planning**

- ▶ FHWA or NCDOT, on behalf of the FHWA, provides the NMFS with an environmental document and/or resource evaluation report
  - ▶ The 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 (30 days) to review and comment
- ▶ NMFS provides EFH conservation recommendations, as appropriate, within specified time frames
- ▶ FHWA or NCDOT 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 cannot 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 action agency 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 FHWA/NCDOT decisions contrary to NMFS conservation recommendations

## **Recommended Contents of an EFH Assessment as Part of a Draft NEPA or Planning Document**

- I. The 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 - detail provided should be commensurate with the anticipated level of impact
  - 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 summer flounder and postlarval and juvenile brown and white shrimp are common in the project area and are managed under authorities of 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: *Amendments to the South Atlantic and Mid-Atlantic Fishery Management Plans identifies Essential Fish Habitat in the project area to be intertidal wetlands, submerged aquatic vegetation (SAV), unvegetated bottoms, shell reefs, and the estuarine water column. Habitat Areas of Particular Concern have been identified for the project area and include SAV and state-designated nursery areas.* Note that EFH may include open water and non-vegetated habitats, therefore, the consulting 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 portion of the document which discusses environmental consequences 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 "Take Me Home Highway project" would affect 0.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 of this document. We consider these impacts to be minimal on an individual project and cumulative effects 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.

cc: F/SER41  
F/HC3  
Files



U.S. DEPARTMENT OF TRANSPORTATION  
Federal Highway Administration  
310 New Bern Avenue, Suite 410  
Raleigh, NC 27601

April 25, 2001

IN REPLY REFER TO:  
PPD-NC

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



Subject: Essential Fish Habitat (EFH) Consultation Requirements of the  
Magnuson-Stevens Fishery Conservation and Management Act

Dear Mr. Mager:

The Essential Fish Habitat (EFH) regulation (50CFR600) enables the National Marine Fisheries Service (NMFS) to determine if the existing consultation/ environmental review procedures are adequate or if they can be modified to satisfy consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). Your letter of November 15, 2000 (addressed to both the Federal Highway Administration (FHWA) North Carolina Division and the North Carolina Department of Transportation (NCDOT)), outlined consultation procedures based on a meeting of staff members from the NMFS, the FHWA North Carolina Division Office and the NCDOT. You also concluded that the environmental review procedures contained in the letter and enclosures are adequate for EFH consultation and requested that FHWA and NCDOT concur.

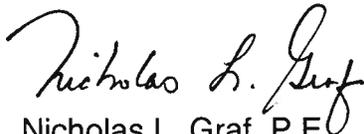
The FHWA North Carolina Division Office and NCDOT have reviewed the consultation procedures outlined in the November 15, 2000, letter and are in agreement with them.

As noted in your letter, regulations of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) allow a federal agency to designate a non-federal representative to conduct consultations and prepare EFH assessments. By copy of this letter, the FHWA North Carolina Division is designating the NCDOT as the non-federal representative for Federal-aid funded highway construction projects administered by NCDOT in North Carolina.

Mr. Andreas Mager, Jr.  
April 25, 2001  
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The points of contact regarding this matter are Michael Dawson at FHWA North Carolina Division, (919) 856-4330, extension 116; and Roy Shelton at NCDOT, 919-733-7844.

Sincerely,



Nicholas L. Graf, P.E.  
Division Administrator

Sincerely,



*For* William D. Gilmore, Manager  
Project Development and  
Environmental Analysis Branch

cc:

David Franklin, COE  
Ann Deaton, USCG  
Ron Sechler, NMFS