UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, Maryland 20910

MAY 25 2001

Michael B. Cook, Director
Office of Wastewater Management
U.S. Environmental Protection Agency
Ariel Rios Building, 4201
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Cook:

The Magnuson-Stevens Fishery Conservation and Management Act requires Federal agencies to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH) identified under the Act. EFH is located in nearly all coastal, ocean, and estuarine waters and in certain freshwater rivers and streams that support federally managed species of salmon. The EFH regulations (50 CFR 600.920(e)) specify that after discussion with a Federal agency, the National Marine Fisheries Service (NMFS) may develop a finding that an existing environmental review process can be used, with or without modifications, to satisfy the EFH consultation requirements. This letter addresses the EFH consultation requirements for the Environmental Protection Agency's (EPA) National Pollutant Discharge Elimination System (NPDES), including specific permitting actions and NPDES activities subject to the National Environmental Policy Act (NEPA). Specifically, NMFS has discussed the EFH requirements with your staff and we have agreed that EPA's existing NPDES permitting procedures, specified in section 402 of the Clean Water Act and its implementing regulations, are appropriate mechanisms to carry out EFH consultations for EPA NPDES activities throughout the United States, including U.S. territories, tribal lands, and commonwealths.

This finding only addresses those individual and general NPDES permitting activities that are under EPA's direct authority (e.g., issuing/renewing permits and granting variance requests). State actions are not subject to the EFH consultation requirements, so permits issued by states under authority granted by EPA are not subject to consultation. EPA will, however, need to complete a separate EFH consultation before authorizing states, tribes, and U.S. territories in the future to administer the NPDES program.

Background

Section 600.920(e)(3) of the EFH regulations enables Federal agencies to use existing consultation/environmental review procedures to satisfy the EFH consultation requirements if the existing procedures meet 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 Magnuson-Stevens Act. This national finding is

intended to establish the general procedure for combining EFH consultations with the NPDES process nationwide, but more specific findings may be beneficial in some cases to address unique regional circumstances. For example, NMFS has developed regional findings that are similar and complementary to this national finding to address certain NPDES activities handled by EPA Regions 1, 6, and 10. This national finding does not supersede existing regional findings, and NMFS may make additional regional findings as deemed appropriate by NMFS and EPA regional staff.

Finding

NMFS finds that EPA's procedures to implement the NPDES program and issue NPDES permits may be used to satisfy the consultation requirements of the Magnuson-Stevens Act, provided that NMFS and EPA adhere to the process described below.

Timely Notification

The NPDES permit issuance process described in 40 CFR 124 provides NMFS with timely notification of proposed actions. Consultation will occur between the appropriate NMFS and EPA regional offices. Wherever possible, NMFS should have at least 60 days notice before a final decision on an action, or at least 90 days if the action would result in substantial adverse impacts to EFH. NMFS and EPA will work to expedite the process whenever a permitting action must be completed with less than 60 days notice. Notification will occur, and EFH consultation will begin, after EPA determines that a permitting action may adversely affect EFH and when NMFS receives the fact sheet and draft permit. EPA does not need to provide NMFS with a written determination that an action would not adversely affect EFH.

EFH Assessment

NMFS and EPA have agreed that the fact sheet (or statement of basis) for the draft NPDES permit, and, if applicable, relevant NEPA documents, could contain the information necessary for an EFH Assessment. To satisfy the requirements of 50 CFR 600.920(g), the pertinent section of the document should be clearly identified as the EFH Assessment and must include: 1) a description of the proposed action; 2) an analysis of individual and cumulative effects of the action on EFH, the managed species, and associated species such as major prey species, including affected life history stages; 3) EPA's views regarding the effects of the action on EFH; and 4) a discussion of proposed mitigation, if applicable. Additional information that may be appropriate for an EFH Assessment is listed in 50 CFR 600.920(g)(3). The EFH Assessment could incorporate the required information by reference to other documents, such as an NPDES permit and associated permit documents, NEPA document, or a previous EFH Assessment prepared for a similar or related action, provided the proposed action involves similar adverse effects to EFH in the same geographic area or similar ecosystems. EPA should provide any referenced documents to NMFS and should supplement them with any relevant new project-specific information.

There may be circumstances where, due to the length and complexity of the EFH Assessment, it is more efficiently presented as a separate document or part of an associated NPDES demonstration study (e.g., ocean discharge criteria evaluation, variance request, or section 316(b) study). When this occurs, EPA should submit a separate request for consultation stating how the EFH Assessment will be presented to NMFS.

NMFS EFH Conservation Recommendations

Upon review of the EFH Assessment, NMFS will develop EFH Conservation Recommendations, when appropriate, as required by section 305(b)(4)(A) of the Magnuson-Stevens Act. NMFS will provide its recommendations in a comment letter on the proposed action in a section titled *EFH Conservation Recommendations*. NMFS will provide its recommendations in an appropriate time frame before EPA makes a final determination on the issuance and conditions of a permit, but no later than the end of the public comment period.

EPA Response

Under Section 305(b)(4)(B) of the Magnuson-Stevens Act, EPA has a statutory requirement to provide a written response to NMFS within 30 days after receiving NMFS' EFH Conservation Recommendations. If EPA is unable to respond fully within 30 days, EPA should send an interim response stating that it has received NMFS' recommendations and will consider them fully, but has yet to make a decision on the activity. EPA must provide a detailed response to NMFS at least 10 days before completing its final action (e.g., issuing a final NPDES permit) if a decision on a final action is required within fewer than 30 days.

Section 305(b)(4)(B) of the Magnuson-Stevens Act and 50 CFR 600.920(j) provide that EPA's response must include a description of the measures proposed by EPA for avoiding, mitigating, or offsetting the impact of the activity on EFH. EPA's response should explain how NMFS recommendations were incorporated into the requirements of the NPDES permit if they were so incorporated. This could be accomplished by providing NMFS with a copy of the draft EPA authorization letter or permit transmittal letter that explains how the EFH recommendations were addressed. If EPA's response is inconsistent with NMFS' EFH Conservation Recommendations, EPA must explain its reasons for not following the recommendations, including scientific justification for any disagreements with NMFS over the anticipated effects of the action or the measures needed to avoid, minimize, or offset such effects.

Review of Decisions Inconsistent with NMFS' EFH Recommendations

If an EPA decision is inconsistent with NMFS' EFH Conservation Recommendations, 50 CFR 600.920(j)(2) provides that the NOAA Assistant Administrator for Fisheries may request a meeting with the head of the EPA to discuss the proposed action and opportunities for resolving any disagreements. NMFS will endeavor to resolve any such issues at the regional level wherever possible.

Conclusion

If you agree with the procedures described above, please respond by letter indicating your concurrence. Should you or your staff have any questions on this matter, please contact Brian Pawlak at 301/713-2325.

Sincerely,

Rolland A. Schmitten
Director
Office of Habitat Conservation

cc'd Field offices 7/24