



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

September 5, 2001

Ms. Irene Rico, Director
Planning and Program Development
Texas Division Office
Federal Highway Administration
Federal Building, 300 East 8th Street
Austin, Texas 78701

Ms. Dianna Noble, Director
Environmental Affairs Division
Texas Department of Transportation
125 E. 11th Street
Austin, TX 78701-2483

Dear Ms. Rico and Ms. Noble:

With the cooperation of your staffs, the National Marine Fisheries Service (NMFS), Texas Division Office of the Federal Highway Administration (FHWA), and Texas Department of Transportation (TXDOT) have met and discussed Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). This letter concerns the funding, project development, and operational activities subject to provisions of both the MSFCMA and National Environmental Policy Act (NEPA).

The EFH regulations (50 CFR 600.920(e)(3)) specify that after discussion with a Federal action agency, the NMFS may make a finding that an agency's existing coordination processes are adequate, or can be modified, to satisfy EFH consultation requirements. In order for an established coordination process to be employed, it must meet the following criteria: 1) NMFS must be provided 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, as contained herein, that the existing process satisfies the requirements of section 305(b)(2) of the MSFCMA.

Timely Notification

The project development process of the FHWA and TXDOT, which can include 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. When a public review process is employed by your agencies, it generally provides 30 to more than 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 TXDOT during the project development and environment planning phase, or that 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 Texas, TXDOT normally will be the non-federal representative of the FHWA. Furthermore, NMFS encourages TXDOT 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/TXDOT. 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 project development and review processes for highway projects in Texas can be used to satisfy the consultation requirements of the MSFCMA. Specifically, notification of potential impacts on EFH will occur when the FHWA or TXDOT, on behalf of the FHWA, sends NMFS a letter requesting initiation of consultation and providing an EFH assessment. The assessment may be a stand-alone document or incorporated in another environmental document. If combined with other environmental documentation, impacts to EFH should 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 30 days of the initiation of consultation, NMFS will provide the FHWA and TXDOT 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 clearly labeled as "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 response substantively addressing NMFS EFH Conservation Recommendations cannot be completed within 30 days of receiving those recommendations, the FHWA or TXDOT should provide NMFS with an interim written response within the statutorily established timeframe. If an interim response must be 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 Finding of no Significant Impact or Record of Decision).

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/TXDOT Process for EFH Consultation for Highway Project Development

- ▶ FHWA or TXDOT, on behalf of the FHWA, provides the NMFS with an environmental document and/or resource evaluation report¹
 - ▶ The document indicates that it is intended to initiate EFH consultation
 - ▶ The document includes the required components of an EFH assessment
 - ▶ NMFS will review and provide comments within 30 days unless FHWA/TXDOT determines that a longer review period is appropriate
- ▶ NMFS provides EFH conservation recommendations, as appropriate, within specified time frames
- ▶ FHWA or TXDOT 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/TXDOT decisions contrary to NMFS conservation recommendations

¹A stand-alone EFH Assessment also is acceptable.

**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 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 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 commensurate with 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 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 X.X 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.



U.S. DEPARTMENT OF TRANSPORTATION

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125 E. 11th Street
AUSTIN, TEXAS 78701-2483

October 4, 2001



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

Attention: Mr. Rickey Ruebsamen.

Dear Mr. Mager:

In response to your September 5, 2001, letter that submitted the final coordination package to be employed in order to meet the Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA).

After reviewing the process described in your letter, we at the Federal Highway Administration (FHWA) and Texas Department of Transportation (TxDOT) agree with the procedures described in this finding.

We look forward to the future implementation of the EFH coordination process. If you need additional information, please feel free to contact Mr. Neel Vanikar, FHWA Environmental Coordinator at (512)536-5917 or Mr. Jeff Casbeer, Section Director of TxDOT's Natural Resources Management Section, at (512)416-3017.

Sincerely yours,

Irene Rico
Director,
Planning and Program Development

Dianna Noble
Director,
Environmental Affairs Division

Enclosure