



DEPARTMENT OF THE ARMY
GALVESTON DISTRICT, CORPS OF ENGINEERS
P.O. BOX 1229
GALVESTON, TEXAS 77553-1229

REPLY TO
ATTENTION OF:

January 12, 2004

Evaluation Section

SUBJECT: Essential Fish Habitat Consultation

RioK
~~Mr. Riskey N. Ruebsamen~~
Essential Fish Habitat Coordinator
National Marine Fisheries Service
Habitat Conservation Division
3500 Delwood Beach Road
Panama City, Florida 32408

Dear Mr. Ruebsamen:

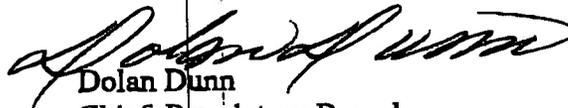
This letter is to confirm our use to date, of procedures for Essential Fish Habitat (EFH) Consultation outlined in your August 6, 1999 letter. Furthermore, in our letter dated September 17, 2003, we stated our desire to revise the manner in which we, as an action agency, respond to EFH conservation recommendations provided by NOAA Fisheries and we provided a draft procedure for your consideration. We also stated in our letter that we wanted to discuss the lack of established procedures to pursue higher level review when significant disagreements exist regarding the issuance of Department of the Army permits.

In your October 14, 2003 response letter and during a subsequent telephone conversation, you stated that as specified in the Magnuson-Stevens Act and the EFH findings prepared at both the headquarters' and regional level, once EFH conservation recommendations are provided to the Corps of Engineers, a written response is required. However, the format (e.g. letter, final environmental assessment, statement of findings or interagency coordination notice) for that response could vary and that the form of correspondence used must clearly state that it represents our response to NOAA Fisheries' EFH conservation recommendations. Finally, if we did not agree to implement some or all of the conservation recommendations, our correspondence must also clearly state our reasons why. With regard to procedures for EFH higher level review, you offered to work with us to develop regional procedures but stated that because of the need for a high level of national consistency within both our agencies, development of formal procedures for each agency had to be implemented at a headquarters level.

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Based on your response, we will begin implementation of the enclosed revised EFH response procedures as of the date of this letter. However, we have decided to not pursue any regional level review process at this time. Thank you for your consideration of these matters. If you have any questions or need additional information, please do not hesitate to contact Ms. Janet Thomas Botello at 409-766-3095.

Sincerely,



Dolan Dunn
Chief, Regulatory Branch

Copy Furnished w/encl:

Mr. Rusty Swafford
National Marine Fisheries Service
Habitat Conservation Division
4700 Avenue U
Galveston, Texas 77551

Essential Fish Habitat (EFH) Consultation Procedures
and the
Corps of Engineers – Regulatory Process

The following questions will help you work through the EFH consultation process:

1. How will EFH Consultation be initiated?

● **Actions Requiring A Public Notice:**

To initiate consultation, insert the following statement:

“This notice initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Our initial determination is that the proposed action would not have a substantial adverse impact on Essential Fish Habitat or Federally managed fisheries in the Gulf of Mexico. 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 (NMFS).”

● **Actions Requiring Coordination Letters:**

To initiate consultation, insert the following statement:

“This coordination letter initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Our initial determination is that the proposed action would not have a substantial adverse impact on Essential Fish Habitat or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with NMFS.”

● **Actions Requiring PCN Coordination Notices:**

To initiate consultation, insert the following statement:

“This PCN coordination notice initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act. Our initial determination is that the proposed action would not have a substantial adverse impact on Essential Fish Habitat or Federally managed fisheries in the Gulf of Mexico. Our final determination relative to project impacts and the need for mitigation measures is subject to review by and coordination with the NMFS.”

2. Were EFH recommendations received from NMFS during the comment period?

- **Yes:** This step pertains to all NMFS comment letters (or portions thereof) that specifically address EFH concerns. Send a letter to NMFS acknowledging receipt of comments. This is a generic response letter (refer to Attachment No. 1). It must be sent immediately (mail/fax) after receiving EFH comments and/or recommendations.
- **No:** Proceed as normal with next stage of evaluation.

3. If EFH concerns were received, can they be resolved?

- **Yes:** Coordinate revised plans with NMFS. If concerns are resolved prior to the finalization of an action, you will receive some type of "No Objection" letter. This will end consultation. Note coordination procedures as listed:

If applicant includes all EFH recommendations and no further coordination letter is required EFH recommendations will be addressed in SOF/EA. SOF/EA will have "special language" for such a case in the master. No separate letter needs to be typed. NMFS will have 10 days upon receipt of SOF/EA to comment. Need to electronically send SOF/EA to NMFS. (Days referenced as calendar days) If no further comments received from NMFS permit can be released. Also, if a no objection on EFH is submitted by NMFS, it is assumed that EFH consultation is complete.

If applicant includes all EFH recommendations and a coordination letter is required (i.e. revised plans), EFH recommendations will be addressed in coordination letter. Coordination letter will have "special language" for such a case in the master. No separate EFH letter needs to be typed. NMFS will respond within coordination letter time frame to comment on EFH issues. If no further comments received from NMFS permit can be released. Also, if a no objection on EFH is submitted by NMFS, it is assumed that EFH consultation is complete. SOF/EA will reflect additional coordination on EFH issues with NMFS.

- **No:** No later than 10 days prior to the finalization of an action (e.g. approval of the SOF/EA for a permit), we must correspond with NMFS, in writing (mail/fax), and state our position and/or any actions taken on each EFH recommendation received. It must clearly specify why we chose not to adopt an EFH recommendation.

If applicant does not include all EFH recommendations and we concur with applicant, then a separate letter will be written to NMFS explaining our position for overriding EFH concerns. NMFS will have 10 days upon receipt of our letter to comment on EFH issues. If no further comments received from NMFS permit can be released. Also, if a no objection on EFH is submitted by NMFS, it is assumed that EFH consultation is complete. SOF/EA will reflect our position on EFH issues with NMFS.

4. What happens next?

Standard Permits – Will the permit action be elevated by the NMFS?

- **Yes:** If NMFS chooses to elevate the permit action for additional review, it will notify the Corps within the aforementioned 10-day time frame. The procedures to be used if this happens are not yet known. It will more than likely follow that used for a 404q referral. Guidance is forthcoming.

- **No:** NMFS will send the Corps a letter within the 10-day time frame which states that they do not wish to elevate the permit action. This letter will end EFH consultation. After NMFS response is received, proceed with the issuance of the permit.

Nationwide Permits – If NMFS maintains that a proposed project will result in more than minimal impacts to EFH, the Corps will take discretionary authority over the action, and review the application as a standard action – individual permit.

5. Have you documented all EFH information in the decision document for each permit action?

- If EFH comments/recommendations were received from NMFS, thoroughly address in the decision document the project's impacts on EFH, any comments/recommendations that were received, and our response.
- If no impacts to EFH were identified (no objection letters were received from NMFS), use the following statement in the decision document:
"Essential Fish Habitat – No adverse impacts to Essential Fish Habitat will result from the proposed project."

General Comments:

- Consultation will not be initiated at this time for any action evaluated pursuant to a General Permit. Programmatic consultation will be conducted each time that a General Permit is renewed (every 5 years).