



Essential Fish Habitat

I. Overview of EFH Consultation Requirements

In the MSA discussion we reviewed the requirements that FMPs identify and describe EFH, and minimize to the extent practicable the adverse impacts of fishing on EFH. The MSA also establishes procedural requirements relating to EFH, including Council comments on other agencies' actions, Council/SF duties to consult with HC on proposed fishery management actions that may adversely affect EFH, HC's obligation to provide conservation recommendations if appropriate, and the requirement for Councils/SF to respond within 30 days to conservation recommendations. This chapter focuses on the consultation aspects of the MSA EFH requirements.

Council Comments on other agency actions: The MSA provides that:

- Councils may comment on agency actions that may affect any habitat of fishery resource under jurisdiction; and that
- Councils must make recommendations on actions likely to substantially affect any habitat of anadromous fish under their jurisdictions (MSA section 305(b)(3)).

Consultations: The MSA requires that Federal action agencies must consult on agency actions that may adversely affect EFH. This includes fishery management actions that may adversely affect EFH (MSA section 305(b)(2)).

Conservation Recommendations/Response: In addition, NOAA Fisheries must make conservation recommendations for actions that would adversely affect EFH (MSA section 305(b)(4)). The Action agency must respond within 30 days to conservation recommendations (MSA section 305(b)(4)). For fishery management actions, SF and the Councils are the "action agency" and HC provides the conservation recommendations.

II. Trigger

The EFH consultation requirement is triggered whenever there is: An agency action that "may adversely affect" EFH.

III. Compliance

NOAA Fisheries has issued regulations outlining the general procedures for completing consultations and addressing conservation recommendations (50 CFR 600.905 et seq.). In addition, the Office of Habitat Conservation has posted guidance specific to the fishery management process (EFH Consultation Guidance,

April 2004, D.2). For the most current version of this guidance, go to the EFH website at <http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat9.htm>.

For fishery management actions, the consultation process should be based on an early and iterative cooperative exchange of information about potential effects of upcoming actions on EFH in order to avoid the potential for adverse effects whenever possible. Each action should be evaluated on an individual basis, and if there is potential for adverse effects, a consultation must be completed.

Each type of consultation begins with a determination of whether the action “may adversely affect EFH.” If there may be an Adverse effect on EFH, consultation is necessary and an “EFH Assessment” prepared by the action agency (in our case that would be either the Council or SF) (50 CFR 600.920(e)). If HC determines that Conservation Recommendations are appropriate, it will provide the recommendations to SF (50 CFR 600.920). SF must respond in writing describing what mitigation measures it is proposing, and, if its proposal differs from HC’s recommendations, SF must explain why and provide the scientific justification for any disagreement with HC (50 CFR 600.920(k)).

The Decision Memo should describe how the EFH consultation requirements have been addressed. Sample determination language is included in these materials

IV. Special Types of Consultations

In addition to the approach in the guidance for consulting on individual fishery management actions, the EFH Final Rule describes two other approaches for addressing consultations for categories of actions and ongoing programs. There may be some instances when these alternative approaches should be considered for fishery management actions (see Penny Dalton Memo, attached).

The Final Rule says that agencies may:

- Seek a General Concurrence from NMFS determining that the action is of a certain type of actions that may adversely affect EFH, but will not individually or cumulatively result in more than minimal adverse impacts; or
- Consult on an entire program of related activities through a Programmatic Consultation (50 CFR 600.920).

A. General Concurrence

A “General Concurrence” (GC) identifies specific types of actions that may adversely affect EFH, but for which NMFS has determined no further consultation is necessary due to the minimal nature of the impacts (50 CFR § 600.920(g)). A GC requires assessment of cumulative impacts, and requires continued tracking of cumulative impacts. Results of the tracking must be made publicly available on an annual basis (50 CFR § 600.920(g)(2)(ii)).

To request a General Concurrence, a Federal agency should provide HC with an EFH Assessment containing a description of the nature and approximate number of the actions, an analysis of the effects of the actions on EFH, including cumulative effects, and the Federal agency’s conclusions regarding the magnitude of such effects. If HC agrees that a GC is appropriate, HC will provide a written statement of General Concurrence that further consultation is not required. If HC does not agree, it will notify the Federal agency that a General Concurrence will not be issued and that another type of consultation will be required.

NMFS has undertaken two GCs, both at regional levels with the Corps. Both essentially establish a presumption that certain types of activities do not require consultation, but require the Corps to notify NMFS on an action-by-action basis to allow NMFS to determine if a particular activity may require additional consideration. Thus NMFS continues to receive notice of each pending action, and cumulative effects are monitored, but the agency is able to reduce the workload of conducting full-blown consultations on each individual action. Examples are included in these materials.

Overview of the Fishery Management Process

B. Programmatic

Programmatic consultation provides a means for HC and a Federal agency to consult regarding a potentially large number of individual actions that may adversely affect EFH.

Programmatic consultation will generally be the most appropriate option to address funding programs, large-scale planning efforts, and other instances where sufficient information is available to address all reasonably foreseeable adverse effects on EFH of an entire program, parts of a program, or a number of similar individual actions occurring within a given geographic area.

To request programmatic consultation, the action agency should provide HC with an EFH Assessment. The description of the proposed action in the EFH Assessment should describe the program and the nature and approximate number (annually or by some other appropriate time frame) of the actions.

HC will respond to the action agency with programmatic EFH Conservation Recommendations and, if applicable, will identify any potential adverse effects that could not be addressed programmatically and require project-specific consultation. HC may also determine that programmatic consultation is not appropriate, in which case all EFH Conservation Recommendations will be deferred to project-specific consultations.

NOAA Fisheries has completed several programmatic consultations with other agencies (the Corps and MMS). An example is included in these materials.