

# Carmel Bay Divers

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San Jose, CA 95123

Office of Habitat Conservation

December 17, 2003

DEC 30 2003

Rolland A. Schmitten  
Director, Office of Habitat Conservation

*Received*

NOAA National Marine Fisheries Service

F/HC, 1315 East-West Highway

Silver Spring, MD 20910

Dear Mr. Schmitten:

I am writing you concerning the Advance Notice of Proposed Rulemaking (ANPR) addressing potential revisions to the essential fish habitat (EFH) guidelines. As a scuba diver and scuba diving instructor, I pay close attention to public policy concerning ocean habitats and commercial fishing regulations. I have observed first hand the results of years of over fishing, pollution and destructive fishing practices. Even the casual observer can tell the difference in size, health, diversity and quantity of fish inside the Point Lobos reserve in Carmel, CA and just outside the reserve.

In short, I am not against commercial fishing as I enjoy eating fish. I am opposed to the practices that are destroying are fish stocks. I am in favor of banning bottom trawling and allowing fishing vessels owned and operated by non-US Citizens from fishing in US Coastal waters out to 200 miles. We need to protect our resources and the Essential Habitat in this case the bottom of the ocean.

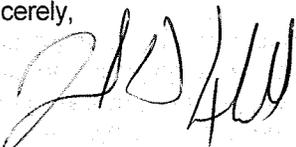
Let's protect vast areas of our ocean such as Monterey Bay, The Gulf of the Farallones, The California Channel Islands and the Cordel Banks. These regions have been titled as National Marine Sanctuaries. Yet commercial fishing still occurs inside these regions. Let's restrict these regions to recreational and scientific use only.

In addition, we should establish similar regions in the Bering Sea to protect the deep ocean coral beds there.

Also, I am in favor of setting "Total Catch" limits for commercial fishing vessels. Currently commercial fisherman may have restrictions on the targeted catch. By-catch is thrown overboard without remorse or consequence to the fisherman. If the weight of by-catch were part of their fishing quota, perhaps fisherman would be willing to put in a little more effort to only catch the targeted species.

Thank you for you time and consideration in these matters.

Sincerely,



John D. Foxhall  
President, Carmel Bay Divers



## ENVIRONMENTAL DEFENSE

finding the ways that work

January 26, 2004

Rolland A. Schmitten, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service  
F/HC, 1315 East-West Highway  
Silver Spring, MD 20910.

RE: Advance Notice of Proposed Rulemaking (ANPR) addressing potential revisions to the essential fish habitat (EFH) guidelines

Dear Dr. Schmitten:

Please enter these comments of Environmental Defense into the public record for the above referenced matter. We have engaged extensively on efforts to protect essential fish habitat (EFH) from both fishing and non-fishing impacts in a variety of regional fishery management councils, and offer lessons from that engagement.

As a general matter, we concur that aspects of the current program implementing the EFH provisions of the 1996 Sustainable Fisheries Act should be revisited. However, we strongly oppose any attempt to water down or reduce the effectiveness of that critically important program. We concur with the general sentiment of the Marine Fish Conservation Network (MFCN) that any necessary adjustments are most effectively and directly made through reconsideration of the technical guidance implementing the rules, rather than by revisiting the rules themselves.

It is important to note that the overall effectiveness of the EFH protection program in this country has been severely limited by the nearly continuous modification of and resulting uncertainty in the EFH process, including repeated rulemaking and litigation. Further disruption of current EFH trajectories would directly and seriously compromise processes far along and fully underway. We urge you in the strongest possible terms not to take any action that might threaten existing, productive EFH processes.

Three specific comments:

1) EFH protection efforts must be enhanced to address both fishing and non-fishing threats.

The majority of EFH protection efforts around the country (with a few specific exceptions) have focused on fishing activities directly under council and NOAA management. While those efforts remain crucial to achieving ecosystem-based management needs, greater attention to non-fishing based impacts is needed.

Dr. Rollie Schmitten  
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In the US Southeast (under the leadership of the South Atlantic Fishery Management Council, SAFMC), teams of NOAA and state officials, working with conservation interests and project developers, have been extremely effective in addressing and mitigating important impacts at the pre-permitting and permitting steps. More than 75% of proposed activities with the potential to significantly impair the functional role of EFH are routinely modified or conditioned to significantly reduce or eliminate those impacts. NMFS regional staff, and their council and state colleagues, deserve great kudos for that effort.

When the permitting process doesn't work, and when the threat is great, the EFH program as it currently stands is an essential last defense against damaging impacts that must be prevented. The Oregon Inlet jetty is a perfect example, where a marginally beneficial project with significant political support that constituted a serious threat to fisheries production was stopped for that reason alone. (We have previously congratulated Dr. Bill Hogarth and his staff for their roles in that outcome.) Such outcomes remain the extreme exception to the day-to-day operation of the program.

Moreover, the suite of policies expressed in the SAFMC Habitat Plan (1998) and under development for the next iteration of that document provide good examples of the use of best available science in identifying upfront threats to habitat functionality, for application to categories of waters and non-fishing activities.

Emphasis on fishing-based impacts has allowed the creation of an EFH "myth," that EFH is just one more attempt to shut down trawling and ban commercial fishing. The best available science suggests that some types of trawling are compatible with the functionality of some types of marine habitats. Trawling which fits that bill is not threatened by EFH programs.

2) Any top-down and artificial limitation on the extent of EFH is contrary to requirements to use the best available science, and would be arbitrary and capricious.

It should surprise no manager (and certainly surprises no scientist) that virtually all US EEZ waters constitute essential habitats for some managed species or their prey, especially once protected species are included. That is the simple nature of marine ecosystems – a plethora of species exploiting available environments and food resources as they are able. An empty "niche," in the old technical vernacular, will always be filled.

Fully rebuilt ecosystems, with all species at sustainable levels, require the full complement of serviceable habitats. Failure to understand and maintain the functionality of these

diverse ecosystem compartments guarantees failure to rebuild stocks of fishes, as the law requires.

Based on our detailed engagement around the country in many EFH processes, it is clear that there is no scientific justification for numerical or other top-down limitation on the spatial extent of EFH. We oppose the application of any such limit as arbitrary, and technically indefensible.

3) Better identification of differentially important habitats and tiering of protection efforts is essential.

A second EFH myth often takes the form that "if all waters are EFH, none are." In truth, simple labeling of bottom as EFH results in no specific regulatory burden (in contrast to identification of lands as wetlands, for example). What is important is the individual and aggregate effect of an activity or class of activities on the functionality of that habitat, either as a direct component of production for a federally managed species, or in support of the ecosystem-based processes that in turn sustain related fisheries. The burden of proof remains on the regulatory agencies involved to establish that proposed actions, either fishing or non-fishing, exceed specified thresholds in temporal extent and net impact on those ecosystems. Absent such a determination, based on the best available science, nothing happens.

By far the best approach is that areas of overarching or unusual importance be identified as Habitat Areas of Particular Concern (HAPCs), with associated documentation of habitat functionality, so that activities which threaten those functions can be identified upfront, and avoided where possible, both in the development of fishery management plans and in triaging non-fishing based impacts for regulatory attention.

Considerably more attention and resources are required to implement this top tier of EFH in an effective way. The SAFMC is far along in this regard, but resource limitations continue to stifle even that productive process.

4) The effectiveness of regional efforts varies widely, and needs strong national leadership.

The extreme range in the effectiveness of council-derived implementation programs for EFH protection is clear evidence of the inadequacy of top-down direction to the councils.

Where facilitated by council and/or NMFS actions, the current EFH processes are working, and working well. But NMFS must take better advantage of nascent efforts to

Dr. Rollie Schmitten  
26 January 2004  
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implement meaningful habitat protection. For example, in New England where the New England Fishery Management Council has identified development of an omnibus habitat amendment as its top priority in 2004, significant NMFS support will be necessary to ensure success. Lacking direction and support from headquarters, well-intentioned efforts like those in New England risk falling by the wayside.

In summary, better resources and national oversight are needed to enhance the excellent programs that exist, and to enhance those that lag behind.

We would be glad to meet with you to discuss these comments in greater detail.

Thank you for the opportunity to comment.

Sincerely,



Douglas N. Rader, Ph.D.  
Senior Scientist



Kenyon Lindeman, Ph.D.  
Senior Scientist



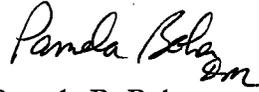
Sally McGee  
Conservation Advocate



Michelle A. Duval, Ph.D.  
Staff Scientist



Daniel J. Whittle  
Senior Attorney



Pamela B. Baker  
Staff Scientist



January 26, 2004

## WASHINGTON FOREST PROTECTION ASSOCIATION

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 Olympia, Washington 98501  
 360-352-1500 • Fax: 360-352-4621

Mr. Rolland A. Schmitten  
 Director, Office of Habitat Conservation  
 NOAA National Marine Fisheries Service, F/HC  
 1315 East-West Highway  
 Silver Spring, MD 20910  
 FAX submission also allowed: 301-427-2570

RE: **Advanced Notice of Proposed Rulemaking; Consideration of Revision to Essential Fish Habitat Guidelines**  
*FR. Vol. 68. No. 238. Thursday, December 11, 2003. 69070-69071*

Dear Mr. Schmitten:

The Washington Forest Protection Association (WFPA) appreciates this opportunity to comment on the *Notice of Proposed Rulemaking; Consideration of Revision to Essential Fish Habitat Guidelines*. WFPA represents large and small forest landowners who grow and harvest timber on approximately 4.2 million acres of private forestland in Washington State. WFPA members are interested in the essential fish habitat guidelines as these guidelines are a part of the myriad of environmental laws, rules and guidelines that influence forest management activities in Washington State.

### § 600.810 Definitions and word usage.

#### *(a) Healthy ecosystem*

We are concerned that specifying that ecosystems must be capable of self regulation in order to be considered healthy is restrictive beyond any reasonable measure. Apparently, only lands permanently preserved as wilderness would qualify. Human development is ubiquitous throughout nearly the entire terrestrial range of anadromous fish. Development often intentionally or unintentionally alters natural systems, and places human objectives in the path of natural system behavior. These disruptions often make sustained ecosystem function dependent on continued human interference and management in order to maintain functions that support fish. This is the inevitable cost of resource use. Examples in forestry include fire exclusion in inland western forests which now requires active management of these forests to prevent uncharacteristically severe wildfires and riparian forest management in coastal forests designed to overcome historic logging techniques that depleted large woody debris in many salmon streams.

We are further concerned that the definition of a healthy ecosystem infers that the system must replicate the standing crop found in undisturbed ecosystems. Properly functioning ecosystem conditions can be attained in a number of ways, including through active

management to improve habitat conditions in the system. Healthy ecosystems can and do exist in managed forest landscapes in Washington State. Though these systems do not always resemble undisturbed stands, they provide the habitat conditions, flora, and fauna that fish need for healthy stable conditions.

We recommend that you remove the phrase “and the ecosystem retains the ability to regulate itself” and the term “standing crop” from the healthy ecosystems definition.

### **§ 600.815 Contents of Fishery Management Plans.**

We support the federal government’s efforts to establish and enforce peer review standards for regulatory science (Executive Order No. 12866). This effort requires that information used to describe and identify EFH come from the most credible and best scientific sources. WFPA recommends that the Councils make every effort to use only peer-reviewed scientific information in developing fisheries management plans. Many interest groups develop scientific information as part of their organization missions. WFPA recommends that before science from advocacy or public interest organizations is used in decision-making, an independent peer review, at the expense of the submitting organization, should be required. When non-peer reviewed technical information is used, the Councils should take into account the source of the information as part of an assessment of the quality and applicability of the data.

#### *(a)(iii)(2) Level 2: Habitat-related densities of the species are available.*

In the Level 2 Analysis section, the guidelines state that “Density data should reflect habitat utilization, and the degree that a habitat is utilized is assumed to be indicative of habitat value.” WFPA supports the assertion that habitat use is an important indicator of habitat value. In fact, we believe that assessing fish use is the only true indicator of which waters are habitat to fish. Essential fish habitat should include only the habitat that is used by fish and includes fish density levels indicating that continued use of the habitat is likely and that improvements to the habitat area would very likely result in increased health of fish populations.

#### *(a)(iv) EFH determination. (A)*

Under the EFH determinations category of the rule, a statement is made that “Councils should interpret information in a risk-averse fashion to ensure adequate areas are identified as EFH for managed species.” Title III of the Magnuson-Stevens, Act Section 301, National Standards for Fishery Conservation and Management, states that “conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” WFPA believes that this requirement of the act extends to identification of EFH. While considering information on habitat of managed species, the Council should minimize risk to the species, but should also avoid duplicative processes and minimize the risk of excessive economic impacts of their decisions. Basing EFH determinations on resource risk only, could result in economic costs that are excessive when compared to species benefit. Any consideration of EFH that may result in regulatory actions that could intentionally or unintentionally restrict economic uses of

fresh water habitats or riparian areas of those habitats must weigh the economic costs as well as the species benefits of making the EFH decision.

WFPA recommends that the sentence be revised as follows: "Councils should interpret this information in a risk-averse fashion to ensure adequate areas are identified as EFH for managed species and to ensure that economic costs are not excessive when compared to species benefit.

*(a)(iv) EFH determination. (B)*

The EFH guidelines discuss the use of maps, text and tables to describe EFH. The guidelines further indicate that, when there is confusion about the area of EFH, the text will govern decisions in-the-field. The maps should govern field decisions. Field operations managers and personnel may find it difficult to make decisions based on textual descriptions and interpretations of the text will result in varying opinions of where EFH actually exists. Maps clearly show boundaries and allow field personnel to see where EFH is and is not designated. Management decisions are more easily made based on maps and arguments over interpretation will be minimized if reliance on maps governs when there are differences between maps, text and tables.

*(a)(iv) EFH determination. (C)*

The guidelines state:

"If a species is overfished and habitat loss or degradation may be contributing to the species being identified as overfished, all habitats currently used by the species may be considered essential in addition to certain historic habitats that are necessary to support rebuilding the fishery and for which restoration is technologically and economically feasible."

All habitat that is or could be occupied by a species is not EFH. Some areas very likely support the species, while other areas are marginal in their ability to support a species and to contribute to the survival of that species and should not be considered EFH. EFH is that habitat which contributes most to the survival of the species, not all habitat that the species could possibly occupy. WFPA recommends the following revision to the language:

If a species is overfished and habitat loss or degradation may be contributing to the species being identified as overfished, all habitats currently used by the species, and supporting densities that will contribute to the long term productivity of the species, may be considered essential if restoration is technologically and economically feasible. Certain historic habitats that are necessary to support rebuilding the fishery and for which restoration is technologically and economically feasible may also be designated as EFH.

*(a)(v) EFH determination.*

In section (v) mapping requirements are defined. An important indicator of map accuracy and quality is the amount of coordination between agencies – state and federal – in creating the map. In many cases, more than one GIS system and base data set will exist for the same area. When maps are generated, every effort should be made to ensure that areas identified in one map are identical as other maps, which are used to regulate management and land use activities. The regulated community needs to know, in definitive fashion, what areas are EFH and what areas are not. Accurate maps are critical to ensure that designated areas of EFH are protected.

NOAA Fisheries maintains a database of rivers and stream in Washington, Oregon and California that are considered habitat for ESA listed fish species as well as other salmon populations. The Councils should use this database for determining the fresh waters used by salmon.

**§ 600.905 Purpose, scope, and NMFS/Council cooperation.**

This section must include a section specifying how NMFS will coordinate with state resource agencies. In most cases, state resource agencies will have detailed information about the status of water quality in the state and the historical distribution of fish. NMFS should consult state agencies and coordinate closely with state agencies when designating EFH and when reviewing and updating any fish management plans.

Thank you for this opportunity to comment on revisions to the *Essential Fish Habitat guidelines*. Please call me at 360-352-1500 if you have questions or concerns.

Sincerely,



Ann Goos, Director of Environmental Affairs

# The Seafood Coalition

*National Fisheries Institute (USA)*  
*Fishermen's Marketing Association*  
*Fisheries Survival Fund*  
*Trawler Survival Fund*  
*West Coast Seafood Processors Association*  
*The Groundfish Group -Associated*  
*Fisheries of Maine.*  
*Southeastern Fisheries Association*  
*Coalition of Coastal Fisheries*  
*California Fish and Seafood Institute*  
*Oregon Trawl Commission*  
*Fishermen's Association of Moss*  
*Landing*  
*Long Island Commercial Fishing*  
*Association*  
*Monroe County Commercial*  
*Fishermen's Association*  
*Pacific Seafood Processors Association*  
*United Catcher Boats*  
*The Groundfish Forum*  
*North Pacific Longline Association*  
*Southern Offshore Fishermen's*  
*Association*  
*Coxs Bay Trawlers Association*  
*Montauk Inlet Seafood, Inc.*  
*Texas Shrimp Association*  
*Monkfish Defense Fund*  
*Western Fishboat Owners Association*  
*Alaska Druggers Association*  
*Western Gulf of Alaska Fishermen's*  
*Association*  
*Alaska Groundfish Databank*  
*Federation of Independent Seafood*  
*Harvesters*  
*Garden State Seafood Association*  
*Blue Water Fishermen's Association*  
*Organized Fishermen of Florida*  
*North Carolina Fisheries Association*  
*New England Seafood Producers*  
*Association*  
*Portland Fish Exchange*  
*City of Morro Bay (CA) Harbor*  
*Department*

January 26, 2003

Mr. Rolland A. Schmitten, Director  
 Office of Habitat Conservation  
 NOAA NMFS, F/HC  
 1315 East-West Highway  
 Silver Spring, MD 20910-3282  
 4 pages via facsimile @301.427.2570

**RE: Comments on the Notice of Proposed Rulemaking to Revise  
Essential Fish Habitat Guidelines (68 FR 69070).**

Dear Rolland:

These comments on the ANPR to revise the Essential Fish Habitat (EFH) Guidelines are submitted on behalf of the Seafood Coalition (See 68 FR 69070). The Seafood Coalition is comprised of a diverse group of 34 regional commercial fishing organizations from around the nation. The Seafood Coalition's broad-based membership includes companies involved in all aspects of the fish and seafood industry, including commercial fishing, gear supply & dock operations, processing, importing/exporting, and restaurant/retail market operations.

**GENERAL SEAFOOD COALITION COMMENTS**

The National Seafood Coalition strongly supports the concept of protecting habitat that is scientifically determined to be essential for the long-term health and productivity of managed fish stocks. We believe the intent of the U.S. Congress and the National Marine Fisheries Service was (and still is...) to develop a science-based process using high quality mapping and habitat-use information geared toward identification and prioritization of specific areas of concern considered essential for the sustainability of managed species. Once identified as essential, these discrete areas could be studied for quantifiable adverse impacts from fishing gear, and if practicable, protected from such interactions.

However, the Seafood Coalition perceives the EFH component of the SFA as a good plan gone awry. We believe that in many cases, the EFH requirements have far outstripped the available data upon which to base reasonable EFH determinations. Rather than a useful management tool to address real resource issues, EFH has mutated into a litigation hammer deployed to prohibit use of various types of commercial fishing gear, to burden fishery managers and NOAA staff with voluminous documentation and procedural requirements, and as a top end fundraising tool for some in the environmental industry to wage their assault on commercial fishing and restrict access to our Nation's seafood resources, all of which seem to contradict the mandates of the SFA.

We appreciate this opportunity to comment on the concepts underlying the EFH process. The members of the Seafood Coalition appreciate NMFS' efforts and remain willing to assist NMFS staff in their efforts to develop a more reasoned process to protect truly essential habitat.

However, Coalition members are very concerned that any subsequent revisions to the EFH guidelines may adversely affect previous or concurrent Regional Council efforts to address EFH requirements. In particular, NMFS, the North Pacific Regional Council, and the North Pacific fishing industry are currently addressing EFH issues under a strict timeline established pursuant to the court under *AOC v. Daley*. In other cases, Regional Councils may have already achieved SFA consistency with respect to EFH. If any proposed revisions to the EFH guidelines could negatively affect these efforts the Seafood Coalition would not support revising the guidelines at this time.

#### SPECIFIC SEAFOOD COALITION COMMENTS

I. Consider clarifying the linkage between EFH/HAPC protection measures and individual managed stock productivity. Currently, Regional Councils are required to minimize, to the extent practicable, the adverse impacts of fishing gear on EFH. The vague nature of this language encourages some environmental groups to advocate for constraints on fishing activities with little regard for the condition of the fish stock in question.

The result is a skewed approach to EFH protection whereby some Councils evaluate the impacts of fishing gear based solely on whether the gear physically impacts the substrate, not on whether the gear-bottom interaction is actually harmful to the productivity of the managed stock. Thus, fishing gear that tends bottom is a target for restriction under the current provision simply because it tends bottom. We believe gear impacts should be evaluated on a case-by-case basis to determine if the resulting habitat disturbance enhances or impedes managed stock productivity and whether the adverse effect is permanent/temporary in nature.

The Seafood Coalition recommends using extreme caution when re-constructing the guidelines to connect EFH, gear impacts, and stock productivity. We believe it should be a comprehensive process that requires the highest level of detailed habitat information (i.e. Levels 2 through 4), use of research areas, and a full understanding of gear impacts, and is not simply a process designed to select and protect the most productive fishing areas.

II. Redefine EFH. We believe the current interpretation of the EFH definition is too broad and has contributed to inappropriate designations in many regions. The Seafood Coalition encourages the NMFS consider revising the interpretation of EFH in the guidelines to be only *areas* deemed essential for a managed species. Furthermore, we suggest the NMFS consider refining the guidelines to ensure that adverse impacts due to fishing be mitigated via the HAPC approach (as a quantifiably discrete subset of EFH) instead of throughout the entire EFH designation. Finally, it is imperative the revised guidelines for EFH and HAPC do not facilitate the selection of core fishing areas as EFH/HAPC simply because the areas happen to encompass highly productive fishing grounds.

III. Consider implementing a National EFH prioritization process. In many cases, the NMFS and Regional Councils are not equipped to properly specify EFH/HAPC and habitat protection measures for every managed fish stock, especially if constrained by court-ordered deadlines. As such, habitat designations may be excessively broad, relying primarily on Level 1 data (i.e. presence/absence). This may lead to erroneous habitat designations and unnecessary economic losses.

A useful alternative approach to minimize the regulatory burden and direct resources to the most significant problem areas first would be to prioritize EFH and HAPC designations for the most important stocks considered overfished pursuant to the SFA requirements.

A tiered system could be applied to all managed fisheries whereby individual stocks/fisheries would be placed initially into two categories – “Major” and “Minor” stocks, based on a set of national criteria (i.e. relative size of annual harvest, value, number of vessels/permit holders, etc.). Within the “Major” and “Minor” categories stocks would be further divided into categories such as “Overfished”, “Not Overfished”, and “Unknown Status”. EFH and HAPC priorities could then be assigned based on a given stock’s categorization.

For example, the highest priority for EFH and HAPC designation would be placed on “Major Overfished Stocks” followed by “Minor Overfished Stocks”, and so on. Stocks that are not overfished would be subject to general EFH designation only, not HAPC designation. Stocks of “Unknown Status” would not be assigned EFH or HAPC designations but would be included in future data collection efforts and habitat mapping program elucidated in “Comment IV” below.

The Seafood Coalition envisions this prioritization process to be a dynamic one. As stock status changes and new information is collected the habitat designation requirements would be continually monitored and adjusted by the Secretary and Councils through the normal FMP process.

IV. Consider fine-tuning the concept of Habitat Areas of Particular Concern (“HAPC”). If we are to develop an effective habitat management system, everything cannot be deemed essential nor should EFH/HAPC be used to target productive core fishing areas. A judicious use of the HAPC-approach is a useful way to prioritize potential mitigation to the more discrete, vulnerable components within the broad EFH designation that may require special attention. The NMFS should consider developing a set of quantifiable HAPC criteria including ecological function, environmental degradation, rarity, and stock-specific habitat information at the highest level of

detail, namely Levels 2 through 4. Additionally, if the necessary information to determine a HAPC is not available, NMFS could consider a provision that would not force HAPC designation until such time that sufficient information can be collected.

V. Consider designing and implementing a comprehensive, systematic national EFH mapping program. Arguably, insufficient data is the key obstacle preventing the proper identification of EFH and HAPC. Unfortunately, we believe extensive human resources are being diverted away from the collection of scientific information in an effort to combat EFH-driven litigation and address burdensome EFH procedural requirements. Thus, often only presence/absence data or CPUE from a given area are relied upon to establish EFH/HAPC and fishing gear impact minimization alternatives. We must first understand the habitat and the marine ecology of a given species if we are to address the actual issue of what part of the habitat requires special status. The Seafood Coalition believes that a national habitat mapping initiative that incorporates industry knowledge and new sonar techniques could provide the critical data to reliably define EFH and HAPC. We note that the NMFS Northwest Region has embarked on such a project for the Pacific groundfish fishery, successfully combining GIS techniques and local knowledge. This Pacific collaborative model could help NMFS form the template for national application.

VI. Consider the efficacy of clarifying the "practicability standard" and developing a process to realistically assess the associated costs to the industry pursuant to EFH/HAPC designations (see Section 600.815 at 67 FR 2378) and consistent with the requirements of National Standard 7. The Seafood Coalition is concerned that insufficient consideration is given to the real economic impacts of EFH and HAPC designations and how this economic information affects the EFH/HAPC process. We believe it may prove useful for NMFS to consider clarifying the "practicability standard" contained in the current guidelines as it applies to EFH/HAPC designations and subsequent cost/benefit analyses.

In sum, the EFH components of the 1996 SFA Amendments were intended to be a positive step towards enhancing our ability to protect sensitive habitat areas important to the productivity of managed species through our existing fisheries management system. This basic concept of protecting EFH was supported by a number of commercial fishing constituents from around the country. Unfortunately, due to the vagueness of the EFH language the resulting interpretation was overly broad, creating serious management problems and numerous legal challenges. In some cases, the Regional Councils were not provided sufficient time, scientific information, or guidance to effectively implement the requirements of the Act. The NMFS has an excellent opportunity to revisit the guidelines and work within the Magnuson-Stevens Act reauthorization process to correct the problems that have arisen since implementation of the SFA.

Respectfully submitted on behalf of the 34 members of the National Seafood Coalition,



Rick E. Marks  
Director of Government Affairs  
Robertson, Monagle & Eastaugh  
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Arlington, VA 22201



Justin LeBlanc  
Vice President of Government Relations  
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Office of Habitat Conservation

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Silver Springs, MD 20910

Mark Muhich, chairperson  
Sierra Club Galveston Group  
PO Box 1392  
Galveston TX 77553

December 15, 2003

RE: Essential Fish Habitat

Sir:

With fishing stocks in the Gulf of Mexico and in the seas of the world depleted by in some case 90% of their historic populations, it is crucial for NMFS to re-assess its priorities regarding strategies for fish management. I am glad to comment on the importance of Essential Fish Habitat, EFH, toward the stabilization and recovery of our invaluable fish stocks.

Though many factors must have contributed to the demise of fish stocks in the US and elsewhere, it must be apparent that the management of these fisheries by establishing total allowable catches for commercial species, is inadequate in dealing with this complex but crucial problem.

Since the 1996 EFH amendment to the Stevens- Magnasum Fisheries Management Act, the scientific understanding of the role fish habitat plays in the survival of fish species has been approached but not researched or funded to degree such basic study merits.

The dynamics of wetlands in the life cycles of innumerable and valuable fish species are taken for granted but little understood. The mechanisms by which such habitat forms and nurses species of fish, shrimp, crabs and the rich biota that is a wetland, have not been identified, much less investigated. As EFH is central to the life cycle of most of our marine species, it would behoove NMFS to devote more of its limited resources to the establishment of basic science into the FUNCTION of EFH.

We are not investing in the fundamental science of natural estuarine habitats. And we know practically nothing about the habitat of the marine coastal shelf environment. Our science that might restore, recreate or create new EFH is rudimentary. Such basic scientific inquiry would have long term benefits for our fish populations.

I would recommend a concerted effort from NMFS to establish a rigorous research program, including creation of a EFH laboratory devoted to the function of EFH. In example we do not currently know the parameters to gauge the success of failure of habitat restoration projects. We need to establish good solid criteria for what a thriving fish habitat contributes to the eco-system, how a habitat does this, and how restoration projects can replicated.

The highly publicized Beneficial Use Group of the Houston Ship Channel is a perfect example of the need for better scientific understanding of complexity of EFH. Though the perimeter of the 4,500 acre "new wetlands" has been constructed from dredge material on the north shore of Bolivar Peninsula, there remains currently no design for the interior of these vast cells, because the basic science does not exist to answer some basic questions, i.e.:

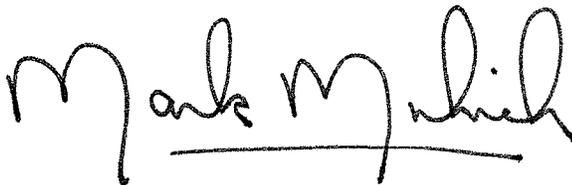
1. What is the optimal elevation for the interior of he wetland cells?
2. What is the optimal water /marsh ratio?
3. Which contours and topography best achieve that ratio?
4. Which plants will best contribute organic material to the dredge spoil?
5. What is the optimal flooding duration in the interior of the cells?

The BUG was just the beginning, though a very good beginning to the complicated creation of estuarine wetlands in Galveston Bay. Having spent nearly \$1 billion on the Houston Ship Channel project, the lack of basic science in the design of the final wetlands would seem a terrific waste.

The growing emphasis on EFH is a welcome development. In the future, greater importance and more resources should be devoted to developing the basic science of the function of essential fish habitat.

Sincerely,

Mark Muhich, chair  
Sierra Club Galveston Group

A handwritten signature in black ink that reads "Mark Muhich". The signature is written in a cursive style with a horizontal line underneath the name.



# RESOURCE DEVELOPMENT COUNCIL

Growing Alaska Through Responsible Resource Development

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January 26, 2004

Mr. Rolland A. Schmitt, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service  
F/HC 1315 East-West Highway  
Silver Spring, MD 20910

Dear Mr. Schmitt:

On behalf of the Resource Development Council for Alaska, Inc. (RDC), I am submitting our comments to encourage NMFS to move forward with revision of the essential fish habitat (EFH) guidelines. While we fully support the Council process with respect to fisheries management, we believe the current EFH guidelines are duplicative and unnecessary, especially with respect to coastal and inland non-fishing industries and communities.

RDC is a private, non-profit, business association representing individuals and companies from Alaska's oil and gas, mining, timber, fisheries, and tourism industries. RDC's membership also includes sectors that support Alaskan industry, such as construction, labor and other technical service providers, Native corporations and local communities. Through RDC, these interests work together to promote and support responsible development of Alaska's natural resources. It is on behalf of this diverse membership that we offer our comments.

Given their broad and duplicative nature, RDC feels changes to the current EFH guidelines are necessary. We encourage NMFS to restrict EFH consultations to managed species with specifically defined essential habitat found within federal marine waters (3-200 miles offshore). In addition, EFH consultations are often unnecessary as the issues they purport to address are covered under NEPA, ESA, or other existing federal environmental protection statutes. We encourage NMFS to streamline the regulatory process by eliminating such duplication.

The councils' expertise lie in fisheries management and RDC believes that is where their efforts should be focused. Under the status quo, there is no representation for non-fishing entities in the council process. RDC believes that non-fishing entities should not be

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RDC Comments re: EFH ANPR

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burdened with involvement in the council process and the councils should not be burdened with regulation of non-fishing entities.

Thank you for the opportunity to comment.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL  
for Alaska, Inc.



Jason Brune  
Projects Coordinator



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January 23, 2004

**By Federal Express and Facsimile—(301) 427-2570**

Mr. Rolland A. Schmitten  
Director, Office of Habitat Conservation  
NOAA National Marine Fisheries Service  
F/HC 1315 East-West Highway  
Silver Spring, MD 20910

**Re: Advance Notice of Proposed Rulemaking, 68 Fed. Reg. 69070  
(December 11, 2003); Consideration of Revision of Essential Fish  
Habitat ("EFH") Guidelines**

Dear Mr. Schmitten:

This letter is submitted in response to the above-referenced advance notice of proposed rulemaking (ANPR) on behalf of Idaho and Valley Counties, Idaho; Okanogan County, Washington; and the Alaska Forest Association and Intermountain Forest Association. Each of these parties is a plaintiff in the lawsuit Idaho County et al. v. Evans et al., No. CV 02-80-C-EJL (D. Idaho) that concerns EFH issues. The remaining plaintiff, National Association of Homebuilders, is sending you their own separate comment letter.

We applaud NOAA National Marine Fisheries Service ("NMFS") for initiating a rulemaking process to consider revisions to the EFH final regulations (50 C.F.R. §§ 600.10, 600.805 to 600.930). This rulemaking is a primary objective that we have pursued in the litigation as well as in written comments, meetings and other interaction with NMFS for several years, and we look forward to NMFS addressing our continuing concerns regarding the EFH regulations in this process.

The ANPR asks first of all for input regarding whether the current regulations should be revised. As NMFS knows from our prior comments and submittals in the lawsuit, we firmly believe there is a strong need for the regulations to be substantially revised

[28498-0003/SL040200.005]

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as soon as possible to implement a much more focused, simple, and less costly and burdensome approach to EFH identification and consultation. We fully support adequate protection of fishery resources, but this protection must be achieved in a workable and reasonable manner that does not unnecessarily and unfairly burden nonfishing communities and businesses. The current regulations do not efficiently and effectively serve the purposes of the 1996 EFH amendments to the Magnuson-Stevens Fisheries Conservation and Management Act ("FCMA"). They are not practicable for NMFS to implement, as well as imposing requirements that are grossly and unnecessarily broad, complex, duplicative and costly for local governments, businesses, and citizens.

The ANPR also seeks comment on what parts of the regulations should be revised, how and why. We believe that NMFS should undertake a comprehensive overhaul of the regulations to: 1) narrow and simplify the EFH identification and consultation processes to focus upon truly essential marine habitat, and activities that are likely to have direct and significant adverse impact on that habitat; 2) eliminate duplication with already existing consultation, coordination and comment procedures under laws such as the National Environmental Policy Act, Coastal Zone Management Act, Endangered Species Act, and Fish and Wildlife Coordination Act; and 3) otherwise better incorporate objective science, cost-effectiveness, consideration of economic and social impacts on nonfishing as well as fishing communities and enterprises, and common sense. Such a revision is needed to implement FCMA EFH provisions in a manner that is workable, effective, and acceptable to all stakeholders. To the extent that NMFS believes that the FCMA constrains its ability to implement an affordable, focused, and fair approach to EFH identification and consultation, the agency should recommend and support further amendment of the statute to remove such perceived constraints.

There is a voluminous record of prior comments submitted to NMFS by a broad spectrum of nonfishing entities, many of which are included in our submittals in the Idaho County v. Evans proceedings, that should be an adequate guide regarding the changes we seek in particular parts of the regulations and the reasons those changes are needed. Below is a summary of what we think needs to be changed in the regulations and why:

- 1) Delete or revise the definition of EFH in the regulations and the vague "ecosystem" approach to EFH identification that it incorporates in 50 C.F.R. §§ 600.10, 600.810 and related provisions. These go far beyond the EFH definition in the FCMA and what is truly essential habitat. The definition and

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- procedures for identification and consultation spawned by it need to be eliminated or narrowed and clarified to limit EFH to marine areas such as those identified in the "habitat areas of particular concern" ("HAPC") provisions of the current regulations.
- 2) Convert the regulations to true guidelines rather than mandates. Although the ANPR characterizes the regulations as guidelines for EFH identification and consultation, which is what the FCMA envisions, the regulations still contain numerous mandatory procedures and other requirements that are not needed to comply with the FCMA. These mandatory provisions should be eliminated to allow NMFS, fishery management councils, action agencies, and other affected parties the flexibility to carry out EFH identification and consultation in more focused and flexible ways. One leading example is the requirement in the regulation that an action agency or applicant for a federal authorization must prepare a written EFH assessment meeting specific criteria, as part of nearly all EFH consultations.
  - 3) Eliminate duplication of EFH consultation with other existing procedures that apply to nonfishing activities. The current regulations allow EFH consultation to be coordinated and combined with other procedures, but still require completion of discrete written EFH assessments and other extra procedures that are not needed to protect habitat. As a leading example, when Endangered Species Act section 7 procedures are completed for an activity with potential effects on a fish population that is managed under the FCMA, those procedures more than adequately protect against any adverse impacts on habitat, and should be deemed to meet EFH requirements without the need for further EFH assessment or consultation.
  - 4) Otherwise simplify and narrow the scope of EFH identification and consultation procedures. Under the current regulations, nearly all habitat for managed species, including vast areas of inland and coastal habitat that are already subject to procedures and other protections against adverse impact, are being identified by the fishery management councils and NMFS as "essential." A full spectrum of nonfishing as well as fishing activities are in turn being identified as having potential effects on this habitat and being subjected to burdensome EFH consultation requirements. There is no "significance" threshold included in the current regulations for triggering this consultation. It is a matter of record that this approach has resulted in a volume of several thousands of EFH consultations being conducted during the first few years of

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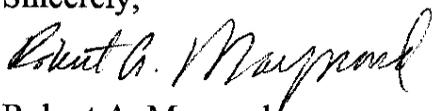
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the EFH program. In the Idaho County v. Evans proceedings, we provided several examples of unnecessarily burdensome consultations. NMFS has repeatedly sought from Congress additional funding to carry out EFH functions. This comes at a time when the agency does not have adequate staff and funds to complete its Endangered Species Act consultation and other responsibilities.

- 5) Otherwise limit the scope of fishery management council EFH responsibility to offshore marine areas and activities within those areas. Fishery management councils are dominated by fishing interests and they have a more than full plate addressing fishery regulation issues in the offshore marine areas for which they have responsibility. They have no substantial expertise, ability, or need to address nonfishing activity effects on coastal or inland fish habitat, already regulated under numerous other federal, state, and local laws. The council documents that have been produced under the current EFH regulations regarding perceived effects on fish habitat and conservation measures for coast and inland resource development and use show a lack of understanding regarding these activities and the protective mechanisms already in place under forest practice statutes, coastal zone management programs, and other law. The current regulations do not provide nonfishing entities with a meaningful voting voice in council EFH functions. In any case, the nonfishing sector generally does not have the resources to participate in arduous fishery management council meetings and other proceedings, on top of other regulatory and business imperatives.

Thank you for the opportunity to comment in response to the ANPR. Any of the plaintiffs may submit additional comments individually or with other interested stakeholders that supplement this letter. We look forward to NMFS issuing a proposed revision of the EFH regulations for comment and will remain keenly interested in a revision that fully responds to our concerns. If NMFS representatives wish to meet with any of the plaintiffs or otherwise further discuss our concerns regarding the proposed rulemaking, feel free to contact me.

Sincerely,



Robert A. Maynard

RAM:ram



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January 26, 2004

*VIA FACSIMILE AND PRIORITY MAIL*

Mr. Rolland A. Schmitten

Director

Office of Habitat Conservation

NOAA National Marine Fisheries Service, F/HC

1315 East-West Highway

Silver Spring, MD 20910

(301) 427-2570 (fax)

*Re:* Comments of Oceana, Inc. concerning advance notice of proposed rulemaking; consideration of revision to Essential Fish Habitat (EFH) guidelines, 68 Fed. Reg. 69070 (Dec. 11, 2003).

Dear Mr. Schmitten:

Oceana welcomes this opportunity to comment to you concerning the advisability of revising the essential fish habitat (EFH) guidelines (codified at 50 CFR §§ 600.805 to 600.930). Oceana strongly believes that now is not the appropriate time to revise the EFH guidelines.

While the Fisheries Service has failed to make adequate progress in protecting EFH in the 7 years since the passage of the Sustainable Fisheries Act, the problem is not any flaw in the current EFH guidelines published in the Code of Federal Regulations. In the Sustainable Fisheries Act, Congress made habitat protection a priority and adopted an expansive definition of essential fish habitat. The current regulations properly reflect Congress' intent to minimize harm to habitat, including not only direct alterations to the seafloor, but also harm to prey species and other ecosystem components. Nevertheless, the Fisheries Service has consistently failed to mitigate the adverse effects of fishing on designated essential fish habitat.

It has become clear to Oceana and other conservation groups that the agency's best hope for making progress is to turn to a global approach to halt damage to pristine and known sensitive seafloor habitats immediately, while conducting the necessary research to focus protections on sensitive areas as fishing continues in other areas. Rather than revise the regulations, the Fisheries Service should impose a moratorium on expanding the footprint of destructive fishing, protect all known sensitive seafloor areas immediately, and conduct research to determine additional areas that need protection.

Specifically, to protect seafloor habitat, Oceana recommends that, *inter alia*, the Fisheries Service:

Rolland A. Schmitten

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1. identify all areas not fished within the past three years with bottom-tending mobile fishing gear, and close such areas to bottom-tending mobile gear including otter trawls and scallop dredges.
2. identify, map, and list all known sensitive habitat areas, including those containing high concentrations of deep sea coral and sponge, and complex seafloor habitat essential for groundfish;
3. designate all known areas containing high concentrations of deep sea coral and sponge habitat, both as EFH and "habitat areas of particular concern" (HAPC), and close these HAPC to bottom-tending mobile gear;
4. designate all, or a significant proportion, of other known sensitive areas both as EFH and HAPC and close these HAPC to bottom-tending mobile gear;
5. monitor bycatch to identify areas of deep sea coral and sponge habitat that are being currently fished, establish appropriate limits or caps on bycatch of deep sea coral and sponge habitat, and immediately close areas to bottom-tending mobile gear where these limits or caps are reached until such time as the areas can be mapped, identified as EFH and HAPC, and permanently protected.

In addition to launching a new approach to protecting seafloor habitat, it might be appropriate for the Fisheries Service to revise its existing Technical Guidance, to allow the agency to address the concern that the regional fishery management councils feel compelled to make overbroad EFH designations, for example. The current regulations allow for narrower designations of EFH than those the regional councils have adopted. The Technical Guidance could be revised to encourage the councils to refine EFH designations as more information about fish populations' use of habitat is collected. The Fisheries Service should also clarify how to designate HAPCs as well as promote the identification and protection of HAPCs by the councils as a way of focusing habitat protection efforts.

Oceana has also noticed specific instances where the current guidance has been misinterpreted. To address these specific instances, Oceana suggests that the Technical Guidance be revised to stress the following points, even though they should already be clear from the Sustainable Fisheries Act and existing guidance:

- The Technical Guidance should make clear that minimizing adverse effects on EFH is not linked to effects on productivity of managed species. Considerations of the productivity of commercial species should not be a factor when creating provisions to minimize adverse effects on EFH. In fact, the preamble to the EFH final rule states, "It is not appropriate to require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take action to minimize adverse fishing impacts to EFH to the extent practicable. Such a requirement would raise the threshold for action above that set by the Magnuson-Stevens Act." 67 Fed. Reg. 2354 (2002).

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- The Fisheries Service should emphasize that rarity is only one of four factors that can be used to identify a HAPC and it is not a mandatory factor in that designation. Requiring a habitat to be rare prior to identifying it as a HAPC will limit habitat protection to the detriment of EFH that is ecologically important, sensitive, or exposed to stress, but not rare.
- Finally, the Technical Guidance should advocate that sensitive and important habitats such as deep water corals and coral reefs must be designated as HAPC. Deep water corals such as those that have been found in the North Pacific have been discovered relatively recently, and without proper protection could be destroyed before scientists have had a chance to thoroughly investigate them.

Thank you for considering these comments on the ANPR. For the reasons set forth above, Oceana requests that NMFS not initiate a rulemaking to revise its EFH guidelines. We would be pleased to talk with you and your staff about implementing Oceana's approach to protecting habitat and about revising the Technical Guidance.

Very truly yours,



David L. Allison  
Campaign Director



**NAHB**  
NATIONAL ASSOCIATION  
OF HOME BUILDERS

**ADVOCACY GROUP**

Federal Regulatory & Housing Policy  
Susan Asmus, SVP



January 26, 2004

Mr. Rolland A. Schmitten  
Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service, F/HC  
1315 East-West Highway  
Silver Spring, Maryland 20910

**RE: Advance Notice of Proposed Rulemaking; Consideration of Revision to Essential Fish Habitat Guidelines.**

Dear Mr. Schmitten:

On behalf of the 220,000 members of the National Association of Home Builders (NAHB), I respectfully submit the following comments in response to the Advance Notice of Proposed Rulemaking regarding potential revisions to the Essential Fish Habitat Guidelines, as published in the Federal Register on December 11, 2003.

NAHB's membership consists of individuals and firms who develop land and construct homes, apartments and light commercial buildings. Our members' activities frequently require them to obtain permits or approvals from a federal agency, such as the Army Corps of Engineers or the Environmental Protection Agency. If the proposed activity may adversely affect Essential Fish Habitat (EFH), the granting of these permits triggers consultation under the Magnuson-Stevens Fishery Conservation and Management Act (FCMA) which may result in costly and restrictive conservation recommendations being issued by the National Marine Fisheries Service ("Service"). To this end, NAHB has been an ongoing party to discussions and litigation surrounding the implementation of EFH regulations under the FCMA. NAHB has submitted extensive comments in response to several proposed revisions to EFH guidelines and management plans (e.g. 62 FR 19732, 62 FR 66531, 64 FR 60731, and 65 FR 39584), and likewise remains a party to ongoing litigation surrounding their implementation. *See Idaho County et al. v. Evans*, No. CV02-80-C-EJL (D. Idaho Sept. 30, 2003). As such, the Advanced Notice of Proposed Rulemaking (ANPRM) regarding revision of the EFH guidelines is of great interest and import to NAHB and its members. NAHB's specific comments and recommended actions in response to the ANPRM are as follows.

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## I. The Final EFH Guidelines Must Be Revised to Comply with FCMA Requirements

### A. The scope of the EFH Guidelines must be limited to the authority provided in the FCMA

#### 1. *The definitions established by the EFH Guidelines must be appropriately narrowed.*

In the 1996 amendments to the FCMA, Congress defined EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." 16 U.S.C. § 1802(10). This definition was accompanied in the 1996 amendments by a directive to the Regional Fisheries Management Councils ("Councils") to amend their fishery management plans to identify EFH for each *offshore* fishery, with an emphasis on minimizing adverse effects on such habitat *caused by fishing*. 16 U.S.C. § 1853(a)(7). Rather than adhere to the mandates of the FCMA however, the Final Rule promulgating the EFH Guidelines ("Rule") issued on January 17, 2002 grossly expanded the statutory definitions of EFH and its implementing terms to be all encompassing. The Rule defined the term to include habitat "required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem." 50 C.F.R. § 600.10; 67 FR at 2375. The Rule further defined the term "ecosystem" in a broad and vague manner to encompass extensive inland areas in a "watershed" based approach to identifying EFH. 50 C.F.R. §§600.810, 600.815(a)(4); 67 FR at 2376, 2378. The term "healthy ecosystem" was defined with reference to an ecosystem in its pristine state. 50 C.F.R. § 600.810, 67 FR at 2376. The Rule defined "waters" to encompass all "aquatic areas," including wetlands. 50 C.F.R. § 600.10; 67 FR at 2347, 2375. Likewise, instead of giving "substrate" its ordinary meaning in the context of marine fisheries—the ocean bottom or floor—the Service defined it to extend to "associated biological communities." *Id.* The Rule expanded the concept of EFH beyond the current distributions of fisheries managed under fishery management plans to areas "historically used by fish." *Id.* Moreover, the Rule described EFH to include "habitats that would be necessary to the species to obtain increased yields." 50 C.F.R. § 600.815(a)(1)(iv)(F); 67 FR at 2377.

The FCMA contains no indication that Congress contemplated the all-encompassing, complex, and burdensome regulatory program for EFH designation and consultation set out in the Rule. For example, there is nothing in the FCMA authorizing the Service to expand the statutory definition of EFH to the limitless concept embodied in the Rule. The Rule allows virtually any and all habitat to qualify as "essential" and renders the term meaningless. Indeed, the administrative record reflects recognition of this flaw by the Councils.<sup>1</sup> The result is clearly inconsistent with the plain language of the definition in the statute, and NAHB maintains that the Service must accordingly restrict its overbroad interpretation of EFH in its revision of the EFH Guidelines. *See Arizona Cattle Growers Ass'n.*, 273 F.3d at 1237 (courts "must reject

<sup>1</sup> As stated in the Service's staff notes of concerns expressed by most members of a Council habitat committee: "The definition of EFH is seen as too broad. If EFH is considered everything, the designation of EFH will be meaningless." Rule AR 263 at 2. *See also* Rule AR 321 at 1 (The Service's Northeast Region commenting that "ecosystem" definition of EFH is too broad); Rule AR 789 at 3 (Service staff notes: many commentors, including environmental groups, expressed that broad EFH designations were meaningless).

administrative constructions which are contrary to clear congressional intent" (quoting *Chevron*, 467 U.S. at 843, n. 9)). See also *California v. Montrose Chemical Corporation*, 104 F.3d 1507, 1513 (9<sup>th</sup> Cir. 1997) (absent a clearly expressed legislative intent to the contrary, the plain language must ordinarily be regarded as conclusive).

*2. EFH must not include all past, present, and future utilized and potentially utilized habitat areas.*

Contrary to the directive of the FCMA, the Rule established additional criteria to ensure that the EFH identified by Councils under the FCMA extends to most or all areas used by managed fish species, rather than being limited to truly essential habitat. 50 C.F.R. § 600.815(a)(1). The Rule requires "where possible, that an ecosystem approach be used" to designate EFH. 50 C.F.R. § 600.815(a)(1)(iv)(E); 67 FR at 2377. For "overfished" species, the Rule provides that *all* habitats currently used by the species may be considered "essential" in addition to "historic" habitats. 50 C.F.R. § 600.815(a)(1)(iv)(C); 67 FR at 2377. The Rule likewise contains language to ensure that the Councils follow an all-encompassing, open-ended "ecosystem" approach to identifying EFH. The Rule also provides that EFH "will normally be greater than or equal to aquatic areas that have been identified as 'critical habitat' for any managed species listed as threatened or endangered under the Endangered Species Act" (ESA). 50 C.F.R. § 600.810(a)(1)(iv)(D); 67 FR at 2377. In contrast to this assertion, the ESA defines critical habitat as "the specific areas...on which are found those physical or biological features *essential* for the conservation of the species" (emphasis added). 16 U.S.C. § 1532(3)(5)(A)(i) In its revisions of the EFH Guidelines, NAHB believes that the Service should limit the expanse of EFH to include only those areas so designated as critical habitat. At a minimum, the Service must rationally explain how those "essential" areas identified as ESH differ from those "essential" areas identified as critical habitat, and what additional protections are granted by such expansive and duplicative coverage.

While NAHB agrees that certain habitat areas may be necessary for species survival, to the extent that essential habitat areas are identified, there is clearly no requirement to identify ultra-essential habitat. That is to say habitat is either essential – i.e., necessary to fish for spawning breeding, feeding, or growth to maturity – or it is not. Yet, the Rule contains specific provisions for identifying such areas, termed Habitat Areas of Particular Concern (HAPC). Although it is unclear what effect this designation imparts, NAHB believes that the Service could avoid this unnecessary attempt at focusing consultations and recommendations by simply properly defining EFH in accordance with the intent of Congress in the first place. NAHB believes that, if EFH were properly limited to the habitat essential to fish species, there would be no need for an additional category representing habitats that are truly important or rare.

*3. The EFH Guidelines must not be applied to nonfishing activities.*

The expansive EFH definition, the broad "ecosystem" approach to identifying EFH, and the elaborate consultation requirements of the Rule ultimately subject a universe of nonfishing as well as fishing activities to regulatory consultation burdens. Indeed, the Rule directs the Service to address potential adverse effects from inland and other nonfishing activities, and implement

"conservation and enhancement measures" to restrict nonfishing activities. For example, the regulations provide:

[Fishery management plans] must identify activities other than fishing that may adversely affect EFH. Broad categories of such activities include, but are not limited to: dredging, filling, excavation, mining, impoundment, discharge, water diversions, thermal additions, actions that contribute to non-point source pollution and sedimentation, introduction of potentially hazardous materials, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH. 50 C.F.R. § 600.815(a)(4); 67 FR at 2378.

The regulations further provide: "To the extent feasible and practicable, [fishery management plans] should analyze how the cumulative impacts of fishing and non-fishing activities influence the function of EFH on an ecosystem or watershed scale." 50 C.F.R. § 600.815(a)(5); 67 FR at 2378.

There is no indication in the FCMA or its legislative history that Congress intended this huge scope and degree of burden, particularly on upland activities or those outside the fishing industry. NAHB believes that by including these nonfishing and upland activities, the Rule has been illegally and improperly expanded.<sup>2</sup> Indeed, the EFH Guidelines established by the Rule have effectively morphed the Service's very mandate from protection of America's commercial fisheries to upland land-use management and the regulation of countless unrelated industries. Accordingly, NAHB strongly urges the Service to drastically narrow the scope of the EFH Guidelines and remove nonfishing activities from its purview.

B. The consultation process is unnecessary and, if retained, must be simplified and narrowed

*1. Existing laws and regulations provide adequate protection.*

States and countless towns and communities have realized the vital role that viable fisheries play in their daily lives. As such, many initiatives, ordinances, and statutes have been enacted in order to protect a wide variety of aquatic and marine wildlife. In these areas, the designation of EFH will only serve to add another layer of review and bureaucracy while failing to afford any of the additional protections envisioned. NAHB believes that, in revising the EFH Guidelines, the Service must consider and review all local, state, regional, and federal protections to determine whether additional management considerations in the form of EFH are in fact warranted for particular species or areas.

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<sup>2</sup> See, e.g., S. Rep. No. 276, 104<sup>th</sup> Cong., 2d Sess. 8 (1996) ("Regulatory Impact Statement: "The total number of individuals affected . . . will not be significantly different than those currently regulated by the agency in the fishery and should be consistent with current levels."). See also S. Rep. No. 235, 105<sup>th</sup> Cong., 2d Sess. 97 (1998) ("The Committee [on Appropriations] is concerned that the National Marine Fisheries Service has exceeded the scope of congressional intent in implementing the essential fish habitat provisions of the 1996 Magnuson-Stevens Act").

*2. The consultation process is overly complicated and convoluted.*

The 1996 amendments to the FCMA did not require written, formal, or otherwise complex and burdensome procedures to meet the federal agency obligations to consult with the Service regarding actions that may adversely affect identified EFH. 16 U.S.C. § 1855(b)(2). The EFH Rule nevertheless sets out detailed, elaborate procedures for consultation regarding actions with federal agency involvement that may adversely affect designated EFH. The process includes "general concurrence," "programmatic," "site-specific," "abbreviated," "expanded," "further" and "supplemental" consultation. 50 C.F.R. § 600.920(a), (f)-(1); 67 FR at 2380-83. The statute further provided that it is the Secretary of Commerce who is required to "coordinate with and provide information to other Federal agencies to further the conservation and enhancement of essential fish habitat." 16 U.S.C. § 1855(b)(1)(D). With very limited exception, for each consultation the federal action agency (rather than the Service) must complete a written "EFH assessment" of the effects of the proposed action on EFH, meeting specified requirements for analysis. 50 C.F.R. § 600.920(e); 67 FR at 2380. The EFH assessment must be submitted to the Service for review and response, and the Service must develop measures to avoid or reduce effects on EFH. *See, e.g.*, 50 C.F.R. § 600.920(h); 67 FR at 2382. The agency must provide a detailed response in writing to the Service and the appropriate Council regarding any EFH conservation recommendations prior to approving the proposed action. 50 C.F.R. § 600.920(k); 67 FR at 2383. The response must include the scientific justification for any disagreements with the Service over the anticipated effects of the proposed action and the measures needed to avoid, minimize, or offset effects. *Id.*

In testament to its complexity, the text of the consultation requirements in the Rule extends to four pages in the three-column fine print of the Federal Register format. 67 FR at 2739-83. The complexity and burden associated with the consultation requirements are further illustrated by materials prepared by the Service to implement the program. These include 1) "flow charts" of the various consultation procedures, extending to several pages of material; and 2) voluminous EFH consultation "guidance" documents. *See, e.g.*, Rule AR 471, 472, 482; Am. 14 AR Supp. 3. Clearly, this is beyond what Congress had in mind with the passage of the 1996 FCMA amendments. In revising the EFH Guidelines, NAHB recommends that, should consultation requirements be retained in the EFH Guidelines, the implementing regulations, including general concurrence provisions, must be drastically simplified and streamlined.

*3. The consultation threshold is too broad.*

In addition to being overly complex and burdensome, the Rule fails to provide any threshold of significance for triggering the formal EFH consultation requirements. For example, the Service defined "adverse effect" to mean:

[A]ny impact which reduces quality and/or quantity of EFH. Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components . . . . Adverse effects to EFH may result from actions

occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions. 50 C.F.R. § 600.910(a); 67 FR at 2379.

The practical effect of such a definition is that any land-based activity could trigger the threshold for formal EFH consultation if it involves some federal agency permit, funding, or other action, and it has a possibility of some effect on designated EFH, however remote or minor. 50 C.F.R. § 600.920(a)(1); 67 FR at 2380. NAHB recommends that the Service revise the EFH Guidelines to limit the definition of “adverse effect” to only those actions that are “significant.” This limitation is commonly applied in the context of the national Environmental Policy Act of 1969, 42 U.S.C. 4321-4370d, and rules thereunder, and should be used in this instance to ensure that private actions that are insignificant in effect or in scope are not unduly delayed by the overbroad treatment of the EFH regulations. NAHB continues to believe that narrowing the threshold for EFH consultation is absolutely necessary to fully conform to the FCMA and to achieve a workable, meaningful scope for EFH implementation.

C. The EFH Guidelines must remain advisory

NAHB believes that the Rule improperly imposes *mandatory* requirements on Councils regarding EFH designation and other actions. *See* 50 C.F.R. §§ 600.815(a), 600.920. This is plainly contrary to the directive of the FCMA to limit the regulations to advisory *guidelines* to assist the Councils in describing and identifying EFH and in considering actions to conserve and enhance such habitat. 16 U.S.C. § 1855(b)(1)(A). Accordingly, NAHB believes that the Service should revise the EFH Guidelines and adopt a pragmatic approach in developing the EFH program. The goal should be to design a program that works in an advisory context rather than rely upon the post hoc and incorrect “risk-averse” justification and regulation on activities that have little or no impact on the long-term sustainability of fisheries.

D. The Service may not pass its responsibilities to other Federal agencies.

The EFH Rule imposes a written EFH assessment and other consultation obligations on agencies in other federal departments and other third-party applicant entities. *See* 50 C.F.R. § 600.920(c),(e). In creating the FCMA, NAHB believes that Congress did not delegate authority to the Service to impose fiscal and other burdens on agencies in other departments or on third parties. Congress purposefully patterned the brief provision in the FCMA requiring other agencies to consult with the Service regarding actions that may affect EFH after the simple information sharing requirements in the Fish and Wildlife Coordination Act, rather than the much more detailed and extensive mandates in section 7 of the ESA.<sup>3</sup> The statute did not

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<sup>3</sup> *See* 16 U.S.C. § 1855(b)(2) (FCMA consultation); 16 U.S.C. § 662(a) (Fish & Wildlife Coordination Act consultation). *Cf.* 16 U.S.C. § 1536(c) (expressly imposing obligation on federal action agency to prepare biological assessment for ESA consultation purposes). *See also Clouser v. Espy*, 42 F.3d 1522, 1535 (9<sup>th</sup> Cir. 1994, *cert. denied*, 515 U.S. 1141 (1995) (no authority for the proposition that one agency may promulgate regulations that bind another agency); Rule AR 73 (agency legal counsel warning that the Service could be challenged for overstepping

otherwise authorize the Secretary of Commerce to promulgate rules that establish a formal, complex, mandatory and all-encompassing EFH consultation process. *See* 16 U.S.C. §§ 1855(b)(1)(A), (D) (directing the Service to issue "guidelines" to assist Councils and for the Service to "coordinate" and "provide information" to other federal agencies"). Nonetheless, the Service established just such a regime in the Rule, patterned after the formal and cumbersome consultation process for species listed as threatened and endangered under the ESA. *See* 50 C.F.R. Part 402, Subpart B; Rule AR 56 at 1, 187 at 1.

In addition to the long, onerous, and confusing EFH consultation process, NAHB believes that conservation measures established pursuant to consultation under the EFH Guidelines should be tied to maintaining existing habitat values rather than to restoring habitat across entire watersheds. Conservation measures should be tied to existing or reasonable achievable conditions instead of optimal conditions that may not be achievable in most, if not all, developed watersheds. NAHB does not believe that the Service, with a narrow federal responsibility to fisheries management, should develop or lead comprehensive watershed-based programs that mandate or require multiple stakeholder and agency action. As a result, NAHB believes that the EFH Guidelines must be revised to fully reflect the Congressional intent, limit undue consultation requirements, and rightly reestablish the EFH program as advisory.

## **II. The EFH Guidelines Must Be Sufficiently Supported**

### **A. The EFH Guidelines must fully comply with the FCMA**

In addition to the substantive issues raised above, NAHB believes that the EFH consultation requirements in the Rule specifically violate the FCMA by unnecessarily duplicating and complicating other existing regulatory procedures that already promote fish habitat conservation in coastal and inland areas. As described above, there are obvious redundancies with the ESA written "biological assessment" and other consultation requirements that apply to any action with federal involvement that may adversely affect fish populations that are listed as endangered or threatened under the ESA. 50 C.F.R. § 402.03. *See* Rule AR 894 (Service staff proposing that ESA consultation substitute for EFH consultation for listed populations of salmon and other species). Additional duplication with analysis, consultation and other protective requirements include National Environmental Policy Act (NEPA) procedures, under which a written environmental impact assessment is prepared and circulated among interested agencies and the public for any proposed federal agency action that may adversely affect fish habitat or other ecosystem components (40 C.F.R. §§ 1500-1508), and standards and procedures under the Clean Water Act (33 U.S.C. §§ 1251-1387), Coastal Zone Management Act (16 U.S.C. §§ 1451-1465), and Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. § 662(a)), as well as state and local environmental and land use laws, regulations, and ordinances.

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FCMA authority on this issue); Rule Administrative Record (AR) 1092 (Fish & Wildlife Service objections); Rule AR 1162, 1362 at 2 (Army Corps of Engineers objections).

Further, the Rule plainly contradicts other specific FCMA provisions. The redundant and unnecessarily burdensome EFH definition, designation, and consultation requirements in the Rule are not based on the best scientific data available, contrary to FCMA National Standard 2 and the policy stated in section 2(c)(3) of the statute. 16 U.S.C. §§ 1801(c)(3)); 1851(a)(2). These requirements also do not, where practicable, minimize costs and avoid unnecessary duplication, contrary to FCMA National Standard 7. 16 U.S.C. § 1851(a)(7). The incredibly broad and cumbersome program established in the regulations is not responsive to the needs of affected States and organizations like NAHB, nor are they efficient or "workable and effective," contrary to 16 U.S.C. § 1801(c)(3)). As mentioned above, NAHB believes that the information sharing provisions of the FWCA are a wholly adequate and appropriate model for consultation and information sharing under the EFH program and urges the Service to adopt these provisions for the EFH consultation program. At a minimum, in its revisions to the EFH Guidelines, NAHB believes that the Service must justify why it believes it to be appropriate to abandon the directly comparable and effective approaches of the FWCA in favor of the arcane, excessive, redundant approach set forth in the Rule.

**B. The EFH Guidelines must fully comply with the Administrative Procedure Act**

The character and scope of the Rule was never contemplated by Congress in the statutory scheme and is unworkable in the real world. By promulgating regulations to implement an EFH regime that conflicts with specific provisions as well as the marine fishery purpose of the FCMA, NAHB believes that the Service has acted in an "arbitrary and capricious" manner that is otherwise "not in accordance with law," within the meaning of the Administrative Procedure Act (APA). By rendering the statutory concept of "essential" fish habitat meaningless and overlaying that flaw with an elaborate regulatory approach to consultation, the Service committed clear errors of judgment in promulgating requirements that impose unjustified costs on broad classes of stakeholders. This is precisely the kind of action that violates the APA "arbitrary and capricious" standard as well as national standards in the FCMA. *Blue Water Fisherman's Ass'n*, 112 F. Supp. 2d at 171; *Southeastern Fisheries Ass'n v. Mosbacher*, 773 F. Supp. at 441. NAHB believes that, in order to correct this fatal flaw, the Service must create and implement a rational, efficient, and effective consultation program that is limited to only those activities and areas that are directly tied to commercial fisheries. In particular, NAHB echoes its earlier recommendation that in lieu of the convoluted consultation requirements outlined in the Rule, the Service should adopt simple information sharing requirements such as those identified in the FWCA, while further limiting the scope of the EFH program to marine fishery activities.

**C. The EFH Guidelines must meet data quality standards**

As of October 1, 2002, all information disseminated by federal agencies, including information used to support rulemakings, must meet stringent information quality standards before it can be published or released by the agency. These federal information quality requirements were mandated by Congress in Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), and effectuated by the Office of Management and Budget's (OMB) model Information Quality Guidelines (67 FR 8452) and by the Department of Commerce's and the Service's own implementing guidelines.

Due to the significance of the EFH Rule, NAHB insists that the Service make clear its adherence to these data quality requirements. The information used to describe, define and identify EFH, the identification of adverse effects to EFH, and the identification of actions to conserve and enhance EFH must all comply with these information quality mandates. NAHB is particularly interested in the data quality guidelines' imposition of special, more rigorous quality standards on information deemed to be influential, including information contained in rulemaking dockets and which form the basis for an agency's actions. Under these enhanced requirements, scientific information must be both transparent and reproducible, and environmental risk information must be accompanied by an agency assessment of the information, including a discussion of significant uncertainties, studies that support or contradict the agency, and the method that will be followed for reconciling discrepancies.

NAHB further believes that information quality should go beyond the formalized implementation of the OMB mandates, and be viewed as a critical component of each of the agency's actions. We urge the Service to not only comply with the intent of the Information Quality Guidelines, but to identify in its revisions to the Rule how each Council is to comply, as we believe a clear endorsement of information quality is essential to the successful transformation of the Service's information practices and to ensuring the quality of information used and disseminated in the EFH program.

### **III. The Service Must Follow All Appropriate Rulemaking Processes**

#### **A. The EFH Guidelines must comply with the Regulatory Flexibility Act**

In its promulgation of the EFH Rule, the Service failed to provide any factual support in the rulemaking notices for its certification that the rule will not have a significant economic effect on a substantial number of small entities. The support for the certification was instead limited to circular, bald assertions that 1) the regulations establish "guidelines" to the Councils for "developing EFH components" of fishery management plans that "do not have the force of law"; and 2) since compliance with the Service recommendations in the EFH consultation process" is not mandatory, any effects on small businesses would be speculative." 67 FR 2375. Despite these claims, NAHB believes that the Rule has resulted in huge economic impacts on local government, forest enterprise, homebuilder, and other small entities.<sup>4</sup>

Under the Regulatory Flexibility Act (RFA), an agency engaged in rulemaking is required to prepare a detailed initial and final regulatory flexibility analysis unless the rule will not have a significant economic impact on a substantial number of small entities. The agency must certify this conclusion to the Small Business Administration with a statement providing the factual basis for that conclusion. 5 U.S.C. § 605(b) As described above, the Rule "guidelines" to

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<sup>4</sup> Ample information was provided during the rulemaking process demonstrating the likely economic impacts of EFH designation and consultation. See, e.g. Rule AR 736; 757 at 7-10; 1162 at 2; 1164 at 1, 2; 1173 at 1; 1206 at 3, 7; 1238 at 1; 1244 at 2; 1246 at 7, 8, 65-66, 71-72; 1256 at 2; 1259 at 19; 1282 at 4-5; 1283 at 1; 1284; 1292 at 2, Specific Comments at 6-11, 15-18; 1295; 1299; 1361 at 1-2, Attachment A at 4-5; 1415 at 11, 20, 22; 1495 at 1-3,

Councils regarding designation of EFH and other EFH components are replete with mandatory direction, including the limitless "ecosystem" definition of EFH. The EFH consultation requirements in the Rule are clearly mandatory for federal action agencies and delegable directly to permit applicants such as NAHB and its members. The Service brushed aside these relevant factors in making its initial assertion that the final Rule would result in no significant impacts. The lack of support in the record for the Service's certification confirms a clear violation of the RFA as well as the APA "arbitrary and capricious" standard, thus the Service is urged to reconsider this finding. Indeed, the courts have themselves noted this shortcoming.

“...the effect on non-fishing entities which include small businesses, small organizations and small governmental jurisdictions is not speculative, but real and the cursory certification of compliance with the RFA by the [Service] does not appear to be a good faith effort by the [Service] to comply with the RFA.” (*Idaho County et al. v. Evans*, No. CV02-80-C-EJL Slip op. at 9 (D. Idaho Sept. 30, 2003)).

To remedy this glaring shortfall, NAHB strongly recommends that the Service conduct a full RFA analysis of the economic impact to nonfishing entities in its revision of the EFH Guidelines. Such an analysis must account for the full direct, indirect and cumulative economic impacts of EFH regulations, such as, but not limited to, the effect on public works projects, transportation and other infrastructure projects, job loss, the availability and costs of housing, increased costs due to regulation, and the price of and tax implications on affected real estate.

**B. The EFH Guidelines must comply with the National Environmental Policy Act**

NAHB continues to disagree with the Service's original conclusions and reasoning for not completing detailed analysis of the likely effects of the EFH regulations on the environment, states, small and large business entities, and local and regional economies. The programmatic nature of impacts was not and is not premise for avoiding or deferring analysis on the basis that the impacts are "speculative," as continually asserted by the Service. NAHB reads NEPA to require a reasonable evaluation of socioeconomic as well biological and physical effects of a proposed action. 40 C.F.R. § 1508.8; AO 216-6 at 6.11; *American Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 18-19 (D.D.C. 2000). An agency cannot avoid analysis of effects based on general assertions that projecting impacts would be uncertain or speculative. *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246, n. 9 (9<sup>th</sup> Cir. 1984). An Environmental Assessment (EA) must consider reasonable alternatives, environmental effects, and mitigation in sufficient depth to constitute a "hard look" that supports a conclusion that no significant effects will result and that preparation of a more detailed Environmental Impact Statement (EIS) is not required. NAHB believes, however, that an EA that addresses these elements in vague and conclusory terms, like that prepared for the Rule, is not adequate and plainly violates NEPA. *See American Oceans Campaign*, 183 F. Supp. 2d at 17-21 (finding that EAs and Findings of No Significant Impact (FONISs) prepared by the Service for EFH amendments for several fishery management plans violated NEPA). This violation deprived the regulated community of the meaningful analysis and opportunity for comment and change in the rulemaking that NEPA procedures are designed to provide. As such, NAHB strongly recommends that the Service complete all

relevant, applicable, and mandated socioeconomic analyses in its revision of the EFH Guidelines, including full NEPA analysis. NAHB believes that a failure to do so would find the Rule in continual violation of federal law.

In closing, NAHB believes that the EFH Guidelines must be revised to ensure that they remain advisory in scope and limited to those marine fishery actions and activities that reasonably affect the maintenance and recovery of affected fisheries. NAHB also strongly urges the Service to fully analyze the probable environmental, social, and economic effects of any proposed revisions to the EFH Guidelines per all relevant federal statutes, including RFA and NEPA. Further, NAHB believes that the worthy goal of restoring commercial fisheries is being misguided and misapplied to nonfishing interests by way of a confusing, inefficient, and improper consultation process.

We appreciate your consideration of our comments. We believe that by incorporating them into the revisions to the EFH Guidelines, the Service will continue to maintain the viability of this nation's fisheries while minimizing the impact to unrelated stakeholders and industries. Please do not hesitate to contact me at (202) 266-8538 if you have any questions or if you would like to discuss our comments further.

Sincerely,



Susan Asmus  
Staff Vice President  
Regulatory Affairs

SA/csg

AMERICAN FOREST & PAPER ASSOCIATION  
AMERICAN FOREST RESOURCE COUNCIL  
NATIONAL ASSOCIATION OF HOME BUILDERS  
WEYERHAEUSER COMPANY

January 26, 2004

Mr. Rolland A. Schmitten  
Director, Office of Habitat Conservation  
NOAA - National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3282

Re: **Consideration of Revision of Essential Fish Habitat  
Guidelines, 68 Fed. Reg. 69070 (December 11, 2003)**

Dear Mr. Schmitten:

In 1998, non-fishing entities expressed their concern about the new regulatory program under development by the National Marine Fisheries Service (NMFS) to implement the "essential fish habitat" (EFH) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). At that time the non-fishing community expressed support for the statutory goal of improved conservation of offshore fisheries and the habitat essential to those fisheries, but emphasized its serious concerns over the emerging EFH program. Since then, little has been done to refine the EFH program or make it more efficient. As a result, many of the same concerns continue to exist.

These comments are submitted on behalf of additional non-fishing interests in response to the Advance Notice of Proposed Rulemaking (ANPR); Consideration of Revision of Essential Fish Habitat (EFH) Guidelines 68 Fed. Reg. 69070 (December 11, 2003). These entities are pleased that NMFS is reconsidering the EFH program, and these comments are submitted to help guide future rulemaking.

As envisioned by NMFS, EFH covers all marine, coastal, and estuarine waters of the United States, and very extensive inland habitat for anadromous species, including upland terrestrial areas. As we noted in earlier comments, such an all-encompassing definition, has

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rendered the term "essential" meaningless. The EFH program has no limitation; it simply applies everywhere. The definition and procedures for identification and consultation need to be narrowed in scope, and clarified for marine areas such as those identified in the "habitat areas of particular concern" provisions of the current regulations.

Under the current regulations, nearly all habitat for managed species, including vast areas of inland and coastal habitat that are already subject to other protections against adverse impact, are being identified as "essential." A full spectrum of non-fishing as well as fishing activities are in turn being identified as having potential effects on this habitat and have thus become subject to burdensome EFH consultation requirements. There is no "significance" threshold included in the current regulations for triggering such consultation. This approach has resulted in a volume of thousands of EFH consultations being conducted during the first few years of the EFH program.

In addition, the current regulations still contain numerous mandatory procedures and other requirements that are not needed to comply with the MSFCMA. The regulations allow EFH consultation to be coordinated with other regulatory procedures, but still require written EFH assessments and additional procedures that are not needed to protect habitat. Rather than take advantage of existing consultation and decisionmaking procedures, NMFS has created a redundant and burdensome new federal procedure that results in the inefficient use of agency resources and significant delay in decisionmaking.

These definitions need to be clarified, and mandatory provisions eliminated to allow NMFS, fishery management councils, action agencies, and other affected parties to carry out EFH identification and consultation in more focused and flexible ways.

Finally, fishery management councils have been established specifically for the purpose of regulating fishing, and they are dominated by fishing interests. The councils have no expertise in non-fishing activities, do not seek or provide significant representation of

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non-fishing interests, and do not have any accountability to non-fishing interests. The fishery management plan documents that have been produced by the councils show a lack of understanding regarding coastal and inland and resource development and for the protective mechanisms already in place under forest practice statutes, coastal zone management programs, and other law. Clearly, the scope of their responsibility should be limited to marine areas and activities within those areas.

The non-fishing sector seeks an EFH program that can function without imposing new and redundant burdens on resource utilization activities. The current regulations do not efficiently and effectively serve the purposes of the 1996 EFH amendments to the Magnuson-Stevens Fisheries Conservation and Management Act. They are not practicable for NMFS to implement, and they impose requirements that are unnecessarily broad, complex and costly for the non-fishing sector.

We look forward to working with you further, to obtain a balanced approach to protecting fish habitat, without unduly impeding agency decisionmaking or resource utilization activities.

Thank you for considering these comments. Please contact me if you have any questions.

Sincerely,



W. H. Fawcett

cc: American Forest & Paper Association  
American Forest Resource Council  
National Association of Home Builders  
Weyerhaeuser Company

January 26, 2004



**THE MARINE INDUSTRIES ASSOCIATION OF PALM BEACH COUNTY, INC.**

Rolland A. Schmitt, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service, F/HC  
1315 East-West Highway  
Silver Spring, Maryland 20910

Re: Essential Fish Habitat Guidelines

Gentlemen:

On behalf of The Marine Industries Association of Palm Beach County (MIAPBC) we provide the following response to your public notice of December 11, 2003, regarding Essential Fish Habitat Guidelines. We apologize for the lack of details, but were only provided a copy of the notice today. Regardless, we believe that EFH is an important issue to our industry, and that the guidelines and their implementation are in need of review.

In answer to your first question, yes, the EFH guidelines 50 CFR 600.805 to 600.930 should be revised. In answer to your second question, again, we unfortunately have not had time to present a part by part review. Please let us know if we have further opportunity to comment, and we would be happy to provide detailed remarks.

In general, we believe that the concept of Essential Fish Habitat, as set forth in the Magnuson-Stevens Act, was to protect habitat which was "essential" to certain defined fisheries. Essential Fish Habitat implies some level of importance greater than some other habitat. Instead, the implementation of the act has extended not only to all habitat for the applicable species, but even to areas which are not habitat for the applicable species.

We recommend that at a minimum, the definition of "adverse effect" be narrowed down. We further recommend that maps be required to be adopted and recorded in a format such that EFH can be located by the regulated public. The fact that the boundaries "should be static" should be reinforced in the guidelines, so that the regulated public can rely on the boundaries.

Post-it® Fax Note 7671		Date 1/26/04	# of pages 2
To R. A. Schmitt	From C. Isiminger		
Co./Dept. NOAA Nat'l	Co.		
Phone # Marine Fisheries	Phone #		
Fax # 301/427-2570	Fax #		

13205 U.S. Hwy. One  
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Phone: 561.624.9092  
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Thank you for the opportunity to comment. Please let us know if you will accept further comments.

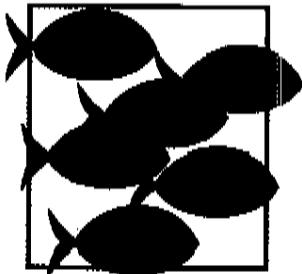
Sincerely,

MARINE INDUSTRIES ASSOCIATION  
OF PALM BEACH COUNTY, INC.



Charles C. Isiminger  
Vice-President

0403MIA.NMFS1  
cc: Lou Daniello, President



**The  
Marine  
Fish  
Conservation  
Network**

"... To Protect, Restore, and Conserve Marine Fish."

January 26, 2004

Mr. Rolland A. Schmitten  
Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service, F/HC  
1315 East-West Highway  
Silver Spring, MD 20910

Dear Mr. Schmitten:

As members of the Marine Fish Conservation Network (Network) and concerned conservation groups, we are writing to provide you with comments on the Advanced Notice of Proposed Rulemaking regarding the Essential Fish Habitat (EFH) regulations published in the *Federal Register* on December 10, 2003.

In general, the Network feels that the current EFH regulations are appropriate and adequate for the identification of EFH, determining the effects of fishing activities on EFH, and protecting EFH from the adverse effects of fishing and non-fishing activities. We would like to point out that the EFH regulations have already been open for comment (and delayed) for a total of 270 days through five separate comment periods. The rulemaking for EFH began on November 8, 1996, when NMFS published an advanced notice of proposed rulemaking (ANPR). A second ANPR was published on January 9, 1997 to provide an additional comment period. A proposed rule (PR) was published on April 23, 1997. Next, an interim final rule (IFR) was published on December 19, 1997. The IFR was reopened for additional public comment on November 8, 1999. This extended series of comment periods is, in our experience, unprecedented for NMFS and has allowed for more than enough input from the public about the content and impact of the EFH regulations.

When NMFS published the IFR in December 1997, it justified use of the interim rule by stating that it would be beneficial to implement the EFH regulations while still allowing for modifications to the final rule based on implementation experience. This "trial" period lasted four years and gave NMFS enough time to collect comments about the regulations and determine what changes would make EFH delineation and protection operate smoothly. The final rule became effective on February 19, 2002. Now, after only 22 months, NMFS has published an additional ANPR to collect comments about

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whether or not to change the existing EFH regulations. Constantly considering these regulations undermines the credibility of NMFS's EFH program.

In addition, the Network notes that there are currently five Environmental Impact Statements (EISs) being drafted throughout the country under the lawsuit settlement for *American Oceans Campaign et al. v. Daley et al., No. 99-0982 (D.D.C.)* that are utilizing the current EFH regulations and are soon to be completed. Altering the EFH regulations prior to the deadlines for completion of the EISs would create confusion and duplication of work to alter the EISs to match the new regulations.

In our view, most of the concerns with the EFH program can be resolved through better implementation of EFH regulations, not changing the regulations themselves. Rather than revising the regulations, we recommend that NMFS revise and reissue its EFH Technical Guidance.

Revising the Technical Guidance will allow NMFS to address the concern that "everything is EFH." The Network agrees that the importance of protecting EFH can be diminished if everything is designated as EFH. The current regulations allow for a narrower designation of EFH. The Technical Guidance could be revised to encourage the Councils to refine EFH designations as more information about fish populations' use of habitat is collected. NMFS should also clarify how to designate HAPCs as well as promote the identification and protection of HAPCs by the Councils as a way of focusing habitat protection efforts.

In our experience with EFH implementation, we have noted instances where NMFS and the Councils have failed to adequately protect EFH. To address these concerns, the Technical Guidance should be revised to emphasize the following points:

- It should make clear that the duty to minimize adverse effects on EFH does not require proof of effects on the productivity of managed species. Considerations of the productivity of commercial species should not be required when creating provisions to minimize adverse effects on EFH. This consideration is not set out in the statute or in the regulations and is counter to the published preamble to the EFH final rule (67 FR 2354) which states, "It is not appropriate to require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take action to minimize adverse fishing impacts to EFH to the extent practicable. Such a requirement would raise the threshold for action above that set by the Magnuson-Stevens Act." Requiring a link to productivity is anti-precautionary and establishes an unrealistic data requirement that would result in little to no habitat protection due mainly to the paucity of this type of data.
- NMFS should revise the Technical Guidance to emphasize that rarity is only one of four factors that can be used to identify a HAPC and it is not a mandatory factor in that designation. Requiring a habitat to be rare prior to identifying it as an HAPC will limit habitat protection to rare habitats to the detriment of EFH that is ecologically important, sensitive, or exposed to stress, but not rare.

- Finally, the Technical Guidance should advocate that sensitive and important habitats such as deep-water corals and coral reefs must be designated as HAPCS. Deep water corals such as those that have been found in the North Pacific, Gulf of Mexico, and northwest Atlantic have been relatively recently discovered and without proper protection could be destroyed before scientists have had a chance to thoroughly investigate them. These habitats are clearly important to many species and experience with other coral habitats has shown their vulnerability to damage and their extremely low recovery rate.

Implementation of these Technical Guidance changes can happen rapidly because the current regulations require that EFH amendments be revised at least once every five years. Most of the EFH designations are at or over this five-year deadline.

Finally, the request in the ANPR -- asking for input about whether and how the EFH regulations should be changed -- is too vague. The request should provide a more detailed explanation of the issues about which NMFS is soliciting comments. We believe it would be much more productive if the public were provided with specific questions regarding issues of concern in the EFH regulations. This would ensure that the comments would be more useful.

In conclusion, we are very concerned that this ANPR will further undermine NMFS's EFH protection efforts by creating uncertainty regarding the program. Concerns about the EFH program can be addressed through better implementation of the existing regulations. Thank you for considering our comments. If you have any questions, please feel free to contact the Network's Executive Director, Lee Crockett, at (202) 543-5509.

Sincerely,

Lee Crockett  
Marine Fish Conservation Network

Dorothy Childers  
Alaska Marine Conservation Council

Mark J. Spalding  
Alaska Oceans Program

Dave Bulloch  
American Littoral Society - SE chapter

Peter Baker  
Cape Cod Commercial Hook  
Fishermen's Association

David Godfrey  
Caribbean Conservation Corp. / Sea  
Turtle Survival League

Nan Hauser  
Center for Cetacean Research and  
Conservation

Theresa Pierno  
Chesapeake Bay Foundation

Sarah Clark Stuart  
Clark Stuart Resources

Keith Stieduhar  
Colorado's Ocean Journey

Dale Beasley  
Columbia River Crab Fishermen's  
Association

Bill Akin  
Concerned Citizens of Montauk

Peter Shelley  
Conservation Law Foundation

William Snape  
Defenders of Wildlife

Eric Jorgensen  
Earthjustice

Beth Lowell  
Endangered Species Coalition

Kiza Gates  
Federation of Fly Fishers

Ray Pringle  
Florida Fishermen's Federation

Cynthia Sarthou  
Gulf Restoration Network

Linda Paul  
Hawaii Audubon Society

Rick Gaffney  
Hawaii Fishing & Boating Association

Lewis Regenstein  
Interfaith Council for the Protection of  
Animals and Nature, Inc.

Dean W. Crawford  
International Big Fish Network, Inc.

Cynthia D'Vincent  
Intersea Foundation, Inc.

Cha Smith  
KAHEA: The Hawaiian-Environmental  
Alliance

Kevin Scribner  
KoosKooskie Fish

Elliott A. Norse  
Marine Conservation Biology Institute

Mary Marsh  
Maryland Conservation Council

Robert G Lingenfelter, Jr.  
Marine Mammal Conservancy, Inc.

Ken Hinman  
National Coalition for Marine  
Conservation

Gerry Leape  
National Environmental Trust

Tim McKay  
Northcoast Environmental Center

Paula Del Giudice  
Northwestern Natural Resource Center  
National Wildlife Federation (Seattle, WA)

David L. Allison  
Oceana

Greg L. Carter  
Oceanic Resource Foundation

Kristin L. Stahl-Johnson  
Ocean People Resources

Jennifer Bloeser  
Pacific Marine Conservation Council

Jean Flemma  
Prairie Rivers Network

Leah M. Lopez  
Save the Sound, Inc.

Michael Stocker  
Seaflow

John Swingle  
Sierra Club

Doug Olander  
Sport Fishing magazine

Clark Lee Merriam  
The Cousteau Society

David Hoskins  
The Ocean Conservancy

Peter van Tuyn  
Trustees for Alaska

Bob Strickland  
United Anglers of California

Tierman Sittenfeld  
U.S. Public Interest Research Group

cc: Dr. William Hogarth

# MARINE CONSERVATION ALLIANCE

P O Box 20676  
JUNEAU, AK 99802

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FAX (907) 523-0732

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ASSOCIATION

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ALASKA PACIFIC SEAFOODS

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PLATINUM, QUINHAGAN, SCAMMON BAY,  
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PACIFIC SEAFOOD  
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FISHERIES, INC.

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ASSOCIATION  
ALASKAN, ERHAR, GRAYLING, KOTLIK,  
MOUNTAIN VILLAGE, NUNAM IQUIP

January 26, 2004

Mr. Rolland A. Schmitt  
Director, Office of Habitat Conservation  
NOAA/NMFS F/HC  
1315 East-West Highway  
Silver Spring, MD 20910

Two (2) pages via facsimile: (301) 427-2570

Dear Mr. Schmitt:

The Marine Conservation Alliance (MCA) is pleased to provide comments on the advance notice of proposed rulemaking (ANPR) regarding consideration of revisions to the Essential Fish Habitat (EFH) guidelines. The MCA is a broad-based coalition of coastal communities, fixed and mobile gear fishermen, Community Development Quota groups, vessel owners, processors, support industries and consumers directly and indirectly involved in the Alaska groundfish and shellfish fisheries. The coalition members have joined together to support science-based policies that protect both the marine environment and the North Pacific fishing community.

The MCA does not support re-opening the EFH rule at this time.

As noted in the Federal Register notice announcing this ANPR, the existing regulations are the product of a five-year public process, involving extensive work by the National Marine Fisheries Service (NMFS), the regional councils, and the public in response to the *AOC v. Daley* lawsuit, including ongoing work on the EFH Environmental Impact Statement (EIS) for North Pacific fisheries. The Federal Register notice states, "NMFS committed to evaluating the efficacy of the EFH guidelines as they are implemented, to apply the lessons learned from such implementation as appropriate, and to consider changing the regulations if warranted through an appropriate public process." The MCA appreciates NMFS's intent to periodically evaluate EFH Guidelines and make changes as necessary. However, the MCA does not believe that the time is ripe to re-open the final rule for further work, nor is it an appropriate time to alter the existing regulations.

Pursuant to the court order and stipulation under *AOC v. Daley*, the North Pacific Fishery Management Council (Council) is engaged in the public process to identify and designate EFH in the Council's Fishery Management Plans. A draft EIS is presently available for public comment, and the Council is on a strict schedule established by the court order to finalize work on EFH. If the final rule were reopened at this time, the timeline could slip beyond that mandated by the court order. Changing the regulations

Mr. Rolland A. Schmitten  
January 26, 2004  
Page 2

in mid-stream is even more problematic, as the Council's work to date may not comply with the revised rules. The possibility of all the hard work and good faith efforts by the Council and NMFS being placed at risk of further court sanction argues strongly against re-opening the regulations at this time.

Further, NMFS states the intent is to evaluate the EFH rule based on the experience of implementation. In the North Pacific, the Council is still developing its EFH program, so no implementation has occurred from which we might learn. If a problem arises during the process of developing and implementing the EFH program, then that will be the time to consider changing the regulations based on lessons learned.

Finally, Congress will likely begin the process of reauthorizing the Magnuson Stevens Act (MSA) in the next year or two. Surely, the MSA's EFH provisions will be the subject of extensive Congressional debate and possible legislative action. The MCA believes it would be appropriate to await the results of the MSA reauthorization process before changing the EFH guidelines.

Thank you for this opportunity to comment on the notice of advanced rulemaking.

Sincerely yours,



Ronald G. Clarke  
Executive Director  
Marine Conservation Alliance



# MANASOTA-88

## A Project for Environmental Quality 1968-2088

Rolland A. Schmitten, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service  
F/HC  
1315 East-West Highway  
Silver Spring, MD 20910.

12/20/03

Office of Habitat Conservation

DEC 29 2003

*Received*

### Re: Revisions to the Essential Fish Habitat (EFH) Guidelines

#### Directors

Glenn Compton  
Mary Compton  
Rebecca Eger  
Charles Holmes  
Edith Holmes  
Mary Jelks, M.D.  
Dan Kixmiller  
Greg Nowaski  
Joan Perry  
Hilda Quy  
Doris Schember  
Janet Smith

Dear Mr. Schmitten:

A purpose of the Magnuson-Stevens Act is: "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses or other authorities that affect, or have the potential to affect such habitat."

Thus far the National Marine Fisheries Service (NMFS) has failed to efficiently manage our marine resources and protect fish habitats in U.S. waters. Sustainable fisheries have declined, recovery of threatened or endangered species is not occurring, and the health of marine and anadromous fish habitats continues to degrade. Overfishing, pollution of water resources, bycatch, degradation of important wetlands, and habitat loss continue at an unacceptable rate in coastal states. NMFS has significant problems with implementation of the conservation requirements of the Magnuson-Stevens Act.

Florida's coastline is home to hundreds of fish species. In addition, these fish support commercial and recreational fishing industries that bring substantial revenues to the state and coastal communities.

ManaSota-88 recommends any proposed revisions to the Essential Fish Habitat (EFH) Guidelines consider the following :

1. The National Marine Fisheries Service must stop approving management plans that do not comply with the strict conservation mandates of the Magnuson-Stevens Act
2. Delays in implementing conservation plans must stop, inaction by the NMFS will contribute to the decline of marine resources.
3. NMFS must take immediate action to minimize the bycatch of unwanted species. Better collection of bycatch data is needed. NMFS must make the collection of bycatch data a high priority .

#### Information

P.O. Box 1728  
Nokomis, FL 34274  
(941) 966-6256  
FAX (941) 966-0659



4. Prohibit overfishing of all stocks. Fish habitats need to be protected from destructive commercial and recreational fishing practices.
5. Provide funding to improve research and reporting. Funding for the fish habitat protection provisions of the Magnuson-Stevens Act should not be weakened or eliminate.
6. The National Marine Fisheries Service should provide EFH consultation to permitting agencies (pursuant to the 1996 amendment of the Magnuson-Stevens Act) for all phosphate mining proposals within Florida, especially within the Peace River basin.

Over 100,000 acres of phosphate mining has already occurred in the Peace River watershed, nearly 60,000 additional acres of mining is being proposed.

Thus far, phosphate mining impacts to EFH have been overlooked, the NMFS should immediately review the adverse effects phosphate mining is having on the Peace River and Charlotte Harbor EFH.

Sincerely,

A handwritten signature in black ink that reads "Glenn Compton". The signature is written in a cursive style with a large initial "G".

Chairman - ManaSota-88



# FLORIDA INLAND NAVIGATION DISTRICT

January 23, 2004

Office of Habitat Conservation

JAN 28 2004

Received

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ASSISTANT EXECUTIVE DIRECTOR

Rolland A. Schmitten, Director  
Office of Habitat Conservation  
NOAA NMFS F/HC  
1315 East-West Highway  
Silver Spring, MD. 20910

Dear Mr. Schmitten:

Re: Advance Notice of Proposed Rulemaking; Consideration of  
Revision to Essential Fish Habitat (EFH) Guidelines [Docket  
No. 031031272-3272-01;I.D. 102903A]

The District is in receipt of the referenced Federal Register Notice of December 11, 2003 and would like to provide the following comments.

As the District has previously discussed with you and the Service, EFH provisions have had a serious impact on the ability of the District, and our project partner the U.S. Army Corps of Engineers, to efficiently, effectively and economically maintenance the Intracoastal Waterway (IWW) channel in Florida. The District is of the opinion that the current provisions of EFH will continue to present unreasonable obstacles to future maintenance of the IWW in Florida and elsewhere along the east coast of the United States.

We are pleased that the Service has recognized that the implementation of EFH provisions is causing unforeseen and unanticipated impacts and that the Service is willing to consider changing the EFH regulations through a public process. In that regard we offer the following specific comments to address our above stated concerns with EFH guidelines and to provide the Service with a mechanism to more efficiently utilize your resources for protecting significant EFH resources.

Schmitt Ltr.  
January 23, 2004  
Page Two.

**s.600.920(a) Federal agency consultation with the Secretary, Consultation generally.**

Language should be added to this section to identify that the maintenance of federal navigation channels and ports that have been constructed prior to the approval of EFH designations are not subject to further EFH consultations unless an expansion or alteration of the project is undertaken. This would allow routine maintenance dredging of existing projects to proceed without consultation so that the maintenance is timely and efficiently accomplished. No additional EFH would be affected by the addition of this language. A new consultation should be required if an expansion of the project is proposed that would potentially affect new EFH.

**s.600.920(g) Federal agency consultation with the Secretary, General Concurrence.**

Language should be added to this section to identify that maintenance dredging of federal navigation channels is approved by the guidelines for general concurrence and no further consultation is required by the Service. Again, this would allow routine maintenance dredging of existing projects to proceed without consultation so that the maintenance is timely and efficiently accomplished. No additional EFH would be affected by the addition of this language. A new consultation should be required if an expansion of the project is proposed that would potentially affect new EFH.

**s.600.925(c) and/or (2) NMFS EFH Conservation Recommendations to federal and state agencies.**

Language should be added to this section similar to our previous comments that would identify that maintenance dredging of existing federal channels performed by the local sponsor of the project is authorized without further consultation unless an expansion is proposed. Again, this would allow routine maintenance dredging of existing projects to proceed without consultation so that the maintenance is timely and efficiently accomplished. No additional EFH would be affected by the addition of this language. A new consultation should be required if an expansion of the project is proposed that would potentially affect new EFH.

Schmitt Ltr.  
January 23, 2004  
Page Three.

On another note, should comments from this public notice process form the basis of or being included in any EFH report to Congress on the re-authorization of the Magnuson-Stevens Act or the EFH program, we would like to go on record again that the definition of EFH should be changed to exclude federal navigation channels and more specifically the Intracoastal Waterway in Florida. We also support the EFH definition language proposed in bills by Chairman Gilchrist and Senator Collins.

Thank you for this opportunity to provide these comments and the District appreciates your consideration of our concerns.

Sincerely,

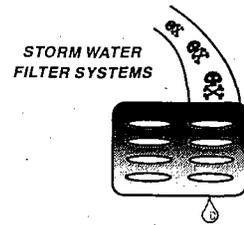
A handwritten signature in black ink, appearing to read "D. Roach", written in a cursive style.

David K. Roach  
Executive Director

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January 13, 2004

NOAA National Marine Fisheries Service  
Attn: Rolland A. Schmitt, Director  
Office of Habitat Conservation  
F/HC  
1315 East-West Highway  
Silver Spring, MD 20910

Office of Habitat Conservation

JAN 20 2004

Received

Thank you for the opportunity for the public to comment on the Essential Fish Habitat (EFH) Guidelines and to present my evaluation of the current Essential Fish Habitat (EFH) Guidelines.

The current Essential Fish Habitat (EFH) guidelines do not take into consideration the huge impacts that development has on the quality of water going into salmon habitat. Urban runoff should be included in the EFH because it contains huge amounts of sediments, heavy metals, petroleum products, and pesticides that end up in our creeks, streams, rivers, lakes and bays throughout the country and is proven to destroy habitat. Restoring creeks, streams and rivers into pristine salmon habitat cannot happen effectively without improved water quality.

In Washington State, the Department of Ecology spends approximately \$200 million every year on monitoring, analyzing, studying, and managing stormwater runoff with no improvement to the quality of water. The laws on the books in Washington State are misinterpreted to the point that they will never accomplish the intent of the law. This is extremely irresponsible and unfair given the amount of money that is mismanaged and misguided.

The Alaska Fisheries Science Center at Auke Bay Laboratory printed a quarterly report dated Jan-Mar 1999 and you may find it at NOAA's website, [afsc.noaa.gov/quarterly/jfm99/rptABL\\_jfm99.htm](http://afsc.noaa.gov/quarterly/jfm99/rptABL_jfm99.htm). This report confirms that urban runoff is toxic and can damage and deform salmon eggs and persist in the environment for years.

The country is spending way too much on managing, analyzing, and studying the impacts on stormwater pollution while salmon, seals and orca populations dwindle to near extinction. Now is the time to expand the thinking to prevent pollution from stormwater runoff. Doing this correctly can create private sector manufacturing jobs that will immediately improve the water quality and salmon habitat. What needs to be done is allow environmental businesses an opportunity to sit at the table with government and tribes to combine economic and environmental goals in the process.

Using catch basin inserts that filter stormwater runoff will retrofit existing catch basins in urban areas and prevent the continuation of persistent pollutants that are jeopardizing the health and productivity of fish populations around the country and should be considered in the EFH as well. The main reason to use catch basin inserts is that it's easier and less expensive to stop the pollution than to restore and dredge on a continual basis.

Sincerely,

Jim Hutter, Vice President  
Enviro-Drain, Inc.  
12568 33<sup>rd</sup> Ave NE  
Seattle, WA 98125  
(206) 363 - 0316  
[jim@enviro-drain.com](mailto:jim@enviro-drain.com)



VIA FACSIMILE TO: 301-427-2570

January 26, 2004

Mr. Rolland A. Schmitten  
Director, Office of Habitat Conservation  
NOAA - National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3282

**Re: Advance Notice of Proposed Rulemaking; Consideration of  
Revision of Essential Fish Habitat (EFH) Guidelines  
68 Fed. Reg. 69070 (December 11, 2003)**

Dear Mr. Schmitten:

These comments are submitted on behalf of the Western Urban Water Coalition (WUWC) in response to the Advance Notice of Proposed Rulemaking (ANPR); Consideration of Revision of Essential Fish Habitat (EFH) Guidelines. 68 Fed. Reg. 69070 (December 11, 2003).

The WUWC consists of the largest urban water utilities in the West, serving over 30 million western water consumers.<sup>1</sup> Several WUWC members are subject to comprehensive regulatory programs that address the full range of environmental concerns, including fish habitat. These members have experience with the EFH program as proposed by NMFS under the Magnuson-Stevens Fisheries Conservation and Management Act (MSFCMA), and believe there is a strong need for the

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<sup>1</sup> The WUWC includes the following urban water utilities: Arizona – City of Phoenix, city of Tucson; California – East Bay Municipal Utility District, Metropolitan Water District of Southern California, Santa Clara Valley Water District; Colorado – Denver Water Department; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; Utah – Central Utah Water Conservancy District; and Washington – City of Seattle.

January 20, 2004

Page 2

regulations to be substantially revised to implement a more focused, simple, and less costly and burdensome approach to EFH identification and consultation.

We suggest the following specific changes to the current regulations:

#### **Revise the Definition of EFH**

The "ecosystem" approach to EFH identification that NMFS incorporates in 50 C.F.R. §§ 600.10, 600.810 and related provisions is vague and goes far beyond the EFH definition in the MSFCMA for what is "essential habitat." The definition and procedures for identification and consultation need to be eliminated or narrowed, and clarified for marine areas such as those identified in the "habitat areas of particular concern" provisions of the current regulations.

#### **Convert the Regulations to Guidelines**

The ANPR characterizes the regulations as guidelines for the EFH identification and consultation, which is what the MSFCMA envisioned. However, the regulations still contain numerous mandatory procedures and other requirements that are not needed to comply with the MSFCMA. These mandatory provisions should be eliminated to allow NMFS, fishery management councils, action agencies, and other affected parties the flexibility to carry out EFH identification and consultation in more focused and flexible ways.

#### **Eliminate EFH Consultation Overlap with Other Regulatory Procedures**

The current regulations allow EFH consultation to be coordinated with other regulatory procedures, but still require completion of discrete written EFH assessments and other extra procedures that are not needed to protect habitat. For example, when Endangered Species Act section 7 procedures are completed for an activity with potential effects on a fish population that is managed under the MSFCMA, those procedures more than adequately protect against any adverse impacts on habitat. Such procedures should be deemed to meet EFH requirements without the need for further EFH assessment or consultation.

January 20, 2004

Page 3

### **Narrow the Scope of the EFH Identification and Consultation Process**

Under the current regulations, nearly all habitat for managed species, including vast areas of inland and coastal habitat that are already subject to other protections against adverse impact, are being identified by the fishery management councils and NMFS as "essential." A full spectrum of nonfishing as well as fishing activities are in turn being identified as having potential effects on this habitat and have thus become subject to burdensome EFH consultation requirements. There is no "significance" threshold included in the current regulations for triggering such consultation. It is a matter of record that this approach has resulted in a volume of several thousands of EFH consultations being conducted during the first few years of the EFH program.

In addition, we recognize that NMFS has repeatedly sought from Congress additional funding to carry out EFH functions. Until such funding becomes available, the agency does not have adequate staff and funds to complete its Endangered Species Act consultation and other responsibilities.

### **Limit the Scope of Fishery Management Council Responsibility**

Fishery management councils have a full plate addressing fishery regulations in the offshore marine areas for which they have responsibility. They have no substantial expertise, ability, or need to address nonfishing activity effects on coastal or inland fish habitat, already regulated under numerous other federal, state, and local laws. The fishery management plan documents that have been produced by the councils under the current EFH regulations show a lack of understanding regarding conservation measures for coastal and inland and resource development and for the protective mechanisms already in place under forest practice statutes, coastal zone management programs, and other law. Even if the current regulations provided entities with a meaningful voice in council EFH functions, the nonfishing sector in any case generally does not have the resources to participate in arduous fishery management council meetings and other proceedings, along with other regulatory and business imperatives.

January 20, 2004

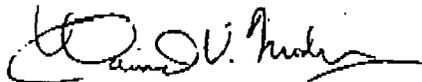
Page 4

### Conclusion

The WUWC fully supports adequate protection of fishery resources, but this protection must be achieved in manner that does not unnecessarily and unfairly burden nonfishing communities and businesses. The current regulations do not efficiently and effectively serve the purposes of the 1996 EFH amendments to the Magnuson-Stevens Fisheries Conservation and Management Act. They are not practicable for NMFS to implement, and they impose requirements that are unnecessarily broad, complex and costly for local governments, businesses, and citizens.

Thank you for considering these comments. As in the past, we look forward to continued discussions with NMFS on the EFH issues of particular concern to us. Please contact me if you have any questions.

Sincerely,



David Modeer  
Chair, Western Urban Water Coalition  
Director, Tucson Water Department



**New England Fishery Management Council**

80 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116  
David V.D. Borden, *Chairman* | Paul J. Howard, *Executive Director*

January 20, 2004

Rolland A. Schmitten, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service  
F/HC, 1315 East-West Highway  
Silver Spring, MD 20910

RE: Request for extension of the comment period on the Advance Notice of Proposed Rulemaking (ANPR) addressing potential revisions to the essential fish habitat (EFH) guidelines

Dear Rollie:

The Council would like to request a two-month extension on the comment period for the ANPR addressing potential revisions to the EFH guidelines. The extension will allow us to provide your office with more thorough comments on suggested changes based on our extensive involvement with the SFA's EFH Final Rule requirements.

The New England Fishery Management Council is taking a proactive course on updating the EFH components of our FMPs to meet the 5-year review requirement with an Omnibus Habitat Amendment. We hope to work collaboratively with NMFS on all aspects of this amendment. If you have any questions about this request, please contact me at (978) 465-0492.

Sincerely,

Paul J. Howard  
Executive Director

cc: Ms. Patricia Kurkul  
Ms. Sally McGee  
NEFMC Council Members



## New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 9116  
David V.D. Borden, *Chairman* | Paul J. Howard, *Executive Director*

January 26, 2004

Rolland A. Schmitten, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service  
F/HC, 1315 East-West Highway  
Silver Spring, MD 20910

RE: Comments on the Advance Notice of Proposed Rulemaking (ANPR) addressing potential revisions to the essential fish habitat (EFH) guidelines

Dear Rollie:

The New England Fishery Management Council submits the following comments in response to the above noted ANPR. Thank you for providing us the opportunity to address this important topic.

To the question of whether or not the guidelines should be revised, our initial response is yes. The Council is taking a proactive course on updating the EFH components of our FMPs to meet the five-year review requirement via an Omnibus Habitat Amendment. We hope to work collaboratively with NOAA Fisheries on all aspects of this amendment. More importantly, we are reviewing our components based on the requirements of the current EFH Final Rule. We are concerned that new guidelines may be produced during this review that would change substantially the mandatory EFH components of FMPs the review (e.g. redesignation of EFH, gear effects evaluation, adverse impacts determination, and measures to minimize adverse effects).

With that said, there are parts of the EFH Final Rule that the Council would like to see addressed by NMFS. These include the following: improved specifications on the practicability analysis and the term "to the extent practicable", more specific guidance on units of measurement to ascertain if we are meeting our requirements to minimize adverse effects on EFH, formal language to describe the Council's responsibilities versus the NMFS's responsibilities (e.g. data collection, map preparation, habitat science responsibilities, etc.), requirements of different levels of actions (e.g. annual specifications vs. framework measures vs. FMP amendments) and the establishment of a NMFS peer review process specifically for SFA EFH scientific exercises and analyses.

We look forward to working with you and your staff closely on any potential new guidelines and are available to discuss our comments. In addition, we will provide more detailed comments on this topic and the specifics as the review process develops. Please contact me with any questions you may have.

Sincerely,

Paul J. Howard  
Executive Director

cc: Pat Kurkul, NMFS NERO  
Sally McGee, NEFMC  
NEFMC Council Members

# North Pacific Fishery Management Council

Stephanie Madsen, Chair  
Chris Oliver, Executive Director



605 W 4<sup>th</sup> Avenue, Suite 306  
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Visit our website: [www.fakr.noaa.gov/npfmc](http://www.fakr.noaa.gov/npfmc)

January 23, 2004

Office of Habitat Conservation

JAN 27 2004

Received

Mr. Rolland A. Schmitten, Director  
Office of Habitat Conservation  
NOAA National Marine Fisheries Service, F/HC,  
1315 East-West Highway,  
Silver Spring, MD 20910

Dear Mr. Schmitten:

Thank you for the opportunity to provide comments on the advance notice of proposed rulemaking to consider revisions to the Essential Fish Habitat (EFH) guidelines. Our comments concern two issues: the timing of the notice relative to ongoing activities, and the potential, additional litigation that could result.

The North Pacific Fishery Management Council recently prepared a draft Environmental Impact Statement for EFH, based on the existing EFH guidelines, pursuant to *American Oceans Campaign et al. v. Daley et al.* The joint stipulation filed with the court specified that, for the North Pacific region, NMFS must issue a Draft EIS by January 16, 2004, and Final EIS no later than June 1, 2005. The Draft EIS for North Pacific EFH, which totals about 2,500 pages, represents a Herculean attempt to address each and every requirement set forth in the existing EFH guidelines. We are concerned that changing the requirements at this time would be disruptive to the process, and may risk additional litigation. Should major changes to the guidelines be made, it may be impossible to revise and reissue the EIS accordingly, provide for an additional public comment period, and still produce a Final EIS before June 2005. We recommend that NMFS not revise the guidelines at this time, but instead completely withdraw the regulatory language as discussed below.

We are concerned about the guidelines being legal requirements, rather than advisory guidelines. The Magnuson-Stevens Act requires that "The Secretary shall...establish by regulation guidelines to assist the Councils in the description and identification of essential fish habitat..." We believe that Congress did not intend to give NMFS carte blanche authority to write the law on fish habitat conservation. Rather, conservation of fish habitat is simply another required provision of fishery management plans. Note that MSA (section 301(b)) states quite clearly that "The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans." We recommend that NMFS remove all regulatory requirements of the existing EFH guidelines, and re-issue as non-binding advisory guidelines. Not doing so may result in never-ending litigation, given the complexity and the vagueness of the existing EFH language.

Thank you for the opportunity to comment. If you have any questions, please feel free to contact me, or the Council's Deputy Director, David Witherell, at the Council office.

Sincerely,

*Stephanie D. Madsen*

Stephanie D. Madsen  
Chair