

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 03-201-07  
JUNE 29, 2001***

***Habitat Conservation and Restoration  
Essential Fish Habitat Policy***

***FURTHER GUIDANCE ON COMBINED EFH AND ESA CONSULTATIONS***

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***SUMMARY OF REVISIONS:***

Signed \_\_\_\_\_  
[Approving Authority name] Date  
[Approving Authority title]

June 29, 2001

MEMORANDUM FOR: Regional EFH Coordinators \*

FROM: Jon Kurland

SUBJECT: Further Guidance on Combined EFH and ESA Consultations  
**(Note – this memo revises and supercedes the June 19, 2001 memo on the same subject.)**

On February 28, 2001, the Assistant Administrator signed a finding for the use of the Endangered Species Act (ESA) section 7 consultation process to complete essential fish habitat (EFH) consultations under the Magnuson-Stevens Act. The guidance attached to that finding discussed the relationship between the two consultation processes and focused on the results of EFH consultations under three scenarios: (1) the Magnuson-Stevens Act managed species and ESA listed species are identical; (2) some (but not all) of the managed and listed species are the same; or (3) none of the managed and listed species are the same. Apparently there remains some confusion about the action agency's responsibilities under the Magnuson-Stevens Act in the case of informal ESA consultations for scenarios 1 and 2. This memorandum provides further guidance to address those circumstances.

Federal agencies must consult with NMFS under section 305(b)(2) of the Magnuson-Stevens Act regarding any action they authorize, fund, or undertake that may adversely affect EFH. For purposes of EFH consultation, "adverse effect" is defined at 50 CFR 600.910 to include any impact that reduces the quality and/or quantity of EFH, and should be interpreted to include both temporary and permanent impacts. For any action requiring an EFH consultation, except for those covered by a General Concurrence, Federal agencies are required by 50 CFR 600.920(g) to provide NMFS with a written EFH Assessment that discusses the effects of the action on EFH. There is no provision that allows NMFS to waive either the EFH consultation or EFH Assessment requirement for actions that are expected to cause insignificant or discountable adverse effects to EFH (although the General Concurrence process at 50 CFR 600.920(f) provides a means to handle consultations categorically for actions that have no more than minimal adverse effects). However, the level of detail in an EFH Assessment should be commensurate with the potential adverse effects on EFH, so the assessment may be very brief for relatively simple actions involving only minor adverse effects.

If NMFS has made a finding regarding the use of an existing environmental review process to handle EFH consultations, the EFH Assessment may be combined with that other review process, as specified in the applicable finding. The February 28, 2001 finding for the use of the ESA consultation process specifies that the information prepared by an action agency for an informal or formal ESA consultation may also serve as the EFH Assessment, provided it is clearly labeled as such and it includes all of the required components of an EFH Assessment as outlined in 50 CFR 600.920(g).

For cases where the Magnuson-Stevens Act managed species and ESA listed species are identical, or when some (but not all) of the managed and listed species are the same, and the Federal agency concludes the action is not likely to adversely affect ESA listed species, the guidance attached to the February 28, 2001 finding notes that no NMFS EFH Conservation Recommendations are necessary in most cases. However, in those situations action agencies are still required to complete an EFH consultation with NMFS, including an EFH Assessment, and NMFS should review that information to verify whether to provide EFH Conservation Recommendations under section 305(b)(4)(A) of the Magnuson-Stevens Act. Since the action agency must write to NMFS and request written concurrence with its “not likely to adversely affect” determination for ESA listed species under 50 CFR 402.13(a), the action agency should include in that letter a brief description of effects to EFH, and NMFS should state in the response letter whether NMFS is providing EFH Conservation Recommendations. If NMFS does not concur with the agency’s evaluation of effects to EFH, or if NMFS needs additional information, NMFS can request a more detailed EFH Assessment, as appropriate.

In summary, as detailed in the February 28, 2001 guidance, EFH consultations for actions involving minor adverse effects may be combined with informal ESA consultations. In cases where the managed and listed species are identical, or if some (but not all) managed and listed species are the same, the action agency’s letter requesting concurrence with a “not likely to adversely affect” determination for listed species should also include a brief assessment of effects to EFH. NMFS’ response should state whether NMFS agrees with the action agency’s effect determinations under both the ESA and the Magnuson-Stevens Act and whether NMFS is providing EFH Conservation Recommendations.

Please share this guidance with other staff in your Region and/or with other agencies, as appropriate. If you have additional questions about combining EFH consultations with the ESA section 7 consultation process, please contact either Korie Johnson or me.

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