Department of Commerce $ National Oceanic & Atmospheric Administration $ National Marine Fisheries Service

NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 03-201-10
Habitat Conservation and Restoration ***Essential Fish Habitat Policy***
NATIONAL FINDING FOR USE OF ESA SECTION 7 CONSULTATION PROCESS TO COMPLETE EFH CONSULTATIONS
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ENCLOSURE 1

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, MD 20910

THE DIRECTOR

FEB 28 2001

MEMORANDUM FOR: Regional Administrators

FROM: William T. Hogarth, Ph.D.
Acting Assistant Administrator for Fisheries

SUBJECT: National Finding for use of Endangered Species Act Section 7 Consultation Process to Complete Essential Fish Habitat Consultations

The National Marine Fisheries Service (NMFS) has developed national guidance (attached to this memo) with recommended procedures for integrating Magnuson-Stevens Fishery Conservation and Management Act (MSA) Essential Fish Habitat (EFH) consultations with Endangered Species Act (ESA) section 7 consultations in cases where a Federal agency must consult under both statutes and NMFS determines that combining the two consultations improves efficiency. If necessary, NMFS Regional Offices may develop subsequent regional guidance, consistent with the national guidance, to address any unique regional circumstances regarding the implementation of EFH and ESA consultations.

The EFH regulations at 50 CFR 600.920(e) enable Federal action agencies to use existing consultation or environmental review procedures to satisfy the MSA consultation requirements if the procedures meet the following criteria: 1) the existing process must provide NMFS with timely notification of actions that may adversely affect EFH; 2) notification must include an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH Assessments discussed in section 600.920(g); and 3) NMFS must have made a finding pursuant to section 600.920(e)(3) that the existing process satisfies the requirements of section 305(b)(2) of the MSA.

National Finding

NMFS finds that the ESA section 7 consultation process may be used by NMFS and any Federal action agency to satisfy the MSA EFH consultation requirements, provided consultations are implemented consistent with this memorandum and the attached guidance. NMFS Regional Offices should convey this finding to Federal agencies, as appropriate. If NMFS has made a finding for another environmental review process that meets the requirements for completing EFH consultations, the Federal action agency may

decide which process to use for any given EFH consultation. The basis for this finding is discussed below.

1. Notification

The ESA regulations prescribe specific time limits for completing section 7 consultation. If the Federal action agency clearly states that it is notifying NMFS regarding a proposed action that may adversely affect EFH at the same time that informal or formal ESA consultation is initiated, then the existing ESA consultation process would provide NMFS with sufficient notification to analyze the effects of the proposed action on EFH and provide EFH Conservation Recommendations.

2. EFH Assessment

As described in the attached “Guidance for Integrating EFH Consultations with ESA Section 7 Consultations,” the information prepared by the Federal agency for informal or formal ESA consultation as outlined in 50 CFR 402.14 may also serve as the EFH Assessment provided it is clearly labeled as such and includes all the required components of an EFH Assessment as outlined in 50 CFR 600.920(g).

3. EFH Conservation Recommendations

Under section 305(b)(4)(A) of the MSA, NMFS is required to provide EFH Conservation Recommendations to Federal and state agencies for actions that would adversely affect EFH. For any Federal action requiring consultation under both statutes, the results of the ESA and EFH consultations should be provided in a single transmittal from NMFS to the Federal agency. As detailed in the attached “Guidance for Integrating EFH Consultations with ESA Section 7 Consultations,” if EFH consultation is integrated with informal ESA consultation, EFH Conservation Recommendations should be transmitted in a separate, clearly defined section of the informal ESA concurrence letter. If EFH consultation is integrated with formal ESA consultation, EFH Conservation Recommendations should be presented either within the cover letter or at the end of the transmittal following all the components of the ESA /biological opinion.

4. Federal Agency Response

As required by section 305(b)(4)(B) of the MSA and 50 CFR 600.920(j), the Federal agency must provide a detailed response in writing to NMFS within 30 days after receiving NMFS’ EFH Conservation Recommendations. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In

the case of a response that is inconsistent with NMFS' EFH Conservation Recommendations, the Federal agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects.

If the Federal agency is not able to respond fully within 30 days, the Federal agency should provide NMFS with an interim written response stating that it has received NMFS' EFH Conservation Recommendations and will respond in detail at least 10 days prior to a final decision on the action.

5. Dispute Resolution

If the Federal action agency decision is inconsistent with a NMFS' EFH Conservation Recommendation, the NOAA Assistant Administrator for Fisheries may request a meeting with the head of the Federal action agency to discuss the proposed action and opportunities for resolving any disagreements (50 CFR 600.920 (j)(2)). NMFS will endeavor to resolve any such issues at the field level wherever possible.

Attachment

Guidance for Integrating
Magnuson-Stevens Fishery Conservation and Management Act
EFH Consultations with Endangered Species Act
Section 7 Consultations

National Marine Fisheries Service
January 2001

Introduction

The 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA)(16 U.S.C. 1801 et seq.) require the identification of Essential Fish Habitat (EFH) for Federally managed fishery species and the implementation of measures to conserve and enhance this habitat. The MSA requires Federal agencies to consult with the National Marine Fisheries Service (NMFS) on activities that may adversely affect EFH (MSA section 305(b)(2))[1]. There are many situations where designated EFH overlaps with the habitat (including critical habitat) of species listed as threatened or endangered under the Endangered Species Act (ESA). Thus, a proposed Federal action could affect both a listed species and its designated critical habitat and adversely affect EFH, necessitating consultation under both section 7 of the ESA and section 305(b)(2) of the MSA. Because of this dual obligation, the Federal action agency and NMFS can find efficiencies by integrating EFH and ESA consultations. As explained in this guidance, EFH consultations can be completed using the ESA section 7 consultation process provided that the Federal action agency supplies the information required by 50 CFR 600.920(g) for an EFH Assessment, and NMFS clearly distinguishes its EFH Conservation Recommendations from ESA conservation recommendations under 50 CFR 402.14(j) or any other ESA measures or conditions. If NMFS has made a finding for another environmental review process that meets the requirements for completing EFH consultations, the Federal action agency may decide which process to use for any given EFH consultation.

EFH Consultation Requirements

The EFH regulations encourage the use of existing interagency consultation or environmental review procedures for EFH consultations. If an existing procedure allows appropriate notification to NMFS regarding proposed actions and includes an assessment of the effects of the proposed actions on EFH, then NMFS can make a finding that the existing process can be used for EFH consultation. If no appropriate procedures exist, then the consultation process outlined in 50 CFR 600.920 should be used.

For all Federal actions, the lead Federal agency determines the effects of the proposed action on EFH. If the action will have no adverse effect, then no EFH consultation is necessary. If the action may have an adverse effect, then the Federal action agency must notify NMFS and provide an EFH Assessment. The length of the EFH Assessment can vary depending on the magnitude of the potential impacts to EFH, but all EFH Assessments must include the following

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[1]EFH designations and associated requirements for federal agencies to consult with NMFS on actions which Amay adversely affect@ EFH are in effect once the Secretary of Commerce approves the EFH provisions of federal fishery management plans (FMPs).

information: (1) a description of the proposed action; (2) an analysis of the effects, including cumulative effects, of the proposed action on EFH, the managed species, and associated species, such as major prey species, including affected life history stages; (3) the Federal agency's views regarding the effects of the action on EFH; and (4) proposed mitigation, if applicable (50 CFR 600.920(g)(2)).

Once NMFS has reviewed the EFH Assessment and analyzed possible adverse effects to EFH resulting from the proposed action, NMFS must develop EFH Conservation Recommendations (MSA section 305(b)(4)(A)). These recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. EFH Conservation Recommendations will not include actions beyond the statutory authority of the Federal action agency (50 CFR 600.925(a)). Fishery Management Councils (Councils) may also comment on actions that may adversely affect EFH (MSA section 305(b)(3)). Thus, it may be necessary for NMFS to coordinate with the Council(s) regarding NMFS' EFH Conservation Recommendations. The Federal action agency must provide a detailed response in writing to NMFS regarding the EFH Conservation Recommendations within 30 days of their receipt (MSA section 305(b)(4)(B)). The response must include a description of measures proposed by the Federal action agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. If the response is inconsistent with NMFS' EFH Conservation Recommendations, the Federal action agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects. If there are future changes to the proposed action that may have adverse impacts on EFH, or if new information becomes available that affects the basis for NMFS' EFH Conservation Recommendations, the Federal action agency must re-initiate EFH consultation with NMFS (50 CFR 600.920(k)).

ESA Consultation Requirements

For all Federal actions, the Federal action agency is required to determine the effects of the proposed action on any species listed as "threatened" or "endangered" under the ESA, including any modifications to critical habitat. If the action will have no effect, then no consultation is necessary. If the Federal action agency determines that the proposed action "may affect" listed species or critical habitat, then the Federal action agency must request section 7 consultation with NMFS. If, based on information provided by the Federal action agency, NMFS finds that the proposed action "may affect" but is "not likely to adversely affect" listed species or critical habitat, NMFS provides the Federal action agency with a concurrence letter and consultation is complete (50 CFR 402.13(a)). If the Federal action agency or NMFS determines that the proposed action is "likely to adversely affect" listed species or critical habitat, the Federal agency must request initiation of formal consultation[2] and provide the information outlined in 50 CFR 402.14. After reviewing the status of the species, the environmental baseline for the

[2]Formal consultation determines whether a proposed agency action(s) is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification). It also determines the amount or extent of anticipated incidental take. Formal consultation follows a structured process for meeting section 7 consultation requirements and culminate in the preparation of a biological opinion (ESA Consultation Handbook 1998).

action area, the effects of the proposed action and the cumulative effects, NMFS issues a biological opinion (50 CFR 402.14(h)), including in most cases an incidental take statement with reasonable and prudent measures to minimize the impact of incidental take of listed species (50 CFR 402.14(i)) and, if jeopardy is found, any reasonable and prudent alternatives to the proposed action (50 CFR 402.14(h)(3)).

Integrating EFH Consultations with ESA Consultations

The process for combining ESA and EFH consultation depends upon the extent to which the action involves effects to EFH and species listed under the ESA within the action area, and the number of affected species in common between the two statutes. Three scenarios exist: the MSA managed species and ESA listed species are identical; some (but not all) of the MSA managed species and ESA listed species are the same (other affected species may be listed but not managed, or managed but not listed); or none of the MSA managed species are listed under the ESA. When integrating ESA and EFH consultations for each of the three scenarios, care should be taken to avoid confusion by the Federal action agency between the different components of ESA and EFH consultations.

The information prepared by the Federal action agency for the informal or formal ESA consultation (50 CFR 402.14) may also serve as the EFH Assessment if it includes all the components required in an EFH Assessment (50 CFR 600.920(g)). If the document contains information that is specific to the EFH Assessment, that information must be clearly identified in a separate section of the document.

The results of the ESA and EFH consultations should be provided in a single transmittal from NMFS to the Federal agency. If EFH consultation is integrated with informal ESA consultation, EFH Conservation Recommendations should be transmitted in a separate, clearly defined section of the informal ESA concurrence letter. If EFH consultation is integrated with formal ESA consultation, EFH Conservation Recommendations should be presented either in the cover letter or at the end of the transmittal following all of the components of the ESA biological opinion. All of the EFH Conservation Recommendations must be clearly labeled to distinguish them from ESA conservation recommendations under 50 CFR 402.14(j) or any other ESA recommendations or conditions. NMFS should cite section 305(b)(4)(A) of the MSA as the authority for providing EFH Conservation Recommendations, and should remind the Federal action agency of its obligation to respond to the recommendations in writing pursuant to section 305(b)(4)(B) of the MSA and 50 CFR 600.920(j). This is important to clarify since Federal action agencies are not required to respond to ESA conservation recommendations. Any conflicts between NMFS' determinations, information needs, or recommendations for ESA and EFH must be resolved within NMFS before being provided to the Federal action agency.

ESA/EFH Early Planning/Coordination and Determination of Effect

ESA and EFH consultations often involve discussions with Federal action agencies at early stages in the project planning process prior to initiation of consultation. When an action agency requests information on the presence of ESA listed species or critical habitat in a particular location, that agency should also be informed of the presence of EFH and the associated MSA managed species and life stages, if applicable. Likewise, if an action agency requests information on the presence of EFH in a particular location, that agency should also be informed of the presence of ESA listed species and

critical habitat, if applicable. Many times, issues related to adverse effects on ESA listed species and their critical habitat can be resolved through early planning and coordination efforts. Similarly, issues related to potential adverse effects on the EFH should be discussed along with ESA concerns during preliminary planning and coordination.

In determining whether an action is likely to adversely affect ESA listed species/critical habitat, and/or may adversely affect EFH, it is appropriate during this early coordination to consider project modifications that may avoid and/or minimize adverse effects. Completing a careful alternatives analysis and incorporating design stipulations and "best management practices" can lessen or eliminate potential adverse effects to EFH and listed species/critical habitat under the ESA. Incorporating such measures can result in a "not likely to adversely affect" determination for ESA-listed species/critical habitat, and narrowing the scope of necessary EFH Conservation Recommendations or even obviating the need for EFH consultation. In contrast to avoidance and minimization, compensatory mitigation should have no bearing on determinations of potential adverse effects on EFH and whether an action requires an EFH consultation.

Process for Combining ESA and EFH Consultations

Scenario 1: The MSA Managed Species and ESA Listed Species Are Identical (e.g., projects with adverse effects to freshwater areas designated as both EFH and critical habitat for salmonid species)

The simplest scenario for combining EFH and ESA consultations occurs when the MSA managed species and ESA listed species are identical in the action area (i.e., all of the MSA managed species are also listed as threatened or endangered under ESA, and no non-managed listed species are involved), and EFH overlaps with ESA listed species and their critical habitat. In such cases, a thorough analysis of ESA listed species and critical habitat potentially affected by a proposed action would also encompass all potential adverse effects to EFH. The ESA and MSA use different standards and terminology to trigger consultation and determine the appropriate level of consultation. Since in this scenario the affected species are identical, and because in most cases an action that would adversely affect an ESA listed species would be attributable to adverse effects on the habitat, the standards for determination of effects would generally be treated as functionally equivalent under the two statutes. However, there could be cases when adverse effects to habitat occur without any corresponding effects to a listed species or vice versa. In such cases, NMFS should evaluate potential adverse effects to EFH and listed species/critical habitat separately.

- If NMFS finds that the proposed action is not likely to adversely affect ESA listed species or their critical habitat, in most situations NMFS would also conclude that the action would not adversely affect EFH, and no EFH Conservation Recommendations are necessary. The results of informal ESA consultation and EFH consultation should be transmitted in separate sections of a single letter from NMFS to the Federal action agency. If the ESA "not likely to adversely affect" determination is based upon NMFS' understanding that the Federal agency will implement the action with specific measures to avoid and/or minimize adverse effects, the EFH section of the document should refer to those measures as the basis for determining that no EFH Conservation Recommendations are necessary.

- If NMFS determines that formal ESA consultation is necessary because the proposed action is likely to adversely affect listed species or adversely modify critical habitat, in most situations NMFS would conclude that the action would adversely affect EFH and provide EFH Conservation Recommendations. The EFH Conservation Recommendations may be similar to, or reference, the reasonable and prudent alternatives (RPAs) contained in the biological opinion and/or the reasonable and prudent measures and the associated terms and conditions (TCs) of the incidental take statement. If the EFH Conservation Recommendations are identical to measures (i.e., RPAs, TCs) required by the ESA consultation, the cover letter may notify the Federal action agency that the ESA measures are also serving as EFH Conservation Recommendations, rather than repeating the measures in a separate section of the transmittal. The cover letter must clearly state that the measures are satisfying both the ESA and the MSA, two separate statutory authorities. If additional measures that do not apply to EFH are included in the ESA consultation, the cover letter must specify which of the ESA measures apply as EFH Conservation Recommendations. Any EFH Conservation Recommendations that supplement specific measures of the ESA consultation should be clearly stated within the cover letter or presented at the end of the transmittal following all of the components of the biological opinion. The transmittal must clearly notify the Federal action agency of its responsibility to respond to NMFS EFH Conservation Recommendations, whether or not they overlap with ESA RPAs and/or TCs.

SCENARIO 1: COMBINED EFH-ESA CONSULTATION WHEN THE MSA MANAGED SPECIES AND ESA LISTED SPECIES ARE IDENTICAL		
ESA EFFECTS DETERMINATION	TYPE OF ESA CONSULTATION	RESULT OF EFH CONSULTATION
Not likely to adversely affect ESA listed species that are also MSA managed	Informal	No EFH Conservation Recommendations necessary in most cases.
Likely to adversely affect ESA listed species that are also MSA managed	Formal	EFH Conservation Recommendations provided or referenced in the cover letter to the biological opinion or at the end of the transmittal following all the components of the biological opinion. Federal action agency responds to EFH Conservation Recommendations within 30 days.

Scenario 2: Some But Not All MSA Managed Species and ESA Listed Species Are the Same

A second scenario involves situations where there is partial overlap between EFH and ESA listed species/critical habitat in the action area (i.e., some of the MSA managed and ESA listed species are the same, but some of the managed

species are not listed and/or some of the listed species are not managed). In this case, additional information beyond what would be required for ESA consultation would be necessary to evaluate potential adverse effects on EFH for any non-listed species, if the action may adversely affect EFH for those species. For non-listed species, the Federal action agency should provide the EFH Assessment information to NMFS along with its biological assessment or analysis of effects to listed species and critical habitat (either as a discrete clearly labeled section of the same document or as a separate EFH Assessment), to facilitate combined EFH and ESA review.

- If NMFS concurs that the proposed action is not likely to adversely affect listed species or their critical habitat, in most situations NMFS would also conclude that the action would not adversely affect EFH for those MSA managed species that are also listed under ESA. However, NMFS must still determine whether the action would adversely affect EFH for any MSA managed species that are not listed under ESA, and whether EFH Conservation Recommendations are necessary for those species' EFH. The results of the informal ESA consultation and EFH consultation should be transmitted in separate sections of a single letter from NMFS to the Federal action agency. If the ESA "not likely to adversely affect" determination is based on NMFS' understanding that the Federal action agency will implement the action with specific measures to avoid and/or minimize adverse effects, the EFH section of the document should also refer to those measures as the basis for determining that no EFH Conservation Recommendations are necessary for the species that are both MSA managed and ESA listed.

- If NMFS determines that formal ESA consultation is necessary because the proposed action is likely to adversely affect listed species or adversely modify critical habitat for the species that are both ESA listed and MSA managed, in most situations NMFS would conclude that the action would adversely affect EFH and provide EFH Conservation Recommendations for those species. NMFS must still determine whether the action would adversely affect EFH for any MSA managed species that are not listed under ESA, and whether EFH Conservation Recommendations are necessary for those species' EFH. The results of the ESA and EFH consultations should be provided under a single cover letter with the EFH Conservation Recommendations pertaining to both ESA listed and non-listed species presented either in the cover letter or at the end of the transmittal following all the components of the biological opinion. The EFH Conservation Recommendations may be similar to, or reference, the reasonable and prudent alternatives contained in the biological opinion and/or the reasonable and prudent measures and the associated terms and conditions of the incidental take statement.

SCENARIO 2: COMBINED EFH-ESA CONSULTATION WHEN SOME BUT NOT ALL MSA MANAGED SPECIES AND ESA LISTED SPECIES ARE THE SAME		
ESA EFFECTS DETERMINATION	TYPE OF ESA CONSULTATION	RESULT OF EFH CONSULTATION
Not likely to adversely affect ESA listed species that are also MSA managed	Informal	In most cases, no EFH Conservation Recommendations necessary for species that are both listed and managed. EFH Conservation Recommendations pertaining to non-listed species, if appropriate, provided in the informal concurrence letter. Federal action agency responds to any EFH Conservation Recommendations within 30 days.
Likely to adversely affect ESA listed species that are also MSA managed	Formal	EFH Conservation Recommendations for species that are listed and managed, and for non-listed species that are managed, if appropriate, provided either in the cover letter to the biological opinion or at the end of the transmittal following all of the components of the biological opinion. Federal action agency responds to any EFH Conservation Recommendations within 30 days.

Scenario 3: None of the MSA Managed Species and ESA Listed Species Are the Same

If none of the MSA managed species and ESA listed species are the same in the action area, but consultation is required nevertheless under both statutes, the EFH and ESA consultations should still be coordinated to facilitate the consultation process for the Federal action agency (i.e., one-stop shopping). Regardless of whether informal or formal ESA consultation is necessary for ESA listed species/critical habitat, NMFS must still determine whether the action would adversely affect EFH, and thus whether NMFS must provide EFH Conservation Recommendations. The results of the ESA and EFH consultations should be provided under a single cover letter with the EFH Conservation Recommendations provided either in the cover letter to the biological opinion or at the end of the transmittal following all of the components of the biological opinion.

SCENARIO 3: COMBINED EFH-ESA CONSULTATION WHEN NONE OF THE MSA MANAGED AND ESA-LISTED SPECIES ARE THE SAME		
ESA EFFECTS DETERMINATION	TYPE OF ESA CONSULTATION	RESULT OF EFH CONSULTATION
Not likely to adversely affect ESA listed species	Informal	EFH Conservation Recommendations for non-listed species, if appropriate, provided in the informal concurrence letter. Federal action agency responds to any EFH Conservation Recommendations within 30 days.
Likely to adversely affect ESA listed species	Formal	EFH Conservation Recommendations for non-listed species, if appropriate, provided either in the cover letter to the biological opinion or at the end of the transmittal following all of the components of the biological opinion. Federal action agency responds to any EFH Conservation Recommendations within 30 days.

Internal Consultations on NMFS Actions

NMFS consults within itself on internal actions related to ESA, including approving Habitat Conservation Plans and issuing section 10 take permits. If any of these actions may have an adverse effect on EFH, an EFH consultation is required. These consultations may require developing new internal procedures and should be coordinated with the appropriate Regional EFH Coordinators.