



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

October 4, 2006

Mr. Dennis E. Bschor
Regional Forester
USDA Forest Service
P.O. Box 21628
Juneau, AK 99802

Dear Mr. Bschor:

Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each federal agency to consult with the Secretary of Commerce regarding all actions or proposed actions authorized, funded, or undertaken by the agency that may adversely affect essential fish habitat (EFH). The National Marine Fisheries Service (NMFS) EFH regulations enable federal agencies to use existing consultation or environmental review procedures to satisfy the Magnuson-Stevens Act consultation requirements if the existing procedures meet the following criteria (50 CFR 600.920(f)): 1) the existing process must provide NMFS with timely notification of actions that may adversely affect EFH; 2) notification must include an assessment of impacts of the proposed action on EFH; and 3) NMFS must have made a finding that the existing process can be used to satisfy the EFH consultation requirements of the Magnuson-Stevens Act.

In May 2000 NMFS found that the National Environmental Policy Act (NEPA) process used by the Forest Service (FS) may be used to satisfy the EFH consultation requirements, and we worked with FS staff to develop an agreed upon consultation process. In recent months NMFS staff discussed this finding and process with FS staff and revised the process so it is consistent with the January 2002 final EFH regulations and changes in the FS environmental assessment process since 2000. NMFS appreciates the efforts of Don Martin, Dick Aho, and Dennis Rogers in developing this revised consultation process.

NMFS finds that the NEPA process used by the FS may be used to satisfy the consultation requirements of the Magnuson-Stevens Act provided the FS and NMFS adhere to the process in the enclosed document. Please respond in writing to indicate whether you concur. If you have any questions, please contact Jon Kurland (907) 586-7358 or Cindy Hartmann (907) 586-7585.

Sincerely,

Robert D. Mecum
Acting Administrator, Alaska Region

Enclosure

cc: Don Martin, FS, Juneau
Dennis Rogers, FS, Sitka
Dick Aho, FS, Petersburg



**MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT
ESSENTIAL FISH HABITAT (EFH) CONSULTATION PROCEDURES
for consultation between the
USDA FOREST SERVICE, ALASKA REGION
and the
NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION**

BACKGROUND

The 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) require federal agencies such as the USDA Forest Service (FS) to consult with the National Marine Fisheries Service (NMFS) regarding actions that may adversely affect Essential Fish Habitat (EFH) for federally managed marine and anadromous fish species. NMFS issued a final rule (50 CFR 600) to revise the regulations implementing the EFH provisions of the Magnuson-Stevens Act on January 17, 2002 (67 FR 2343). The intended effect of the rule is to promote the protection, conservation, and enhancement of EFH. Subpart K of the rule details procedures NMFS and other federal agencies will use to coordinate, consult, or provide recommendations on federal and state actions that may adversely affect EFH. Information on EFH designations in Alaska and guidance on the EFH consultation process can be found at <http://www.fakr.noaa.gov.habitat/efh.htm>.

Wherever possible, NMFS integrates EFH consultations into environmental review procedures required by other statutes, such as the National Environmental Policy Act (NEPA), to fulfill EFH consultation requirements. The procedure outlined in this document incorporates EFH review into the NEPA process. The FS may designate a non-federal representative to conduct an EFH consultation or prepare an EFH Assessment; however, the FS is ultimately responsible for complying with the EFH Consultation requirements of the Magnuson-Stevens Act.

The FS and NMFS will follow the EFH consultation process outlined below for all actions or proposed actions, authorized, funded or undertaken by the FS that the FS has determined¹ "may adversely affect EFH" and are not covered by a General Concurrence² (50 CFR 600.920(g)), or a Programmatic Consultation³ (50 CFR 600.920(j)). Adverse effect means any impact which reduces quality and/or quantity of EFH (50 CFR 600.910(a))⁴.

¹ Determination means to conclude, ascertain, or decide upon as after reasoning or observation.

² A General Concurrence identifies specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because NMFS has determined, through an analysis of that type of action, that it will likely result in no more than minimal adverse effects individually and cumulatively. A Federal agency may request a General Concurrence for a category of its actions by providing NMFS with an EFH Assessment (see 50 CFR 600.920(g)(3)).

³ Programmatic consultation provides a means for NMFS and a Federal agency to consult regarding a potentially large number of individual actions that may adversely affect EFH.

⁴ 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, if such modifications reduce the quality and/or quantity of EFH. 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 CFR 600.910 (a)).

EFH CONSULTATION PROCESS

1. Determination:

The FS will determine if a proposed action being covered by an environmental impact statement (EIS), environmental assessment (EA), or categorical exclusion (CE) will have “no adverse effect” or “may adversely affect” EFH. FS personnel may confer with NMFS personnel if necessary to assist in making this determination. If the “no adverse effect” determination is made the decision must be summarized in the decision document and fully explained in the planning record.

2. Notification:

The FS should involve NMFS early in the planning process for proposed actions that “may adversely affect” EFH. EFH consultation, if required, will begin when NMFS receives an EFH Assessment either in a draft environmental impact statement (DEIS), in an environmental assessment (EA), or as a separate document (50 CFR 600.920(h)(2)).

In accordance with 50 CFR 600.920(f)(1)(i) NMFS should have at least 60 days notice prior to a final decision on an action, or at least 90 days notice if the action would result in substantial adverse impacts.

NMFS may review the Schedule of Proposed Actions (SOPA) available on the internet (<http://www.fs.fed.us/r10/ro/projects-plans/>) and request additional information. However, the internet posting of proposed actions does not constitute notification for EFH consultation.

2. EFH Assessment:

If the FS determines that a proposed action “may adversely affect EFH” and is not covered by a General Concurrence or a Programmatic Consultation, an EFH Assessment is required. The level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. The EFH Assessment must contain (50 CFR 600.920(e)(3)):

- A description of the proposed action;
- An analysis of the potential adverse effects of the action on EFH and the managed species;
- The FS’s conclusions regarding the effects of the action on EFH; and
- Proposed mitigation, if applicable.

If appropriate, the assessment should also include (50 CFR 600.920(e)(4)):

- The results of site investigations to evaluate the habitat and the site-specific effects of the project;
- The views of recognized experts on the habitat or species that may be affected;
- A review of pertinent literature and related information;
- An analysis of alternatives to the action including alternatives that could avoid or minimize adverse effects on EFH; and
- Other relevant information.

The FS may incorporate the EFH Assessment into the DEIS or EA; include it as an appendix to the DEIS or EA; or submit it as a separate document to NMFS during the public review period. Separate EFH Assessment documents will be submitted to NMFS for CE's. If the entire EFH Assessment is not included in the body of the DEIS or EA a summary of the assessment and the FS conclusions regarding the effects of the action on EFH will be included. Wherever the EFH Assessment is located, it must be clearly labeled as such and include all the required information.

Mail documents and correspondence regarding EFH actions on the Tongass National Forest to NMFS, Habitat Conservation Division, P.O. Box 21668, Juneau, AK 99802. Mail documents and correspondence regarding EFH actions on the Chugach National Forest to: NMFS, Habitat Conservation Division, 222 West 7th Avenue # 43, Anchorage, AK 99513.

3. NMFS EFH Conservation Recommendations:

NMFS will respond in writing within the established DEIS or EA comment period (45 days for an EIS or 30 days for an EA) as to whether it concurs with the conclusions of the EFH Assessment. For CEs NMFS will respond in writing within 30 days of receipt of the EFH Assessment. For all actions, NMFS may provide EFH Conservation Recommendations, ask for additional analysis, or request expanded consultation (50 CFR 600.920(i)) if appropriate.

4. Forest Service Response:

If NMFS does not respond within the established comment period, without a FS approved time extension, consultation is ended and no further correspondence is necessary. If NMFS concurs with the FS EFH Assessment and proposed minimization measures and mitigation, consultation is ended and no further correspondence is necessary. If NMFS provides EFH Conservation Recommendations the FS must provide a written response to NMFS within 30 days after receiving NMFS Conservation Recommendations (600.920(k)(1)). If the Forest Service is not able to respond fully within 30 days, the FS will send a preliminary response to NMFS. If the FS response is inconsistent with any of NMFS EFH Conservation Recommendations it must be provided at least 10 days prior to a final approval of the action.

The FS response to NMFS EFH Conservation Recommendations must include a description of or reference to measures proposed by the FS for avoiding, minimizing, or mitigating the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS Conservation Recommendations, the FS must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action and the measures needed to avoid, minimize, mitigate, or offset such effects (600.920(k)(1)). In addition to scientific justification the FS may provide additional reasons for not following the recommendations such as budget, or an explanation of an alternate agency process or procedure established to address the concern.

5. Dispute Resolution:

Potential conflicts should be identified and handled prior to the publication of the Final EIS, Decision Notice, or Decision Memo. If a FS decision is inconsistent with NMFS EFH Conservation Recommendations NMFS may request a meeting with a FS line officer to discuss the action and opportunities for resolving any disagreements. NMFS will endeavor to resolve any such issues in a meeting between the Assistant Regional Administrator for Habitat Conservation and the District Ranger or Forest Supervisor, or between the Alaska Regional Administrator and the Alaska Regional Forester. If issues cannot be resolved to NMFS satisfaction, 50 CFR 600.920(k)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with the FS Chief to discuss the proposed actions and opportunities for resolving disagreements.

6. Final EIS (FEIS):

The FEIS should include a summary of the EFH consultation and/or copies of the EFH Assessment and related correspondence.

7. Record of Decision (ROD); Decision Notice/Finding of No Significant Impact (FONSI); Decision Memo; and Project File/Planning Record:

The FS will summarize the conclusions of the EFH consultation (along with a summary of the determination as discussed in step 1 above) in the ROD, Decision Notice, FONSI, or Decision Memo. The consultation process will be fully explained (along with the full explanation of the rationale for the determination as discussed in step 1 above) in the planning record.