

**ENVIRONMENTAL ASSESSMENT, FINDING OF NO SIGNIFICANT IMPACT,
AND REGULATORY IMPACT REVIEW FOR THE FINAL REGULATIONS TO
IMPLEMENT THE ESSENTIAL FISH HABITAT PROVISIONS OF THE
MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT**

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EXECUTIVE SUMMARY

This Environmental Assessment (EA) evaluates the environmental effects of the National Marine Fisheries Service's (NMFS) final regulations containing guidelines and procedures to implement the essential fish habitat (EFH) requirements of the Magnuson-Stevens Fishery Conservation and Management Act. NMFS prepared this EA in accordance with the National Environmental Policy Act (NEPA).

The purpose of the regulations is to assist regional Fishery Management Councils (Councils), Federal agencies, and other interested parties in fulfilling the EFH requirements of the Magnuson-Stevens Act. The regulations contain guidelines for the description and identification of essential fish habitat, minimization of adverse fishing impacts to EFH, and consideration of actions to conserve and enhance EFH. The regulations also establish procedures for the EFH coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act.

Six alternatives were considered during the preparation of the final regulations. The preferred alternative will make minor revisions to the EFH interim final rule (IFR) in response to extensive public comments and publish the regulations in a final form. Implementation of this alternative will result in better conservation of EFH and managed species through the improved guidance it offers to Councils, Federal agencies, and interested parties in carrying out the EFH requirements of the Magnuson-Stevens Act. The no action alternative is to leave the EFH interim final rule in its current interim form, without incorporating public comments or providing improved guidance for carrying out the EFH requirements. This alternative would not publish the rule in a final form, leaving uncertainty as to whether changes will be made to the EFH regulations in the near future. The third alternative is to finalize the IFR with no changes, which would be similar to the second alternative but would remove uncertainty as to whether changes will be made to the EFH regulations in the near future. The fourth alternative is to establish final EFH regulations only as mandated by the Magnuson-Stevens Act for the EFH provisions of fishery management plans, thereby eliminating subpart K, which provides guidance for implementation of the coordination, consultation, and recommendations requirements of the Magnuson-Stevens Act. This alternative could result in confusion among Federal action agencies and the public over how to implement the EFH coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. The fifth alternative is to develop new EFH regulations to replace the IFR. Given the numerous comment periods and extensive revision the EFH regulations have already undergone, this alternative would be inefficient and is unnecessary. The sixth alternative is to designate EFH for all fish species in the U.S. exclusive economic zone (EEZ) rather than limiting EFH to federally managed species. This alternative would expand the scope of EFH beyond the requirements of the Magnuson-Stevens Act and would be much more difficult to implement given current staffing and funding, and therefore could not be relied upon to result in improved fish habitat conservation.

In addition, the Regulatory Impact Review determines that the EFH regulations do not constitute a significant regulatory action for economic reasons and will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

1.0 PURPOSE AND NEED

1.1 Purpose

The essential fish habitat (EFH) provisions of the Magnuson-Stevens Act require Fishery Management Councils to amend fishery management plans (FMPs) to describe and identify EFH for all managed species. EFH is defined by the Act as those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity. Additionally, the Councils are directed to minimize, to the extent practicable, the adverse effects of fishing on EFH, and to identify other actions to encourage the conservation and enhancement of EFH. The Councils are authorized to make recommendations to Federal and state agencies on actions that may adversely affect EFH. These recommendations will enable those agencies to conserve EFH. NMFS is required to provide EFH conservation recommendations to Federal and state agencies on activities authorized, funded, or undertaken by these agencies that would adversely affect EFH. Federal agencies are directed to consult with NMFS for any action that may adversely affect EFH, and to respond in writing to any EFH conservation recommendation provided by NMFS.

The purpose of the EFH regulations is to advise the Councils on how to identify, conserve, and enhance EFH and to set forth how NMFS, Federal agencies, and other interested parties will meet the coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act.

1.2 Need

Fishery resources contribute to the food supply, economy, welfare, and health of the nation and provide recreational opportunities. Fishing, both commercial and recreational, is a major source of employment and contributes significantly to the economy of the nation. Numerous stocks of fish have declined to unsustainable levels and are considered “overfished.” Threats to fish stocks include excessive fishing pressure and effort, the inadequacy of fishery conservation and management practices and controls, and the degradation and loss of fish habitat. As Congress declared in the Magnuson-Stevens Act, “a national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources.” Congress addressed these needs in the Sustainable Fisheries Act amendments to the Magnuson Act (renamed Magnuson-Stevens Act) in 1996. The Magnuson-Stevens Act specifically requires the Secretary of Commerce to develop regulations to assist the Councils in adding EFH provisions to FMPs, and authorizes the Secretary to develop other regulations necessary to carry out the Act.

2.0 BACKGROUND

2.1 The Magnuson Fishery Conservation and Management Act

The Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.; also known as the Magnuson Act) was signed into law on April 13, 1976. The Magnuson Act established eight Regional Fishery Management Councils for the New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf of Mexico, Pacific, Western Pacific, and North Pacific regions. Regulations relating to Council activities and operations and guidelines for preparing FMPs in conformance with national standards are published in 50 CFR Part 600. A categorical exclusion, environmental assessment, or environmental impact statement is prepared for every FMP and FMP amendment. After public hearings, NEPA documents, FMPs, FMP amendments, and draft regulations (if necessary) are submitted to the Secretary for approval. Any regulations required to implement FMPs or FMP amendments are published in the Federal Register.

Currently, there are 40 FMPs for various fish and shellfish resources, with additional plans in various stages of development (see Appendix B). Some FMPs are created for individual or a few closely related species (e.g., FMPs for red drum, northern anchovy, shrimp). Others are developed for larger species assemblages inhabiting similar habitat (e.g., FMPs for Gulf of Alaska groundfish, reef fish). Most of the FMPs have been amended, and some have been developed and implemented jointly by more than one Council. In addition, Pub. L. 101-627 amended the Magnuson Act to give the Secretary the responsibility for preparing FMPs for Atlantic highly migratory species, such as sharks, billfish, and tuna. The regulations implementing individual FMPs are published in 50 CFR Parts 625 through 685.

Prior to 1986, the Magnuson Act contained limited language on fish habitats. In 1986, the Act was amended to require that each FMP include readily available information regarding the significance of habitat to the fishery, and an assessment of the effects of changes to that habitat upon the fishery. Section 302(i) provided that each Council may comment on and make recommendations concerning any activity undertaken, or proposed to be undertaken, by a state or Federal agency that, in the view of the Council, may affect the habitat of a fishery resource under its jurisdiction. The Magnuson Act further mandated that within 45 days after receiving a comment or recommendation from a Council, a Federal agency had to provide a detailed response, in writing, to the Council regarding the matter. In 1990, the Magnuson Act was amended to require that each Council comment on and make recommendations concerning any such activity that, in the view of the Council, is likely to substantially affect the habitat of an anadromous fishery resource under its jurisdiction.

2.2 The Sustainable Fisheries Act Amendments to the Magnuson-Stevens Act

The Sustainable Fisheries Act (SFA), which amended the Magnuson Act (renamed the Magnuson-Stevens Act), was signed into law on October 11, 1996. The SFA added new provisions to the Magnuson-Stevens Act aimed at halting overfishing, reducing bycatch, and minimizing adverse impacts

to essential fish habitat. The EFH provisions of the Magnuson-Stevens Act are described in greater detail in Section 1.1 above.

3.0 ALTERNATIVES

3.1 Preferred Alternative—Implement the Revised IFR as the EFH Final Rule

The preferred alternative is to make minor revisions to the EFH interim final rule (IFR), which took effect in January 1998, and publish the EFH regulations in a final form. The revisions are based on approximately 3,300 public comments received from two separate public comment periods on the IFR, and NMFS' experience implementing the IFR since January 1998. These revisions provide a clearer description of the mandatory EFH contents of FMPs; clarify standards for identifying EFH; provide more specific guidance on the evaluation of fishing activities that may adversely affect EFH; simplify procedures for NMFS to provide recommendations to Councils on EFH provisions of FMPs; provide clearer organization of the EFH consultation procedures; streamline the procedures for developing General Concurrences; and provide additional guidance for conducting programmatic consultations. Additionally, the preferred alternative includes editing the IFR to remove redundancies and to clarify language in general. The changes made in the preferred alternative will ensure that the EFH provisions of the Magnuson-Stevens Act are implemented in an efficient and effective manner.

The EFH regulations state that Councils must identify in FMPs the habitats that are necessary for spawning, breeding, feeding or growth to maturity for all life stages of each species managed under a fishery management plan. These areas will be described and identified as EFH, both in narratives and geographically (in text and maps) in the FMPs. The amount of data available to identify EFH varies from species to species, so the level of detail with which EFH can be identified may also vary. The preferred alternative provides increased guidance to Councils on what types of information to use in EFH designations, how to use different levels of information to designate EFH, and how to present this information in text and tables in FMPs. EFH that is judged to be particularly important in ecological function, sensitive to human-induced environmental degradation, stressed by development activities, or rare may be identified as "habitat areas of particular concern" (HAPC) to help provide additional focus for conservation efforts.

After describing and identifying EFH, Councils must evaluate all fishing-related activities that occur in or affect EFH, and minimize to the extent practicable those activities that adversely affect EFH. The preferred alternative clarifies the required contents of fishing impact evaluations, stating that FMPs must describe each fishing activity, review and discuss all available relevant information, and provide conclusions regarding whether and how each fishing activity adversely affects EFH. It also clarifies the threshold for when Councils must take action to minimize adverse fishing impacts to the extent practicable. Additionally, the preferred alternative includes simpler guidance for Councils to identify other actions to further the conservation and enhancement of EFH.

The regulations establish procedures for implementing the coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. Coordination between NMFS and the

Councils is encouraged in the identification of threats to EFH and in the development of appropriate EFH conservation recommendations to Federal or state agencies. The preferred alternative clarifies that either existing coordination procedures, such as NEPA, or the procedures established by the regulations can be used to fulfill the requirement that Federal agencies consult with NMFS on actions that may adversely affect EFH. Additionally, the preferred alternative reorganizes the regulations to clearly outline and describe the five different approaches that may be taken to fulfill EFH consultation requirements: use of existing environmental review procedures, General Concurrence, abbreviated consultation, expanded consultation, and programmatic consultation. When NMFS provides EFH conservation recommendations to a Federal agency, that agency must respond in writing within 30 days. That response must include a description of measures proposed by the agency for conserving EFH. The regulations also provide for further, higher level, review of Federal agency decisions that are inconsistent with NMFS or Council recommendations.

3.2 No Action Alternative—Leave the EFH Regulations in their Current Interim Form

The no action alternative would keep the EFH Interim Final Rule (IFR) in its current, interim form indefinitely.

3.3 Third Alternative—Finalize the Interim Final Rule with No Changes

The third alternative is to finalize the interim final rule in its current form, without the revisions proposed in the preferred alternative.

3.4 Fourth Alternative—Establish Regulations for Subpart J, not Subpart K

The fourth alternative is to establish final EFH regulations for only those sections of the Magnuson-Stevens Act that explicitly require the promulgation of regulations. The Magnuson-Stevens Act requires the Secretary of Commerce to establish by regulation guidelines to assist the Councils in the identification of EFH in FMPs (including adverse effects on such habitat) and in the consideration of actions to ensure the conservation and enhancement of such habitat. The Act does not require the Secretary to prepare guidelines for the EFH coordination, consultation, and recommendation process. Therefore, the fourth alternative is to eliminate Subpart K of the EFH guidelines and to retain and finalize Subpart J.

3.5 Fifth Alternative—Develop New EFH Regulations

The fifth alternative is to reinitiate the process of EFH regulation development rather than finalizing the IFR.

3.6 Sixth Alternative—Designate EFH for All Fish Species in the Exclusive Economic Zone (EEZ)

Under the Magnuson-Stevens Act, any fish species occurring in the EEZ may be subject to regulation by NMFS and the Councils. The sixth alternative is to designate EFH for all such species, and not limit EFH to species managed under FMPs.

4.0 AFFECTED ENVIRONMENT

4.1 Physical and Biological Environment

The affected environment will be a subset of the habitat currently or historically used by fish managed under the Magnuson-Stevens Act. Because of the large variety of fish species managed under the Magnuson-Stevens Act, the areas identified as EFH will encompass a wide range of aquatic habitats. Habitats that may be identified as EFH for one or more fish species include streams and rivers supporting anadromous fish species; marine and estuarine habitats, such as seagrass beds, coral reefs, tidal marshes, coastal wetlands, submerged aquatic vegetation, cobble with attached fauna, dense mud and clay burrows; and oceanic banks and continental shelf or slope areas extending to the 200-mile EEZ. Aquatic areas that have historically supported managed species of fish, but do not currently, may also be identified as EFH if the habitats are necessary to rebuild the stocks and if restoration is economically and technically feasible. EFH will likely be identified in the coastal waters of all coastal states. Overall, the environment directly affected by the regulations is likely to be primarily marine and estuarine habitat in the United States. Some of the species managed under the Magnuson-Stevens Act are anadromous fish, such as salmon, which spend most of their lives in the marine environment, but migrate to fresh water streams for spawning. For these species, it is likely that EFH will be identified in fresh water streams in coastal and inland states. Fish populations managed under the Magnuson-Stevens Act will be affected by the regulations when EFH receives increased protection or is restored.

4.2. Socioeconomics

Commercial and recreational fisheries make significant contributions to the U.S. economy. In 1998, U.S. commercial fisheries produced approximately \$3.1 billion in dockside revenues (NMFS 1999). By weight of catch, the U.S. is the world's fifth largest fishing nation, harvesting approximately 10 billion pounds annually. The U.S. is also the third largest seafood exporter, with exports valued at \$2.3 billion in 1998 (NMFS 1999).

Commercial fishing is an important part of the economies of many states, but is of particular importance in Alaska (whose fisheries are the most productive in the country), Louisiana (second in productivity), the Pacific northwest (where salmon stocks are imperiled), and the New England states (where many local economies have been adversely affected by the decline of the groundfish and scallop fisheries). The fishing industry includes large businesses, such as factory trawlers, and small businesses, such as individual, self-employed fishermen. Although some parts of the fishing industry are thriving, many fish stocks are currently overfished, and there is a general sense among fishers and fishery managers that commercial fishing faces some serious challenges in the decades to come.

Recreational fishing provides significant social, cultural, and economic benefits to American society, and is the second most popular form of outdoor recreation in the United States (swimming being first). Fishing provides an introduction to the aquatic environment, and an opportunity to develop an appreciation for natural resource conservation and the importance of habitats. Recreational fishing contributes significantly to the nation's economy. U.S. fishery resources provided enjoyment for more than nine million saltwater anglers who spent an estimated \$8.6 billion on tackle, equipment, food, lodging, and other goods and services related to fishing in 1996 (American Sportfishing Association 1997). The recreational fishing industry is thriving, but many species popular with recreational fishers are currently overfished or declining due to habitat loss and degradation and other forms of human impact.

5.0 ENVIRONMENTAL CONSEQUENCES

While environmental consequences will not result from the act of finalizing the EFH regulations in and of itself, consequences may result from actions taken in accordance with the final EFH regulations.

5.1 Consequences of the Preferred Alternative

The final rule provides improved guidance to Councils and Federal agencies in carrying out the EFH requirements of the Magnuson-Stevens Act. The final rule contains more explicit guidelines to the Councils for designating EFH. Thus, the revisions may result in clearer descriptions of habitats essential to fish, as well as increased understanding of the effects of fishing on different habitats. Additionally, the preferred alternative clarifies options for fulfilling the EFH coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. These revisions may provide for greater efficiency, and thus reduced costs, in carrying out the EFH consultation process and other parts of the EFH mandate.

5.1.1 Effects on Fish Habitat

The goal of the regulations is to improve the conservation and management of marine fisheries by identifying EFH, minimizing adverse effects of fishing activities on EFH, and providing information and conservation recommendations to Federal agencies, state agencies, and other entities whose actions may adversely affect EFH. Achievement of this goal depends on individual decisions made by the Councils, Federal agencies, and state agencies. It is not possible to predict the site-specific nature of those decisions. Therefore, the consequences of this alternative can only be addressed in a general sense. NEPA documentation prepared for individual EFH FMP amendments or for individual proposed actions affecting EFH will address the environmental consequences of specific activities.

Councils may adopt a variety of strategies to minimize the adverse effects of fishing activities on EFH pursuant to this rule. For example, Councils may restrict fishing techniques that cause physical disturbance of the substrate, loss of and/or injury to benthic organisms, loss of prey species and/or their habitat, and changes to other components of the ecosystem. These actions will have a beneficial effect

on fish habitat and the associated ecosystems.

Fishery management plans and EFH conservation recommendations provided by NMFS or the Councils under this rule may encourage avoidance of activities that would adversely affect EFH. For example, development projects that may adversely affect EFH may provide vegetated buffers or alternate methods to treat surface runoff, relocate away from the area identified as EFH, or incorporate other actions to reduce detrimental effects. EFH conservation recommendations may advise the use of environmentally sound engineering and management practices (e.g., seasonal restrictions, specific dredging methods, and disposal options) for construction projects. EFH conservation recommendations may suggest the restoration of riparian and coastal areas through re-establishing endemic trees or other appropriate native vegetation, and restoring natural bottom characteristics. If implemented by the action agencies, recommendations provided by a Council or NMFS will improve the conservation of important aquatic habitats and the associated ecosystem.

5.1.2 Effects on Fish Populations

Habitat loss and degradation can exacerbate the effects of increased fishing pressures. The net effect has been a decline in many of the nation's important fish stocks. Protection from further adverse impacts and restoration of degraded EFH, where feasible, should reduce some of the stress on populations, and fish stocks should stabilize or regain some lost productivity. Furthermore, fish habitat protection under this rule can help provide increased insurance against stock collapses that may result from management failures or inter-annual environmental variability.

Displacement and the subsequent relocation of fishing effort due to habitat protection regulations can also adversely impact fish stocks and habitats in fishing grounds outlying a protected area by concentrating too much effort in a particular region. Additional measures including effort controls may be necessary to protect against adverse fishing impacts to EFH outside any protected areas that may be designated pursuant to this rule.

5.1.3 Socioeconomic Effects

Detrimental effects of the regulations on fisheries are expected to be temporary in nature, with any short-term losses more than offset by long-term gains in the fishery. The long-term expectation of the Magnuson-Stevens Act's EFH mandate is that habitat conservation will help to reverse declining trends in fish stocks by minimizing adverse impacts to EFH, and by restoring lost habitats or access to habitats, where feasible. Protecting the quality and quantity of EFH should increase survival potentials of managed fishery species, and increase biological productivity of both the ecosystem and the stocks of managed species dependent on the components of that ecosystem. Increases in stock abundance and fish sizes should result in increased economic return and stabilization of interannual variations in catch, as well as provide increased resistance to episodic disturbance events.

The most likely short-term consequence to the fishing participants, both commercial and recreational, would be the modification of fishing effort, if scientific evidence suggests that particular fishing methods or gear types are adversely affecting the quantity or quality of habitat necessary to one or more life

stages of a managed species. Restrictions to minimize these adverse effects could be either seasonal, annual, or permanent. For the duration of the restriction, fishers who have traditionally used that method or area may need to increase their search or travel distance to find other suitable fishing grounds, or they may need to invest in gears more appropriate for use in the identified EFH. There may be individual fishing participants for whom the net effect of reducing adverse impacts on EFH is negative, either because no relocation of effort is possible or because the cost of acquiring new gear is prohibitive, which could cause the participant to withdraw from the industry. Overall, short term economic losses should be compensated by future increases in catch levels and increased stability in the fishery. Again, any such impacts would be analyzed under all applicable laws at the time any restrictions are proposed by a Council.

The EFH coordination, consultation, and recommendation process established by the regulations may result in Federal or state action agencies deciding to restrict various development activities to avoid or minimize adverse effects to EFH. EFH recommendations from NMFS or Councils to action agencies are non-binding. It would be speculative to predict the socioeconomic effects of future restrictions on development that may be imposed by agencies that authorize, fund, or undertake actions that may adversely affect EFH. Moreover, such agencies typically evaluate socioeconomic effects and other public interest factors before taking final action on any given activity.

The provisions of the final rule that concern the statutory requirement for Federal agencies to consult with NMFS regarding actions that may adversely affect EFH will result in Federal expenditures of time and resources and could detract from other activities. The final rule provides guidance on required information for consultations and encourages agencies to combine the consultation process with existing environmental review procedures, ensuring that consultations will be completed in an efficient and effective manner.

5.1.4 Other Environmental Effects

These regulations are intended to benefit the environment by establishing procedures to control adverse effects on the EFH of managed species under the Magnuson-Stevens Act. There may be some changes in the patterns of resource use in order to avoid activities that degrade EFH. These changes, such as directing dredged material disposal away from important habitat features, would likely result in net environmental benefits.

The overall purpose of these regulations is to conserve, protect, and restore EFH, and thus to promote the long-term sustainability of marine fisheries. These regulations will not cause any irreversible or irretrievable commitment of resources as a result of their implementation. EFH will be identified in FMPs, which may be subsequently revised.

5.2 Consequences of the No Action Alternative

The consequences of the no action alternative are that EFH implementation would continue in the manner in which it has been operating since the EFH IFR took effect in January 1998. Public comments and NMFS' experience implementing the IFR suggest that the EFH regulations contain redundancies, inefficiencies, and unclear language. Additionally, some commenters asked for increased

guidance on specific EFH implementation issues, such as how to conduct fishing impact evaluations and practicability analyses. Without the improved guidance regarding EFH implementation procedures provided in the final rule, EFH implementation would not be as efficient as it could be and may result in less overall environmental benefit than the preferred alternative since it may be harder for Councils and Federal agencies to understand how to properly implement the EFH provisions of the Magnuson-Stevens Act. Furthermore, keeping the rule “interim final” rather than “final” might leave the public unclear as to whether to expect further changes to the EFH regulations in the near future, and thus would result in uncertainty for affected parties.

5.3 Consequences of the Third Alternative—Finalize the IFR with No Changes

The consequences of this alternative are the same as those for the no action alternative except that this alternative removes uncertainty as to whether or not revisions to the regulations will be made in the near future. As stated above, based on extensive public comment and experience implementing the IFR since January 1998, NMFS has identified improvements that could be made to the EFH regulations to maximize environmental benefit and ensure that EFH implementation is carried out in an efficient and effective manner. Those improvements would not be made under this alternative.

5.4 Consequences of the Fourth Alternative—Establish Regulations for Subpart J, not Subpart K

The consequences of the fourth alternative are that Federal agencies and other interested parties would not receive any formal guidance on how to implement the EFH coordination, consultation, and recommendation requirements of Sections 305(b)(1)(D) through 305(b)(4) of the Magnuson-Stevens Act.

This alternative would result in substantial inefficiency since it would be more difficult for Federal agencies and NMFS to carry out the needed steps of consultation and for NMFS to prepare suitable EFH conservation recommendations in a timely fashion. For example, without specifying procedures for Federal agencies to carry out EFH consultation, there would likely be confusion and significant variation between and within agencies in conducting EFH consultations. NMFS would not in all cases have sufficient information on which to base the preparation of EFH conservation recommendations. Additionally, this could result in diminished attention to the impacts of Federal and state actions on EFH and missed opportunities for NMFS to provide conservation recommendations on Federal actions that would adversely affect EFH. Furthermore, Subpart K has been in effect for approximately three years and its elimination at this stage could result in confusion among Federal agencies and members of the public.

5.5 Consequences of the Fifth Alternative—Develop New EFH Regulations

The consequences of the fifth alternative are that EFH implementation would be unsettled until new regulations were developed. The work of the Councils in designating EFH and establishing measures to protect EFH would be delayed. Furthermore, the EFH coordination, consultation, and recommendation process would be unclear until new regulations are developed. Reinitiating the process

of EFH regulation development would delay the process of EFH implementation until a date uncertain and the environmental benefits of EFH implementation would be delayed.

Reinitiating EFH regulation development at this time would be inefficient and is unnecessary. The EFH regulations have evolved through two Advance Notices of Proposed Rulemaking (November 8, 1996 and January 9, 1997), a Proposed Rule (April 23, 1997), and the Interim Final Rule (December 19, 1997, reopened for public comment on November 8, 1999). Altogether, there have been five separate public comment periods for the regulations, totaling 225 days. NMFS has held numerous public meetings and received approximately 3,600 written public comments on the EFH regulations. Furthermore, the regulations have been in effect for approximately three years and have enabled the Councils and Federal agencies to comply with the EFH mandate. Councils have developed EFH provisions for all 40 fishery management plans¹ and NMFS has completed more than 8,000 EFH consultations using the IFR. Based on this experience and public comment, only minor modifications to the rule are necessary.

5.6 Consequences of the Sixth Alternative—Identifying EFH for All Species Subject to Regulation Under the Magnuson-Stevens Act

The consequences of the sixth alternative, identifying EFH for all species in the EEZ, as opposed to just those 700+ species managed under an FMP, are that an increased amount of aquatic habitat would be identified as EFH. For example, anadromous species in the southeast United States are not currently managed under Federal FMPs. Identifying EFH for these non-managed species would mean including riverine habitats that would not be so identified if EFH identification was confined to the habitat necessary for species managed by a Federal FMP. In addition, implementation of the coordination, consultation, and recommendation provisions of the Magnuson-Stevens Act under this alternative would result in a greater number of EFH conservation recommendations from NMFS to Federal and state agencies, and a greater number of consultations required of Federal agencies.

Although identifying additional areas as EFH and performing more consultations might seem advantageous for overall aquatic habitat conservation, the additional area identified as EFH and the additional workload resulting from increased consultation and conservation recommendations could dilute the effectiveness of the EFH initiative. This alternative would be beyond the capability of NMFS and the Councils to implement given current staffing and funding, and therefore could not be relied upon to result in improved fish habitat conservation.

6.0 COORDINATION WITH OTHERS

In total, NMFS held five separate public comment periods and received approximately 3,600 written comments on the EFH regulations. NMFS published two Advance Notices of Proposed Rulemaking (ANPR). The first, published in the Federal Register on November 8, 1996 (61 FR 57843), solicited

1- NMFS fully approved the majority of EFH FMP amendments. In some cases, EFH amendments were only partially approved.

comments to assist NMFS in developing a framework for the proposed guidelines. The second ANPR, published on January 9, 1997 (62 FR 1306), announced the availability of the "Framework for the Description, Identification, Conservation, and Enhancement of Essential Fish Habitat" (Framework). The Framework served as a detailed outline for the regulation, and as an instrument to solicit public comments. The public comment period for the Framework closed February 12, 1997. During the comment period, NMFS held 15 public meetings, briefings, and workshops across the nation. Eighty-eight comments were received via mail or fax, and numerous others were received during the public meetings.

A proposed rule was published in the Federal Register on April 23, 1997 (62 FR 19723). A draft Environmental Assessment was also made available at that time. The public comment period was extended twice, closing on July 8, 1997. Six regional public meetings and numerous briefings were held during the comment period to explain the proposed rule and solicit public comments by all interested parties. NMFS received 224 comments via mail or fax. A number of changes were made to the interim final regulation in response to comments received.

An interim final rule was published in the Federal Register on December 19, 1997 (62 FR 66531). An Environmental Assessment was also made available at that time. The public comment period was extended once, closing after 90 days on March 19, 1998. The IFR was reopened for public comment on November 8, 1999 (64 FR 60731) to solicit input on four specific aspects of the EFH regulations: the scope of EFH designations, documentation of measures to minimize adverse fishing effects on EFH, the use of existing environmental procedures in EFH consultations, and the preparation of EFH Assessments.

NMFS received a total of 3,300 written comments on the IFR. The majority of comments were from private citizens, conservation organizations, and non-fishing industry groups. The other comments came from a wide variety of groups including government agencies, commercial and recreational fishing industry groups, and academic institutions. Comments ranged from strongly supportive to strongly opposed. Comments from the conservation community and private citizens were generally supportive of the regulations but recommended improved guidance to Councils on matters related to assessing fishing impacts on EFH and minimizing adverse impacts. Non-fishing industry groups were generally opposed to the regulations and expressed particular concern over the scope of EFH designations and the impacts these broad designations would have on activities requiring Federal permits. They also questioned NMFS' authority to comment on non-fishing related activities. The preamble to the EFH final rule addresses in more detail the comments received during the extensive public review and comment process and the subsequent changes that were made to the final EFH regulations.

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8.0 LITERATURE CITED

American Sportfishing Association, 1997. The Economic Importance of Sport Fishing: Economic Data on Sport Fishing throughout the Entire United States. Alexandria: American Sportfishing Association.

National Marine Fisheries Service. 1999. Fisheries of the United States, 1998. Silver Spring: National Marine Fisheries Service.

NOAA Technical Memorandum NMFS-F/SPO-23 December 1996 Magnuson-Stevens Fishery Conservation and Management Act: As Amended Through October 11, 1996.

9.0 FINDING OF NO SIGNIFICANT IMPACT

In compliance with the National Environmental Policy Act (NEPA), an Environmental Assessment has been prepared for the final rule implementing the requirements of the Magnuson-Stevens Fishery Conservation and Management Act to describe, identify, conserve, and enhance Essential Fish Habitat (EFH). NEPA documentation will be undertaken for each Fishery Management Plan to fully address site specific effects of EFH implementation. The environmental review process led me to conclude that this action will not have a significant effect on the human environment. Therefore, an Environmental Impact Statement is not required by Section 102(2)(C) of NEPA or its implementing regulations. A copy of the environmental assessment and supporting documentation are available from the Office of Habitat Conservation, National Marine Fisheries Service, Silver Spring, MD 20910.

Date: _____

Signature: _____

10.0 REGULATORY IMPACT REVIEW

The National Marine Fisheries Service (NMFS) requires a Regulatory Impact Review (RIR) for all regulatory actions that are of public interest. The RIR serves several purposes:

It provides a review of the problems and policy objectives prompting the regulatory proposals;
It ensures that NMFS systematically and comprehensively evaluates major alternatives to solve problems; and
It provides a comprehensive review of the level of incidence of impacts associated with a regulatory action.

The RIR also includes information on the expected economic impact of regulations. The RIR serves as the basis for determining whether the regulations are a “significant regulatory action” for economic reasons under the criteria established in Executive Order (E.O.) 12866 and whether the regulations will have a “significant economic impact on a substantial number of small entities” pursuant to the Regulatory Flexibility Act.

The preceding EA fulfills the objectives and information requirements of the RIR. Sections 1.0 and 2.0 of the EA describe the objectives and need for this regulatory action. Section 3.0 outlines six alternatives for addressing NMFS’s requirement to establish EFH regulations. In Section 4.0, the EA highlights the affected physical and biological environment and socioeconomic considerations. Section 5.0 evaluates the environmental and socioeconomic impacts associated with the EFH regulations.

10.1 Determination of Significant Regulatory Action

Pursuant to E.O. 12866, a regulation is considered a “significant regulatory action” if it may:

1. Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state and local, or tribal governments or communities;

Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or

Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the executive order.

As explained in Section 5.1.3 of the EA, the proposed action will not significantly impact the economy. Protecting the quality and quantity of EFH should increase the survival of managed fish species, and increase biological productivity of the ecosystem and the stocks of managed species dependent on the components of that ecosystem. Increases in stock abundance and fish sizes should increase economic

returns and stabilize annual variations in catch.

The EFH regulations establish procedures for consultation between Federal agencies and NMFS when Federal actions may adversely affect EFH. The EFH regulations do not require states to consult regarding EFH. The rule requires NMFS to provide conservation recommendations for any Federal or state actions that would adversely affect EFH. The Councils may comment and make recommendations on Federal and state actions that may affect EFH and must comment and make conservation recommendations concerning any Federal or state activity that is likely to substantially affect EFH for anadromous species. Neither NMFS' nor the Councils' recommendations are binding, and states are not required to respond to the recommendations. Similarly, the final rule does not require any expenditures by nor place any responsibilities or duties on state, local, or tribal governments.

This rule, however, is deemed significant for the purposes of E.O. 12866. The determination of significance is based on the legal and policy issues raised, rather than the concern for economic or budgetary implications or interference with another agency's actions. As such, NMFS will submit this rule to the Office of Management and Budget for review.

10.2 Determination of Significant Economic Impact on a Substantial Number of Small Entities

A "small entity" can include small businesses, organizations, and governmental jurisdictions. The Small Business Administration (SBA) considers a small business in the commercial fishing industry as a firm with receipts of up to \$3 million annually. For processors, a small business is one with 500 or fewer employees; the wholesale industry size standard is 100 or fewer employees. SBA defines a small business in the charter boat industry as a firm with receipts up to \$5 million per year.

NMFS has adopted a standard that a "substantial number" of small entities is more than 20 percent of those small entities affected by the regulations, out of the universe of small entities in the industry or, if appropriate, industry segment. In determining the universe of entities, only those entities that can be reasonably expected to be directly or indirectly impacted by the proposed rule should be considered in making the significance determination.

A significant economic impact would result if a substantial number of small entities experience any of the following:

A decrease in annual gross revenue of more than 5 percent

An increase in total costs of production of more than 5 percent

Compliance costs as a percent of sales are at least 10 percent higher than similar compliance costs for large entities

The Assistant General Council for Legislation and Regulation of the Department of Commerce has certified that this action is not expected to have a significant economic impact on a substantial number of small entities. Therefore, NMFS did not prepare an Initial Regulatory Flexibility Analysis. The determination that this action will not have significant economic impacts was completed without a

quantitative assessment because any attempts to estimate costs would be speculative. Furthermore, this rule does not establish regulatory requirements for industry. Should NMFS or the Councils establish fishing regulations as a result of the EFH guidelines, those actions may affect small entities and will be subject to the requirement to prepare regulatory flexibility analyses at the time NMFS or the Councils propose them.

APPENDIX A - COMPLIANCE WITH APPLICABLE ENVIRONMENTAL LAWS AND EXECUTIVE ORDERS

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

NMFS determined that this rule is necessary for conservation and management and is consistent with the Magnuson-Stevens Act. The guidelines and procedures contained in this rule are required by the Magnuson-Stevens Act to conserve essential fish habitat.

COASTAL ZONE MANAGEMENT ACT

NMFS determined that this rule does not have reasonably foreseeable coastal effects. The regulations contain guidelines to the Councils for incorporating EFH information into FMPs in accordance with the Magnuson-Stevens Act, and procedures to be used by NMFS, the Councils, and Federal agencies to satisfy the coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. Therefore, a coastal zone consistency determination is not appropriate because any potential effects on state coastal uses or resources arise not from this rule, but from the FMPs. EFH provisions of FMPs should be provided to state coastal zone consistency coordinators for review prior to approval by the Secretary.

REGULATORY FLEXIBILITY ACT

NMFS determined that this rule will not have a significant economic impact on a substantial number of small entities. NMFS was not required to prepare a regulatory flexibility analysis under the Regulatory Flexibility Act / Small Business Regulatory Enforcement Fairness Act. The rule provides guidelines to the Councils for developing the EFH components of FMPs in compliance with the Magnuson-Stevens Act, and the guidelines do not have the force of law. Should Councils establish fishing regulations as a result of the guidelines, those actions may affect small entities and could be subject to the requirement to prepare regulatory flexibility analyses at the time the Councils propose them. The rule also establishes consultation procedures and a process for NMFS to provide EFH Conservation Recommendations to Federal and state action agencies. However, because compliance with NMFS recommendations is not mandatory, any effects on small businesses would be speculative.

PAPERWORK REDUCTION ACT

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act (PRA). The PRA requires Office of Management and Budget (OMB) clearance for most planned information collections. The only information collection that derives from the rule is the requirement for Federal agencies to prepare EFH Assessment for actions that may adversely affect EFH. OMB clearance is not required for a collection of information from Federal agencies.

ENDANGERED SPECIES ACT

An informal Endangered Species Act section 7 consultation concluded that the rule is not likely to adversely affect endangered or threatened species or critical habitat.

MARINE MAMMAL PROTECTION ACT

Activities conducted under the rule will have no adverse impacts on marine mammals.

ESSENTIAL FISH HABITAT

This action will not adversely affect designated EFH, so consultation under section 305(b)(2) of the Magnuson-Stevens Act is not necessary.

UNFUNDED MANDATES REFORM ACT (TITLE II)

This action will not require any expenditures by, nor place any responsibilities or duties on, state, local, or tribal governments. Therefore, NMFS was not required to develop an assessment of the effects of this rule on other levels of government or the private sector. EFH consultations regarding Federal permits, licenses, or funding could lead the responsible Federal agency to restrict or limit the proposed action, which may result in indirect costs on the entity seeking the authorization or funding. However, any such requirements would be imposed at the discretion of the responsible Federal agency, and it would be speculative to evaluate such costs in conjunction with this rulemaking.

EXECUTIVE ORDER 12866

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget has determined that this rule is significant based on the legal and policy issues raised, rather than out of concern for economic or budgetary implications or interference with another agency's actions.

EXECUTIVE ORDER 13132

This rule does not contain policies with federalism implications sufficient to warrant a federalism assessment under Executive Order 13132.

EXECUTIVE ORDER 12630

The rule provides guidance to Councils on how to designate EFH and establishes consultation procedures for Federal actions that may adversely affect EFH. This action will not result in a taking of private property and does not have takings implications. Accordingly, NMFS was not required to complete a federal takings assessment.

EXECUTIVE ORDER 13175

This rule does not contain policies that have tribal implications as that term is defined in Executive Order 13175.

EXECUTIVE ORDER 13211

This rule will not have a significant adverse effect on the supply, distribution, or use of energy, and preparation of a Statement of Energy Effects is not required. EFH consultations result in non-binding conservation recommendations. EFH consultations regarding Federal permits, licenses, or funding could lead the responsible Federal agency to restrict or limit proposed actions, which potentially may affect entities seeking authorization or funding for projects involving energy supply, distribution, or use. However, any such requirements would be imposed at the discretion of the responsible Federal agency, and it would be speculative to evaluate the effects of such requirements in conjunction with this rulemaking.

APPENDIX B - FISHERY MANAGEMENT PLANS, PRELIMINARY FISHERY MANAGEMENT PLANS, AND FISHERY MANAGEMENT PLANS UNDER DEVELOPMENT

Fishery Management Plans

1. Fishery Management Plan for Atlantic Sea Scallops (New England Fishery Management Council)
2. Fishery Management Plan for the Northeast Multispecies Fishery (New England Fishery Management Council)
3. Atlantic Salmon Fishery Management Plan (New England Fishery Management Council)
4. Monkfish Fishery Management Plan (New England Fishery Management Council)
5. Atlantic Herring Fishery Management Plan (New England Fishery Management Council)
6. Fishery Management Plan for Atlantic Surf Clam and Ocean Quahog Fisheries (Mid-Atlantic Fishery Management Council)
7. Fishery Management Plan for Atlantic Mackerel, Squid, and Butterfish Fisheries (Mid-Atlantic Fishery Management Council)
8. Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries (Mid-Atlantic Fishery Management Council)
9. Fishery Management Plan for Atlantic Bluefish (Mid-Atlantic Fishery Management Council)
10. Spiny Dogfish Fishery Management Plan (Mid-Atlantic Fishery Management Council)
11. Fishery Management Plan for Tilefish (Mid-Atlantic Fishery Management Council)
12. Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (South Atlantic Fishery Management Council)
13. Atlantic Coast Red Drum Fishery Management Plan (South Atlantic Fishery Management Council)
14. Fishery Management Plan for the Shrimp Fishery of the South Atlantic Region (South Atlantic Fishery Management Council)
15. Fishery Management Plan for Coral, Coral Reefs, and Live/Hard Bottom Habitats of the South Atlantic Region (South Atlantic Fishery Management Council)

16. Fishery Management Plan for the Golden Crab Fishery of the South Atlantic Region (South Atlantic Fishery Management Council).
17. Fishery Management Plan for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic (Gulf of Mexico Fishery Management Council; joint with South Atlantic Council)
18. Fishery Management Plan for Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (Gulf of Mexico Fishery Management Council; joint with South Atlantic Council)
19. Fishery Management Plan for Coral and Coral Reefs of the Gulf of Mexico (Gulf of Mexico Fishery Management Council)
20. Fishery Management Plan for the Red Drum Fishery of the Gulf of Mexico (Gulf of Mexico Fishery Management Council)
21. Fishery Management Plan for the Stone Crab Fishery of the Gulf of Mexico (Gulf of Mexico Fishery Management Council)
22. Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (Gulf of Mexico Fishery Management Council)
23. Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Gulf of Mexico Fishery Management Council)
24. Fishery Management Plan for the Spiny Lobster Fishery of Puerto Rico and the U.S. Virgin Islands (Caribbean Fishery Management Council)
25. Fishery Management Plan for the Shallow Water Reeffish Fishery of Puerto Rico and the U.S. Virgin Islands (Caribbean Fishery Management Council)
26. Fishery Management Plan for Corals and Reef Associated Invertebrates of Puerto Rico and the U.S. Virgin Islands (Caribbean Fishery Management Council)
27. Fishery Management Plan for the Queen Conch Resources of Puerto Rico and the United States Virgin Islands (Caribbean Fishery Management Council)
28. Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California (Pacific Fishery Management Council)
29. Northern Anchovy Fishery Management Plan (Pacific Fishery Management Council)
30. Fishery Management Plan for the Groundfish Fishery off Washington, Oregon, and California (Pacific Fishery Management Council)

31. Fishery Management Plan for Crustaceans Fisheries of the Western Pacific Region (Western Pacific Fishery Management Council)
32. Fishery Management Plan for the Precious Corals Fishery of the Western Pacific Region (Western Pacific Fishery Management Council)
33. Fishery Management Plan for the Bottomfish and Seamount Groundfish Fisheries of the Western Pacific Region (Western Pacific Fishery Management Council)
34. Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (Western Pacific Fishery Management Council)
35. Fishery Management Plan for the Groundfish Fishery of the Gulf of Alaska (North Pacific Fishery Management Council)
36. Fishery Management Plan for the High Seas Salmon Fishery off the Coast of Alaska East of 175 Degrees East Longitude (North Pacific Fishery Management Council)
37. Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (North Pacific Fishery Management Council)
38. Bering Sea/Aleutian Islands King and Tanner Crab Fishery Management Plan (North Pacific Fishery Management Council)
39. Fishery Management Plan for the Scallop Fishery off Alaska (North Pacific Fishery Management Council)
40. Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks (Secretarial Fishery Management Plan)
41. Fishery Management Plan for Atlantic Billfishes (Secretarial Fishery Management Plan)

Preliminary Fishery Management Plans

1. Preliminary Fishery Management Plan for the Foreign Trawl Fisheries of the Northwestern Atlantic
2. Preliminary Fishery Management Plan for Pacific Billfish, Oceanic Sharks, Wahoo and Mahimahi
3. Preliminary Fishery Management Plan for Bering Sea Snails
4. Preliminary Fishery Management Plan for Bering Sea/Northeast Pacific Herring

Fishery Management Plans Under Development

1. Fishery Management Plan for Dolphin and Wahoo (South Atlantic, Gulf of Mexico, and Caribbean Fishery Management Councils)
2. Fishery Management Plan for Calico Scallops (South Atlantic Fishery Management Council)
3. Fishery Management Plan for Sargassum (South Atlantic Fishery Management Council)
4. Fishery Management Plan for Coral Reef Ecosystem of the Western Pacific (Western Pacific Fishery Management Council)
5. Fishery Management Plan for Gulf of Mexico Butterfish (Gulf of Mexico Fishery Management Council)
6. Fishery Management Plan for Skates (New England Fishery Management Council)
7. Fishery Management Plan for Red Crab (New England Fishery Management Council)
8. Fishery Management Plan for Pacific Highly Migratory Species (Pacific Fishery Management Council)