



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service*

*P.O. Box 21668*

*Juneau, Alaska 99802-1668*

December 1, 2004

Stephanie Madsen, Chair  
North Pacific Fishery Management Council  
605 W 4<sup>th</sup> Avenue, Suite 306  
Anchorage, Alaska 99501-2252

Dear Ms. Madsen:

Per the Council's request, enclosed please find a brief issue paper regarding the discussion in the Essential Fish Habitat Environmental Impact Statement (EFH EIS) of activities other than fishing that may adversely affect EFH. The National Marine Fisheries Service is continuing to revise the EIS in response to public comments in anticipation of final Council action at the February 2005 meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Balsiger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James W. Balsiger  
Administrator, Alaska Region

Enclosure



## **Background Information on the Discussion of Non-Fishing Threats to EFH in the Environmental Impact Statement for EFH Identification and Conservation in Alaska**

Prepared for the North Pacific Fishery Management Council  
by the National Marine Fisheries Service, Alaska Region  
November 30, 2004

### **Legislative and Regulatory Background**

In 1996 Congress added new habitat conservation provisions to the Magnuson-Stevens Fishery Conservation and Management Act. Section 303(a)(7) of the amended Magnuson-Stevens Act required that every fishery management plan (FMP) describe and identify Essential Fish Habitat<sup>1</sup> (EFH) for federally managed species, minimize to the extent practicable the adverse effects of fishing on EFH, and identify other actions to encourage the conservation and enhancement of EFH. The 1996 amendments to the Magnuson-Stevens Act also directed the Secretary to develop by regulation guidelines to assist the Fishery Management Councils in developing the EFH components of FMPs. The National Marine Fisheries Service (NMFS) issued an interim final rule with such guidelines in 1997 and a final rule in 2002.

The EFH regulations at 50 CFR 600.815(a)(4) specify that “FMPs must identify activities other than fishing that may adversely affect EFH” and “For each activity, the FMP should describe known and potential adverse effects to EFH.” The regulations also specify that “FMPs must identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate for the adverse effects identified... especially in habitat areas of particular concern” (50 CFR 600.815(a)(6)).

In addition, Section 305(b) of the Magnuson-Stevens Act requires federal agencies to consult with the Secretary regarding all actions or proposed actions permitted, funded, or undertaken by the agency that may adversely affect<sup>2</sup> EFH. The EFH regulations establish procedures for EFH coordination, consultations, and recommendations regarding such actions, including non-fishing activities (50 CFR Part 600, Subpart K).

When it added the EFH provisions to the Magnuson-Stevens Act, Congress found that “One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations

---

1 EFH means “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” “Waters” include aquatic areas and their associated physical, chemical, and biological properties. “Substrate” includes sediment underlying the waters. “Necessary” means the habitat required to support a sustainable fishery and the managed species’ contribution to a healthy ecosystem. “Spawning, breeding, feeding, or growth to maturity” covers all habitat types utilized by a species throughout its life cycle. (50 CFR 600.10)

2 Adverse effect means any impact that reduces the quality and/or quantity of EFH. Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species, and their habitat, as well as and other ecosystem components. Adverse effects may be site- specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions. (50 CFR 600.910(a))

should receive increased attention for the conservation and management of fishery resources of the United States” (16 U.S.C. 1801(a)(9)). Congress also stated that a purpose of the amended Magnuson-Stevens Act is “to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat” (16 U.S.C 1801(b)(7)).

## **Implementation Background**

To address the new EFH requirements, the Council amended its five FMPs in 1998. The Secretary, acting through NMFS, approved the Council’s EFH FMP amendments in January 1999. In the spring of 1999, a coalition of seven environmental groups and two fishermen’s associations filed suit in the United States District Court for the District of Columbia to challenge NMFS’ approval of EFH FMP amendments prepared by the Gulf of Mexico, Caribbean, New England, North Pacific, and Pacific Fishery Management Councils (*American Oceans Campaign [AOC] et al. v. Daley et al.*, Civil Action No. 99-982-GK). The focus of the *AOC v. Daley* litigation was whether NMFS and the Council had adequately evaluated the effects of fishing on EFH and taken appropriate measures to mitigate adverse effects. In September 2000, the court upheld NMFS’ approval of the EFH amendments under the Magnuson-Stevens Act, but ruled that the environmental assessments (EAs) prepared for the amendments violated the National Environmental Policy Act (NEPA). The court ordered NMFS to complete new and thorough NEPA analyses for each EFH amendment in question.

NMFS issued a draft Environmental Impact Statement (EIS) in January 2004 as required by the court order. The EIS reexamines the effects of fishing on EFH, presents a wider range of alternatives, and provides a more thorough analysis of potential impacts than the EA approved in 1999. The court did not limit its criticism of the 1999 EA solely to the section that considered the effects of fishing on EFH, so the EIS also reexamines options for identifying EFH and identifying activities other than fishing that may adversely affect EFH.

## **Purpose of Appendix G to the EFH EIS**

Appendix G to the EFH EIS fulfills the requirement to describe non-fishing activities that may have adverse effects on EFH and identify actions to encourage the conservation and enhancement of EFH. Non-fishing activities can adversely affect the quantity or quality of EFH for species managed by the Council. Such activities may include dredging, filling, discharges, and actions that contribute to nonpoint source pollution. Appendix G provides an introductory description of each activity, identifies potential adverse impacts, and suggests general conservation measures that would help minimize and avoid adverse effects of non-fishing activities on EFH.

Non-fishing activities are subject to a variety of regulations and restrictions under federal, state, and local laws designed to limit environmental impacts. Many of these existing requirements help to avoid or minimize adverse effects to aquatic habitats, including EFH. The conservation recommendations contained in Appendix G are rather general and may overlap with certain existing standards for specific development activities. Nevertheless, the

recommendations highlight practices that can help to avoid and minimize adverse effects to EFH. During EFH consultations between NMFS and other agencies, NMFS strives to provide reasonable and scientifically based recommendations that account for restrictions imposed under various state and federal laws by agencies with appropriate regulatory jurisdiction. NMFS will not recommend that state or federal agencies take actions beyond their statutory authority, and NMFS' EFH conservation recommendations are not binding.

The conservation measures discussed in Appendix G should be viewed as options to avoid, minimize, or compensate for adverse impacts and promote the conservation and enhancement of EFH. Ideally, non-water-dependent actions should not be located in EFH if such actions may have adverse impacts on EFH. Activities that may result in significant adverse effects on EFH should be avoided where less environmentally harmful alternatives are available. If there are no alternatives, the impacts of these actions should be minimized. Environmentally sound engineering and management practices should be employed for all actions that may adversely affect EFH. If avoidance or minimization is not practicable, or will not adequately protect EFH, compensatory mitigation should be considered to conserve and enhance EFH.

During interagency consultations, NMFS evaluates potential impacts of non-fishing activities and develops appropriate conservation recommendations. Because adverse effects to EFH can be direct, indirect, and cumulative, NMFS biologists must consider and analyze these interrelated impacts. Consequently, it is not unusual for particular impacts to be overlooked or discounted during a consultation. In addition to fulfilling the requirements for revising the FMPs, Appendix G will be useful to NMFS biologists reviewing proposed projects as they consider potential impacts to EFH. The document should also be useful for federal action agencies undertaking EFH consultations, especially in preparing the EFH assessments that are a required part of interagency consultation.

The conservation recommendations included in Appendix G are a series of site-specific measures that can be undertaken by the action agency to avoid, offset, or mitigate impacts to EFH. All of the suggested measures are not necessarily applicable to any one project or activity. NMFS may develop more detailed or different recommendations based on project specific considerations before or during EFH consultations, and would communicate those to the appropriate agency. The recommendations provided in Appendix G represent a short menu of the types of measures that can contribute to the conservation of EFH. These recommendations are not binding on any action agency or permit applicant.

In response to public comments on the draft EFH EIS, NMFS is revising Appendix G to ensure that it reflects the best available information specific to Alaska. The revisions will clarify that non-fishing activities are subject to a variety of regulatory requirements that help to reduce threats to EFH. The revisions will also clarify that the conservation recommendations are advisory and should be followed to the extent practicable, recognizing that many non-fishing activities have unavoidable consequences for EFH.