Mr. Charles M. Hess

Chief, Operations Division

U.S. Army Corps of Engineers

20 Massachusetts Avenue, N.W.

Washington D.C. 20314-1000

Dear Mr. Hess:

The purpose of this letter is to document discussions between staff in the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (ACOE) headquarters offices regarding NMFS making an official finding that the individual permit public notice (IP) process used by the ACOE to authorize projects under section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection Research and Sanctuaries Act can be used to meet the consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). The provisions for such a finding are found in the essential fish habitat (EFH) regulations (50 CFR 600.920).

Section 600.920(e)(3) enables NMFS to find that existing consultation/environmental review procedures can be used to satisfy the MSFCMA consultation requirement if the existing 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 impacts of the proposed action as 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 MSFCMA.

With respect to the first criterion above, ACOE's IP process for authorizing projects in jurisdictional waters provides the NMFS with timely notification in that a public notice is generally provided at least 60 days before the ACOE's final decision on the project. With respect to the second criterion, the ACOE public notices generally do not include an assessment of the effects of the proposed action on fish habitat. However,

in discussions with NMFS staff, the ACOE has agreed to implement at the District level the process described below. This process will allow EFH Assessments to be incorporated into ACOE public notices, or into other draft decision documents, as appropriate. Based on the implementation of this process, NMFS finds that the IP process can be used to satisfy the requirements of section 305(b)(2) of the MSFCMA.

Incorporation of EFH Consultation into Corps Individual Permit Process

At the District and Regional level, NMFS and ACOE staff meet to develop a regional finding tailored to regional local procedures. As part of developing that finding, NMFS and ACOE discuss the information needs for EFH consultation and the types of projects that might require expanded consultation. The EFH regulations state that expanded consultation must be used for projects that would result in substantial adverse effects to EFH (50 CFR 600.920(i)). For any particular project, the ACOE should make a determination of whether abbreviated or expanded consultation is appropriate. Additionally, if NMFS believes that expanded consultation is required for a particular project, NMFS should inform the Corps of this conclusion at the earliest opportunity, such as in pre-application meetings and no later than the close of the public notice comment period.

For those projects requiring only abbreviated consultation, the ACOE public notice will include an EFH Assessment containing brief information on EFH and impacts (e.g., "This project will fill ## acres of EFH for juvenile summer flounder. Loss of this nursery habitat may adversely affect summer flounder, but the District Engineer has made a preliminary determination that this site-specific adverse effect will not be substantial"). The EFH Assessment will also address cumulative effects if such information is available.

For those projects requiring expanded consultation, the ACOE will provide NMFS with information on impacts to EFH in a more detailed EFH Assessment. The EFH Assessment will be provided to NMFS in a time frame sufficient to allow NMFS to develop EFH conservation recommendations (generally 30 days, but no greater than 60 days.)

If appropriate, the ACOE may incorporate the EFH Assessment into a draft Environmental Assessment (EA) or draft Statement of Findings (SOF). If the EFH Assessment is not part of the SOF or EA, EFH should still be addressed in the final EA or SOF by summarizing the EFH Assessment, NMFS' EFH conservation recommendations, and the ACOE's response.

Within the public notice comment period, or within 30 days of receiving an EFH Assessment, NMFS will

provide EFH conservation recommendations as comments on the public notice or other document containing the EFH Assessment. Under section 305(b)(4)(B) of the MSFCMA, the ACOE has a statutory requirement to respond in writing within 30 days to the NMFS recommendations. If the ACOE will not make a decision within 30 days of receiving NMFS EFH Conservation Recommendations, the ACOE should provide NMFS with a letter within 30 days to that effect, and indicate when a response will be provided (e.g., we have received your recommendations, we will consider them fully, we have not yet made a decision on the project, but will respond to your recommendations fully when we have made a decision in ## days.) The ACOE will then respond in detail in the final EA, SOF, or letter to NMFS, at least 10 days before the permit decision.

Summary of EFH Consultation Process for ACOE Individual Permits

1) **Notification** -Notification will occur when NMFS receives a public notice from the ACOE on the project.

2 **EFH Assessment** -

a) For those projects that require abbreviated consultation, the ACOE will put a brief EFH Assessment in the public notice (e.g, "This project will fill ## acres of EFH for juvenile summer flounder. Loss of this nursery habitat may adversely affect summer flounder, but the ACOE has made a preliminary determination that this adverse effect will not be substantial.") The EFH Assessment will also address cumulative effects if such information is available.

b) For those projects that require expanded consultation, the ACOE will provide NMFS with a detailed EFH Assessment. This Assessment may be a separate document or it may be a component of another document, as long as the EFH Assessment is clearly identified. The EFH Assessment will be provided to NMFS in a time frame sufficient to allow NMFS to develop EFH conservation recommendations.

c) If, upon receiving a public notice (or in pre-application consultation), NMFS concludes that a project has the potential for substantial adverse impacts on EFH, NMFS will so inform the ACOE and request that the ACOE conduct expanded EFH consultation and provide a detailed EFH Assessment. If a public comment period for the project has already begun, NMFS may request an extension of the comment period (under Part II. 4 of the 404(q) MOA with Army) to allow time for the ACOE to provide the EFH Assessment, and for NMFS to develop EFH conservation recommendations. If the ACOE does not agree to provide a more detailed EFH Assessment, NMFS will provide EFH conservation recommendations based on whatever information has been provided.

3) **EFH Conservation Recommendations** -NMFS will provide EFH conservation recommendations as NMFS comments on the public notice, clearly labeled as such.

4) **Response** -The ACOE will respond to NMFS EFH conservation recommendations in either a letter, the statement of findings, or the final EA, at least 10 days before a permit will be issued. If the ACOE will not be making a decision within 30 days of receiving NMFS recommendations, the ACOE will send a preliminary response within 30 days stating that the ACOE has received NMFS EFH recommendations, will consider them fully, that the ACOE has not yet made a decision on the project, but will respond to NMFS EFH recommendations fully when a decision is made in ## days.

Finding

With the implementation of the process described above, NMFS finds that the ACOE IP process can be used to satisfy the requirements of section 305(b)(2) of the MSFCMA. NMFS regional offices and ACOE Districts should develop additional findings to tailor this process to local procedures.

Sincerely,

Andrew Kemmerer

Director

Office of Habitat Conservation