Brigadier General M. Stephen Rhoads

U.S. Army Corps of Engineers

North Atlantic Division

New York, NY

Dear Brigadier General Rhoads:

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) requires federal agencies such as the Army Corps of Engineers (ACOE) to consult with the Secretary of Commerce regarding any action or proposed action authorized, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH) identified under the MSFCMA. The first designations of EFH became effective in March 1999 after approval by the Secretary. National Marine Fisheries Service (NMFS) personnel have discussed the new EFH requirements with your staff and we have agreed to use the National Environmental Policy Act (NEPA) process to carry out EFH consultations for ACOE civil works projects throughout the North Atlantic Division as described below.

The EFH regulations, 50 CFR Section 600.920(e)(3), enable federal agencies to use existing consultation/environmental review procedures to satisfy the MSFCMA consultation requirements 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.

NMFS finds that the NEPA process used by the ACOE North Atlantic Division for civil works projects (navigation, shoreline stabilization, environmental remediation, flood control, etc.) may be used to satisfy the consultation requirements of the MSFCMA provided the ACOE adheres to the following steps:

1. Notification

The ACOE must provide NMFS with timely notification of actions that may adversely affect EFH. Wherever possible, NMFS should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in a substantial adverse impact to EFH. These time frames will allow NMFS to develop EFH Conservation Recommendations.

Although NMFS and the ACOE typically coordinate early in project planning, notification for the purposes of the EFH consultation will usually occur when NMFS receives a draft Environmental Impact Statement (EIS), draft Environmental Assessment (EA) or other EFH assessment document. In order for the EA process to serve as the EFH consultation, ACOE must provide NMFS a draft EA and delay signing a Finding of No Significant Impact (FONSI) until after the agency responds to NMFS' EFH recommendations.

2. EFH Assessment

The the draft NEPA document must include an assessment of the impacts of the proposed action on EFH in a chapter or section titled "EFH" or something similar enough to be easily identified within the document.

The EFH assessment must include 1) a description of the proposed action; 2) an analysis of individual and cumulative effects of the action on EFH, the managed species, and associated species such as major prey species, including affected life history stages; 3) the ACOE's views regarding effects on EFH; and, 4) a discussion of proposed mitigation, if applicable.

The draft NEPA document may incorporate such information by reference to another EFH Assessment prepared for a similar action, supplemented with any relevant new project specific information, provided that the proposed action involves similar impacts to EFH in the same geographic area or a similar ecological setting. It may also incorporate by reference other relevant assessment documents. These documents must be provided to NMFS with the draft EIS or EA.

In cases where there is an existing NEPA document for a civil works project, an EFH consultation should be completed prior to a new action such as maintenance dredging of a federal navigation project. At that time the EFH consultation can be accomplished through the development of a supplemental EIS or EA. However, an EFH assessment document submitted outside of the NEPA process would also be sufficient for purposes of the consultation.

3. NMFS EFH Recommendations

Upon review of the draft EIS, EA, or other EFH assessment document, NMFS will develop EFH Conservation Recommendations as part of its comments on the draft NEPA document, in a separate section of the NMFS comment letter titled "EFH Conservation Recommendations." NMFS will provide its recommendations during the established comment period under NEPA.

4. ACOE Response

Under section 305(b)(4)(B) of the MSFCMA, the ACOE has a statutory requirement to provide a written response to NMFS within 30 days after receiving the NMFS EFH Conservation Recommendations. If the ACOE is not able to respond fully within 30 days, the ACOE may send a preliminary response stating that they have received NMFS recommendations, will consider them fully, have not yet made a decision on the project, but will respond to NMFS recommendations in detail within the final EIS or EA. The ACOE then must respond to the recommendations by letter or within the final EIS or EA in a section or chapter clearly labeled as such. The ACOE response must be provided to NMFS at least 10 days before the ACOE signs a FONSI or a Record of Decision, to allow time for dispute resolution if necessary.

The ACOE response must include a description of measures proposed by the ACOE for avoiding, mitigating, or offsetting the impact of the activity on EFH, as required by section 305(b)(4)(B) of the MSFCMA and 50 CFR 600.920(j). In the case of a response that is inconsistent with NMFS Conservation Recommendations, the ACOE 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 or the measures needed to avoid, minimize, mitigate, or offset such effects.

5. Dispute Resolution

If an ACOE decision is inconsistent with NMFS EFH Conservation Recommendations, 50 CFR 600.920(j)(2) allows the NOAA Assistant Administrator for Fisheries to request a meeting with the head of the ACOE to discuss the proposed action and opportunities for resolving any disagreements. NMFS will endeavor to resolve any such issues at the field level wherever possible, typically in a meeting between the NMFS Regional Administrator and the ACOE District Engineer.

Conclusion

If you agree with the procedures described above, please respond by letter indicating your concurrence. Should you have any questions on this matter, please contact Peter Colosi at

978-281-9332 or Lou Chiarella at 978-281-9277.

Sincerely,

Patricia A. Kurkul

Regional Administrator

cc: Gloucester - Colosi, Chiarella

Sandy Hook - Gorski

Milford - Ludwig

Oxford - Goodger