

Colonel William Pearce, District Engineer

New York District

U.S. Army Corps of Engineers

26 Federal Plaza

New York, NY 10278-0900

Dear Colonel Pearce:

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 Act. The first designations of EFH became effective on March 3, 1999 upon their approval by the Secretary. National Marine Fisheries Service (NMFS) personnel have discussed the new EFH requirements with your Regulatory Branch staff to determine the most efficient means to address EFH consultations for permits issued by the ACOE. Our staffs have agreed to conduct the required consultations using the ACOE's existing regulatory process under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act, as described below. (Please note that we are also discussing with the ACOE North Atlantic Division the options for using the National Environmental Policy Act process to carry out EFH consultations for ACOE civil works projects such as navigation, flood control and shoreline stabilization.)

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 existing process used by the ACOE New York District for projects authorized under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act may be used to satisfy the consultation requirements of the

MSFCMA provided that NMFS and the ACOE adhere to the following steps:

1. Notification

The ACOE must provide NMFS with timely notification of actions that may adversely affect EFH. For actions authorized through the individual permit process, notification for the purposes of the EFH consultation can be accomplished in the ACOE Public Notice. For Nationwide Permits for which NMFS has not issued a General Concurrence, notification can be accomplished in the Pre-Construction Notification or Joint Permit Processing meeting.

2. EFH Assessment

For most projects the EFH Assessment can be included as a brief statement in the Public Notice or in the transmittal of the nationwide or general permit project notification. In such cases, the ACOE should indicate in the document that it has preliminarily determined that the project will not have a substantial adverse effect on EFH, and therefore expanded EFH consultation is not required. However, if the ACOE preliminarily determines that the project will have a substantial adverse effect on EFH, an expanded consultation will be required. Based on comments from NMFS in response to this notification, further EFH consultation may be necessary.

The level of detail in the EFH Assessment should be commensurate with the level of threat to EFH. For routine projects which would require an abbreviated consultation, the EFH Assessment will be addressed during normal coordination as described above. However, actions that may cause substantial adverse effects to EFH will require an expanded EFH consultation and a separate detailed EFH Assessment, which could be prepared by the permit applicant if appropriate. NMFS will notify the ACOE as early as possible (e.g., during pre-application coordination) in cases where a detailed EFH Assessment and an expanded EFH consultation is necessary. Upon completion of a detailed EFH Assessment, the ACOE will submit the document to NMFS for review and preparation of EFH Conservation Recommendations.

In all cases, 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. Additional information which may be appropriate to include in an EFH Assessment is listed in 50 CFR 600.920(g)(3).

An EFH Assessment may incorporate 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 or append other relevant assessment documents.

3. NMFS EFH Recommendations

Upon review of the EFH Assessment, NMFS will develop EFH Conservation Recommendations as part of its comments on the project. For projects authorized through the individual permit process, NMFS will provide the EFH Conservation Recommendations in a separate section of the NMFS comment letter titled "EFH Conservation Recommendations." For projects discussed at Joint Permit Processing Meetings, NMFS may note the EFH Conservation Recommendations on the Agency Comment Form at the meeting. In all cases, NMFS will provide its recommendations during the regular (or extended) comment period.

4. ACOE Response

Under section 305(b)(4)(B) of the MSFCMA, the ACOE must 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 it has received NMFS recommendations, will consider them fully, has not yet made a decision on the project, but will respond to NMFS recommendations in detail as soon as possible. The ACOE response should be provided to NMFS at least 10 days before the ACOE makes a final permit 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.

If the ACOE accepts all of the NMFS' EFH Conservation Recommendations in their entirety, the ACOE's

authorization letter to the applicant or individual permit transmittal letter will explain how these recommendations were incorporated into the authorization (e.g. as special conditions). The ACOE will provide copies of these letters to NMFS and this information will constitute ACOE's written response.

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 for assistance.

Sincerely,

Patricia A. Kurkul

Regional Administrator

cc: Sandy Hook - Gorski, Greene

Milford - Ludwig, Rusanowski

Gloucester - Colosi, Chiarella