

***NATIONAL MARINE FISHERIES SERVICE PROCEDURE 03-201-05***

Effective on: January 2001

To be reviewed on: MAY 1, 2026

## Habitat Conservation and Restoration

## Essential Fish Habitat Policy

## Guidance for Combining Magnuson-Stevens Fishery Conservation and Management Act EFH Consultations with Endangered Species Act Section 7 Consultations

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**Type of Issuance: Revision**

***SUMMARY OF REVISIONS:***

Significant revisions made in Winter/Spring 2021 to update content and to consolidate this directive with 03-201-07 *Further Guidance on Combined EFH and ESA Consultations* (issued 6/29/2001) and 03-201-10 *National Finding for Use of Endangered Species Act Section 7 Consultation Process to Complete Essential Fish Habitat Consultation* (issued 2/28/2001). This initial directive was put into effect in January 2001.

Signed

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Date \_\_\_\_\_

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## I. Introduction

The 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA)(16 U.S.C. 1801 et seq.) require the identification of essential fish habitat (EFH) for federally managed fish species and the implementation of measures to conserve and enhance such habitat. In addition, the MSA requires federal agencies that are undertaking activities (hereafter, “action agencies”) to consult with the National Marine Fisheries Service (NMFS) if those activities may adversely affect EFH (MSA section 305).<sup>1</sup> The EFH regulations at 50 C.F.R. 600.920(f) encourage EFH consultations under the MSA to be consolidated or combined with existing

<sup>1</sup> EFH designations and associated requirements for federal agencies to consult with NMFS on actions which may adversely affect EFH are in effect once the Secretary of Commerce approves the associated Fishery Management Plan or FMP amendment describing and identifying EFH.

environmental review procedures to satisfy the EFH consultation requirements, provided that NOAA has made a finding that such review procedures can be used for EFH compliance. There are many situations in which designated EFH overlaps with habitat, including critical habitat, of species listed as threatened or endangered under the Endangered Species Act (ESA)(16 U.S.C. 1531 *et seq*).<sup>2</sup> Thus, a proposed federal action could both adversely affect EFH and affect a listed species or its designated critical habitat, necessitating consultation with NMFS under both section 305(b)(2) of the MSA and section 7(a)(2) of the ESA.

## **II. Objective**

The objective is to describe a suitable procedure for combining EFH and ESA consultations in accordance with 50 C.F.R. 600.920(f). However, an action agency that wants to combine an EFH consultation with an ESA section 7 consultation must obtain an EFH finding from NMFS. An EFH finding identifies the acceptable procedure that the action agency will use to ensure that all of the regulatory requirements of both statutes are met when consulting with NMFS. NMFS is encouraged to make EFH findings with action agencies using this guidance, where doing so would improve efficiency.

## **III. Guidance**

The ESA section 7 consultation procedure may be used by NMFS and an action agency to satisfy the MSA EFH consultation requirements, provided consultations are implemented consistent with this procedure and meet the following criteria:

1. The ESA consultation procedure provides NMFS with timely notification of actions that may adversely affect EFH, as described at 50 C.F.R. 600.920(f)(1)(i)
2. The ESA consultation procedure includes an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH assessments described at 50 C.F.R. 600.920(e)

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<sup>2</sup> Comparison between critical habitat and EFH: Critical habitat is designated for species that are listed as endangered or threatened under the ESA, whereas EFH is designated for federally managed fish species under the MSA. Critical habitat is defined as “the specific areas within the geographical area occupied by the species...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and...specific areas outside the geographical area occupied by the species at the time it is listed...upon a determination...that such areas are essential for the conservation of the species.” EFH is defined as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” 50 C.F.R. 600.10.

3. The action agency contacts NMFS at the appropriate level (regional or headquarters) and obtains a finding to use the ESA section 7 consultation procedure as described at 50 C.F.R. 600.920(f)(3)

### **Authority and EFH Findings**

In order to use this procedure to consult on EFH, action agencies must first obtain an EFH finding from NMFS at the appropriate level (regional or national) through an EFH Coordinator.<sup>3</sup> NMFS' authority under the MSA for EFH has been delegated from the Secretary of Commerce to NMFS Regional Administrators and the Director of the Office of Habitat Conservation (i.e., NMFS Headquarters), and Regional Administrators have re-delegated that authority to the Assistant Regional Administrators for Habitat Conservation in Transmittal Number 61.<sup>4</sup>

Many EFH findings include the procedure for a specific action agency to combine the EFH consultation procedure with another environmental review procedure. In this case, EFH findings that NMFS makes to combine EFH and ESA section 7 consultations should refer to this national policy directive, and use the EFH finding template provided as Attachment 1 to this procedure.

Action agencies are encouraged to contact NMFS to determine if EFH findings exist for their agency, or to request that NMFS make a new EFH finding. The EFH finding template can be used or adapted to document the one-time coordination necessary between NMFS and individual action agencies and to describe any modifications to the EFH consultation procedure needed to ensure the MSA requirements are met through the action agency's other environmental review procedure. In addition, EFH findings do not expire, but they can be modified, and apply to subsequent EFH consultations that are combined with the action agency's other environmental review procedure. However, a finding made with one NMFS region is not necessarily applicable to another NMFS region; therefore, EFH findings should be made with all of the appropriate NMFS offices: regional offices for consultations whose scope is limited to a single region and NMFS headquarters for actions that include two or more NMFS regions.

### **EFH Consultation Requirements**

Action agencies must consult with NMFS under section 305(b)(2) of the MSA regarding any action they authorize, fund, or undertake that may adversely affect EFH. For purposes of EFH consultation, "adverse effect" is defined at 50 C.F.R. 600.910 to include any impact that reduces the quality and/or quantity of EFH, and should be interpreted to include both temporary and permanent impacts. Action agencies must notify NMFS and provide an EFH assessment when they determine that their action may adversely affect EFH. If the action will have no adverse effect, then no EFH consultation is necessary. The level of detail of the EFH assessment can vary depending on

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<sup>3</sup> <https://www.fisheries.noaa.gov/contact-directory/regional-essential-fish-habitat-coordinators>

<sup>4</sup> <https://www.noaa.gov/sites/default/files/legacy/document/2020/Mar/transmittal-61.pdf>

the complexity and magnitude of the potential adverse effects on EFH, but all EFH assessments have mandatory components as described in 50 C.F.R. 600.920(e)(3):

- 1) A description of the proposed action
- 2) An analysis of the potential adverse effects of the proposed action on EFH
- 3) The action agency's conclusions regarding the effects of the action on EFH
- 4) Proposed mitigation, if applicable

The EFH assessment may also include additional information, per 50 C.F.R. 600.920(e)(4), as appropriate.

Once NMFS has reviewed the EFH assessment, including the action agency's analysis of possible adverse effects on EFH resulting from the proposed action, NMFS will respond to the action agency. Often, this response will include EFH conservation recommendations as described in MSA section 305(b)(4)(A). These recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. EFH conservation recommendations will not include actions beyond the statutory authority of the action agency. EFH conservation recommendations may be provided with input from fishery management councils per MSA section 305(b)(3).

The action agency must provide a detailed response in writing to NMFS regarding the EFH conservation recommendations within 30 days of their receipt (MSA section 305(b)(4)(B)). The response must include a description of any measures proposed by the action agency for avoiding, minimizing, mitigating, or offsetting the adverse effects of the activity on EFH. If the response is inconsistent with NMFS' EFH conservation recommendations, the action agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the recommendations provided according to 50 C.F.R. 600.920(k).

The action agency is required to reinitiate consultation if the plans for the action are substantially revised in a manner that may adversely affect EFH, that agency must reinitiate consultation with NMFS according to 50 C.F.R. 600.920(l)).

### **ESA Consultation Requirements**

Section 7(a)(2) of the ESA states that each action agency shall, in consultation with the Secretary, ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. If the action agency determines its action will have "no effect" on listed species or critical habitat, then no ESA section 7(a)(2) consultation is necessary. If the action agency determines that the proposed action "may affect" a listed species or critical habitat, then the action agency must request section 7 consultation with NMFS.

If the action agency determines that the proposed action "may affect" but is "not likely to adversely affect" listed species or critical habitat, the action agency may request concurrence with their

determination. If NMFS agrees with the action agency's determination, NMFS will issue a letter of concurrence and the consultation is complete (50 C.F.R. 402.13).

If the action agency or NMFS determines that the proposed action is "likely to adversely affect" listed species or critical habitat, the action agency must request initiation of formal consultation<sup>5</sup> and provide the information outlined in 50 C.F.R. 402.14(c), which includes:

- 1) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action
- 2) A map or description of all areas to be affected directly or indirectly by the federal action
- 3) Information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat
- 4) A description of the effects of the action and an analysis of any cumulative effects
- 5) A summary of any relevant information provided by the action agency (and in some cases their permit applicant), if available
- 6) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat

NMFS will issue a biological opinion for a formal consultation after reviewing the status of the species, the environmental baseline, the effects of the action, and cumulative effects per 50 C.F.R. 402.14(h). In most cases, the biological opinion includes an incidental take statement, and reasonable and prudent measures (RPMs) and terms and conditions that NMFS believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take. It may also include discretionary conservation recommendations which, if implemented, will assist the action agency in reducing or eliminating the impacts of its action.

If NMFS determines that the proposed action is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat, NMFS will provide one or more reasonable and prudent alternatives (RPAs), if any, that would allow the proposed action to be carried out in a manner that is not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. An RPA must be consistent with the purpose of the action and the scope of the action agency's authority and jurisdiction, and be economically and technologically feasible.

If there are future changes to the proposed action that may affect the species or critical habitat in a manner or extent not previously considered, if the anticipated amount or extent of incidental take is exceeded, if a new species or critical habitat is listed or designated that may be affected by the

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<sup>5</sup> In a formal consultation, NMFS provides its opinion on whether a proposed agency action(s) is likely to jeopardize the continued existence of a listed species (jeopardy) or destroy or adversely modify critical habitat (adverse modification). Formal consultation follows a structured process for meeting section 7 consultation requirements and culminates in the preparation of a biological opinion on the part of NMFS (50 C.F.R. 402.14).

proposed action, or if new information becomes available that may affect the basis for NMFS' ESA determination, the action agency must re-initiate ESA consultation with NMFS (50 C.F.R. 402.16).

### **Combining EFH Consultations with ESA Consultations**

The procedure for Combining EFH and ESA consultations typically depends upon the extent to which the effects of the action on EFH overlap with those on ESA-listed species or their critical habitat (i.e., the MSA-managed species and ESA-listed species are the same; some, but not all, are the same; or none are the same).

#### *Role of Early Coordination in the Determination of Effects*

EFH and ESA consultations often involve coordination with action agencies at early stages in the project planning process, prior to initiating a consultation. When an action agency requests information on the presence of ESA-listed species or critical habitat in a particular location, NMFS should also inform that agency of the presence of EFH and the associated MSA-managed species and life stages, if applicable. Likewise, if an action agency requests information on the presence of EFH in a particular location, NMFS should inform that agency of the presence of ESA-listed species and critical habitat, if applicable.

Coordinating early presents the best opportunity to accurately identify potential adverse effects on EFH and incorporate measures that avoid or minimize effects under both mandates. Incorporating such measures can potentially eliminate the need for EFH and ESA consultations, or result in either narrowing the scope of EFH conservation recommendations or a "may affect, not likely to adversely affect" determination for ESA-listed species or their critical habitat.

NMFS should inform the action agency of the possibility of combining EFH and ESA consultations when the action agency does not request a combined consultation. Some action agencies may be unaware of that option and may benefit from seeing this policy directive on the requirements and expectations of a combined consultation.

#### *Initiation of Consultation*

When an action agency requests both EFH and ESA consultation, the information prepared by the action agency for an informal or formal ESA consultation may also serve as an EFH assessment if it includes all the components required in an EFH assessment as outlined in 50 C.F.R. 600.920(e). If the document contains information that is specific to the EFH assessment, that information must be clearly identified under a separate heading.

#### *Notification and Timeline*

The ESA regulations prescribe specific time limits for completing section 7(a)(2) consultations. If the action agency clearly states that it is requesting EFH consultation at the same time that informal

or formal ESA consultation is requested, then adopting the ESA consultation procedure timeline would provide NMFS with sufficient notification to analyze the effects of the proposed action on EFH and provide EFH conservation recommendations. However, ESA consultations, particularly formal consultations, often take longer than EFH consultations, and the action agency should be made aware of this. When ESA and EFH consultations are combined, the ESA consultation timeline should apply to the EFH consultation, unless NMFS and the action agency have agreed to a different timeline to receive EFH conservation recommendations.

Furthermore, joint ESA and EFH programmatic consultations, which are used to streamline consultations on programs of activities that are reoccurring, can be combined. While EFH programmatic consultations do not have an explicit timeline to complete, when combined they follow the ESA timeline.

### *Combining Effects Analyses*

The action agency must ensure that the evaluation of potential adverse effects on EFH, listed species, and critical habitat are all adequately addressed. In limited circumstances, the ESA-listed species and the MSA-managed species are either identical or their affected habitats very closely coincide (e.g., some diadromous species that use riverine or estuarine areas), such that they can be analyzed together. In such cases, a single effects analysis will address both the EFH and ESA consultation. As noted above, where the action agency's notification is combined with an ESA analysis, the document must explicitly identify the portions that satisfy the EFH requirements (50 C.F.R. 600.920(f)(1)(ii)).

More commonly, the analysis for the ESA-listed species and their habitat may be unsuitable for the EFH of the managed species. For example, even if an ESA-listed species (e.g., Chinook salmon) and MSA-managed species (e.g., lingcod) inhabit the same area, such as an estuary, their use of the habitat may differ spatially or temporally, or they may rely on different habitat features or functions within the estuary, or have differing responses or sensitivity to habitat changes. As a result, a proposed project that could adversely affect this habitat should evaluate the potential effects for ESA-listed and MSA-managed species separately to account for these differences.

After considering the action agency's analysis of the effects of the proposed action on EFH, NMFS may provide EFH conservation recommendations if the action would adversely affect EFH, consistent with section 305(b)(4)(B) of the MSA. When combined with the ESA, the EFH conservation recommendations should be clearly identified by NMFS to facilitate the action agency's response as required by regulation at 50 C.F.R. 600.920(f)(2) particularly because such a response is not required for conservation recommendations in ESA consultations.

### *Response Transmittal*

When NMFS provides a response to action agencies for combined EFH and ESA consultations, it should be provided in a single document, but in separate, clearly identified sections.

EFH conservation recommendations may be similar to, or reference, the habitat-related RPMs and the associated terms and conditions of an incidental take statement (or RPAs in the case of a “jeopardy” opinion) or vice versa. If the EFH conservation recommendations reinforce the measures required by the ESA consultation, the cover letter may notify the action agency that the ESA measures are also serving as EFH conservation recommendations, rather than repeating the measures in a separate section of the transmittal. If separate, the EFH conservation recommendations must be clearly labeled to distinguish them from components of the ESA biological opinion, including any ESA conservation recommendations.

When providing EFH conservation recommendations, NMFS should cite section 305(b)(4)(A) of the MSA as the authority and should remind the action agency of its obligation to respond to those EFH conservation recommendations in writing pursuant to section 305(b)(4)(B) of the MSA and 50 C.F.R. 600.920(k)(1). This is an important clarification because action agencies are not required to respond to ESA conservation recommendations. Any conflicts between NMFS’ determinations, information needs, or recommendations for EFH and ESA should be resolved within NMFS before being provided to the action agency.



ATTACHMENT 1: *Template for Making an EFH Finding that an Agency's Procedures for ESA Section 7 Consultations Can be Used to Satisfy EFH Consultation Requirements*

**Instructions for Action Agencies**

1. Coordinate with NMFS to determine if a suitable EFH finding exists for your agency with the appropriate NMFS regional office or with NMFS' headquarters office for consultations that occur in two or more regions
2. For a new EFH finding to combine EFH and ESA section 7 consultations, first review the draft EFH finding below and then propose necessary modifications to NMFS with your request
3. Engage with NMFS to resolve any concerns, and then NMFS will put it on the letterhead for that office and return it to you
4. Review and sign the EFH finding in the signature block provided by NMFS, and return it to NMFS for counter-signature
5. Once a finding is signed by both agencies, request a combined EFH consultation using this procedure to initiate an ESA section 7 consultation with NMFS and the stipulations described in the *Combining EFH Consultations with ESA Consultations* section of NMFS's policy directive 03-201-05

**EFH-ESA Finding Template**

The 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 et seq.) require the identification of essential fish habitat (EFH) for federally managed fishery species and the implementation of measures to conserve and enhance this habitat. The MSA requires a federal agency to consult with the National Marine Fisheries Service (NMFS) on any action that may adversely affect EFH (MSA section 305(b)(2)). For any action that may adversely affect EFH, NMFS must recommend to the action agency measures that it can take to conserve such habitat. Within 30 days after receiving recommendations, the action agency must provide a detailed response.

There are many situations where designated EFH overlaps with the habitat (including critical habitat) of species listed as threatened or endangered under the Endangered Species Act (ESA). Thus, a proposed federal action could affect both a listed species and its designated critical habitat, and adversely affect EFH, necessitating consultation under both section 7 of the ESA and section 305(b)(2) of the MSA. Because of this dual consultation requirement, federal action agencies and NMFS may find efficiencies by combining EFH and ESA section 7 consultations.

Under 50 C.F.R. 600.920(f), an agency can use an existing environmental review procedure, such as an ESA section 7 consultation, to satisfy the MSA EFH consultation requirements if: 1) those procedures provide NMFS with timely notification of actions that may adversely affect EFH; 2) the notification would include an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH assessments of 50 C.F.R. 600.920(e); and 3) NMFS has made a finding pursuant to 50 C.F.R. 600.920(f)(3) that the procedures can be used to satisfy the requirements of 305(b)(2) and 305(b)(4) of the MSA.

NMFS has determined and finds that the [AGENCY]'s procedures for ESA section 7 consultations satisfy these three criteria, because they are consistent with NMFS policy directive 03-201-05 *Guidance for Combining Magnuson-Stevens Fishery Conservation and Management Act EFH Consultations with*

ATTACHMENT 1: *Template for Making an EFH Finding that an Agency's Procedures for ESA Section 7 Consultations Can be Used to Satisfy EFH Consultation Requirements*

*Endangered Species Act Section 7 Consultations*,\* which is appended to this letter. NMFS [OFFICE] makes this finding under 50 C.F.R. 600.920(f)(3) based on written confirmation from the [AGENCY] [DATE] that the [AGENCY]'s ESA section 7 consultation procedures will follow the *Combining EFH Consultations with ESA Consultations* section of NMFS's policy directive 03-201-05, as revised, when combined with EFH consultation.

In lieu of using this EFH finding to consult with NMFS, the [AGENCY] can use another EFH consultation type that NMFS offers (See NMFS Policy Directive 03-201-11 *Guide to EFH Consultations*\*); or, if NMFS has made an EFH finding for another environmental review process (e.g., National Environmental Policy Act) that meets the requirements for completing EFH consultations, the [AGENCY] may use that existing environmental review procedure to satisfy the EFH consultation requirements of the MSA.

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\* <https://www.fisheries.noaa.gov/national/laws-and-policies/habitat-conservation-and-restoration-policy-directives>