DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 961030300–7238–04; I.D. 120996A]

RIN 0648–AJ30

Magnuson-Stevens Act Provisions; Essential Fish Habitat (EFH)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: NMFS issues this interim final rule to implement the essential fish habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This rule establishes guidelines to assist the Regional Fishery Management Councils (Councils) and the Secretary of Commerce (Secretary) in the description and identification of EFH in fishery management plans (FMPs), including identification of adverse impacts from both fishing and non-fishing activities on EFH, and identification of actions required to conserve and enhance EFH. The regulations also detail procedures the Secretary (acting through NMFS), other Federal agencies, state agencies, and the Councils will use to coordinate, consult, or provide recommendations on Federal and state activities that may adversely affect EFH. The intended effect of the rule is to promote the protection, conservation, and enhancement of EFH.

DATES: Effective on January 20, 1998. Comments must be received no later than February 17, 1998.

ADDRESSES: Requests for copies of the Environmental Assessment (EA) should be sent to the Director, Office of Habitat Conservation, Attention: EFH, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3282. (see **SUPPLEMENTARY INFORMATION**). These documents are also available via the NMFS Office of Habitat Conservation Internet website at: http://kingfish.ssp.nmfs.gov/rschreib/habitat.html or by contacting one of the regional NMFS Offices:

Northeast Regional Office, Attention: Habitat and Protected Resources Division, One Blackburn Drive, Gloucester, MA 01930–2298; 978/281–9328.

Southeast Regional Office, Attention: Habitat Conservation Division, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; 813/570–5317.

Southwest Regional Office, Attention: Habitat Conservation Division, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; 562/980–4041.

Northwest Regional Office, Attention: Habitat Conservation Branch, 525 N.E. Oregon St., Suite 500, Portland, OR 97232–2737; 503/230–5421.

Alaska Regional Office, Attention: Protected Resources Management Division, 709 West 9th Street, Federal Bldg., Room 461, P.O. Box 21668, Juneau, AK 99802–1668; 907/586–7235.

FOR FURTHER INFORMATION CONTACT: Lee Crockett, NMFS, 301/713–2325.

SUPPLEMENTARY INFORMATION: This rulemaking is required by the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) as reauthorized by the Sustainable Fisheries Act, signed into law on October 11, 1996. Details concerning the justification for and development of this interim final rule were provided in the proposed rule (62 FR 19723, April 23, 1997) and will not be repeated here. In the proposed rule, the guidelines to the Councils for amending FMPs and the regulations outlining the processes for coordinating and consulting with, and providing recommendations to, the appropriate Federal and state agencies were combined within one subpart. For increased clarity and easier access for agencies involved in coordination or consultation, the interim final regulations separate the guidelines from the coordination, consultation, and recommendation procedures. The former is in subpart J and the latter is in subpart K of 50 CFR part 600. Both subparts are being issued together because of the importance for all affected parties to understand the implications of an area being identified as EFH.

Overview of EFH FMP Amendment Guidelines

The themes of sustainability and risk-averse management are prevalent throughout the Magnuson-Stevens Act, both in the management of fishing practices (e.g., reduction of bycatch and overfishing and consideration of ecological factors in determining optimum yield [OY]) and in the protection of habitats (i.e., prevention of direct and indirect losses of habitats, including EFH). Management of fishing practices and habitat protection are both necessary to ensure long-term productivity of our Nation's fisheries. Mitigation of EFH losses and degradation will supplement the traditional management of marine fisheries. Councils and managers will be able to address a broader range of impacts that may be contributing to the reduction of fisheries resources. Habitats that have been severely altered or impacted may be unable to support populations adequately to maintain sustainable fisheries. Councils should recognize that fishery resources are dependent on healthy ecosystems; and that actions that alter the ecological structure and/or functions within the system can disturb the health or integrity of an ecosystem. Excess disturbance, including over-harvesting of key components (e.g., managed species) can alter ecosystems and reduce their productive capacity. Even though traditional fishery management and FMPs have been mostly based on yields of single-species or multi-species stocks, these regulations encourage a broader, ecosystem approach to meet the EFH requirements of the Magnuson-Stevens Act. Councils should strive to understand the ecological roles (e.g., prey, competitors, trophic links within food webs, nutrient transfer between ecosystems, etc.) played by managed species within their ecosystems. They should protect, conserve, and enhance adequate quantities of EFH to support a fish population that is capable of fulfilling all of those other contributions that the managed species makes to maintaining a healthy ecosystem as well as supporting a sustainable fishery.

Councils must identify in FMPs the habitats used by all life history stages of each managed species in their fishery management units (FMUs). Habitats that are necessary to the species for spawning, breeding, feeding, or growth to maturity will be described and identified as EFH. These habitats must be described in narratives (text and tables) and identified geographically (in text and maps) in the FMP. Mapping of EFH maximizes the ease with which the information can be shared with the public, affected parties, and Federal and state agencies to facilitate conservation and consultation. EFH that is judged to be particularly important to the long-term productivity of populations of one or more managed species, or to be particularly vulnerable to degradation, should be identified as ''habitat areas of particular concern'' (HAPC) to help provide additional focus for conservation efforts. After describing and identifying EFH, Councils must assess the potential adverse effects of all fishing-equipment types on EFH and must include management measures that minimize adverse effects, to the extent practicable, in FMPs. Councils

are also directed to examine non-fishing sources of adverse impacts that may affect the quantity or quality of EFH and to consider actions to reduce or eliminate the effects. Councils are directed to identify proactive means to further the conservation and enhancement of EFH.

Overview of Coordination, Consultation, and Recommendation Regulations

This regulation establishes procedures for implementing the coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. NMFS will coordinate with other Federal and state action agencies by providing them with descriptions and maps of EFH, as well as information on ways to conserve and enhance EFH. The regulations allow Federal agencies to use existing consultation/environmental review procedures or the procedures outlined in the regulation to fulfill their requirement to consult with NMFS on actions that may adversely affect EFH. Consultations may be conducted at a programmatic and/or project-specific level. In cases where effects from an action will be minimal, both individually and cumulatively, a General Concurrence (GC) procedure has been developed to simplify the Federal consultation requirements. Consultation on Federal actions may be conducted under Abbreviated or Expanded Consultation, depending on the severity of the threat to EFH. NMFS anticipates that a majority of Federal actions with the potential for adverse effects on EFH may be addressed through the abbreviated consultation process or the General Concurrence process. Coordination between NMFS and the Councils is encouraged in the identification of threats to EFH and the development of appropriate EFH conservation recommendations to Federal or state agencies. When NMFS or a Council provides EFH conservation recommendations to a Federal agency, that agency must respond in writing within 30 days. If the action agency's decisions differ from NMFS' conservation recommendations, further review of the decision may be continued by the two agencies, as detailed in the regulations.

Related Documents

Other related documents that led to this interim final rule were referenced in the proposed rule. The Technical Assistance Manual that was released for public comment concurrent with the proposed rule received very little public comment. This was in part due to the very technical nature of the document. Therefore, NMFS will maintain this information as internal technical guidance, and as such, is not making it available for public comment again.

Comments and Responses

Six regional public meetings and numerous briefings were held during the comment period to explain the proposed rule and solicit public comments from all interested parties. Fishery and non-fishery representatives attended the public meetings and were included in briefings. Comments were received in writing from 6 Regional Fishery Management Councils, 3 Interstate Marine Fishery Commissions, 8 Federal agencies, 22 state agencies, 13 fishery groups, 49 conservation/environmental groups, 60 non-fishing industry groups, 11 other non-governmental organizations, 11 academicians, 1 local government, and 40 individuals.

1. Comments Asking for Additional Time to Comment

Comments: Several commenters requested that, given the complex nature of the proposed regulations, additional time should be granted for public comment.

Response: NMFS agrees that, because the EFH rule outlines a new program, additional public comment is desirable. However, because it is critical that these guidelines be available to the Councils and to the Secretary as soon as possible so that EFH FMP amendments can be developed and submitted to the Secretary in time to meet the statutory deadline of October 11, 1998, NMFS is issuing this rule as an interim final rule to provide necessary certainty to conduct this work. NMFS will also consider additional comments received during the comment period on this interim final rule before issuing the final rule. NMFS is particularly interested in receiving comments on those sections of the interim final rule that have been changed in response to comments and any new information not previously submitted.

2. Comments in Favor of Protection of Fish Habitats

Comments: Most of the commenters supported the concept of protecting fish habitats as a means to support fisheries, sustain ecosystems, or preserve aesthetics, some in spite of the fact that they were wary of the approach outlined in the proposed rule because of potential adverse impacts on their activities. Numerous groups and individuals expressed concern that the habitat conservation approach set forth in the proposed rule was a dilution of the previously presented ecosystem approach from the Framework for the Description and Identification of EFH (62 FR 1306, January 9, 1997) (Framework) and feared that it would be weakened further in the interim final rule under pressure from non-fishing interests. Many commenters pointed out that marine fisheries belong to all Americans, not just to certain industries.

Response: NMFS believes that EFH must be conserved and enhanced to prevent future depletions of managed species and to restore many presently overfished stocks. Measures detailed in these regulations are necessary to ensure that adverse impacts from both fishing and non-fishing will be adequately addressed in accordance with the requirements of the Magnuson-Stevens Act. The regulations were developed by NMFS to provide the Councils with guidance that is both feasible and scientifically defensible. Although the guidelines vary superficially from the Framework, they are not fundamentally different. Additional input from Councils and the public, and discussions with other Federal agencies, were used to make the program workable. NMFS will continue to work with all parties to protect both quantity and quality of these habitats in a streamlined and efficient manner. NMFS has worked to insure that an ecologically sound approach was developed to protect, conserve, and enhance EFH to support sustainable fisheries and the ecosystems that support them in accordance with the mandate set by Congress.

3. Comments on the Interpretation of EFH

Comments: Some industry groups commented that linking EFH to the amount of habitat necessary to support a healthy ecosystem exceeds the authority granted to NMFS under the Magnuson-Stevens Act. Additionally, they criticized this linkage as vague and overly broad. Some fishing interests expressed concern that ecosystem considerations might interfere with the focus on maintaining fishing production. Other commenters supported the linkage to healthy ecosystems, but asked that a healthy ecosystem be more clearly defined. Some commenters suggested that healthy ecosystems should be defined by species composition and abundance, presence of key interactions, and habitat persistence.

Response: In the proposed rule, NMFS linked EFH to the amount of habitat required to support a sustainable fishery and healthy ecosystem. In the

interim final rule, NMFS clarified this linkage to be the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem.

The Magnuson-Stevens Act provides authority for the link between EFH and the managed species' contribution to a healthy ecosystem in a number of places. Ecosystem themes are common in the definitions of ''fishery resources,'' ''conservation and management,'' and ''optimum.'' These definitions link protection of the marine environment to managing fisheries. Specifying that Councils should address the degradation and loss of EFH from both fishing and through conservation and enhancement measures further reflects support for more ecologically-based management of marine fisheries. In addition to its present emphasis on ecological components of management, the Magnuson-Stevens Act, in section 406, calls for the establishment of an advisory panel to analyze the extent to which ecosystem principles are being applied, and to recommend to the Secretary and Congress ways to expand the application of ecosystem principles in fishery conservation and management in the future.

Although the implementation of ecosystem management varies among the agencies and organizations that have adopted it, there are common elements among the approaches. Ecosystem management encourages sustainable resource use that is achieved through goal setting and the use of ecological precepts and understanding to achieve those goals; recognition that different processes occur at different temporal and spatial scales and must be addressed appropriately; recognition of the complexity and integration of ecosystems; recognition of humans as active components in ecosystems; recognition of the uncertainties inherent in management and the need to make risk-averse decisions; and the need for adaptive management (Christensen *et al.*, 1996; Grumbine, 1997; Hancock, 1993). This regulation embraces those concepts and urges Councils to seek environmental sustainability in fishery management of living marine and anadromous resources, within the current statutorily-prescribed fishery management framework (i.e., management by FMPs).

Linking EFH to healthy ecosystems will improve conserving and enhancing the habitats of all living marine resources which depend on the same marine ecosystem. Applying an ecosystem approach to the conservation and enhancement of EFH will require NMFS and the Councils to consider the inter-relationships between and among species managed under the Magnuson-Stevens Act, the Marine Mammal Protection Act, and the Endangered Species Act (ESA). Carrying out the habitat conservation mandates of these laws independently is inefficient, because the interrelationships between species are not considered. Concerns expressed by fishing interests that focusing on the ecosystem will divert attention from promoting sustainable fisheries are unfounded since sustainable resource use must be grounded in a sustained ecosystem.

In response to comments requesting clarification, this interim final rule provides additional guidance by listing the general attributes of a healthy ecosystem in a definition. The linkage between a healthy ecosystem and EFH has been clarified to mean the habitat required to support a sustainable fishery and the managed species contribution to a healthy ecosystem.

Comments: Many comments, mainly from conservation groups, opposed linking EFH to fisheries in the definition and throughout the proposed rule. In particular, they wanted the quantity of EFH to be linked to the support of fish populations rather than to fisheries production. Conversely, some Councils' comments suggested that NMFS link EFH to a quantifiable fishery term such as maximum sustainable yield (MSY) or OY. One Council urged NMFS to clarify that the term sustainable fishery means the level necessary to maintain at least the current production. Other commenters supported the linkage of EFH to sustainable fisheries, but were unclear about the meaning of target production goal as used in the proposed rule. One asked that the time period over which sustainable should apply be better defined. Some non-fishing commenters criticized the linkage to sustainable fisheries as vague and too broad.

Response: The Magnuson-Stevens Act mandates that EFH requirements be incorporated into FMPs. It also explicitly states that one of its purposes is to provide for the preparation and implementation of FMPs that will achieve and maintain on a continuing basis, the OY from each fishery. The definition of optimum states that the yield from a fishery should provide the greatest national benefit. This benefit includes food production and recreational opportunities, and takes into account protection of marine ecosystems. This is the basis for long-term sustainable fisheries. Therefore, NMFS continues to maintain that linking EFH to sustainable fisheries is appropriate and based on the Magnuson-Stevens Act. Because managed species are integral parts of the ecosystems that support them, consideration of ecosystem processes are equally important, as expressed in the rule.

In managing a fishery under their jurisdiction, Councils limit the quantity of fish that can be harvested by fishers from a population or stock. These limits or yields, usually expressed as MSY or OY, are based on estimates of the total population (or stock) size and the ability of the population to sustain itself when subjected to some level of fishing pressure. When considering the EFH requirements of a managed species, Councils must describe and identify enough habitat to support the total population, not just the individual fish that are removed by fishing (the fisheries production). ''Target production goal'' was intended to portray this concept in the proposed rule; but, because commenters confused biological production with fisheries production, NMFS has modified this wording. The interim final rule states that FMPs should identify enough EFH to support a population adequate to maintain a sustainable fishery and the managed species' contributions to a healthy ecosystem. If the current stock size supports the long-term potential yield of the fishery then EFH should be adequate to support that population and its contribution to a healthy ecosystem. If the current stock size is lower than that (i.e., overfished), then EFH may need to be bigger or annually enlarged to support a larger spawning stock if habitat is limiting.

Comments: Some commenters stated that including ''biological properties'' and ''biological communities'' in the interpretation of ''waters'' and ''substrate'' was an inappropriate expansion of the Magnuson-Stevens Act. Other commenters criticized NMFS for including ''chemical properties'' in the interpretation of ''waters'' because other agencies have greater expertise in, and jurisdiction over, water quality issues.

Response: NMFS disagrees with these comments and did not change the rule. ''Biological properties'' and ''biological communities'' are fundamental aspects of habitat and have long been recognized as such by the scientific and technical communities. The fact that an area is aquatic or contains a specific physical structure may not necessarily make it fish habitat. Fish species require waters with, among other things, appropriate biological properties and chemical properties (e.g., prey, nutrient sources, salinities, dissolved oxygen concentrations, and pH) to meet their

physiological/habitat requirements. Substrata also must often have certain biological communities (typically sessile organisms) before they function as fish habitat. For example, it is the presence of seagrasses (associated biological community) that provides appropriate settlement habitat for post-larval queen conch, not just the underlying coarse grain sand.

NMFS and other NOAA offices have considerable expertise and state-of-the-art scientific facilities to assess and evaluate water quality issues. The fact that NMFS does not have statutory authority for regulation of water quality makes it no less important in the research and management of resources under NMFS' jurisdiction.

Comments: Some commenters objected to the inclusion of ''structures underlying the waters'' in the interpretation of ''substrate.'' Others supported the inclusion of ''structures,'' but questioned whether the owners of structures that are identified as EFH would be required to maintain them as EFH. Several commenters, primarily dive groups, recreational fishers, and oil industry representatives, applauded the inclusion of artificial reefs as structures, and further stressed the importance of offshore oil platforms as artificial reefs and potential EFH. One commenter pointed out that artificial reefs, if inappropriately established, have the potential to adversely impact EFH.

Response: NMFS included ''structures underlying the waters'' in its interpretation of substrate to clarify that structures such as artificial reefs, jetties, and shipwrecks may be considered EFH if they provide essential habitat for a managed species. This should not be interpreted to mean that all such structures are EFH. Only those structures that meet the criteria outlined in these guidelines and identified as such in an FMP are EFH. If a structure is identified as EFH, the Secretary is required to comment on any state or Federal action that may have an adverse impact on such habitat. Activities, such as routine maintenance, that do not require a state or Federal permit or license would not require consultation. If a state or Federal agency is involved in creating or modifying an artificial reef in, or affecting, EFH, NMFS will be required to comment on ways to minimize or mitigate any adverse impacts to the EFH.

Comment: Some commenters were opposed to interpreting ''spawning, breeding, feeding, or growth to maturity'' to cover a species' full life cycle. Other commenters supported it.

Response: The Magnuson-Stevens Act established this definition for EFH. NMFS recognizes that some may interpret spawning, breeding, and growth to maturity to exclude key life stages, (e.g., mature adults). However, all immature life stages grow to maturity and all mature adults feed, spawn, and/or breed. Therefore, it is appropriate to interpret this phrase to cover the entire life cycle.

Comments: Some commenters criticized the definition of EFH in the proposed rule for allowing historic or degraded habitat to be identified as EFH ''if the loss of that habitat has contributed to reduced yields for the species and it is feasible to restore the lost habitat.'' Other commenters criticized NMFS for allowing degraded or inaccessible habitat to be identified as EFH. The commenters argued that these provisions exceed NMFS' statutory authority. Port authorities in particular are concerned that facilities on dry land may be identified as EFH.

Response: These provisions were included in the proposed rule because the restoration of historic, degraded, or inaccessible habitat, where technologically and economically feasible, may be necessary to meet the rule's stated goal of ensuring the production necessary for some species to support a sustainable fishery and contribute to a healthy ecosystem. This interim final rule continues to allow the identification of historic or degraded habitat as EFH but further clarifies that ''historic habitat'' must currently be an aquatic area before it can be identified as EFH and that restoration must be technologically and economically feasible. Therefore, dry land could not be identified as EFH.

4. Comments Requesting Definition of Other Terms in the Interim Final Rule

Comment: Several commenters suggested that the interim final rule contain a definition of ''adverse impact.''

Response: NMFS agrees and has included a definition in the rule.

Comment: Several commenters suggested that a definition for critical habitat'' is necessary.

Response: NMFS disagrees that a definition is necessary but has modified the rule to clarify that ''critical habitat'' relates to species that are listed as threatened or endangered under the ESA.

Comment: Some commenters suggested that the acronym ''FMU'' needs to be defined.

Response: The acronym FMU is already defined in 50 CFR 600.10, which contains the definitions for all of part 600. The EFH provisions contained in this interim final rule will become subparts of part 600 and as such are subject to those definitions.

Comment: Several commenters suggested that the terms ''high value habitat'' and ''ecosystem scale'' need to be defined in the interim final rule.

Response: NMFS disagrees that these terms need to be defined in the rule since they may be interpreted from the contexts in which they are used in the rule.

5. Comments on the Purpose and Scope of the Rule

Comments: Several commenters criticized NMFS for not requiring Councils to describe and identify EFH for all fish species inhabiting the geographic jurisdiction of a Council, and suggested that such a limitation is not supported by the Magnuson-Stevens Act. Other commenters suggested that EFH be described and identified for all major fisheries, even those not in an FMP. They stated that Councils should be able to describe and identify EFH of non-managed species in order to protect habitats that are affected by fishing for a managed species. Others suggested that as soon as EFH is identified in a proposed FMP, management measures and consultations should begin without waiting for final approval of the FMP.

Response: NMFS continues to maintain that the Magnuson-Stevens Act requires Councils to describe and identify EFH for only those species managed under an FMP. According to section 303(a)(7) of the Magnuson-Stevens Act, EFH provisions are required components of an FMP. Therefore, it is appropriate to describe and identify EFH only for those species managed in the FMP. However, the Magnuson-Stevens Act does not preclude Councils from identifying habitat of a fishery resource under its authority. Section 305(b)(3) describes the Councils' commenting responsibilities for activities that may affect such habitat. In the rule, NMFS points out that Councils have the option to describe and identify habitats (not EFH) and institute management measures to protect species (and their habitats) that are not managed under FMPs. This is currently done by some Councils. However, the habitats of species not managed under a Federal FMP would not be considered EFH for the purposes of consultation.

EFH consultation and management measures can not be implemented until FMPs include an EFH provision. Consultation and management measures would have no statutory basis without the EFH provisions in an FMP.

Comments: Several commenters questioned whether EFH would be

identified in state waters. Many commenters urged NMFS to do so; others opposed it. Commenters urged NMFS to clearly state that management actions regarding fishing impacts only apply to species managed by Councils in Federal waters. While some commenters pointed out that NMFS cannot regulate fishing in state waters, others asked that fishing be regulated in state waters as well as Federal waters. Three commenters suggested that the Submerged Lands Act, in combination with the Magnuson-Stevens Act, would allow NMFS to assert jurisdiction over state waters, and that the rule should explain how states' authority over their waters and submerged lands will be affected by this rule. Some suggested that fishing regulations be closely coordinated with state management agencies to ensure consistency in habitat protection. The commenters who stated that EFH should not be identified in state waters, further asserted that NMFS should not provide comments on Federal and state activities that take place in state waters.

Response: The Magnuson-Stevens Act requires Councils to describe and identify EFH based on all life stages of the managed species, with no limitations placed on the geographic location of EFH. Therefore, EFH may be in state or Federal waters depending on the biological requirements of the species. Regarding actions that occur in state waters that may adversely affect EFH, the Magnuson-Stevens Act provides authority for NMFS to provide EFH conservation recommendations, not regulate.

With few exceptions, direct NMFS regulatory authority applies only to Federal waters, the exclusive economic zone (EEZ). Generally, without appropriate preemptive procedures, NMFS can not implement management measures for state waters. However, many species targeted in Federal fisheries spend part of their life cycle in state waters and may be impacted by fishing activities that are managed by a state. Effective management of marine resources that cross jurisdictional boundaries requires coordination between management entities, and NMFS has added additional language to the interim final rule to emphasize such arrangements. Adverse impacts to EFH that result from state-managed fisheries will be addressed through conservation recommendations to the appropriate state agency. Failure to consult or comment on activities adversely affecting all habitats would be a failure to carry out the legislative mandate to protect EFH for all life history stages.

Comments: Several commenters recommended that the EFH mandate should be applied beyond U.S. territorial waters. They argue that many of the species managed under the Magnuson-Stevens Act range beyond U.S. territorial waters, e.g., New England groundfish and Alaska salmon are found in Canadian waters and the high seas. The highly migratory species that are managed under Secretarial FMPs range into international waters and the waters of other nations. The basic question raised in the comments is whether NMFS and the Councils can identify EFH for those species in the territorial waters of another country or in international waters.

Response: The EFH provisions under the Magnuson-Stevens Act do not direct the Councils to include waters beyond the jurisdiction of the U.S. Since provisions in statutes are not presumed to apply extraterritorially, NMFS has determined that waters beyond the United States' EEZ are not to be identified as EFH. Therefore, NMFS will not regulate fishing beyond the EEZ, and Federal consultation will not be required. However, Councils may describe, identify, and promote protection of habitats for managed species in waters beyond the EEZ. The Secretary will use such information in discussions with Federal agencies involved in international actions, including negotiations with foreign nations.

Comment: One Federal agency commented that the Great Lakes should be added to the EFH program. Other commenters suggested that interjurisdictional fisheries be added to the program.

Response: In order for an area, like the Great Lakes, to be identified as EFH, it must provide essential habitat for a species managed under the Magnuson-Stevens Act. Similarly, an interjurisdictional fishery must be at least partially managed under the Magnuson-Stevens Act for the EFH mandate to apply.

Comment: Commenters asked whether EFH would be described and identified in waters under the jurisdiction of tribes or native corporations.

Response: NMFS intends that tribal and native corporation waters be treated the same as state waters for the purposes of describing and identifying EFH (i.e., EFH may be identified in those waters if the habitat is essential for a managed species). However, tribes and native corporations are not required to consult with NMFS on actions that do not require Federal or state authorization or action. Tribal and native corporation actions, including activities carried out through Federal financial assistance and under permits or licenses issued by Federal or state governments, will require the appropriate procedures for consultation and/or recommendations as set forth in subpart K.

Comment: Commenters voiced concern that this regulation would affect the rights of private landowners to manage their own property.

Response: Private landowners have no new responsibilities to consult with NMFS on private land activities as a result of the Magnuson-Stevens Act or this interim final rule. No consultation is required unless an activity may have an adverse impact on EFH and it requires a Federal or state action, such as permitting or licensing. Those Federal or state actions will trigger the consultation and/or recommendation requirements of section 305(b)(2–4) of the Magnuson-Stevens Act. EFH coordination, consultation, and recommendation procedures are detailed in this interim final rule and will be added to part 600 as new subpart, K. Use of existing consultation procedures to minimize adverse impacts to EFH is strongly advocated in the rule.

Comment: One organization suggested that EFH should be expanded beyond aquatic areas to include riparian areas and hydrological basins.

Response: The statutory definition of EFH limits it to ''waters''; therefore, terrestrial areas may not be identified as EFH. However, there is not a similar legal limit on Federal or state activities that may adversely impact EFH. The only criteria is that the activity may have an adverse impact on EFH, with no limits on where the activity is located. An adverse effect on EFH should be reasonably foreseeable for the action to require consultation. Therefore, NMFS may comment on Federal or state actions which take place within riparian areas or hydrological basins if they may have a reasonably foreseeable adverse impact on EFH. In this rule, NMFS has confined EFH to include only aquatic habitat because the Magnuson-Stevens Act definition of EFH limits it to ''waters.'' However, NMFS believes that areas important to a sustainable fishery necessarily include riparian and upland areas, as well as aquatic areas, particularly in the case of anadromous species. Areas that NMFS considers important are illustrated in the critical habitat designation for Snake River chinook.

Comment: One commenter expressed concern that those areas not identified as EFH will be subject to greater threat of disturbance because they will be thought of as expendable.

Response: The Fish and Wildlife Coordination Act (FWCA) provides a directive to Federal agencies to consult with NMFS when waters of the United States may be modified by activities requiring a Federal permit or license. The FWCA will continue to allow the Secretary to comment on Federal activities that may adversely affect living marine resources and their habitat, even if such habitat is not identified as EFH.

6. Comments on Mandatory Contents of Fishery Management Plans

Comments: Some non-fishing industry commenters argued that NMFS has exceeded the authority granted by the Magnuson-Stevens Act by including mandatory provisions in the EFH guidelines. They argue that Congress intended the guidelines to be voluntary. Other commenters argued that proposing discretionary components that ''should'' be included in an FMP will expose the Councils and NMFS to third-party suits. They stated that the guidelines need to be far less prescriptive to guard against such suits. Conversely, other commenters argued that NMFS should change many of the discretionary components of FMPs in the proposed rule to mandatory components in the interim final rule.

Response: The Magnuson-Stevens Act directs the Secretary to ''establish by regulation guidelines to assist Councils'' in carrying out the EFH mandate. The mandatory components specified in the rule reflect requirements of the Magnuson-Stevens Act, or are logical extensions of it. Since receiving these comments, NMFS has reviewed the use of each term (i.e., must, should, may, etc.) to ensure that the requirements of the Magnuson-Stevens Act are reflected in the interim final rule. NMFS will continue to maintain a mixture of voluntary (may), strongly suggested (should), and mandatory (must) components to inform Councils of the elements needed in an EFH amendment to receive Secretarial approval.

7. Comments on Description and Identification of EFH in Fishery Management Plans

Comment: A commenter criticized NMFS for not providing tighter, less vague standards for the description and identification of EFH.

Response: The guidelines contained in this rule apply to all regions of the United States, including the Caribbean and western Pacific territories, and will be used to amend 39 different FMPs covering over 400 species. Because of this diversity of regional needs, the guidelines need to be flexible, while providing consistent guidance to ensure that amendments meet equivalent standards.

Comments: Many commenters suggested other types of information that should be included in describing and identifying EFH. These include: (1) Sensitive life stages; (2) reproductive and dispersal patterns; (3) information generated from spatial, temporal, and fishing gear experiments; (4) historical information for each data level; (5) carrying capacity, habitat availability, quality, and utilization; and (6) spawning structures and structural complexity.

Response: NMFS concurs that this information may be useful. The lists of information types were intended to be instructive, not exhaustive. The interim final rule has been modified to provide more flexibility with regard to the data used.

8. Comments on the Sources and Quality of Information Used

Comment: Several comments, particularly from state agencies, stressed the need to involve states and use state agency data in satisfying the EFH requirements of the Magnuson-Stevens Act. Several commenters urged NMFS to cooperate with states in gathering information, developing FMP amendments, and funding restoration.

Response: NMFS agrees, and is already collaborating with the states in many activities. For example, NMFS is coordinating with the state fisheries agencies and the three interstate fisheries commissions to gather the best available information for use in the EFH amendments. NMFS is also working with state coastal zone programs to coordinate EFH efforts with approved coastal management plans. These interactions with states are facilitated by the fact that Council members represent each state under the Council's jurisdiction, and many resource agency experts also serve on various Council committees and panels, including habitat committees and advisory panels. All Council activities are open to the public, which affords further opportunities for cooperation. Subpart J of the interim final rule has been further modified to emphasize coordination between states, interstate commissions, and Councils in the development of EFH FMP provisions.

Comment: Several commenters suggested that ''best available information'' might preclude NMFS and the Councils from using local knowledge and log books as sources of information to describe and identify EFH.

Response: Section 305(b)(1)(B) of the Magnuson-Stevens Act requires NMFS to consult with participants in the fishery before submitting its recommendations and information to the Councils to assist in the description and identification of EFH. This indicates Congress' intent to use information from fishers. NMFS intends for Councils to use the best available information, including local knowledge and log books, to describe and identify EFH. However, all information should be evaluated with regard to the reliability of the information and its source.

9. Comments on the Four-Level Approach for Gathering and Organizing EFH Data

Comments: Many commenters expressed concern about the four-level approach to gathering and organizing data for the description and identification of EFH. Some expressed concern that there is no incentive for Councils to move beyond level 1 information (i.e., presence/absence information) and that Councils would identify all habitats occupied by managed species as EFH to ensure the greatest amount of protection. Other commenters suggested that there should be a rebuttable presumption that all habitat is EFH if data from levels 2 through 4 are used to refine the identification of EFH. Finally, some commenters criticized NMFS for allowing the identification of EFH to be based on production rates by habitat type, because it restricts the goal of the Magnuson-Stevens Act to promote the protection of EFH.

Response: The four-level approach provides a logical method to gather and organize data for the identification of EFH. There is a natural incentive to gather and use information from progressively higher levels, because this will enable NMFS and the Councils to target their habitat conservation efforts to ensure that the most productive habitats receive greater attention. The rule has been modified to reinforce this intention. Councils are required to demonstrate that the best scientific information available was used in the identification of EFH. NMFS also disagrees with the comment that linking EFH to production will not promote the protection of EFH. Clearly linking EFH to biological production, and advocating research to quantify these relationships, will increase awareness of the importance of habitat to sustainable fisheries and will likely lead to greater emphasis on protecting EFH. NMFS did not create a rebuttable presumption that all habitat identified by levels 2 through

4 information is EFH because it could lead to an overly broad area being identified as EFH without adequate scientific justification. NMFS' use of the four levels of information is a means of organizing the available data for the identification of EFH. This data will be considered in determining the extent of EFH.

Comment: One commenter suggested that NMFS require Councils to submit a schedule detailing when higher levels of information will be developed.

Response: Periodic updates are required for EFH amendments. Amendments should include an assessment of the information needed to improve the description and identification of EFH. The research needs identified in an FMP should include a schedule for meeting those needs.

10. Comments on Criteria for EFH Determinations

Comments: Several commenters questioned the role of Council judgment when there is only level 1 information available. Others asked for additional guidance on how to interpret level 1 information.

Response: The role of Councils is to evaluate information and use the EFH determination criteria in the interim final rule to identify EFH and the measures required to conserve it. Councils will need to evaluate all available information, according to its merit, and use best scientific judgement in arriving at their decisions. Demonstration that this identification is based on the best scientific information available will be necessary to attain Secretarial approval of an EFH amendment. Additional clarification on how to interpret level 1 information to identify EFH has been added to the interim final rule.

Comments: Comments from conservation groups, many fishing groups, and most individual commenters fully supported a ''precautionary approach'' and encouraged expansion of these provisions. A few commenters urged that all habitats be designated EFH and that those people who impact the habitat should be responsible for proving that their activities are not decreasing the habitat's capacity to support fish populations. Many comments, primarily from non-fishing industry interests, criticized NMFS for establishing a ''risk-averse'' process for identifying EFH that they claim will result in most aquatic areas being identified as EFH. Of particular concern is the guidance in the proposed rule that if only species distribution information is available, EFH should be everywhere a species is found. Also of concern is a provision which states that, if a species is overfished, all habitats used by the species, plus certain historic habitats, should be considered EFH. The commenters believed that these provisions will result in most, if not all, habitats being identified as EFH and that this is not the intent of the Magnuson-Stevens Act.

Response: The ''risk-averse'' approach to describing and identifying EFH was advocated in the proposed regulation because of the uncertainty inherent in much of our knowledge of habitat-productivity relationships. Care should be exercised in the face of inadequate information or overfished stocks to guard against habitat losses or alterations that may prove significant to the long-term productivity of the species. The rule continues to endorse these risk-averse approaches, but clarifies that Councils should use information from all available levels to make best scientific judgments on how to describe and identify EFH. Presence/absence data should be used to delineate the geographic range of the species. Habitat-specific information on density, reproduction, and growth should be used to identify EFH within that range. If only presence/absence information are available on a managed species, these data should be evaluated to identify those areas most commonly used by the species as EFH. The rule also clarifies that, for overfished species, all habitats currently used, and certain historic habitats, should be identified as EFH only if habitat loss or degradation may be contributing to the species' being identified as overfished.

11. Comments on the Relationship Between EFH and Critical Habitat

Comments: Some commenters criticized the proposed rule for stating that EFH will always be greater than or equal to ''critical habitat.'' One commenter noted that some critical habitat can include upland habitats and therefore this linkage is not consistent with the statutory definition of EFH. Others stated that EFH should not be described and identified for species listed under the ESA. One commenter questioned why NMFS is allowing fishing on endangered species. Some commenters supported EFH being equal to or greater than critical habitat because it will promote the recovery of endangered species.

Response: NMFS maintains that it is appropriate to state that EFH will always be greater than or equal to critical habitat, as defined under ESA. The interim final rule includes a minor modification to the language that helps distinguish between critical habitat and EFH and to reiterate that EFH is aquatic only. EFH includes habitats for all life history stages of a species, while for some anadromous salmonids listed under ESA, adult marine habitats have not been identified as critical habitat. NMFS does recognize that critical habitat may contain terrestrial areas and has modified the interim final rule to clarify that those areas may not be considered EFH.

NMFS and the Councils do not allow directed fishing on listed species but EFH requirements are still necessary if the species are covered by an FMP. Certain stocks of west coast salmon are currently part of the management unit of an FMP. Specific runs of those stocks are listed as threatened or endangered under the ESA. Even though certain runs of a larger stock are listed under the ESA, the Magnuson-Stevens Act still requires Councils to describe, identify, and consider actions to conserve and enhance EFH for the species. This does not mean that directed fishing will be allowed on the listed runs.

12. Comments on Inclusion of Mariculture and Indirect Fishing Effects

Comments: NMFS received comments suggesting that fishing activities should include all components of the activity (e.g., anchoring, refueling). Some commenters requested that mariculture be considered a fishing activity.

Response: As fishing is defined in section 3(4) of the Magnuson-Stevens Act it includes ''harvesting of fish.'' Commercial fishing, in the same section, means ''fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade.'' NMFS agrees that mariculture is included within these definitions because the fish harvested enter commerce. The interim final rule was not changed, because mariculture was already considered to be part of commercial fishing. Under these regulations Councils would be required to assess the impacts of mariculture activities and minimize any adverse effects that impact EFH within their jurisdiction. The indirect effects of fishing activities should also be considered, when evaluating adverse impacts from fishing, as well as when analyzing cumulative impacts on EFH.

In the rule, NMFS has used the term ''fishing equipment'' to replace the term ''fishing gear,'' that was used in the proposed rule. Fishing equipment is used to portray the intention to more broadly consider impacts from fishing-related activities when assessing

adverse impacts on EFH. Councils should assess impacts of different fishing gears, fishing techniques, equipment, and practices used in mariculture, and other factors, as appropriate.

13. Comments on Fishing Gear (Equipment) Assessment

Comments: In addition to completing an assessment of fishing gear, commenters requested that Councils rank gear based on the severity of impacts to specific habitats. Some argued that recreational fishing impacts should be excluded from such assessment.

Response: The effects of fishing practices or gear types is habitat-dependent. NMFS has modified the rule to direct that during the assessment of fishing equipment (gear) impacts, the relative effect of different equipment types or techniques on different habitat types should be assessed. This will help the Councils focus research and management efforts on those habitats that require the most attention. Assessments and subsequent research should be conducted on all types of fishing impacts, including recreational and commercial fishing equipment or practices, however relative impacts should be prioritized and management and research should address needs accordingly.

NMFS also emphasizes in the rule that the fishing equipment assessment should be conducted periodically with subsequent review or revision. As new equipment is developed, techniques are changed, or additional research is conducted, new information on effects on EFH will be developed. Language has been added to the rule to clarify that Councils should assess all new information regarding EFH, including new assessments of fishing equipment impacts, to determine when an amendment needs to be updated. EFH amendments are to be reviewed and revised as appropriate, but at least once every 5 years. New information regarding equipment effects on EFH should be incorporated as available into any updates of EFH amendments.

Comments: Commenters suggested that technology, such as the use of remotely operated vehicles, should be an acceptable alternative to research closure areas in assessing the effects of gear. One Council asked that it be able to base assessments on operational characteristics of gear in their specific area rather than inference from studies in other areas.

Response: The rule recommends ''consideration of the establishment of research closure areas and other measures'' to assess the effects of fishing equipment on EFH. It does not restrict Councils from considering any options. Councils should use the most appropriate measures to assess impacts. Councils, however, should not discount some methods or tools because they may be time-consuming or require management action, if they are the most appropriate method to use. All relevant research should be considered when assessing impacts of fishing gear on EFH, including research that has been conducted in other, biogeographically similar areas.

Comment: Several commenters expressed concern that there is no requirement to conduct a cumulative impacts assessment of fishing impacts, as there is for non-fishing impacts.

Response: NMFS assumed that all forms of adverse impacts, including those from fishing, were included as cumulative impacts on EFH. However, NMFS has modified the rule to further clarify this intent. Impacts of fishing and non-fishing activities should be considered when a cumulative impacts analysis is conducted. This may be particularly important where fishing gear of one fishery impacts the habitat of another fishery. Furthermore, cumulative impacts analysis should consider synergistic effects of both fishing and non-fishing impacts on habitat, and should give additional consideration to cumulative impacts affecting HAPC.

Comment: Commenters stated that adverse impacts from fishing should be demonstrated scientifically.

Response: National standard 2 requires that conservation and management measures be based upon the best scientific information available. Councils should, however, take into consideration information available through other valid sources. If scientific information is limited, the best available information should be considered for assessing adverse impacts of fishing equipment on habitats. This information should be weighed, based on the quality of information, and considered appropriately in the development of EFH conservation and management decisions.

14. Comments on the Threshold That Requires Councils To Regulate Fishing Activities That Adversely Impact EFH

Comments: The proposed rule required Councils to act to mitigate or minimize any adverse effect from fishing, to the extent practicable, if there is evidence that a fishing practice is having ''substantial'' adverse effect on EFH. Many comments from environmental and fishing groups criticized the proposed rule for using ''substantial'' to characterize adverse impacts that would require a Council to regulate damaging fishing practices. They claimed this was a higher threshold than intended in the Magnuson-Stevens Act. Under the Magnuson-Stevens Act, Councils are required to ''minimize to the extent practicable adverse effects on such habitat caused by fishing.'' Many of the commenters maintain that this ''higher threshold,'' is so high that Councils will never act to control a damaging fishing practice, nor will research be conducted to assess less understood impacts from fishing. Commenters, additionally, suggested that the burden to prove they are in fact causing no impact should be placed on those wishing to exploit the public resource.

Response: The language of the proposed rule was not meant to raise the threshold of damage from fishing impacts higher than that intended in the statute. The language was intended to provide guidance to assist Councils in determining when they are required to take action on a fishing impact. NMFS believes that the intent of the Magnuson-Stevens Act is to regulate fishing gears or techniques that reduce an essential habitat's capacity to support marine resources, not practices that produce inconsequential changes in the habitat. Therefore, NMFS continues to support this concept but has deleted the word ''substantial'' from the rule and added new language to clarify this concept. Impacts from fishing practices that justify the implementation of management actions should be ''identifiable'' (i.e., both more than minimal and not temporary in nature).

Comments: Commenters stated that the inclusion of a formal cost-benefit analysis to determine whether it is practicable to impose management restrictions on a damaging fishing activity goes beyond the statute. Costs to industry and costs to the environment cannot be directly compared because they are measured differently. Commenters pointed out that the legislative history indicates that while the term ''to the extent practicable'' was intended to allow for the consideration of costs; it was not a requirement that the benefits justify the costs. Commenters suggested that the long-term costs to the ecosystem and long-term benefits to the fishery and all potential users (since this is a public resource) must be weighed and that short-term cost to the fishers is only one of many factors that must be considered.

Response: NMFS agrees that the Magnuson-Stevens Act does not require a formal cost/benefit analysis or a

demonstration that the benefits of minimizing adverse impacts justifies the costs to fishers. In considering management measures, Councils should evaluate the long-term benefits to the habitat and the managed species (including long-term benefits to the fishery), as well as short-term economic consequences to the fishery. This provision is intended to simply focus Council attention on costs and benefits consistent with national standard 7, which requires consideration of costs and benefits in the development of conservation and management measures. Further, Executive Order (E.O.) 12866 requires NMFS to regulate in the most cost effective manner to achieve the regulatory objective. The rule has additional clarifying language to avoid the interpretation that a formal cost/benefit analysis must be completed before taking action.

Comment: Several commenters urged that immediate management measures should be taken as precautionary measures against further EFH degradation, rather than waiting for Councils to identify and describe EFH, and assess gear impacts on EFH. Many commenters identified specific gear types that should be immediately banned or restricted.

Response: Councils must know what types and locations of habitats constitute EFH before they will be able to act to prevent, minimize, or mitigate adverse impacts from either fishing or non-fishing activities on EFH. Banning a gear type to protect EFH before it is identified, in an FMP and without assessment of adverse impacts, is contrary to the Magnuson-Stevens Act. The interim final rule presents a logical progression for description and identification of EFH, identification of adverse impacts to EFH, and development of management, conservation, or enhancement measures, as appropriate.

15. Comments Objecting to Listing of Specific Fishing Gears/Diving as Fishing Impacts

Comment: Commenters opposed the listing of diving or specific fishing gears as potentially causing adverse impacts that would require fishing restrictions. Dive groups commented that commercial diving should be distinguished from recreational diving, or that diving should not be listed at all. Commenters suggested that anchoring on artificial reefs was as damaging as the other examples listed and that it should also be included in the list of potential restrictions.

Response: The intent of this language was to provide the Councils with some examples of typical activities that have the potential to adversely affect diverse types of EFH (e.g., careless divers and snorkelers have been widely documented to cause adverse effects on coral reef habitats). However, NMFS agrees that it is more appropriate to address these considerations in a broader manner. As a result, the language in the interim final rule was modified to present general options that Councils should consider in determining appropriate management measures. These general options are illustrative only, many activities may result in habitat-specific impacts. Councils should examine all practices that may contribute to EFH degradation and act to minimize the impacts as appropriate.

16. Comments on Marine Fishery Reserves as Options for Managing Adverse Effects From Fishing

Comment: Many commenters, primarily individuals, fishing groups, and conservation groups, requested that language be added to the interim final rule to clarify that Councils are not restricted from considering closed areas (Marine Protected Areas, Marine Fishery Reserves, No-Take Zones, or Research Closure Areas) as management tools for protection of habitats and habitat functions and for enhancing recovery of overfished species, as well as for conducting research. Commenters felt that a statement in the preamble of the proposed rule which stated, ''NMFS has clarified that the intent [of the regulation] is not to preclude fishing in areas identified as EFH,'' could be interpreted to mean that fishing or specific fishing gears would never be restricted in any area. Commenters indicated that establishment of such zones is supportive of a precautionary approach to habitat conservation where there is uncertainty on the extent and degree of impacts that occur from fishing. They suggested that early establishment of such zones could protect areas and stocks from further impacts while additional information is gathered. Additional commenters suggested that NOAA's National Marine Sanctuaries and National Estuarine Research Reserves and the Environmental Protection Agency's National Estuary Program provide sites that should be utilized for research areas. These areas are the focus of current research efforts and many have extensive databases on habitat types and usage within the reserve areas.

Response: The interim final rule continues to advocate research closures areas and other measures, as appropriate, to evaluate the impact of fishing equipment and techniques on EFH. The regulations continue to encourage Councils to consider time/area closures as management tools for minimizing impacts of fishing gears on EFH. The language in the preamble of the proposed rule, ''* * * that the intent [of the regulation] is not to preclude fishing in areas identified as EFH,'' was intended to confirm that identification of an area as EFH did not automatically bring restrictions on fishing in the area. NMFS altered the language in the interim final rule to clarify that Councils are encouraged to consider marine protected areas as management tools for habitat conservation as well as management of fishing practices. Currently established Federal and state research areas (e.g., National Marine Sanctuaries or Estuarine Research Reserves) should be evaluated as logical locations for additional studies.

17. Comments on the Statutory Authority To Address Adverse Impacts on EFH From Non-Fishing Activities

Comments: Many commenters, primarily non-fishing industry groups, did not agree that the Magnuson-Stevens Act provided NMFS or the Councils the statutory authority to comment and make recommendations on non-fishing activities. They proposed that the sections regarding identification of adverse impacts from non-fishing activities and consultation be deleted in their entirety.

Response: NMFS disagrees for a number of reasons. First, one of the stated purposes of the Magnuson-Stevens Act is to promote the protection of EFH through the review of projects conducted under Federal permits, licenses, or other authorities that affect, or have the potential to affect, such habitat. These projects would include non-fishing activities. Second, the Magnuson-Stevens Act, in section 303(a)(7), requires that FMPs identify conservation and enhancement measures for EFH. These measures are not limited by statute to addressing only fishing activities. A necessary first step to identifying conservation and enhancement measures is to identify adverse impacts that will require conservation and enhancement measures to adequately promote the protection of EFH. Therefore, a logical extension of the Magnuson-Stevens Act requirement to identify conservation and enhancement measures is the consideration of adverse impacts from non-fishing activities that would necessitate the use of such measures. Third, the requirements for coordination, consultation, and

recommendations relate directly to non-fishing actions. The Magnuson-Stevens Act requires that other Federal agencies consult with the Secretary and then consider and respond in writing to the Secretary's EFH conservation recommendations regarding actions that may adversely impact EFH. These actions will be non-fishing actions. Therefore, the EFH amendments must include consideration of adverse impacts from non-fishing activities to aid NMFS and the Councils when they are consulting/commenting on actions that may adversely impact EFH.

18. Comments on Different Levels of Scrutiny of Non-Fishing Impacts

Comment: Many non-fishing interests commented that their impacts on EFH were being held to a higher standard than adverse impacts from fishing, because NMFS does not have to determine whether it is practicable to minimize or mitigate the adverse impact before providing a recommendation. The commenters were also concerned that too much emphasis is placed on non-fishing adverse impacts on EFH.

Response: Non-fishing and fishing impacts are held to two different levels of scrutiny because of legal differences in how the impacts are addressed. Fishing impacts, as required by the Magnuson-Stevens Act, must be minimized to the extent practicable by implementing conservation and management measures. For non-fishing activities, NMFS is required to provide EFH conservation recommendations to action agencies for all actions that may have an adverse impact on EFH. NMFS and the Councils control fishing activities through regulation, whereas recommendations by NMFS and the Councils on non-fishing activities are advisory. The action agency then considers NMFS' recommendations according to its statutory requirements. The emphasis placed on non-fishing in the coordination, consultation, and recommendation process will depend on the level of impact from each.

19. Comments on the Identification of Specific Industries With Potential Adverse Effects on EFH

Comments: Many commenters objected to their particular industries or activities being highlighted in the proposed rule as having potential adverse effects on EFH. Many pointed out that non-fishing activities do not always adversely impact fish habitat. Some forest industry groups pointed out that they are involved in restoration of anadromous fish habitats. Oil and gas industry commenters pointed out that oil platforms have been documented as artificial reefs that support fish populations and therefore produce positive effects on fisheries, not adverse effects.

Response: NMFS acknowledges that many industries take certain actions specifically to improve fish habitat even if other activities conducted by the industry may adversely affect fish habitat. Therefore, NMFS agrees that the language of the rule should be more generic and that the types of activities that have been demonstrated to have potentially adverse effects on EFH should be highlighted for the Councils in the interim final rule rather than identifying the industries that may engage in these activities. NMFS revised this section to clarify that its intent is to avoid, minimize, or compensate for adverse impacts on EFH. The rule avoids singling out specific industries just because they have the potential to adversely impact EFH.

20. Comments on Cumulative Impacts Analysis

Comments: Several commenters were concerned that the relationship between the required analysis of cumulative impacts and EFH was not clearly specified. Many cited an ecological risk assessment as a lengthy, expensive procedure that would tell little about EFH. Some commenters asked NMFS to provide criteria for conducting an ecological risk assessment.

Response: NMFS has clarified the cumulative impacts analysis requirements in the rule. Cumulative impacts analysis is intended to monitor the effect on EFH of the incremental impacts, occurring within a watershed or marine ecosystem context, that may result from individually minor but collectively significant actions. The assessment of ecological risks is intended in a generic sense to examine actions occurring within the watershed or marine ecosystem that adversely affect the ecological structure or function of EFH. The assessment should specifically consider the habitat variables, previously noted while describing and identifying EFH, that control or limit a managed species' use of a habitat. It should consider the effects of all impacts that affect either the quantity or quality of EFH. The term ''ecological risk assessment'' was not meant to be interpreted in the stricter toxicological sense. NMFS will continue to develop further criteria for conducting an ecological risk assessment.

21. Comments on Mapping of Cumulative Impacts Analysis

Comments: Some commenters thought the requirement to map adverse impacts should be discretionary. Others thought it should be deleted altogether.

Response: NMFS disagrees and considers mapping of the impacts to be one of the most important ways to analyze the data and to easily share the information with other resource management agencies and the public. It is also an efficient way to track cumulative effects over time and detect when effects are reaching threshold limits. The rule has been revised to clarify that the mapping requirements are strongly encouraged.

22. Comments on the Options for Conservation and Enhancement of EFH

Comments: Several commenters were concerned about the broad examples given in this section. They recommended that FMPs address site-specific activities because an activity might adversely impact EFH under certain conditions and not under others. Other commenters expressed concern that statements suggesting that certain activities (such as diversion of fresh water) always produce adverse effects did not reflect their regional perspective. There were many comments about the examples used and questions over whether these were the best or even proper examples. There were many suggestions of different examples to include in the rule. Several commenters were concerned that NMFS was mandating best management practices for non-fishing activities.

Response: NMFS recognizes that this section did not provide the clarity that it intended, and that the listing of examples, while not meant to be exhaustive, needs modification. The section has been revised in the interim final rule to clarify that the intent of the section is to provide examples of proactive and reactive measures to conserve and enhance EFH. The revisions focus on avoiding, minimizing, or compensating for impacts on EFH derived from activities both inside and outside of EFH and the need for Councils to provide recommendations to address those impacts. The management measures listed in this section are intended to be optional. Certain actions may have positive or negative impacts on EFH depending on the location and the purpose of the action. The effect of actions should be judged within the context of watershed planning and/or by ecosystem considerations.

Comment: One commenter expressed concern that habitat creation was listed as an option to conserve and enhance EFH.

Response: The Magnuson-Stevens Act requires NMFS and the Councils to conserve and enhance EFH. NMFS believes that, under certain circumstances, habitat creation is a viable means to enhance EFH on a watershed basis.

Comment: One commenter criticized NMFS for not encouraging proactive measures to conserve and enhance EFH.

Response: NMFS modified the rule to include language stating that the Councils and NMFS will provide information on ways to improve ongoing Federal operations.

23. Comments on the Treatment of Prey Species Under the Proposed Rule

Comments: Several commenters asked that the proposed rule be modified to require that EFH be described and identified for all prey species. Numerous commenters stated that habitat for forage species should be included in an ecosystem approach, and mapped as well. Other commenters, against the inclusion of prey, stated that loss of prey should not categorically be considered an adverse impact because the fishery decline could be due to other factors such as overfishing, rather than loss of prey. Inclusion of threats to prey, they commented, exceeds the scope of the statute. Commenters concerned with anadromous species stated that predators should be considered if prey are included. They stated that this reflects more of an ecosystem approach and could take into consideration the effects of pinniped predation on the fishery. One Council asked NMFS to clarify that Councils may not place harvest limits on prey species unless the prey species is managed under an FMP.

Response: NMFS continues to maintain that describing and identifying separate EFH for prey species not included in an FMU is beyond the scope of the Magnuson-Stevens Act. However, NMFS recognizes the importance of prey to the managed species. The statutory definition of EFH includes ''feeding'' as an ecological function of EFH necessary to a species. Therefore, presence of adequate prey is one of the biological properties that can make a habitat essential. It is appropriate to consider loss of prey as an adverse impact to a managed species' EFH because the species would not be able to use the habitat for feeding. Therefore, the rule requires Councils to identify prey species for managed species in the FMU and the habitats of major prey species. Councils must address threats to the prey species and its habitat if there is evidence that such adverse effects may lead to a decline in the prey species population and by extension reduce the quality of a managed species' EFH. These threats should be covered under the adverse effects section of the EFH amendment.

A requirement to describe and identify EFH for predators is not authorized by statute, and therefore, not included in the rule. In identifying EFH through an ecosystem approach, however, NMFS does suggest that Councils consider the extent to which the managed species is prey for other managed and non-managed species or marine mammals in determining the habitat necessary to support a sustainable fishery and the managed species' contribution to a healthy ecosystem. Predators of managed species need to be considered a source of natural mortality inherent in the ecosystem. The MMPA does include provisions which address the interactions between marine mammals and other species. NMFS is able to address these interactions through that statute.

24. Comments on Vulnerable Habitats (Habitat Areas of Particular Concern)

Comment: Some commenters asked for a definition of ''vulnerable habitat'' and wanted to know how broad this category may be. Other commenters supported the identification of vulnerable habitats or prioritizing actions in ''areas of special concern'' and suggested that important habitats be ranked. Some commenters asked for guidance in determining whether a habitat type is vulnerable. They asked that impacts analyses consider both fishing and non-fishing impacts as human-induced degradation in vulnerable habitats. Some commenters thought that an additional level of habitat delineation, as envisioned with the identification of vulnerable habitats would add confusion, and thought that this was beyond the scope of the statute.

Response: Comments on the Framework indicated a need for prioritizing the habitats and determining which should be given greatest attention in the coordination and consultation process when little is known about a species' distribution. The vulnerable habitat provision was added to the proposed rule to address these concerns. After consideration of comments on the proposed rule, NMFS has refined this concept to include ecological function of the habitat along with considerations of vulnerability. In the rule, NMFS renamed vulnerable habitats as ''habitat areas of particular concern'' (HAPC). In determining HAPCs, Councils should consider ecological value of a type or area of EFH, its susceptibility to perturbation from both anthropogenic (human-caused) sources and natural stressors, and whether it is currently stressed or rare. HAPC criteria are outlined in the interim final rule. NMFS will elaborate on these criteria in internal technical guidance.

These HAPCs can be used to focus the conservation, enhancement, management, and research efforts of NMFS and the Councils, as well as the consultation requirements of the Federal action agencies and EFH conservation recommendations. These areas should be a primary focus to provide insight into relationships between key habitat characteristics and ecological productivity or sustainability and the ways in which human activity adversely affects such habitat and its contribution to population productivity.

25. Comments on Research Needs and FMP Amendments and Updates

Comment: Commenters suggested annual reviews of research needs and assessments of progress towards meeting those needs. Other commenters were concerned that reviewing EFH sections of FMPs at least once every 5 years is too long.

Response: The proposed rule states that reviews of EFH sections of FMPs must be completed as recommended by the Secretary, at least once every 5 years. NMFS considers this amount of time appropriate and has maintained it in the rule. Councils are strongly encouraged to include interim reviews of EFH information needs during annual reviews of Stock Assessment and Fishery Evaluation (SAFE) reports. NMFS will work to develop an appropriate format for future SAFE reports to address the requirements under the Magnuson-Stevens Act EFH mandate.

Comment: One Council commented that Councils should have the option of including a framework adjustment mechanism in the EFH amendment to allow for more timely changes in management measures.

Response: NMFS agrees that framework amendments may be an appropriate way to institute management measures to conserve and enhance EFH.

Comments: Commenters called for incentives to encourage research to address gear effects and management measures to minimize adverse impacts. They suggested that a schedule be established under which the Councils or industry will be obliged to conduct the

necessary research that will indicate the extent, if any, of impacts caused by fishing sectors. As written, there is no incentive to conduct further research. They feel there is a disincentive, because findings of impacts could be used to restrict a fishery.

Response: To address this concern the interim final rule specifies that, as part of a Council's assessment of impacts caused by fishing, a schedule should be developed detailing the Council's plan to collect any missing information. Regular reporting of progress toward meeting these research goals will provide added incentive for Councils to conduct added research. A standardized schedule for all FMPs would not be useful since existing data and research needs regarding each fishery's impacts to different habitats vary greatly both within and among regions.

Comments: Some commenters asked that research needs be categorized and that cost estimates be included in FMPs. Many commenters stressed that gear effects research is needed.

Response: In developing research recommendations in FMPs, the interim final rule encourages Councils to prioritize research needs. The interim final rule does not require cost estimates; however, Councils may include budget information if they choose. Fishing gear-effects research should be considered, along with research on habitat utilization, habitat availability, and adverse impacts from non-fishing activities. Research should be conducted on all types of fishing impacts, including recreational and commercial fishing equipment or practices, however relative impacts should be prioritized and research should address needs accordingly.

26. Comments on Development and Review of NMFS EFH Recommendations to Councils

Comments: Many commenters stated that a public process must be available for participation in the development and review of EFH recommendations. They sought participation outside of the Council process. They want all stakeholders to be involved in the development of recommendations. Some state resource agencies commented that, prior to approval of recommendations, public meetings should be held in each state. Some commenters suggested that conservation groups should be specifically listed as interested parties, and some commenters suggested that any potentially impacted party should be contacted so that they could review the recommendations.

Response: The proposed rule stated that the NMFS draft recommendation will be made available for public review. The interim final rule continues to suggest that the public review process be coordinated with Council meetings in order to accommodate those user groups most closely associated with the regulation. Stakeholders that have not previously been involved in the Council process are not precluded from participating. Where appropriate, additional meetings outside the Council process may be held. Individual meetings in every state may not be practicable, but where feasible, should be considered, as is standard practice with many Council proceedings. Contacting individual stakeholders to extend the review process is not practicable. It is incumbent upon stakeholders to take the initiative and become involved in the EFH process.

Comment: One commenter criticized NMFS for establishing a standard of ''best available scientific information'' for NMFS EFH conservation recommendations to Councils. The commenter pointed out that this standard is stricter than that established in § 600.815(a)(2)(i).

Response: NMFS agrees and has modified the rule to allow other appropriate information to be used. However, NMFS will evaluate the quality of information in determining if it is appropriate to use.

27. Comments on Authority To Issue the Coordination, Consultation, and Recommendation Section

Comment: Many non-fishing industry representatives doubted the Agency's legal authority to issue regulations for the consultation process, including the requirements that Federal action agencies prepare EFH Assessments or participate in a dispute resolution process.

Response: First, NMFS does have authority to issue the coordination, consultation, and recommendation regulations. Section 305(d) of the Magnuson-Stevens Act gives the Secretary the authority to issue regulations to carry out any provision of the Act. This rulemaking authority applies directly to the EFH coordination, consultation, and recommendation provisions of the Magnuson-Stevens Act.

The provision calling for dispute resolution has been retitled ''further review'' in the interim final rule to clarify that a formal dispute resolution is not envisioned. Further review is not required each time agencies disagree. It is an option available to reach agreement only if both agencies so choose. Information in an EFH Assessment is needed to allow NMFS to fulfill its requirement to provide EFH conservation recommendations to a Federal or state action agency. Thus, the requirements calling for EFH Assessments and further review are mechanisms to improve the efficiency of the consultative process.

28. Comments on the Inclusion of Coordination, Consultation, and Recommendation Procedures

Comments: Many comments from non-fishing industries suggested that NMFS develop the consultation regulations at a later time. Some suggested that the EFH guidelines to Councils and the regulations detailing the coordination, consultation, and recommendation procedures should be published separately.

Response: Within section 305(b), the Magnuson-Stevens Act requires Councils to amend FMPs in order to describe, identify, conserve, and enhance EFH, and requires Federal action agencies to consult with NMFS if their actions may adversely affect EFH identified in FMPs. Developing the consultation regulations at a later date would be neither efficient for implementing the Magnuson-Stevens Act, nor clear to the public. Including the consultation provisions in this rulemaking allows the public and affected parties to fully understand the significance and effect of an area being identified as EFH in an FMP. Description and identification of EFH does not automatically require increased management measures (for fishing) or consultation (for non-fishing) except when Federal or state actions may adversely impact the quality or quantity of EFH. In those cases, it is important for the Councils and the action agency to understand completely the procedures involved. Therefore, NMFS considers it necessary for the development of the two sections to proceed in parallel. Moreover, between completion of this interim final rule and before the first required consultations, NMFS and the Councils will need to develop memoranda or other agreements with Federal and state agencies on how to work within or modify existing consultation procedures and in developing general concurrences, consistent with the rule. The Councils and NMFS will also need to establish procedures to coordinate sharing of information, tracking of projects, and development of conservation recommendations. NMFS does acknowledge that the coordination, consultation, and recommendation provisions for action agencies and

guidelines to the Councils may be clearer and better presented by assigning them to separate subparts (J and K) of 50 CFR part 600.

29. Comments on Use of Existing Consultation/Environmental Review Procedures

Comments: Many non-fishing groups and one government agency commented that the proposed consultation process was burdensome and duplicative because it did not recognize existing procedures that may fulfill the Magnuson-Stevens Act mandate that Federal action agencies must consult with NMFS on actions that may adversely impact EFH.

Response: The coordination, consultation, and recommendation procedures in the proposed and interim final rules reflect the Magnuson-Stevens Act's mandate. The proposed rule included a provision that EFH consultation may be consolidated with other existing consultation and environmental review processes. To clarify that it is NMFS' intention to use existing processes whenever appropriate, the interim final rule contains language strongly encouraging the use of existing consultation and environmental review processes to fulfill the EFH consultation requirements. The procedures will not be duplicative because only one review process will be used.

Existing Federal statutes such as the FWCA, ESA, and National Environmental Policy Act (NEPA) already require consultation or coordination between NMFS and other Federal agencies. Therefore, the need for Federal agencies to evaluate the effects of their actions on fish and fish habitat is not a new requirement imposed by the Magnuson-Stevens Act. As required by section 305(b)(1)(D) of the Magnuson-Stevens Act, NMFS will coordinate with, and provide information to, other Federal agencies on conservation and enhancement of EFH. This will include distribution of maps, tables and narrative descriptions of EFH. The EFH FMP amendments, which will be widely available at all NMFS Regional offices (see **ADDRESSES**), the NMFS Office of Habitat Conservation, Council offices, and other locations such as the World Wide Web, will provide additional information to assist Federal agencies in the assessment of their actions. FMPs will describe EFH and identify those characteristics of EFH that control or limit the habitat's use by a managed species. Action agencies can use this information to determine if, and how, an action will affect EFH. Thus, EFH consultation should not be burdensome, since it will use readily available information that may be incorporated into the same processes that are currently invoked to satisfy existing review requirements.

Comments: Several industry groups commented that the EFH coordination, consultation, and recommendation process will mean additional restrictions on non-fishing industry activities and will not result in any benefit to EFH.

Response: The coordination, consultation, and recommendation process itself will not automatically impose additional restrictions, because NMFS' and the Councils' EFH conservation recommendations are non-binding. However, one of the purposes of the Magnuson-Stevens Act is to promote the protection of EFH in the review of projects that require Federal or state action. Accordingly, Federal and state action agencies must give NMFS' and the Councils' comments and EFH conservation recommendations due weight in their decision-making process. After consideration, Federal or state action agencies may recommend modifications of any actions with adverse effects on EFH, in order to conserve EFH. Benefits to EFH will depend on the extent to which these recommendations are followed.

Comments: Many environmental groups commented that NMFS' recommendations should be mandatory and that NMFS should be able to either stop a project based on adverse effects on EFH or postpone it pending completion of consultation.

Response: The Magnuson-Stevens Act does not provide such authority. Therefore, NMFS' EFH conservation recommendations are not mandatory, and NMFS has no authority to stop a project based on adverse effects on EFH.

Comment: One environmental group suggested that NMFS EFH conservation recommendations contain performance criteria.

Response: Where appropriate, NMFS EFH conservation recommendations will contain performance criteria.

Comments: Several agencies and many industry representatives commented that actions covered by other consultation procedures should be exempt from EFH consultation or covered by a General Concurrence. Many industry groups or resource management programs requested a blanket exemption for their activities.

Response: A purpose of the 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.'' The Magnuson-Stevens Act does not provide exemptions from its consultation requirements in section 305(b)(2). Therefore, NMFS has no authority to exempt any actions from the consultation requirement. Existing environmental consultation procedures do not necessarily ''promote'' the protection of EFH. The rule is sufficiently flexible to consolidate EFH requirements with those environmental review procedures that do promote EFH, or that are modified to conform to the EFH consultation requirements. To address programs or groups of actions that have minimal adverse effects on EFH, the interim final rule allows NMFS to issue a General Concurrence rather than review each of these actions separately.

Comment: One Council commented that the Coastal Zone Management Act (CZMA) consistency process be cited as an existing environmental review that may be used to evaluate adverse impacts from Federal activities.

Response: The CZMA consistency process is a state-run program which would not be appropriate for NMFS to use to evaluate Federal actions. However, NMFS recognizes that state CZM programs may be helpful in learning of, and providing recommendations on, state actions that may adversely impact EFH, and has included this in the rule. Moreover, through joint permitting processes used by many Federal agencies, NMFS attends monthly permit review meetings along with state CZM representatives. NMFS encourages exchanges of this type.

Comment: Four commenters would prefer that the consultation procedures focus on only those activities with the potential for the most significant impacts.

Response: NMFS agrees that effective coordination, consultation, and recommendation will require prioritization of efforts. The three-tiered consultation process (GCs, abbreviated consultation, and expanded consultation) is intended to focus effort on those activities with the greatest potential to adversely affect EFH. If HAPCs are identified in an FMP, NMFS and the appropriate Council may use these as areas to further focus the consultation procedures.

Comments: Several environmental groups commented that states should be subject to the same consultation requirement as Federal agencies. Those commenters also asked for more details on state roles in the consultation process.

Response: The Magnuson-Stevens Act does not require that states consult with the Secretary. NMFS and the Councils are required to provide EFH conservation recommendations to states on activities that may adversely affect EFH. This is why the rule suggests establishing formal agreements with states to inform NMFS and the Councils of such activities. The Secretary and the state may also enter into agreements to promote the protection of EFH.

Comment: One Council commented that NMFS should keep a record of Federal and state actions for which it provides recommendations.

Response: NMFS agrees and plans to establish a system to track the disposition of its recommendations.

Comment: One commenter asked whether it was NMFS' responsibility to develop agreements with states to facilitate providing recommendations on state actions that may adversely impact EFH.

Response: It is NMFS' responsibility to develop such agreements.

Comment: One commenter stated that NMFS should separate the consultation functions from the recommendation functions.

Response: The requirement in the Magnuson-Stevens Act for Federal agencies to consult with NMFS is immediately followed by the provisions that Councils and NMFS provide recommendations to Federal action agencies. The two are also linked because consultation is the main way NMFS receives information about actions that may adversely affect EFH. NMFS must provide EFH conservation recommendations for these actions. Congress clearly intended that these activities be linked; therefore, NMFS continues to link the requirements in the rule.

30. Comments Regarding Federal Actions Requiring Consultation

Comment: Many state and Federal agencies and several non-fishing industries questioned when EFH consultations would begin, whether ongoing or delegated Federal actions require consultation, and to what extent Federal funding may trigger consultation.

Response: No consultation is required until the Secretary has approved an FMP amendment identifying EFH. The Councils are required to submit these amendments to the Secretary by October 11, 1998. Once EFH is identified, completed actions such as issued permits do not require consultation. Permit renewals, modifications, or reviews are a Federal action that could result in further consultation. Delegated programs will require consultation at the time of delegation or renewal of delegation. All Federal funding for programs that may have an adverse effect on EFH will trigger consultation. NMFS encourages agencies funding programs that may adversely affect EFH to initiate programmatic consultation to evaluate their programs. Once funds are dispersed to a non-Federal entity, they are no longer considered Federal funds. Therefore, non-Federal entities receiving Federal funds for certain actions are not required to consult on these actions.

Comments: Several commenters expressed concern about requiring EFH consultation for actions not actually occurring in EFH.

Response: The Magnuson-Stevens Act requires consultation for all actions that may adversely affect EFH, and it does not distinguish between actions in EFH and actions outside EFH. Any reasonable attempt to encourage the conservation of EFH must take into account actions that occur outside of EFH when those actions may have an adverse effect on EFH. Therefore, EFH consultation is required on any Federal action that may adversely affect EFH, regardless of its location. An adverse effect on EFH must be reasonably foreseeable before consultation is required.

31. Comments Regarding Participation in the Consultation Process

Comments: Several individuals and non-fishing interests expressed concern that the rule allowed no clear role for applicants, private landowners, or the conservation community in the consultation process. Those commenters urged more opportunities for public participation.

Response: NMFS' coordination, consultation, and recommendation procedures include opportunities for public involvement, and all Council meetings are open to the public. Most existing environmental review processes, which can be used to satisfy the EFH consultation requirements, already include opportunities for applicants and the public to participate, (e.g., permit reviews under the Clean Water Act section 404 program). Additionally, § 600.905(c)(2) of the rule allows a designated non-Federal representative of a Federal action agency to participate in consultation or preparation of an EFH Assessment. This non-Federal representative could be an applicant or landowner.

Comment: A few commenters requested that the rule clarify the role of Councils in the EFH coordination, consultation, and recommendation process.

Response: The Magnuson-Stevens Act does not require Federal action agencies to consult with Councils on actions that may adversely affect EFH. However, the Act authorizes Councils to provide comments and recommendations on Federal or state activities that may affect fish habitat, including EFH, and requires Councils to comment and provide recommendations if the activity may affect anadromous fish habitat. NMFS included a specific section on coordination between the Councils and NMFS in the interim final rule. The Councils are viewed as integral partners in the entire EFH process. Councils will have a significant role in describing and identifying EFH, in considering threats to EFH, and in selecting conservation measures to enhance EFH. The rule encourages the establishment of agreements between the Secretary and appropriate Council(s) to facilitate provision of Council EFH conservation recommendations to Federal and state agencies.

Comment: Several non-fishing industry groups were concerned that the Councils might institute their own, completely different consultation process. Those commenters urged that NMFS should be the only point of contact.

Response: The Magnuson-Stevens Act does not require Federal agencies to consult with the Councils, although Federal agencies are required to respond to Council comments and recommendations. NMFS and the Councils will be developing agreements to minimize duplication when dealing with action agencies, but Councils will have the ability to act on their own.

32. Comments on the Determination of Adverse Impact

Comments: Several commenters asked that the rule clarify who determines adverse effects.

Response: The action agency is responsible for making an initial determination of whether its activity is going to have an adverse effect on EFH. If NMFS becomes aware of an action that appears to have an adverse effect, and the action agency has not initiated consultation, NMFS may advise the action agency of its concerns and request the initiation of consultation. If the action agency does not initiate consultation, NMFS still has the responsibility to provide EFH conservation recommendations to which the action agency must respond within 30 days of receipt. The rule contains additional language to clarify this process.

33. Comments on the Use or Development of General Concurrences (GCs)

Comments: Several commenters felt the criteria for GCs were ambiguous.

Response: The wide range of actions that may affect EFH makes it impossible to implement more specific criteria for GCs. GCs, established for actions that cause no greater than minimal adverse impact on EFH, will be developed on a case-by-case basis in response to specific programs, activities, habitats, species, and areas. GCs developed for actions that affect HAPCs should be subject to a higher level of scrutiny. GCs will be developed through a public process to allow participation by all interested parties.

Comment: Several Councils believe that GCs should not restrict them from commenting on activities.

Response: GCs are agreements between Federal action agencies and NMFS. Each GC will be developed in coordination with the Councils to improve agreement on which activities have minimal impacts both individually and cumulatively. The informal Council role in developing each GC is separate from the Councils' authority to provide comments and recommendations to Federal and state action agencies and will not restrict Councils from commenting on any action that may affect EFH.

Comments: Several commenters suggested that NMFS should track all activities covered by GCs.

Response: NMFS will ask each Federal action agency to track activities they authorize that are covered by a GC. Tracking and providing information to NMFS may be a GC requirement. NMFS may maintain its own tracking system for specific issues that warrant special attention based on geography, habitat types, species, or other factors.

Comment: An interstate commission commented that the rule should require that GCs be reviewed every 5 years. The commission also suggested that NMFS clarify that GCs it initiates will be subject to public review before issuance.

Response: The rule states that NMFS will periodically review and revise its findings of general concurrence, as appropriate. It is NMFS' intent to conduct this review at least once every 5 years. The rule also requires that GC tracking information be made available to the public annually. Such information will allow the public to review GCs prior to NMFS' review and revision. Additionally, the rule states that NMFS will provide an opportunity for public review prior to the issuance of a GC, even those initiated by NMFS.

34. Comments on the Use of Appropriate Level of Consultation

Comment: Several Federal agencies requested clarification on what triggers the expanded consultation. They sought guidance on whether the action agency or NMFS can initiate expanded consultation.

Response: The rule has been clarified to address this comment. Expanded consultation is appropriate when a proposed action may have substantial adverse impacts on EFH. The action agency determines the appropriate level of consultation. However, if NMFS feels that a proposed action will have substantial effects on EFH and its concerns are not receiving proper consideration, NMFS may request expanded consultation.

35. Comments on EFH Assessments

Comments: Some commenters supported the standard of ''best scientific information'' that is mandated in the Federal consultation and EFH Assessment section of the rule. They felt that all portions of the EFH rule should specify the same standard.

Response: NMFS applies the best scientific information standard throughout the rule. When describing and identifying EFH, Councils should seek the broadest possible information base, since the data are widely scattered among various state and Federal agencies, university or private researchers, and diverse fishery participants. Best professional judgment will be required to properly weigh all data collected regarding habitat usage for the various life history stages of the managed species. With respect to assessing the effects of both fishing and non-fishing activities on EFH, the rule states that the best scientific information available should be used, but that other appropriate sources of information may also be considered. This standard is appropriate and consistent with national standard 2 that requires all FMP conservation and management measures to be based on the best scientific information available. EFH Assessments during Federal consultation should also be based on best scientific information available. An action agency's conclusions regarding the potential adverse impact of an action on EFH should be well supported by relevant research, when available. Conclusions that are contrary to the readily available information will not be considered adequate assessment of adverse effects.

Comment: One commenter was concerned that an EFH Assessment would be required for actions with any adverse impact on EFH and suggested that NMFS establish a threshold level of adverse impact, preferably the NEPA significance threshold, for when such an assessment would be required.

Response: The Magnuson-Stevens Act requires Federal action agencies to consult with NMFS on any action that may adversely affect EFH. The requirement for an EFH Assessment is a mechanism to improve the efficiency of the consultation process. The level of detail in the EFH Assessment should be commensurate with the potential impact. If the action's impacts will be minimal, then it may qualify for a GC and no EFH Assessment would be required.

Comment: One commenter criticized NMFS for allowing the use of a completed EFH Assessment for other similar actions because of temporal and spatial differences in adverse impacts on EFH.

Response: The rule states that completed EFH Assessments may be used for other actions only if the proposed action involves similar impacts to EFH in the same geographic area or a similar ecological setting.

36. Comments on the Establishment of Timelines in the Consultation, Recommendation, and Response Processes

Comment: Several commenters sought clarification on timelines for NMFS action in consultation process. Some commenters were concerned that the consultation process would slow projects. Others expressed concern that NMFS would delay projects while preparing their recommendations.

Response: The timelines presented in the proposed rule have been clarified in this rule. If an existing process is used to meet the EFH consultation requirement, NMFS will work within that procedure's specified timelines, assuming that NMFS receives timely notification of the action. NMFS has clearly established timelines for preparation and submission of its recommendations during consultation. For example, the interim final rule requires NMFS to respond to Federal action agencies within 30 days during abbreviated consultation and within 60 days during expanded consultation. Those timelines may be adjusted based on mutual agreement between the action agency and NMFS (e.g., a compressed schedule for special situations).

Comment: Several commenters suggested that NMFS should not extend the time for the consultation process without concurrence from the Federal action agency.

Response: That has always been NMFS's intent and the rule has been modified to clarify that intent.

Comment: One commenter suggested that NMFS extend the time required for a Federal action agency to respond to a NMFS recommendation from 30 to 90 days.

Response: The deadline for Federal agency response is established in the Magnuson-Stevens Act and can not be extended by regulation.

Comment: One commenter stated that the rule should clarify that if NMFS does not respond to a Federal action agency's request for consultation, the action agency may proceed with the action.

Response: The rule states that Federal action agencies will have fulfilled their consultation requirement after submittal of a complete EFH Assessment to NMFS. The Magnuson-Stevens Act requires Federal agencies to consult with NMFS and NMFS is required to provide recommendations as part of that consultation. Federal agencies and NMFS will follow the requirements of the statute and the rule.

37. Comments on Supplemental Consultation

Comment: Three commenters want supplemental consultation deleted from the interim final rule.

Response: NMFS reconsidered the entire consultation process during its analysis of comments received on the proposed rule. The Agency concluded that supplemental consultation is an important element of the EFH rule. A Federal action agency must reinitiate consultation with NMFS if the agency substantially revises its plans for an action in a manner that may adversely affect EFH or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations. This rule clarifies the language on supplemental consultation.

38. Comments on NMFS' EFH Conservation and Enhancement Recommendations

Comments: Comments from several industry interests and one Federal agency urged NMFS not to recommend measures that are impracticable, too costly, or beyond the action agency's authority.

Response: NMFS will use scientific assessments of impacts on EFH as the basis for conservation recommendations. NMFS agrees that its recommendations should be practical and cost-effective, but it is not NMFS' statutory responsibility to conduct a benefit/cost analysis or to do a public interest test. NMFS expects that action agencies will make their own decisions about the practicality and economic aspects of the EFH conservation recommendations as part of their review of proposed actions. NMFS will not make recommendations that are beyond the action agency's authority.

39. Comment on Federal Action Agency Response to NMFS EFH Recommendations

Comment: One commenter stated that NMFS has no statutory authority to require Federal action agencies to provide the scientific justification for disagreeing with a NMFS EFH conservation recommendation.

Response: As stated previously, section 305(d) of the Magnuson-Stevens Act gives the Secretary authority to issue regulations to carry out any provision of this Act. Therefore, NMFS has the authority to issue regulations detailing how Federal action agencies should respond to NMFS' EFH recommendations. The requirement to provide scientific justification applies to disagreements over the anticipated adverse effects of the proposed action and elaborates on the requirements of section 305(b)(4)(B) of the Magnuson-Stevens Act that a Federal agency explain its reasons for disagreeing with the NMFS EFH conservation recommendation. Federal action agencies may also include discussions of non-scientific issues (e.g., lack of legal authority to carry out the recommendation or economic in feasibility) in their response.

40. Comments Regarding the Interpretation of Anadromous

Comments: Several commenters were confused by the use of the term ''anadromous fishery resource'' in the rule and how such species and their habitat are covered by the EFH mandate.

Response: NMFS included this section in the rule to clarify the meaning of the term ''anadromous fishery resource under a Council's authority,'' as it applies to a Council's commenting responsibilities under section 305(b)(3)(B) of the Magnuson-Stevens Act. Anadromous fish are treated differently from other fishery resources in the Magnuson-Stevens Act. Section 3 of the Magnuson-Stevens Act defines ''anadromous species'' as ''fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.'' It further defines ''fishery resources'' as ''any fishery, any stock of fish, any species of fish, and any habitat of fish.'' In § 600.930(c)(4) of this interim final rule, ''an anadromous fishery resource under a Council's authority'' is described as an anadromous species that inhabits waters under the Council's authority at some time during its life. Although EFH is identified only for species managed under an FMP, the Magnuson-Stevens Act requires Councils to comment on any activity that is likely to substantially affect the habitat of an anadromous fishery resource under its authority.

41. Comments on Extending the Deadline for Councils To Submit FMP Amendments to the Secretary

Comments: Several commenters asked NMFS to extend the deadline for Councils to submit EFH FMP amendments to the Secretary one year beyond the October 11, 1998 deadline.

Response: The Sustainable Fisheries Act, Pub. L. 104–297, requires that each Council submit to the Secretary amendments to each of their FMPs to comply with the amendments of the Act by October 11, 1998. The Secretary does not have the authority to extend this statutory deadline through regulation.

42. Comment on How the NMFS National Habitat Plan Relates to Implementation of the EFH Mandate

Comment: One Council commented that the rule should discuss the relationship between the NMFS National Habitat Plan (NHP) and the EFH mandate of the Magnuson-Stevens Act.

Response: The major themes of the NHP: better integrate habitat and fishery management; promote habitat restoration as a routine part of fisheries and habitat management; expand habitat conservation to assess and manage habitat degradation on a watershed scale; expand understanding of the interrelationships between habitat quality and quantity and the healthy of fisheries, are woven throughout the rule.

43. Comments on Consistency With Coastal Zone Management Plans

Comments: Several state agencies commented concerning consistency with their states' federally approved Coastal Zone Management Programs (CZMP). There was general agreement that the intent of the rule was consistent with CZMPs. Several of the state agencies cautioned that the FMP amendments and their site-specific actions that result from compliance with these regulations would require further review for consistency.

Response: NMFS agrees with this analysis. These regulations guide the Councils in amending FMPs, and detail procedures for NMFS, the Councils, and Federal and state action agencies to use in meeting the EFH requirements of the

Magnuson-Stevens Act. Analysis of the effects of specific EFH amendments to FMPs at this time would be purely speculative; they are not reasonably foreseeable. EFH amendments to FMPs will be submitted to state coastal zone agencies. CZMP consistency will be determined for each FMP EFH section, as is required for all Federal FMPs.

44. Comments on the EA Prepared for the Rulemaking

Comments: Some non-fishing industry commenters questioned the preparation of an EA, rather than an Environmental Impact Statement (EIS), and the finding of no significant impact.

Response: In compliance with NEPA, NMFS prepared an EA for the regulations implementing EFH requirements of the Magnuson-Stevens Act. The environmental review process led to the conclusion that this action will not have a significant effect on the human environment. The rule provides guidelines to the Councils to assist them in developing EFH sections in FMPs. The rule itself does not establish any new regulatory jurisdiction for NMFS or the Councils over these habitats, but it does provide procedures for NMFS, the Councils, and Federal and state action agencies to use in coordinating, consulting, and providing recommendations on actions that may adversely affect EFH. NEPA documentation will be undertaken for each EFH FMP amendment, as is currently done, to fully address FMP-specific effects of EFH implementation. Therefore, an EIS is not required by section 102(2)(C) of NEPA or its implementing regulations.

45. Comments on NMFS' Determination of Significance for the Purposes of E.O. 12866

Comments: One commenter disagreed with NMFS's determination that the rule is not significant for purposes of E.O. 12866 because NMFS did not consider whether the proposed rule was duplicative or inconsistent with existing regulations, and interfered with actions by other agencies. Another commenter did not give the basis for its disagreement.

Response: NMFS continues to believe that the rule does not meet any of the criteria for a significant regulatory action established in E.O. 12866, including those mentioned in the comment. This rule establishes procedures for coordination, consultation, and recommendations to other agencies on actions that may adversely affect EFH. The consultations will be fit into existing procedures whenever possible, and when this is not possible, will be fit into the other agency's time frame for decision-making. The EFH conservation recommendations are not mandatory, but will be part of the action agency's decision-making process. Therefore, the rule does not meet E.O. 12866's requirements for significance.

46. Comments on NMFS' Regulatory Flexibility Act Determination

Comments: One commenter agreed with NMFS that no regulatory flexibility analysis needs to be prepared now, but that regulations affecting EFH will be subject to the analysis. Other commenters disagreed with NMFS' conclusion that the rule would not have a significant economic impact on a substantial number of small entities engaged in non-fishing activities and requested that NMFS prepare a regulatory flexibility analysis.

Response: NMFS does not have mandatory authority over non-fishing interests. NMFS provides EFH conservation recommendations to a Federal or state action agency if their action may adversely affect EFH. The action agency considers the recommendation in its decision-making process and decides for itself whether it will impose any requirements on the entity seeking a permit or license and assess any economic impact on small entities. Additionally, the consultation process itself should not impose any additional burdens on small businesses engaged in non-fishing activities because the Federal action agency will most likely use existing consultation/environmental review procedures. If there are no existing consultation procedures, then the procedures in the rule must be used by the Federal agency. The information requested in the rule is material that the action agency already will need to make its decision on issuing a permit or license. Therefore, there will be no additional burden on small businesses engaged in non-fishing activities.

47. Comments on NMFS' determination That a Federalism Assessment is not Required

Comments: Commenters expressed the opinion that NMFS' determination is incorrect that this rule does not include policies with federalism implications requiring preparation of a Federalism Assessment. This rule does not contain policies that have a substantial direct effect on the states, on the relationship between the National government and the states, or on the distribution of power or responsibilities among the various levels of government. Some commenters stated that while EFH conservation recommendations are not mandatory, the states will be pressured to comply with the recommendations. One commenter stated that the process to guide the agencies is mandatory and therefore raises federalism issues. Other commenters raised the concern that because EFH may be identified in state waters, and many adverse impacts may occur there, a federalism assessment should be prepared.

Response: NMFS disagrees with the commenters and continues to take the position that the rule does not contain policies that have federalism implications sufficient to warrant preparation of a Federalism Assessment. States are not required to consult with NMFS on their actions that may adversely affect EFH. As stated in the Classification section of the rule, NMFS EFH conservation recommendations are not mandatory, and states are not required to undertake action in any way not of their own choosing.

48. Comments on NMFS Compliance With the Paperwork Reduction Act

Comments: Two commenters expressed their opinion that NMFS has not complied with the Paperwork Reduction Act (PRA) because the rule neither displays an Office of Management and Budget (OMB) control number nor states that the rule is not subject to OMB review. They stated that the proposed rule is clearly a collection of information subject to the PRA. They claim that this will be a big burden on many entities.

Response: Commenters correctly state that the PRA requires OMB approval before NMFS may require a collection of information. However, they overlook the regulatory definition of information in 5 CFR 1320.3(h)(4) stating that information does not generally include ''facts or opinions submitted in response to general solicitations of comments from the public published in the **Federal Register** * * * regardless of the form * * *''. The rule clearly fits the regulatory exemption for information and therefore is not subject to OMB approval. As such, it does not need either an OMB control number or a statement that the rule is not a collection of information.

49. Comments on Compliance With the ESA

Comments: Two commenters stated they think that promulgation of the rule is an action that may affect listed species, requiring consultation under section 7(a)(2) of the ESA.

Response: NMFS complied with the ESA by requesting the U.S. Fish and Wildlife Service (FWS) and NMFS'

office that handles ESA issues to concur with its determination that the proposed activity is not likely to adversely affect listed species. Both responded to NMFS stating their concurrence that the EFH rule is not likely to adversely affect listed species.

Changes From the Proposed Rule

The proposed rule contained guidelines to the Councils and procedures addressing the requirements to coordinate, consult, and recommend under the EFH provisions of the Magnuson-Stevens Act. The guidelines to the Councils will be in part 600 subpart J, but NMFS has determined that the regulations on coordination, consultation, and recommendation should be moved to a separate subpart, K. This provides easier access to the regulations, clarification of purpose, and still maintains their proximity to subpart J so that the implications of EFH designation are readily apparent. This is not a substantive change from the proposed rule.

NMFS reorganized parts of the coordination, consultation, and recommendation procedures by addressing use of existing procedures before the regulatory requirements for GCs, and abbreviated and expanded consultation. The use of existing procedures section includes more detail. NMFS reordered this section and expanded it in response to commenter's concerns that consultation could be duplicative with existing consultation/environmental review procedures.

Changes made are technical or administrative in nature and clarify intent or otherwise enhance administration of the EFH process. These changes are listed in the order that they appear in the regulations; grammatical or other minor changes are not detailed. Unless otherwise discussed, the rationale for why changes were made from the proposed rule is contained in the Comments and Response section.

In § 600.10, ''aquatic'' was added to the interpretation of historically used areas of EFH.

In § 600.10, ''the managed species' contribution to'' was added to denote that the healthy ecosystem is the local ecosystem in which the managed species participates.

In § 600.805, references to the consultation procedures required by the Magnuson-Stevens Act have been removed since these regulations have been separated into a new subpart as noted above.

In § 600.805, a new paragraph was added to describe the geographic scope of EFH and clarify the relationship of the regulations to Federal waters, state waters, and extraterritorial waters.

Section § 600.810 was changed to add ''Definitions and Word Usage'' for terms specific to this subpart; subsequent sections were renumbered.

Section 600.815 was renumbered from § 600.810.

In § 600.815, paragraph (a)(2)(i)(B), the phrase ''the habitat requirements by life stage, and the distribution and characteristics of those habitats'' was added to be consistent with later sections regarding information on the habitat; the phase ''but not limited to'' was added to emphasize that this list is intended to be illustrative not exhaustive; ''or formerly occupied'' was added to correct the language to agree with the definition of EFH.

In § 600.815, paragraph (a)(2)(i)(C), ''should'' was substituted for ''will be'' to emphasize that Councils should use information from all levels that are available.

In § 600.815, paragraph (a)(2)(i)(C)(*2*), ''relative densities'' was changed to ''density or relative abundance'' as more scientifically acceptable language; ''gear'' was changed to ''methods'' to include different techniques using the same gear.

In § 600.815, paragraph (a)(2)(ii)(A), the phrase ''erring on the side of inclusiveness'' was deleted because it is redundant with the concept of identifying EFH in a ''risk-averse fashion.'' Wording has been changed to clarify that Level 1 information ''should be used to identify the geographic range'' of a species, Levels 2–4 information should be used to identify EFH within that range. If only Level 1 data exist, appropriate analyses should be used to identify EFH based on utilization of habitats. The sentence, ''Councils must demonstrate that the identification of EFH is based on the best scientific information available, consistent with national standard 2'' was added to clarify that Councils must use all available information to focus their identification of EFH.

In § 600.815, paragraph (a)(2)(ii)(B), references to populations recovering from ''declines'' were removed in favor of the terms ''overfished'' or ''rebuilding the fishery,'' which are more commonly used fishery management terms. NMFS added the phase ''and habitat loss or degradation may be contributing to the species being identified as overfished'' to clarify that habitat limitations should be considered when identifying historic habitat as EFH. ''Once the fishery is no longer considered overfished, the EFH identification should be reviewed, and the FMP amended, as appropriate'' was added to clarify the dynamic nature of EFH identification.

In § 600.815, paragraph (a)(2)(ii)(C), ''aquatic areas'' has been added to clarify that the statutory definition limits EFH to aquatic portions of ''critical habitat.''

In § 600.815, paragraphs (a)(2)(ii)(D) and (E), the phrase ''a sustainable fishery and the managed species' contribution to a healthy ecosystem'' replaced ''target production goal.''

In § 600.815, paragraph (a)(2)(ii)(E), the listing of ecological roles to be considered in determining EFH has been removed, these ecological factors are considered broadly in the national standards. Councils should address these needs on a case-by-case basis.

In § 600.815, paragraph (a)(2)(ii)(F), ''aquatic'' is added to qualify ''degraded or inaccessible habitat'' to clarify that this is not intended to be dry land.

In § 600.815, paragraphs (a)(3), (a)(4), and (a)(5), have been reordered to strengthen the connections between EFH identification and description and the management of fishing activities that may adversely affect EFH as suggested by commenters. Non-fishing activities are addressed under § 600.815(a)(5).

In § 600.815, paragraph (a)(3)(ii), the phrase ''fishing equipment'' has replaced ''fishing gear'' to encompass all sources of fishing-related adverse impacts to EFH; the wording clarifies that ''best scientific data'' should be used but that other ''appropriate information sources'' should be considered. The wording also clarifies for the Councils that gear assessments should include effects on all EFH types potentially impacted (especially HAPC) and Councils should evaluate relative impacts.

In § 600.815, paragraph (a)(3)(iii), ''identifiable'' replaces ''substantial.'' The phrase ''and cumulative impacts analysis'' clarifies that fishing impacts should be included in an analysis of cumulative impacts on EFH.

In § 600.815, paragraph (a)(3)(iv) clarifies that consideration should be given to long- and short-term benefits and costs to both EFH and the fishery when assessing management actions. ''EFH'' is substituted for ''the marine ecosystem'' to improve consistency with the Magnuson-Stevens Act.

In § 600.815, paragraph (a)(4)(i) is retitled ''Fishing equipment restrictions.'' NMFS replaced the list of mixed general and specific examples of fishing types with more general examples of potential gear restrictions.

In § 600.815, paragraph (a)(4)(ii), wording was added to clarify that ''marine protected areas'' can be used for management of adverse effects on

EFH, as well as research on fishing equipment impacts; especially in HAPC.

In § 600.815, paragraph (a)(5) is a consolidation of § 600.810 (a)(3) paragraphs (i) and (ii) from the proposed rule.

In § 600.815, paragraph (a)(5), illustrative examples of ''activities which can adversely affect EFH'' were made more consistent so that broad actions, not industries potentially causing those actions, were highlighted. The phrases, ''actions that contribute to non-point source pollution and sedimentation'' and ''introduction of potentially hazardous materials'' were added for clarity in place of ''runoff'' and ''placement of contaminated material.'' The mapping provisions specific to this section were moved from the Cumulative Impacts Analysis section of the proposed rule.

Section 600.815, paragraph (a)(6)(i), clarifies that fishing effects as well as non-fishing impacts on EFH should be subject to cumulative impacts analysis, separately and in concert. NMFS added the term ''feasible'' to emphasize that a cumulative impacts analysis may not be possible because of technological or other limitations. NMFS replaced the phrase ''natural stresses'' with ''natural adverse impacts''. NMFS changed the wording to avoid misinterpretation of ''ecological risk assessment'' as a formalized toxicological test.

In § 600.815, paragraph (a)(6)(ii) was split out from the cumulative impacts section to emphasize cumulative impacts from fishing and to highlight that HAPCs should be examined for cumulative effects.

In § 600.815, paragraph (a)(6)(iii) splits the mapping of cumulative impacts into a separate paragraph.

In § 600.815, paragraph (a)(6)(iv) ''*Research needs*,'' was added to emphasize that Councils should pursue research efforts geared to understand ecosystem and watershed effects on fish populations and incorporate them into their protection of EFH if they are unable to conduct cumulative impacts analyses.

In § 600.815, paragraph (a)(7) was renumbered from paragraph (a)(3)(iv) and reordered. NMFS modified the language to emphasize that the preferred approach to EFH conservation should be to avoid, minimize, or compensate for adverse effects on EFH from specific actions to focus EFH conservation efforts. NMFS added ''especially in habitat areas of particular concern.''

In § 600.815, paragraphs (a)(7)(ii)(A), (B), (C), and (D) have been renumbered from paragraphs (a)(3)(iv)(A–F) of the proposed rule reflecting the incorporation of the wording from paragraph (a)(7)(ii)(A) (proposed rule) into the previous paragraph mentioned, and titles were generally modified for grammatical consistency. Language was added to clarify that conservation measures presented in these paragraphs are illustrative of measures that Councils may consider to proactively or reactively address past or present adverse effects to conserve and enhance EFH.

In § 600.815, paragraph (a)(7)(iii)(A) has been retitled ''Enhancement of rivers, streams, and coastal areas.'' Paragraph (a)(3)(iv)(C) from the proposed rule has been incorporated into this paragraph. The phrase ''modification of operating procedures for dikes and levees'' was added to clarify that removal is not always the preferred option for providing fish passage. The final sentence in the paragraph was added to emphasize governmental planning in watershed management.

In § 600.815, paragraph (a)(7)(iii)(B), ''and quantity'' has been added to the title; and ''providing appropriate in-stream flow'' has been added to reflect general options to apply to all regions.

In § 600.815, paragraph (a)(7)(iii)(C), ''subsequent watershed'' was deleted from the title. Specific examples have been replaced by more general examples of watershed-scale conservation and enhancement options.

In § 600.815, paragraph (a)(7)(iii)(D), the example has been deleted since it may be only regionally applicable; ''(converting non-EFH to EFH)'' was added for clarity; ''and degraded'' has been added to clarify that such areas may be appropriate for enhancement through habitat creation; ''conversion'' was included as a synonym for ''creation;'' ''within an ecosystem context'' has been added for clarity.

In § 600.815, paragraph (a)(8), ''and their habitat'' has been added to better explain how prey species should be addressed. Language was added to explain why adverse impacts to prey and prey habitat may be adverse impacts to EFH.

In § 600.815, paragraph (a)(9) has been renumbered from paragraph (a)(7) of the proposed rule and retitled ''Identification of habitat areas of particular concern;'' language has been included to denote that HAPC might include not only those areas especially vulnerable to degradation, but those that provide important ecological functions for one or more managed species; the paragraphs have been renumbered after the inclusion of paragraph (i), The importance of the ecological function provided by the habitat.

In § 600.815, paragraph (a)(10) has been renumbered from paragraph (a)(8) of the proposed rule; ''cumulative impacts from fishing,'' ''priority,'' ''and a schedule for obtaining that information'' have been added; ''equipment'' replaced ''gear;'' ''maintaining a sustainable fishery and the managed species' contribution to a healthy ecosystem'' replaces ''reaching target long-term production levels.'' All of these changes were made to ensure that this section is consistent with other parts of the rule.

In § 600.815, paragraph (a)(11) has been renumbered from paragraph (a)(9) of the proposed rule; ''including an update of the equipment assessment originally conducted pursuant to paragraph (a)(3)(ii) of this section'' has been added, as has been ''This information should be reviewed as part of the annual Stock Assessment and Fishery Evaluation (SAFE) report prepared pursuant to § 600.315(e)'' and ''complete.''

In § 600.815, paragraph (c), language has been added to clarify that NMFS EFH FMP recommendations may include ''other appropriate information.'' Language was added to acknowledge differences between Council procedures in preparing FMPs and to assure the flexibility to work within each process.

In § 600.815, paragraph (d) has been added to encourage coordination with other fishery management authorities.

The consultation, coordination, and recommendation provisions in the proposed rule have been separated out into a new subpart K of part 600.

Sections 600.905, 600.915, 600.920, 600.925, and 600.930 have been reorganized from the proposed rule's § 600.815 to provide better access and understanding to the provisions. Each of the provisions that applies to a different part of the Magnuson-Stevens Act has been separated into a different section to highlight the different requirements in response to many commenters who failed to recognize the distinctions between coordination, consultation, and commenting (or providing recommendations) and the entities involved in each process.

Section 600.905 has been added to clarify the intent of these provisions in promoting the protection of EFH in the review of Federal and state actions that may adversely affect EFH.

Section 600.905(c) has been revised adding language to emphasize cooperation between Councils and NMFS in all phases of EFH implementation. The clarification that ''NMFS and the Councils also have the

authority to act independently.'' has been added.

Section 600.910 has been added for definitions and word usage that apply to this subpart.

Section 600.915 has been renumbered and expanded to provide the details of the coordination between NMFS and other action agencies and to indicate that NMFS will take a proactive approach in promoting the conservation of EFH.

Section 600.920 has been revised to combine all sections of the Federal agency consultation provisions in a more organized fashion. The proposed rule recommended incorporation of EFH consultations with other existing environmental reviews, but this was overlooked by some commenters. These sections clarify the details of appropriate consultation and emphasize that NMFS' preference is for consultations to occur within existing consultation/environmental review procedures, whenever possible.

Section 600.920, paragraphs (a) (1) and (2) were added to provide specific information on which Federal actions require consultation, and the use of programmatic consultation.

In § 600.920, paragraph (d), language has been added to clarify that ''other appropriate sources of information may also be considered'' when evaluating the effects of a proposed action on EFH.

In § 600.920, paragraph (f)(1), ''minimal'' has been changed to ''no more'' than minimal.

Section 600.920, paragraph (f)(2)(ii) clarifies the requirements for tracking actions included in General Concurrences.

Section 600.920, paragraph (f)(2)(iv) explains that in HAPC, activities will be held to a greater level of scrutiny before being granted a General Concurrence.

In § 600.920, paragraph (f)(4), ''if appropriate'' has been added.

Section 600.920, paragraph (g)(1) has been rewritten to improve clarity.

Section § 600.920, paragraph (g)(2)(iv), has been moved from the Additional information section.

In § 600.920, paragraph (g)(3)(iv), ''particularly when an action is non-water dependent'' has been added to emphasize alternatives when an action is not water dependent.

In § 600.920, paragraph (h)(1) contains additional criteria to determine when abbreviated consultation is appropriate.

In § 600.920, paragraph (h)(2), ''must'' was changed to ''should'' and language was added to clarify when notification should be sent to a Council.

In § 600.920, paragraph (h)(5), language on combining EFH Assessments with other environmental reviews was deleted because the same concept is included in § 600.920(e)(2).

In § 600.920, paragraph (i)(1) contains additional explanation of the intent of expanded consultation and criteria to determine when expanded consultation is appropriate.

In § 600.920, paragraph (i)(3) provides additional clarification regarding NMFS' response to Federal agencies during expanded consultation.

In § 600.920, paragraph (i)(4) clarifies that there is flexibility in the schedules for consultation; ''or emergency situation'' has been added, and the NMFS deadline has been changed from 90 to 60 days.

In § 600.920, paragraph (i)(5), ''must'' has been changed to ''should.''

Section 600.920, paragraph (j)(2) has been retitled ''Further review of decisions inconsistent with NMFS or Council recommendations'' from ''Dispute resolution;'' language has been added to describe actions available in the case when an action agency's decision is inconsistent with NMFS or the Council's EFH conservation recommendations.

Section 600.920, paragraph (j)(1) has been rewritten to improve clarity.

In § 600.925, paragraph (c), ''use existing coordination procedures under statutes such as the Coastal Zone Management Act or establish new'' and other language has been added to further encourage the use of existing procedures to coordinate with state agencies, and to encourage sharing information with states.

In § 600.925, paragraph (a), language has been added stating that NMFS will not make recommendations beyond a Federal agency's authority.

In § 600.925, paragraph (b) has been added to clarify the relationship between Federal consultation and providing EFH conservation recommendation to Federal agencies.

Classification

The Assistant Administrator for Fisheries (AA), NMFS, has determined that this interim final rule is consistent with the Magnuson-Stevens Act and other applicable laws.

NMFS prepared an EA for this interim final rule, and the AA concluded that there will be no significant impact on the human environment as a result of this rule. The regulations contain guidelines to the Councils for amending FMPs in accordance with the EFH requirements of the Magnuson-Stevens Act, and procedures to be used by NMFS, the Councils, and Federal and state action agencies to satisfy the coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. Any specific effects on the human environment will be addressed in NEPA documents prepared for individual FMP provisions that are prepared pursuant to this rule. A copy of the EA is available from NMFS (see **ADDRESSES**).

This interim final rule has been determined to be not significant for the purposes of E.O. 12866. Each EFH amendment to an existing FMP and all new FMPs will contain detailed analyses of the benefits and costs of the management programs under consideration, to ensure compliance with E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. NMFS received comments regarding this certification. As addressed earlier, NMFS' consideration of these comments did not cause it to change its determination regarding the certification. This rule establishes guidelines for Councils to identify and describe EFH, including adverse impacts, and conservation and enhancement measures. The regulations require that the Councils conduct assessments of the effects of fishing on EFH within their jurisdiction. The Magnuson-Stevens Act requires the Councils to examine their existing FMPs and all future FMPs and amend them as required to comply with the EFH guidelines in this rule. These guidelines are intended to provide direction on compliance with the EFH provisions and in themselves, do not have the force of law. Should Councils establish regulations on fishing as a result of the guidelines and the assessment of fishing equipment, that action may affect small entities and could be subject to the requirement to prepare a Regulatory Flexibility analysis at the time they are proposed. Any future effects on small entities that may eventually result from amendments to FMPs to bring them into compliance with the Magnuson-Stevens Act would be speculative at this time. Finally, the consultation procedures establish a process for NMFS to provide conservation recommendations to Federal and state action agencies. However, because compliance with NMFS recommendations is not mandatory, any effects on small businesses would be speculative. As a result, a regulatory flexibility analysis was not prepared.

For the purposes of E.O. 12612, the AA has determined that this interim

final rule does not include policies that have federalism implications sufficient to warrant preparation of a Federalism Assessment. This rule establishes procedures for coordination between the states and NMFS or the Councils in situations where state action may adversely impact EFH. The rule states that, in such circumstances, NMFS or the Councils would furnish the state with EFH recommendations. NMFS EFH conservation recommendations are not mandatory, and the states are not required to expend funds in a way not of their own choosing.

References

Christensen, N.L., A.M. Bartuska, J.H. Brown, S. Carpenter, C. D'Antonio, R. Francis, J.F. Franklin, J.A. MacMahon, R.F. Noss, D.J. Parsons, C.H. Peterson, M.G. Turner, and R.G. Woodmansee. 1996. The report of the Ecological Society of America committee on the scientific basis for ecosystem management. Ecological Applications, 6(3): 665–691.

Grumbine, R.E. 1997. Reflections on ''What is Ecosystem Management?'' Conservation Biology 11(1): 41–47.

Hancock, D.A. (ed.) 1993. Sustainable Fisheries through Sustaining Fish Habitat, Australian Society for Fish Biology Workshop, Victor Harbor, SA, 12–13 August, Bureau of Resource Sciences Proceedings, AGPS, Canberra.

List of Subjects in 50 CFR Part 600

Administrative practice and procedures, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations.

Dated: December 15, 1997.

David L. Evans,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons stated in the preamble, the National Marine Fisheries Service amends 50 CFR part 600 as follows:

PART 600—[AMENDED]

1. The authority citation for part 600 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. Section 600.10 is amended by adding the definition for ''Essential fish habitat'', in alphabetical order, to read as follows:

§ 600.10 Definitions.

* * * * *

Essential fish habitat (EFH) means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. For the purpose of interpreting the definition of essential fish habitat: *Waters* include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; *substrate* includes sediment, hard bottom, structures underlying the waters, and associated biological communities; *necessary* means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and ''spawning, breeding, feeding, or growth to maturity'' covers a species' full life cycle.

* * * * *

3. New subparts J and K are added to part 600 to read as follows:

* * * * *

Subpart J—Essential Fish Habitat (EFH)

600.805 Purpose and scope.
600.810 Definitions and word usage.
600.815 Contents of Fishery Management Plans.

Subpart K—EFH Coordination, Consultation, and Recommendations

600.905 Purpose, scope, and NMFS/Council cooperation.
600.910 Definitions and word usage.
600.915 Coordination for the conservation and enhancement of EFH.
600.920 Federal agency consultation with the Secretary.
600.925 NMFS EFH conservation recommendations to Federal and state agencies.
600.930 Council comments and recommendations to Federal and state agencies.

Subpart J—Essential Fish Habitat (EFH)

§ 600.805 Purpose and scope.

(a) *Purpose.* This subpart provides guidelines for Councils and the Secretary to use in adding the required provision on EFH to an FMP, i.e., description and identification of essential fish habitat (EFH), adverse impacts on EFH (including minimizing, to the extent practicable, adverse impacts from fishing), and actions to conserve and enhance EFH.

(b) *Scope*—(1) *Species covered.* An EFH provision in an FMP must include all fish species in the FMU. A Council may describe, identify, and protect the habitat of species not in an FMU; however, such habitat may not be considered EFH for the purposes of sections 303(a)(7) and 305(b) of the Magnuson-Stevens Act.

(2) *Geographic.* EFH may be described and identified in waters of the United States, as defined in 33 CFR 328.3 and the exclusive economic zone, as defined in § 600.10. Councils may describe, identify, and protect habitats of managed species beyond the exclusive economic zone; however, such habitat may not be considered EFH for the purposes of section 303(a)(7) and 305(b) of the Magnuson-Stevens Act. Activities that may adversely impact such habitat can be addressed through any process conducted in accordance with international agreements between the United States and the foreign nation(s) undertaking or authorizing the action.

§ 600.810 Definitions and word usage.

(a) *Definitions.* In addition to the definitions in the Magnuson-Stevens Act and § 600.10, the terms in this subpart have the following meanings:

Adverse effect means any impact which reduces quality and/or quantity of EFH. Adverse effects may include direct (e.g., contamination or physical disruption), indirect (e.g., loss of prey, or reduction in species' fecundity), site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions.

Council includes the Secretary, as applicable, when preparing Secretarial FMPs or amendments under sections 304(c) and (g) of the Magnuson-Stevens Act.

Ecosystem means communities of organisms interacting with one another and with the chemical and physical factors making up their environment.

Habitat areas of particular concern means those areas of EFH identified pursuant to § 600.815(a)(9).

Healthy ecosystem means an ecosystem where ecological productive capacity is maintained, diversity of the flora and fauna is preserved, and the ecosystem retains the ability to regulate itself. Such an ecosystem should be similar to comparable, undisturbed, ecosystems with regard to standing crop, productivity, nutrient dynamics, trophic structure, species richness, stability, resilience, contamination levels, and the frequency of diseased organisms.

Overfished means any stock or stock complex, the status of which is reported as overfished by the Secretary pursuant to § 304(e)(1) of the Magnuson-Stevens Act.

(b) *Word usage.* The terms ''must'', ''shall'', ''should'', ''may'', ''may not'', ''will'', ''could'', and ''can'', are used in the same manner as in § 600.305(c).

§ 600.815 Contents of Fishery Management Plans.

(a) *Mandatory contents*—(1) *Habitat requirements by life history stage.* FMPs must describe EFH in text and with tables that provide information on the biological requirements for each life

history stage of the species. These tables should summarize all available information on environmental and habitat variables that control or limit distribution, abundance, reproduction, growth, survival, and productivity of the managed species. Information in the tables should be supported with citations.

(2) *Description and identification of EFH*—(i) *Information requirements.* (A) An initial inventory of available environmental and fisheries data sources relevant to the managed species should be used in describing and identifying EFH. This inventory should also help to identify major species-specific habitat data gaps. Deficits in data availability (i.e., accessibility and application of the data) and in data quality (including considerations of scale and resolution; relevance; and potential biases in collection and interpretation) should be identified.

(B) To identify EFH, basic information is needed on current and historic stock size, the geographic range of the managed species, the habitat requirements by life history stage, and the distribution and characteristics of those habitats. Information is also required on the temporal and spatial distribution of each major life history stage (defined by developmental and functional shifts). Since EFH should be identified for each major life history stage, data should be collected on, but not limited to, the distribution, density, growth, mortality, and production of each stage within all habitats occupied, or formerly occupied, by the species. These data should be obtained from the best available information, including peer-reviewed literature, data reports and ''gray'' literature, data files of government resource agencies, and any other sources of quality information.

(C) The following approach should be used to gather and organize the data necessary for identifying EFH. Information from all levels should be used to identify EFH. The goal of this procedure is to include as many levels of analysis as possible within the constraints of the available data. Councils should strive to obtain data sufficient to describe habitat at the highest level of detail (i.e., Level 4).

(*1*) *Level 1: Presence/absence distribution data are available for some or all portions of the geographic range of the species.* At this level, only presence/absence data are available to describe the distribution of a species (or life history stage) in relation to potential habitats. Care should be taken to ensure that all potential habitats have been sampled adequately. In the event that distribution data are available for only portions of the geographic area occupied by a particular life history stage of a species, EFH can be inferred on the basis of distributions among habitats where the species has been found and on information about its habitat requirements and behavior.

(*2*) *Level 2: Habitat-related densities of the species are available.* At this level, quantitative data (i.e., density or relative abundance) are available for the habitats occupied by a species or life history stage. Because the efficiency of sampling methods is often affected by habitat characteristics, strict quality assurance criteria should be used to ensure that density estimates are comparable among methods and habitats. Density data should reflect habitat utilization, and the degree that a habitat is utilized is assumed to be indicative of habitat value. When assessing habitat value on the basis of fish densities in this manner, temporal changes in habitat availability and utilization should be considered.

(*3*) *Level 3: Growth, reproduction, or survival rates within habitats are available.* At this level, data are available on habitat-related growth, reproduction, and/or survival by life history stage. The habitats contributing the most to productivity should be those that support the highest growth, reproduction, and survival of the species (or life history stage).

(*4*) *Level 4: Production rates by habitat are available.* At this level, data are available that directly relate the production rates of a species or life history stage to habitat type, quantity, quality, and location. Essential habitats are those necessary to maintain fish production consistent with a sustainable fishery and the managed species' contribution to a healthy ecosystem.

(ii) *EFH determination.* (A) The information obtained through the analysis in paragraph (a)(2)(i) of this section will allow Councils to assess the relative value of habitats. Councils should interpret this information in a risk-averse fashion, to ensure adequate areas are protected as EFH of managed species. Level 1 information, if available, should be used to identify the geographic range of the species. Level 2 through 4 information, if available, should be used to identify the habitats valued most highly within the geographic range of the species. If only Level 1 information is available, presence/absence data should be evaluated (e.g., using a frequency of occurrence or other appropriate analysis) to identify those habitat areas most commonly used by the species. Areas so identified should be considered essential for the species. However, habitats of intermediate and low value may also be essential, depending on the health of the fish population and the ecosystem. Councils must demonstrate that the best scientific information available was used in the identification of EFH, consistent with national standard 2, but other data may also be used for the identification.

(B) If a species is overfished, and habitat loss or degradation may be contributing to the species being identified as overfished, all habitats currently used by the species should be considered essential in addition to certain historic habitats that are necessary to support rebuilding the fishery and for which restoration is technologically and economically feasible. Once the fishery is no longer considered overfished, the EFH identification should be reviewed, and the FMP amended, if appropriate.

(C) EFH will always be greater than or equal to aquatic areas that have been identified as ''critical habitat'' for any managed species listed as threatened or endangered under the Endangered Species Act.

(D) Where a stock of a species is considered to be healthy, then EFH for the species should be a subset of all existing habitat for the species.

(E) Ecological relationships among species and between the species and their habitat require, where possible, that an ecosystem approach be used in determining the EFH of a managed species or species assemblage. The extent of the EFH should be based on the judgment of the Secretary and the appropriate Council(s) regarding the quantity and quality of habitat that is necessary to maintain a sustainable fishery and the managed species' contribution to a healthy ecosystem.

(F) If degraded or inaccessible aquatic habitat has contributed to the reduced yields of a species or assemblage, and in the judgment of the Secretary and the appropriate Council(s), the degraded conditions can be reversed through such actions as improved fish passage techniques (for fish blockages), improved water quality or quantity measures (removal of contaminants or increasing flows), and similar measures that are technologically and economically feasible, then EFH should include those habitats that would be essential to the species to obtain increased yields.

(iii) *EFH Mapping Requirements.* The general distribution and geographic limits of EFH for each life history stage should be presented in FMPs in the form of maps. Ultimately, these data should be incorporated into a geographic information system (GIS) to

facilitate analysis and presentation. These maps may be presented as fixed in time and space, but they should encompass all appropriate temporal and spatial variability in the distribution of EFH. If the geographic boundaries of EFH change seasonally, annually, or decadally, these changing distributions need to be represented in the maps. Different types of EFH should be identified on maps along with areas used by different life history stages of the species. The type of information used to identify EFH should be included in map legends, and more detailed and informative maps should be produced as more complete information about population responses (e.g., growth, survival, or reproductive rates) to habitat characteristics becomes available. Where the present distribution or stock size of a species or life history stage is different from the historical distribution or stock size, then maps of historical habitat boundaries should be included in the FMP, if known. The EFH maps are a means to visually present the EFH described in the FMP. If the maps identifying EFH and the information in the description of EFH differ, the description is ultimately determinative of the limits of EFH.

(3) *Fishing activities that may adversely affect EFH.* (i) Adverse effects from fishing may include physical, chemical, or biological alterations of the substrate, and loss of, or injury to, benthic organisms, prey species and their habitat, and other components of the ecosystem.

(ii) FMPs must include management measures that minimize adverse effects on EFH from fishing, to the extent practicable, and identify conservation and enhancement measures. The FMP must contain an assessment of the potential adverse effects of all fishing equipment types used in waters described as EFH. This assessment should consider the relative impacts of all fishing equipment types used in EFH on different types of habitat found within EFH. Special consideration should be given to equipment types that will affect habitat areas of particular concern. In completing this assessment, Councils should use the best scientific information available, as well as other appropriate information sources, as available. Included in this assessment should be consideration of the establishment of research closure areas and other measures to evaluate the impact of any fishing activity that physically alters EFH.

(iii) Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing practice is having an identifiable adverse effect on EFH, based on the assessment conducted pursuant to paragraph (a)(3)(ii) of this section and/or the cumulative impacts analysis conducted pursuant to paragraph (a)(6)(ii) of this section.

(iv) In determining whether it is practicable to minimize an adverse effect from fishing, Councils should consider whether, and to what extent, the fishing activity is adversely impacting EFH, including the fishery; the nature and extent of the adverse effect on EFH; and whether the management measures are practicable, taking into consideration the long and short-term costs as well as benefits to the fishery and its EFH, along with other appropriate factors, consistent with national standard 7.

(4) *Options for managing adverse effects from fishing.* Fishery management options may include, but are not limited to:

(i) *Fishing equipment restrictions.* These options may include, but are not limited to: Seasonal and area restrictions on the use of specified equipment; equipment modifications to allow escapement of particular species or particular life stages (e.g., juveniles); prohibitions on the use of explosives and chemicals; prohibitions on anchoring or setting equipment in sensitive areas; and prohibitions on fishing activities that cause significant physical damage in EFH.

(ii) *Time/area closures.* These actions may include, but are not limited to: Closing areas to all fishing or specific equipment types during spawning, migration, foraging, and nursery activities; and designating zones for use as marine protected areas to limit adverse effects of fishing practices on certain vulnerable or rare areas/species/life history stages, such as those areas designated as habitat areas of particular concern.

(iii) *Harvest limits.* These actions may include, but are not limited to, limits on the take of species that provide structural habitat for other species assemblages or communities, and limits on the take of prey species.

(5) *Identification of Non-fishing related activities that may adversely affect EFH.* FMPs must identify activities that have the potential to adversely affect EFH quantity or quality, or both. Broad categories of activities which can adversely affect EFH include, but are not limited to: Dredging, fill, excavation, mining, impoundment, discharge, water diversions, thermal additions, actions that contribute to non-point source pollution and sedimentation, introduction of potentially hazardous materials, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH. An FMP should describe the EFH most likely to be adversely affected by these or other activities. For each activity, the FMP should describe known and potential adverse impacts to EFH. The descriptions should explain the mechanisms or processes that may cause the adverse effects and how these may affect habitat function. A GIS or other mapping system should be used to support analyses of data. Maps geographically depicting impacts identified in this paragraph should be included in an FMP.

(6) *Cumulative impacts analysis*—(i) *Analysis.* To the extent feasible and practicable, FMPs should analyze how fishing and non-fishing activities influence habitat function on an ecosystem or watershed scale. This analysis should describe the ecosystem or watershed, the dependence of the managed species on the ecosystem or watershed, especially EFH; and how fishing and non-fishing activities, individually or in combination, impact EFH and the managed species, and how the loss of EFH may affect the ecosystem. An assessment of the cumulative and synergistic effects of multiple threats, including the effects of natural stresses (such as storm damage or climate-based environmental shifts), and an assessment of the ecological risks resulting from the impact of those threats on the managed species' habitat should also be included. For the purposes of this analysis, cumulative impacts are impacts on the environment that result from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions, regardless of who undertakes such actions. Cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.

(ii) *Cumulative impacts from fishing.* In addressing the impacts of fishing on EFH, Councils should also consider the cumulative impacts of multiple fishing practices and non-fishing activities on EFH, especially, on habitat areas of particular concern. Habitats that are particularly vulnerable to specific fishing equipment types should be identified for possible designation as habitat areas of particular concern.

(iii) *Mapping cumulative impacts.* A GIS or other mapping system should be used to support analyses of data. Maps depicting data documenting cumulative

impacts identified in this paragraph should be included in an FMP.

(iv) *Research needs.* If completion of these analyses is not feasible or practicable for every ecosystem or watershed within an area identified as EFH, Councils should, in consultation with NMFS, identify in the FMP priority research areas to allow these analyses to be completed. Councils should include a schedule for completing such research. Such schedule of priority research areas should be combined with the research needs identified pursuant to paragraph (a)(10) of this section.

(7) *Conservation and enhancement*—(i) *Contents of FMPs.* FMPs must describe options to avoid, minimize, or compensate for the adverse effects identified pursuant to paragraphs (a) (5) and (6) of this section and promote the conservation and enhancement of EFH, especially in habitat areas of particular concern.

(ii) *General conservation and enhancement recommendations.* Generally, 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 affects 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 which may adversely affect EFH. Disposal or spillage of any material (dredge material, sludge, industrial waste, or other potentially harmful materials) which would destroy or degrade EFH should be avoided. If avoidance or minimization is not possible, or will not adequately protect EFH, compensatory mitigation to conserve and enhance EFH should be recommended. FMPs may recommend proactive measures to conserve or enhance EFH. When developing proactive measures, Councils may develop a priority ranking of the recommendations to assist Federal and state agencies undertaking such measures.

(iii) *Conservation and enhancement options.* FMPs should provide a variety of options to conserve or enhance EFH, which may include, but are not limited to:

(A) *Enhancement of rivers, streams, and coastal areas.* EFH located in, or influenced by, rivers, streams, and coastal areas may be enhanced by reestablishing endemic trees or other appropriate native vegetation on adjacent riparian areas; restoring natural bottom characteristics; removing unsuitable material from areas affected by human activities; or adding gravel or substrate to stream areas to promote spawning. Adverse effects stemming from upland areas that influence EFH may be avoided or minimized by employing measures such as, but not limited to, erosion control, road stabilization, upgrading culverts, removal or modification of operating procedures of dikes or levees to allow for fish passage, structural and operation measures at dams for fish passage and habitat protection, or improvement of watershed management. Initiation of Federal, state, or local government planning processes to restore watersheds associated with such rivers, streams, or coastal areas may also be recommended.

(B) *Water quality and quantity.* This category of options may include use of best land management practices for ensuring compliance with water quality standards at state and Federal levels, improved treatment of sewage, proper disposal of waste materials, and providing appropriate in-stream flow.

(C) *Watershed analysis and planning.* This may include encouraging local and state efforts to minimize destruction/degradation of wetlands, restore and maintain the ecological health of watersheds, and encourage restoration of native species. Any analysis of options should consider natural variability in weather or climatic conditions.

(D) *Habitat creation.* Under appropriate conditions, habitat creation (converting non-EFH to EFH) may be considered as a means of replacing lost or degraded EFH. However, habitat conversion at the expense of other naturally functioning systems must be justified within an ecosystem context.

(8) *Prey species.* Loss of prey is an adverse effect on EFH and a managed species, because one component of EFH is that it be necessary for feeding. Therefore, actions that reduce the availability of a major prey species, either through direct harm or capture, or through adverse impacts to the prey species' habitat that are known to cause a reduction in the population of the prey species may be considered adverse effects on a managed species and its EFH. FMPs should identify the major prey species for the species in the FMU and generally describe the location of prey species' habitat. Actions that cause a reduction of the prey species population, including where there exists evidence that adverse effects to habitat of prey species is causing a decline in the availability of the prey species, should also be described and identified. Adverse effects on prey species and their habitats may result from fishing and non-fishing activities.

(9) *Identification of habitat areas of particular concern.* FMPs should identify habitat areas of particular concern within EFH. In determining whether a type, or area of EFH is a habitat area of particular concern, one or more of the following criteria must be met:

(i) The importance of the ecological function provided by the habitat.

(ii) The extent to which the habitat is sensitive to human-induced environmental degradation.

(iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type.

(iv) The rarity of the habitat type.

(10) *Research and information needs.* Each FMP should contain recommendations, preferably in priority order, for research efforts that the Councils and NMFS view as necessary for carrying out their EFH management mandate. The need for additional research is to make available sufficient information to support a higher level of description and identification of EFH under paragraph (a)(2)(i) of this section. Additional research may also be necessary to identify and evaluate actual and potential adverse effects on EFH, including, but not limited to, direct physical alteration; impaired habitat quality/functions; cumulative impacts from fishing; or indirect adverse effects such as sea level rise, global warming and climate shifts; and non-equipment related fishery impacts. The Magnuson-Stevens Act specifically identifies the effects of fishing as a concern. The need for additional research on the effects of fishing equipment on EFH and a schedule for obtaining that information should be included in this section of the FMP. If an adverse effect on EFH is identified and determined to be an impediment to maintaining a sustainable fishery and the managed species' contribution to a healthy ecosystem, then the research needed to quantify and mitigate that effect should be identified in this section.

(11) *Review and revision of EFH components of FMPs.* Councils and NMFS should periodically review the EFH components of FMPs, including an update of the equipment assessment originally conducted pursuant to paragraph (a)(3)(ii) of this section. Each EFH FMP amendment should include a provision requiring review and update of EFH information and preparation of a revised FMP amendment if new information becomes available. The schedule for this review should be based on an assessment of both the existing data and expectations when

new data will become available. This information should be reviewed as part of the annual Stock Assessment and Fishery Evaluation (SAFE) report prepared pursuant to § 600.315(e). A complete review of information should be conducted as recommended by the Secretary, but at least once every 5 years.

(b) *Optional components.* An FMP may include a description and identification of the habitat of species under the authority of the Council, even if not contained in the FMU. However, such habitat may not be EFH. This subpart does not change a Council's ability to implement management measures for a managed species for the protection of another species.

(c) *Development of EFH recommendations.* After reviewing the best available scientific information, as well as other appropriate information, and in consultation with the Councils, participants in the fishery, interstate commissions, Federal agencies, state agencies, and other interested parties, NMFS will develop written recommendations for the identification of EFH for each FMP. In recognition of the different approaches to FMP development taken by each Council, the NMFS EFH recommendations may constitute a review of a draft EFH document developed by a Council, or may include suggestions for a draft EFH FMP amendment and may precede the Council's development of such documents, as appropriate. In both cases, prior to submitting a written EFH identification recommendation to a Council for an FMP, the draft recommendation will be made available for public review and at least one public meeting will be held. NMFS will work with the affected Council(s) to conduct this review in association with scheduled public Council meetings whenever possible. The review may be conducted at a meeting of the Council committee responsible for habitat issues or as a part of a full Council meeting. After receiving public comment, NMFS will revise its draft recommendations, as appropriate, and forward a final written recommendation and comments to the Council(s).

(d) *Relationship to other fishery management authorities.* Councils are encouraged to coordinate with state and interstate fishery management agencies where Federal fisheries affect state and interstate managed fisheries or where state or interstate fishery regulations affect the management of Federal fisheries. Where a state or interstate fishing activity adversely impacts EFH, NMFS will consider that action to be an adverse effect on EFH pursuant to paragraph (a)(5) of this section and will provide EFH conservation recommendations to the appropriate state or interstate fishery management agency on that activity.

Subpart K—EFH Coordination, Consultation, and Recommendations

§ 600.905 Purpose and scope and NMFS/Council cooperation.

(a) *Purpose.* These procedures address the coordination, consultation, and recommendation requirements of sections 305(b)(1)(D) and 305(b)(2–4) of the Magnuson-Stevens Act. The purpose of these procedures is to promote the protection of EFH in the review of Federal and state actions that may adversely affect EFH.

(b) *Scope.* Section 305(b)(1)(D) of the Magnuson-Stevens Act requires the Secretary to coordinate with, and provide information to, other Federal agencies regarding the conservation and enhancement of EFH. Section 305(b)(2) requires all Federal agencies to consult with the Secretary on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH. Sections 305(b) (3) and (4) direct the Secretary and the Councils to provide comments and EFH conservation recommendations to Federal or state agencies on actions that affect EFH. Such recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH resulting from actions or proposed actions authorized, funded, or undertaken by that agency. Section 305(b)(4)(B) requires Federal agencies to respond in writing to such comments. The following procedures for coordination, consultation, and recommendations allow all parties involved to understand and implement the requirements of the Magnuson-Stevens Act.

(c) *Cooperation between Councils and NMFS.* The Councils and NMFS should cooperate as closely as possible to identify actions that may adversely affect EFH, to develop comments and EFH conservation recommendations to Federal and state agencies, and to provide EFH information to Federal or state agencies. The Secretary will seek to develop agreements with each Council to facilitate sharing information on actions that may adversely affect EFH and in coordinating Council and NMFS comments and recommendations on those actions. However, NMFS and the Councils also have the authority to act independently.

§ 600.910 Definitions and word usage.

(a) *Definitions.* In addition to the definitions in the Magnuson-Stevens Act and § 600.10, the terms in this subpart have the following meanings:

Adverse effect means any impact which reduces quality and/or quantity of EFH. Adverse effects may include direct (e.g., contamination or physical disruption), indirect (e.g., loss of prey, reduction in species' fecundity), site-specific or habitatwide impacts, including individual, cumulative, or synergistic consequences of actions.

Council includes the Secretary, as applicable, when preparing FMPs or amendments under section 304 (c) and (g) of the Magnuson-Stevens Act; and when commenting and making recommendations under the authority of section 305(b)(3) of the Magnuson-Stevens Act to any Federal or state agency on actions that may affect the habitat of fishery resources managed under such FMPs.

Federal action means any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by a Federal agency.

Habitat areas of particular concern means those areas of EFH identified pursuant to § 600.815(a)(9).

State action means any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by a state agency.

(b) *Word usage.* The terms ''must'', ''shall'', ''should'', ''may'', ''may not'', ''will'', ''could'', and ''can'', are used in the same manner as in § 600.305(c).

§ 600.915 Coordination for the conservation and enhancement of EFH.

To further the conservation and enhancement of EFH in accordance with section 305(b)(1)(D) of the Magnuson-Stevens Act, NMFS will compile and make available to other Federal and state agencies, information on the locations of EFH, including maps and/or narrative descriptions. NMFS will also provide information on ways to improve ongoing Federal operations to promote the conservation and enhancement of EFH. Federal and state agencies empowered to authorize, fund, or undertake actions that may adversely affect EFH are encouraged to contact NMFS and the Councils to become familiar with areas designated as EFH, and potential threats to EFH, as well as opportunities to promote the conservation and enhancement of such habitat.

§ 600.920 Federal agency consultation with the Secretary.

(a) *Consultation generally*—(1) *Actions requiring consultation.* Pursuant

to section 305(b)(2) of the Magnuson-Stevens Act, Federal agencies must consult with NMFS regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect EFH. EFH consultation is not required for completed actions, e.g., issued permits. Consultation is required for renewals, reviews, or substantial revisions of actions. Consultation on Federal programs delegated to non-Federal entities is required at the time of delegation, review, and renewal of the delegation. EFH consultation is required for any Federal funding of actions that may adversely affect EFH. NMFS and Federal agencies responsible for funding actions that may adversely affect EFH should consult on a programmatic level, if appropriate, with respect to these actions.

(2) *Appropriate level of consultation.* (i) NMFS and other Federal agencies may conduct consultation at either a programmatic or project-specific level. Federal actions may be evaluated at a programmatic level if sufficient information is available to develop EFH conservation recommendations and address all reasonably foreseeable adverse effects to EFH. Project-specific consultations are more appropriate when critical decisions are made at the project implementation stage, or when sufficiently detailed information for the development of EFH conservation recommendations does not exist at the programmatic level.

(ii) If, after a Federal agency requests programmatic consultation, NMFS determines that all concerns about adverse effects on EFH can be addressed at a programmatic level, NMFS will develop EFH conservation recommendations that cover all projects implemented under that program, and no further EFH consultation will be required. Alternatively, NMFS may determine that project-specific consultation is needed for part or all of the program's activities, in which case NMFS may develop some EFH conservation recommendations at a programmatic level, but will also recommend that project-specific consultation will be needed to complete the EFH consultation requirements. NMFS may also determine that programmatic consultation is not appropriate, in which case all EFH conservation recommendations will be deferred to project-specific consultations.

(b) *Designation of lead agency.* If more than one Federal agency is responsible for a Federal action, the consultation requirements of sections 305(b)(2–4) of the Magnuson-Stevens Act may be fulfilled through a lead agency. The lead agency must notify NMFS in writing that it is representing one or more additional agencies.

(c) *Designation of non-Federal representative.* A Federal agency may designate a non-Federal representative to conduct an abbreviated consultation or prepare an EFH Assessment by giving written notice of such designation to NMFS. If a non-Federal representative is used, the Federal action agency remains ultimately responsible for compliance with sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act.

(d) *Best available information.* The Federal action agency and NMFS must use the best scientific information available regarding the effects of the proposed action on EFH. Other appropriate sources of information may also be considered.

(e) *Use of existing consultation/environmental review procedures*—(1) *Criteria.* Consultation and commenting under sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act should be consolidated, where appropriate, with interagency consultation, coordination, and environmental review procedures required by other statutes, such as the National Environmental Policy Act (NEPA), Fish and Wildlife Coordination Act, Clean Water Act, Endangered Species Act (ESA), and Federal Power Act. The consultation requirements of section 305(b)(2) of the Magnuson-Stevens Act can be satisfied using existing or modified procedures required by other statutes if such processes meet the following criteria:

(i) The existing process must provide NMFS with timely notification of actions that may adversely affect EFH. The Federal action agency should notify NMFS according to the same timeframes for notification (or for public comment) as in the existing process. However, 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 substantial adverse impacts. NMFS and the action agency may agree to use shorter timeframes if they allow sufficient time for NMFS to develop EFH conservation recommendations.

(ii) Notification must include an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH Assessments contained in paragraph (g) of this section. If the EFH Assessment is contained in another document, that section of the document must be clearly identified as the EFH Assessment.

(iii) NMFS must have made a finding pursuant to paragraph (e)(3) of this section that the existing process satisfies the requirements of section 305(b)(2) of the Magnuson-Stevens Act.

(2) *EFH conservation recommendation requirements.* If an existing consultation process is used to fulfill the EFH consultation requirements, then the comment deadline for that process should apply to the submittal of NMFS conservation recommendations under section 305(b)(4)(A) of the Magnuson-Stevens Act, unless a different deadline is agreed to by NMFS and the Federal agency. The Federal agency must respond to these recommendations within 30 days pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act. NMFS may request the further review of any Federal agency decision that is inconsistent with a NMFS EFH recommendation, in accordance with paragraph (j)(2) of this section. If NMFS EFH conservation recommendations are combined with other NMFS or NOAA comments on a Federal action, such as NOAA comments on a draft Environmental Impact Statement, the EFH conservation recommendations shall be clearly identified as such (e.g., a section in the comment letter entitled ''EFH conservation recommendations'') and a response pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act is required for only the identified portion of the comments.

(3) *NMFS finding.* A Federal agency with an existing consultation process should contact NMFS at the appropriate level (regional offices for regional processes, headquarters office for national processes) to discuss how the existing process, with or without modifications, can be used to satisfy the EFH consultation requirements. If, at the conclusion of these discussions, NMFS determines that the existing process meets the criteria of paragraph (e)(1) of this section, NMFS will make a finding that the existing or modified process can satisfy the EFH consultation requirements of the Magnuson-Stevens Act. If NMFS does not make such a finding, or if there are no existing consultation processes relevant to the Federal agency's actions, the action agency and NMFS should follow the consultation process in the following sections.

(f) *General Concurrence*—(1) *Purpose.* The General Concurrence process identifies specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because NMFS has determined, through an analysis of that type of action, that it will likely result in no more than minimal adverse effects individually and cumulatively. General

Concurrences may be national or regional in scope.

(2) *Criteria.* (i) For Federal actions to qualify for General Concurrence, NMFS must determine, after consultation with the appropriate Council(s), that the actions meet all of the following criteria:

(A) The actions must be similar in nature and similar in their impact on EFH.

(B) The actions must not cause greater than minimal adverse effects on EFH when implemented individually.

(C) The actions must not cause greater than minimal cumulative adverse effects on EFH.

(ii) Actions qualifying for General Concurrence must be tracked to ensure that their cumulative effects are no more than minimal. In most cases, tracking will be the responsibility of the Federal action agency, but NMFS also may agree to track actions for which General Concurrence has been authorized. Tracking should include numbers of actions, amount of habitat adversely affected, type of habitat adversely affected, and the baseline against which the action will be tracked. The agency responsible for tracking such actions should make the information available to NMFS, the Councils, and to the public on an annual basis.

(iii) Categories of Federal actions may also qualify for General Concurrence if they are modified by appropriate conditions that ensure the actions will meet the criteria in paragraph (f)(2)(i) of this section. For example, NMFS may provide General Concurrence for additional actions contingent upon project size limitations, seasonal restrictions, or other conditions.

(iv) If a General Concurrence is developed for actions affecting habitat areas of particular concern, the General Concurrence should be subject to a higher level of scrutiny than a General Concurrence not involving a habitat area of particular concern.

(3) *General Concurrence development.* A Federal agency may request a General Concurrence for a category of its actions by providing NMFS with a written description of the nature and approximate number of the proposed actions, an analysis of the effects of the actions on EFH and associated species and their life history stages, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects. If NMFS agrees that the actions fit the criteria in paragraph (f)(2) of this section, NMFS, after consultation with the appropriate Council(s), will provide the Federal agency with a written statement of General Concurrence that further consultation is not required, and that preparation of EFH Assessments for individual actions subject to the General Concurrence is not necessary. If NMFS does not agree that the actions fit the criteria in paragraph (f)(2) of this section, NMFS will notify the Federal agency that a General Concurrence will not be issued and that abbreviated or expanded consultation will be required. If NMFS identifies specific types of Federal actions that may meet the requirements for a General Concurrence, NMFS may initiate and complete a General Concurrence.

(4) *Notification and further consultation.* NMFS may request notification for actions covered under a General Concurrence if NMFS concludes there are circumstances under which such actions could result in more than a minimal impact on EFH, or if it determines that there is not a process in place to adequately assess the cumulative impacts of actions covered under the General Concurrence. NMFS may require further consultation for these actions on a case-by case basis. Each General Concurrence should establish specific procedures for further consultation, if appropriate.

(5) *Public review.* Prior to providing any Federal agency with a written statement of General Concurrence for a category of Federal actions, NMFS will provide an opportunity for public review through the appropriate Council(s), or other reasonable opportunity for public review.

(6) *Revisions.* NMFS will periodically review and revise its findings of General Concurrence, as appropriate.

(g) *EFH Assessments*—(1) *Preparation requirement.* For any Federal action that may adversely affect EFH, except for those activities covered by a General Concurrence, Federal agencies must provide NMFS with a written assessment of the effects of that action on EFH. Federal agencies may incorporate an EFH Assessment into documents prepared for other purposes such as ESA Biological Assessments pursuant to 50 CFR part 402 or NEPA documents and public notices pursuant to 40 CFR part 1500. If an EFH Assessment is contained in another document, it must include all of the information required in paragraph (g)(2) of this section and be clearly identified as an EFH Assessment. The procedure for combining an EFH consultation with other consultation of environmental reviews is set forth in paragraph (e) of this section.

(2) *Mandatory contents.* The assessment must contain:

(i) A description of the proposed action.

(ii) An analysis of the effects, including cumulative effects, of the proposed action on EFH, the managed species, and associated species, such as major prey species, including affected life history stages.

(iii) The Federal agency's views regarding the effects of the action on EFH.

(iv) Proposed mitigation, if applicable.

(3) *Additional information.* If appropriate, the assessment should also include:

(i) The results of an on-site inspection to evaluate the habitat and the site-specific effects of the project.

(ii) The views of recognized experts on the habitat or species that may be affected.

(iii) A review of pertinent literature and related information.

(iv) An analysis of alternatives to the proposed action. Such analysis should include alternatives that could avoid or minimize adverse effects on EFH, particularly when an action is non-water dependent.

(v) Other relevant information.

(4) *Incorporation by reference.* The assessment may incorporate by reference a completed EFH Assessment prepared for a similar action, supplemented with any relevant new project specific information, provided 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 environmental assessment documents. These documents must be provided to NMFS with an EFH Assessment.

(h) *Abbreviated consultation procedures*—(1) *Purpose and criteria.* Abbreviated consultation allows NMFS to quickly determine whether, and to what degree, a Federal action may adversely affect EFH. Federal actions that may adversely affect EFH should be addressed through the abbreviated consultation procedures when those actions do not qualify for a General Concurrence, but do not have the potential to cause substantial adverse effects on EFH. For example, the abbreviated consultation procedures should be used when the adverse effect(s) of an action or proposed action could be alleviated through minor modifications.

(2) *Notification by agency.* The Federal agency should notify NMFS and, if NMFS so requests, the appropriate Council(s), in writing as early as practicable regarding proposed actions that may adversely affect EFH. Notification will facilitate discussion of measures to conserve the habitat. Such early consultation should occur during

pre-application planning for projects subject to a Federal permit or license, and during preliminary planning for projects to be funded or undertaken directly by a Federal agency.

(3) *Submittal of EFH Assessment.* The Federal agency must submit a completed EFH Assessment, prepared in accordance with paragraph (g) of this section, to NMFS for review. Federal agencies will have fulfilled their consultation requirement under paragraph (a) of this section after notification and submittal of a complete EFH Assessment.

(4) *NMFS response to Federal agency.* NMFS must respond in writing as to whether it concurs with the findings of the EFH Assessment. If NMFS believes that the proposed action may result in substantial adverse effects on EFH, or that additional analysis is needed to accurately assess the effects of the proposed action, NMFS will request that the Federal agency initiate expanded consultation. Such request will explain why NMFS believes expanded consultation is needed and will specify any new information needed. If additional consultation is not necessary, NMFS will respond by commenting and recommending measures that may be taken to conserve EFH, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act. NMFS will send a copy of its response to the appropriate Council.

(5) *Timing.* The Federal action agency must submit its complete EFH Assessment to NMFS as soon as practicable, but NMFS must receive it at least 60 days prior to a final decision on the action. NMFS must respond in writing within 30 days. NMFS and the Federal action agency may agree to use a compressed schedule in cases where regulatory approvals or emergency situations cannot accommodate 30 days for consultation, or to conduct consultation earlier in the planning cycle for proposed actions with lengthy approval processes.

(i) *Expanded consultation procedures*—(1) *Purpose and criteria.* Expanded consultation allows maximum opportunity for NMFS and the Federal agency to work together in the review of the action's impacts on EFH and the development of EFH conservation recommendations. Expanded consultation procedures must be used for Federal actions that would result in substantial adverse effects to EFH. Federal agencies are encouraged to contact NMFS at the earliest opportunity to discuss whether the adverse effect of a proposed action makes expanded consultation appropriate.

(2) *Initiation.* Expanded consultation begins when NMFS receives from the Federal agency an EFH Assessment completed in accordance with paragraph (g) of this section and a written request for expanded consultation. Federal action agencies are encouraged to provide in the EFH Assessment the additional information identified under paragraph (g)(3) of this section. Subject to NMFS's approval, any request for expanded consultation may encompass a number of similar individual actions within a given geographic area.

(3) *NMFS response to Federal agency.* NMFS will:

(i) Review the EFH Assessment, any additional information furnished by the Federal agency, and other relevant information.

(ii) Conduct a site visit, if appropriate, to assess the quality of the habitat and to clarify the impacts of the Federal agency action. Such a site visit should be coordinated with the Federal agency and appropriate Council(s), if feasible.

(iii) Coordinate its review of the proposed action with the appropriate Council(s).

(iv) Discuss EFH conservation recommendations with the Federal agency and provide recommendations to the Federal action agency, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act. NMFS will also provide a copy of the recommendations to the appropriate Council(s).

(4) *Timing.* The Federal action agency must submit its complete EFH Assessment to NMFS as soon as practicable, but at least 90 days prior to a final decision on the action. NMFS must respond within 60 days of submittal of a complete EFH Assessment unless consultation is extended by agreement between NMFS and the Federal action agency. NMFS and Federal action agencies may agree to use a compressed schedule in cases where regulatory approvals or emergency situations cannot accommodate a 60-day consultation period.

(5) *Extension of consultation.* If NMFS determines that additional data or analysis would provide better information for development of EFH conservation recommendations, NMFS may request additional time for expanded consultation. If NMFS and the Federal action agency agree to an extension, the Federal action agency should provide the additional information to NMFS, to the extent practicable. If NMFS and the Federal action agency do not agree to extend consultation, NMFS must provide EFH conservation recommendations to the Federal action agency using the best scientific information available to NMFS.

(j) *Responsibilities of Federal action agency following receipt of EFH conservation recommendations*—(1) *Federal action agency response.* As required by section 305(b)(4)(B) of the Magnuson-Stevens Act, the Federal action agency must provide a detailed response in writing to NMFS and the appropriate Council within 30 days after receiving an EFH conservation recommendation. Such a response must be provided at least 10 days prior to final approval of the action, if a decision by the Federal agency is required in fewer than 30 days. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS conservation recommendations, the Federal 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 measures needed to avoid, minimize, mitigate, or offset such effects.

(2) *Further review of decisions inconsistent with NMFS or Council recommendations.* If a Federal action agency decision is inconsistent with a NMFS EFH conservation recommendation, the Assistant Administrator for Fisheries may request a meeting with the head of the Federal action agency, as well as any other agencies involved, to discuss the proposed action and opportunities for resolving any disagreements. If a Federal action agency decision is also inconsistent with a Council recommendation made pursuant to section 305(b)(3) of the Magnuson-Stevens Act, the Council may request that the Assistant Administrator initiate further review of the Federal agency's decision and involve the Council in any interagency discussion to resolve disagreements with the Federal agency. The Assistant Administrator will make every effort to accommodate such a request. Memoranda of agreement or other written procedures will be developed to further define such review processes with Federal action agencies.

(k) *Supplemental consultation.* A Federal action agency must reinitiate consultation with NMFS if the agency substantially revises its plans for an action in a manner that may adversely affect EFH or if new information becomes available that affects the basis

for NMFS' EFH conservation recommendations.

§ 600.925 NMFS EFH conservation recommendations to Federal and state agencies.

(a) *General.* Under section 305(b)(4) of the Magnuson-Stevens Act, NMFS is required to provide EFH conservation recommendations to Federal and state agencies for actions that would adversely affect EFH. NMFS EFH conservation recommendations will not suggest that state or Federal agencies take actions beyond their statutory authority.

(b) *Recommendations to Federal agencies.* For Federal actions, EFH conservation recommendations will be provided to Federal action agencies as part of EFH consultations conducted pursuant to § 600.920. These recommendations fulfill the requirements of section 305(b)(4)(A) of the Magnuson-Stevens Act. If NMFS becomes aware of a Federal action that would adversely affect EFH, but for which a Federal agency has not completed an EFH consultation, NMFS may request that the Federal agency initiate EFH consultation or NMFS will provide EFH conservation recommendations based on the information available. NMFS will provide a copy of such recommendation to the appropriate Council(s).

(c) *Recommendations to state agencies*—(1) *Establishment of procedures.* Each NMFS Region should use existing coordination procedures under statutes such as the Coastal Zone Management Act or establish new procedures to identify state actions that may adversely affect EFH, and for determining the most appropriate method for providing EFH conservation recommendations to the state agency. NMFS will provide a copy of such recommendation to the appropriate Council(s).

(2) *Coordination with states on recommendations to Federal agencies.* When an action that would adversely affect EFH requires authorization or funding by both Federal and state agencies, NMFS will provide the appropriate state agencies with copies of EFH conservation recommendations developed as part of the Federal consultation procedures in § 600.920. NMFS will also seek agreements on sharing information and copies of recommendations with Federal or state agencies conducting similar consultation and recommendation processes to ensure coordination of such efforts.

§ 600.930 Council comments and recommendations to Federal and state agencies.

(a) *Establishment of procedures.* Each Council should establish procedures for reviewing Federal or state actions that may adversely affect the EFH of a species managed under its authority. Each Council may receive information on actions of concern by methods such as: Directing Council staff to track proposed actions; recommending that the Council's habitat committee identify actions of concern; or entering into an agreement with NMFS to have the appropriate Regional Administrator notify the Council of actions that may adversely impact EFH. Federal and state actions often follow specific timetables which may not coincide with Council meetings. Therefore, Councils should consider establishing abbreviated procedures for the development of Council recommendations.

(b) *Early involvement.* Councils should provide comments and recommendations on proposed state and Federal actions of concern as early as practicable in project planning to ensure thorough consideration of Council concerns by the action agency. Copies of Council comments and recommendations should be provided to NMFS.

(c) *Anadromous fishery resources.* For the purposes of the commenting requirement of section 305(b)(3)(B) of the Magnuson-Stevens Act, an ''anadromous fishery resource under a Council's authority'' is an anadromous species that inhabits waters under the Council's authority at some time during its life cycle.

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