

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 devel-

oped 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).