

Annex P Essential Fish Habitat Protection During Emergency Spill Response Operations for Oil Discharges and Hazardous Substance Releases

This document is intended to assist Federal On-Scene Coordinators (FOSCs) in areas where the pre-spill planning activities called for under the Magnuson-Stevens Fishery Conservation and Management Act have not yet been completed. However, this document is not intended to be an all-inclusive technical reference for reducing or eliminating all possible adverse effects to Essential Fish Habitat (EFH). It should also not be used to replace existing Area Contingency Plan (ACP) provisions developed pursuant to the protection of EFH.

100. THE MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT

200. THE EFH CONSULTATION PROCESS AND HOW IT APPLIES TO USCG FOSCs

300. WHAT IS REQUIRED IN AN EFH ASSESSMENT

400. REFERENCES

Appendix 1 - Emergency Response Checklist for EFH during Oil Discharges and Releases of Hazardous Substances

100. THE MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT

In 1996 the Magnuson Fisheries Conservation Act was amended by the Sustainable Fisheries Act to include a number of new mandates, and was subsequently renamed the Magnuson-Stevens Fishery Conservation Act (MSA) (16 USC 1801 et seq). The MSA established procedures designed to identify, conserve, and enhance EFH for those species regulated under a Federal fisheries management plan (FMP). EFH is defined as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity” and can include rivers, estuaries, bays and open ocean (out to 200 miles).

Under Section 305(b)(2) of the MSA, Federal action agencies are required to consult with NOAA’s National Marine Fisheries Service (NOAA Fisheries) on all actions, or proposed actions, authorized, funded, or undertaken by the agency that may adversely affect EFH. Consultation involves the submission of an EFH assessment to NOAA Fisheries for actions including emergency responses to oil discharges and hazardous substance releases. Reference Section 300 for guidance on the identification of EFH in your FOSC’s area of responsibility.

200. THE EFH CONSULTATION PROCESS AND HOW IT APPLIES TO THE USCG FOSC

The EFH consultation process is in place to ensure that Federal agencies consider the effects of their actions on EFH, with the goal of “maintain[ing] fish production consistent with a sustainable fishery and the managed species contribution to a healthy ecosystem” (50 CFR 600.815(a)(2)(i)(C)(4)). The process as outlined in this FOSC guide satisfies the Federal agency consultation and response requirements of Sections 305(b)(2) and 305(b)(4)(B) of the MSA, as well as the EFH conservation recommendation requirement of MSA Section 305(b)(4)(A).

As with the Endangered Species Act, FOSCs determine when an action “may adversely affect” EFH. Once the FOSC has identified an action that may adversely affect EFH, the FOSC must notify NOAA Fisheries and provide an EFH Assessment. Once NOAA Fisheries receives the Assessment, it provides recommendations to the FOSC within 30 days regarding the actions taken or to be taken. The FOSC is then required to provide a detailed response in writing to NOAA Fisheries within 30 days of receiving the recommendation.

Alternatively, if the FOSC determines that there are “no adverse affects,” the FOSC is not required to notify NOAA Fisheries of its findings and actions related to the spill response. However, NOAA Fisheries on their own may decide that an action may adversely affect EFH and send their recommendations to the FOSC. In this case, the FOSC must respond to NOAA Fisheries in writing within 30 days.

The FOSC’s response to NOAA Fisheries shall include a description of measures proposed to avoid, mitigate, or offset the impact of the activity on EFH. In cases where the FOSC is not in agreement with the recommendations by NOAA Fisheries, the FOSC should at a minimum explain the reasons for not following the recommendations.

The FOSC should contact NOAA Fisheries early in emergency response planning, but may consult after-the-fact if consultation on an expedited basis is not practicable before taking action (50 CFR 600.920(a)(1)). To the extent practicable, the Scientific Support Coordinator (SSC) or FOSC should notify NOAA Fisheries of the activities being taken and whether or not time allows for upfront consultation. Additionally, the FOSC and NOAA Fisheries may agree to combine an EFH consultation into an already established consultation process, such as those for the ESA or the National Environmental Protection Act (NEPA), for the same incident, provided all the information required for EFH is documented.

In the development of an Incident Action Plan, refer to the ***Emergency Response Checklist for EFH during Oil Discharges and Releases of Hazardous Substances***. FOSCs are also encouraged to work with applicable Regional Response Teams and Area Committees before an oil discharge or a hazardous substance release to update their ACPs with methods on how to minimize, mitigate, or avoid adverse effects to EFH.

300. WHAT IS REQUIRED IN AN EFH ASSESSMENT?

For the consultation process, the EFH Assessment *must* include the following (50 CFR 600.920(e)(3)):

- (1) Description of the action (level of detail must correspond to magnitude and complexity of potential effects);
- (2) Analysis of the potential adverse effects of the action on EFH and the managed species;
- (3) Federal agency's conclusions regarding the effects of the action on EFH; and
- (4) Proposed mitigation, if applicable.

The EFH Assessment *should* include:

- (1) Description of the spill;
- (2) Conclusions of the USCG (through the Area Committee and/or FOOSC) regarding the effects of the action on EFH; and

EFH Assessments submitted to NOAA Fisheries shall employ one or both of the following formats as necessary:

Use of Existing Environmental Consultation Procedures for EFH Consultation

NOAA Fisheries encourages this procedure to streamline the EFH consultation process. As long as an existing process clearly identifies in a separate section of the document the information required to satisfy an EFH Assessment, and the process will provide NOAA Fisheries with timely notification, the assessment may be incorporated into documents prepared for other purposes. Examples of such documents include Endangered Species Act Biological Assessments pursuant to 40 CFR 402 and the National Environmental Policy Act documents and public notices pursuant to 40 CFR 1500.

Abbreviated and Expanded Consultation

Abbreviated consultation procedures should be used when the adverse effects of an action can be alleviated through minor modifications to the action. However, in cases where Federal actions would result in substantial adverse effects to EFH, expanded consultation procedures must be used. Expanded consultation allows maximum opportunity for NOAA Fisheries and the Federal agency to work together to review the action's impacts on EFH and to develop EFH conservation recommendations. If appropriate, NOAA Fisheries may conduct a site visit.

400. REFERENCES

EFH Policy Regulations

Procedures for identification of EFH and the consultation process can be found in 50 CFR 600 (published January 17th, 2002):

http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr_2004/oct_qtr/pdf/50cfr600.920.pdf

Essential Fish Habitat locations in your region may be found on the web at:

http://www.NOAA.Fisheries.noaa.gov/habitat/habitatprotection/efh_designations.htm

EFH Consultation Guidance

Includes information on the procedures that have been developed to assist NOAA Fisheries and other Federal agencies in addressing the EFH coordination and consultation requirements established by the MSA and the EFH regulatory guidelines:

<http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat9.htm>

EFH Assessment Guidance

Intended to assist Federal agencies in developing EFH Assessments. The guide contains EFH definitions, responses to frequently asked questions concerning preparation of EFH Assessments, and gives three examples of completed EFH Assessments:

<http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat9.htm>

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Appendix 1 - Emergency Response Checklist for EFH during Oil Discharges and Releases of Hazardous Substances

	FOSC notifies Department of Interior/NOAA representative to the RRT of any actual or potential adverse effects to EFH.
	<p>FOSC notifies NOAA Fisheries regional staff of actual or potential adverse effects to EFH. Notification should occur in writing.</p> <p><i>Note:</i> The National Response Center's (NRC) flash fax notification of a spill to NOAA does not meet this requirement.</p> <p>If consultation during the emergency response phase is not practicable, the FOSC may consult with NOAA Fisheries after-the-fact, as per 50 CFR 600.920(1)(a).</p>
	<p>FOSC provides NOAA Fisheries an EFH Assessment for spill activities:</p> <ul style="list-style-type: none"> ___ Description of discharge or release ___ Description of area which may be affected ___ Description of spill response actions ___ Analysis of the potential adverse effect(s) of the response actions on EFH and the managed species ___ USCG recommendations/conclusions regarding the effects of the action on EFH ___ Proposed mitigation, if applicable
	<p>Supplemental information, if appropriate, for EFH Assessment:</p> <ul style="list-style-type: none"> ___ Results of on-site inspection evaluating habitat and site-specific effects ___ Views of recognized experts on the habitat or species affected ___ Review of pertinent literature and related information ___ Analysis of alternatives to the response actions taken ___ Other relevant information
	FOSC notifies NOAA Fisheries of changes in response operations due to weather, extended operations, or some other circumstance.
	FOSC obtains information on seasonal variances or other natural occurrences affecting EFH from NOAA Fisheries.
	FOSC provides a detailed response in writing within 30 days of receiving EFH Conservation Recommendations from NOAA Fisheries, unless otherwise agreed to.
	<p>SSC provides NOAA Fisheries a response regarding EFH Conservation Recommendations after the FOSC determines that removal operations are completed IAW with 40 CFR 300.320(b). If operations are not complete then send an interim response:</p> <ul style="list-style-type: none"> ___ Description of spill response. ___ Evaluation of emergency response actions & their impacts on EFH to include documentation of how NOAA Fisheries recommendations were implemented and results of implementation in minimizing adverse effects to

	EFH. — A comparison of the emergency response actions with the pre-planned countermeasures from the ACP.
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