MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director

DATE: June 13, 1997

SUBJECT: Magnuson-Stevens Act Provisions

ESTIMATED TIME
4 HOURS

ACTION REQUIRED

(a) Review progress and give direction on meeting new requirements.
(b) Review AMCC bycatch proposal
(c) Receive progress report on Essential Fish Habitat initiative.
(d) Comment on various NMFS initiatives in response to Magnuson-Stevens Act revisions

BACKGROUND

(a) Progress Report and Council Direction

The Sustainable Fisheries Act added many new requirements to the Magnuson-Stevens Act. Item C-9(a) is a detailed itemization of the new requirements, keyed to the red covered, December 1996 edition of the Act. In that document, I provide a status report for each requirement and recommendations on next steps. It will be very important for the Council to review the items and give the staff direction on additional tasking. I consider the following five sections as needing particular attention of the Council to set a course of action:

1.	Section 303(a)	Essential fish habitat.
2.	Section 303(a)	Bycatch reporting and minimization.
3.	Section 313(f)	Four-year reduction in economic discards.
4.	Section 313(h)(1)	Total catch measurement.
5.	Section 313(h)(2)	Weighing of fish.

Concerning bycatch reductions under #2 above, I earlier held the opinion that the Council most likely had addressed this new requirement of fishery management plans because of the long list of bycatch control measures the Council has enacted during its twenty-year history. Those are described in a separate paper on BSAI bycatch drafted by David Witherell, to be distributed at this meeting. I earlier believed that the new requirement was meant primarily for other councils to get their house in order.

I have changed my mind after reviewing the legislative history on this issue. It is clear from the Senate Commerce Committee report, Senator Stevens' comments on the Senate floor, and his press release, all under item C-9(b), that additional actions are intended for the North Pacific Council. I still believe, however, that our IR/IU program responds sufficiently to #3 above, though Trustees of Alaska has argued strongly that IR/IU does not (see letter under C-9 supplemental). Obviously, the Council needs to consult with NMFS and NOAA GC and determine next steps to be taken.

I recommend that the Council send out a special notice with its call-for-proposals for groundfish this summer, emphasizing the need for proposals to satisfy the Section 303(a) bycatch reduction requirements of the Act. This would dwell mainly on regulatory discards and PSC species. In September, the Council would prioritize the proposals and task staff with an amendment package for initial review in April 1998 and final action in June 1998. We would need to transmit the amendment package to the Secretary by October 11, 1998 to meet the requirements of the Act.

I do not believe any further action on economic discards makes sense at this time until we find out if the IR/IU program causes a reduction in economic discards or changes in fishermen behavior to avoid economic discards in 1998. Then we can adjust the program as necessary. I have run that approach by various congressional staff members and it has appeared to be acceptable. I think that we need to keep firmly in mind that IR/IU impacts more than just those fishermen operating in the directed fisheries for pollock and cod. Every fisherman in the North Pacific groundfish fisheries, regardless of gear or target species, will need to keep the specified species. We need to see how the program plays out before adding any more regulations to treat economic discards.

(b) Review AMCC Bycatch Proposal

This proposal was submitted during the call-for-proposals last summer, and the Council requested in December that it be placed on the June agenda along with the overall topic of bycatch reduction. The proposal is item C-9(c) in the notebooks. It is rather general in nature, but should be reviewed along with the more specific proposals that may come in over the summer.

(c) Essential Fish Habitat

The Magnuson-Stevens Act amendments call for the Secretary to make recommendations to the Council on the description and identification of essential fish habitat (EFH), for the councils to amend their fishery management plans accordingly, and for the councils to add provisions to the plans that will minimize to the extent practicable the impacts of fishing on the habitat. The councils have until October 1998 to submit their EFH amendments. The Final Rule for EFH guidelines has not been published, but NMFS and the Councils have already started preparing background materials given the limited time available.

The Alaska Region's essential fish habitat core team met in Juneau on May 20-22 to discuss how to prepare the EFH amendment and establish a plan to accomplish this objective. A draft tasking plan is attached as Agenda Item C-9(d). The EFH Core team is proposing that the work be accomplished in two phases, with the initial phase to describe and identify EFH, and a later phase to amend the plans as necessary to minimize to the extent practicable any fishing impacts on EFH. To accomplish phase 1, technical teams would be established to prepare essential fish habitat assessment (EFHA) for each FMP. EFHA's would be similar in structure to the SAFEs in that there would be a separate chapter, drafted by assessment authors, for each target species complete with text, tables, and maps. The EFHAs would be available to the public, and form the scientific basis for EFH recommendations by the EFH Core team. A preliminary EFHA should be available in September for SSC and Ecosystem Committee review. A draft Final EFHA and amendment package will be available for Council review in April, 1998. At this meeting, the Council needs to approve the Tasking Plan, or provide additional guidance.

(d) Other NMFS Initiatives that Respond to SFA

A key new requirement of the Act is the recusal regulations. The draft proposed rule is under item C-9(e). NOAA GC attorneys nationwide developed the draft and Jon Pollard is lucky enough to be here to walk us through it. The Council Chairmen reviewed the draft in early June and had the following comments:

> "The Council Chairmen reviewed the draft proposed rule on recusal. The Chairmen recognize that recusal and conflict of interest are very difficult issues to address in the complex decisionmaking that is embodied in the regional council process. They appreciate the joint work effort of the regional attorneys in drafting the proposed rule, and in general had little disagreement with the use of the 10% rule. There were, however, several concerns expressed.
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> First, the supplementary information section singles out industry association representatives, but no others, for guidance on when to recuse. The Chairmen recommend that the guidance be eliminated by deleting the last part of the first full paragraph on p. 5, beginning with the word "However" in the fifth sentence. If that guidance is not deleted, than other examples for other types of council members and situations should be added so that the public may respond.
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> Second, our discussions and debate on the recusal issue showed how easy it will be to produce illogical or inequitable outcomes. The example for the industry association representative underscores the situation. According to the guidance, though an industry association representative may not have 10% of any interest in the fishery, he (or she) would need to recuse on any vote that would eliminate his membership's fishery. On the other hand, one of his members, who has less than 10% of the fishery, but similarly would lose it all, could still vote under the proposed rule. Further, a State director might lose his job over the same vote, and yet he would not have to recuse. Yet all of these individuals have just as much at stake. In fact it could be argued that the industry association representative might not be as impacted as one of his members, because he does not have the capital investment in equipment.
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> Third, several councils believe that the proposed rule exceeds the language and intent of the Sustainable Fisheries Act in drafting Section 600.235(c)(3) by adding "negative impact" in addition to positive impact. They believe that Congress only intended recusal if a member stands to gain in a positive way from a motion. Extending the impacts to the negative side will increase the number of situations in which members will have to recuse themselves. Other councils felt the language comported with congressional intent because losing part of your finanacial interest could be just as personally motivating as gaining something.
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> Fourth, a comment was made that if NOAA GC has responsibility for deciding an appeal of a decision by a NOAA GC regional attorney, there will need to be a very careful separation between the NMFS and NOAA regional attorney side of the house and NOAA GC who has to review the recusal decision, to ensure that the review is impartial and fair to the appellant.
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> The Councils will be taking up the recusal issue individually in the next month and will provide further recommendations that likely will have additional examples of when recusal may or may not be appropriate. Certainly this whole issue will pose an extraordinary challenge to the representatives of NOAA GC in refereeing the meetings."

This will be our last chance to comment because the proposed rule comment period will be over by the time the Council meets next in September.

North Pacific Council Related
Special Magnuson-Stevens Act Mandates
(Page numbers keyed to red covered, December 1996 copy of Act)

Section 3[illegible]ns (p. 4)

1. NMFS reviewed new definitions and concluded by letter on 2/20/97, that none of the Council's definitions were inconsistent with those contained in the Sustainable Fisheries Act.
2. There have been comments that the OY definition needs revision. In the BSAI groundfish plan, the OY is set for the groundfish complex as a whole, at 85% of the overall groundfish complex MSY. In the GOA groundfish fisheries, the OY is set at 97% of the MSY. Therefore both plans appear to comport with the new definition of OY.

Section 302(e, i, j): SOPP Updated to Reflect New Procedures (p. 51)

1. Council approved SOPP revisions on 2/7/97. Submitted to NMFS on 2/12/97.

Section 303(a): New Required Provisions of FMPs (p. 58)

1. There are five new FMP requirements relating to the following topics: (1) essential fish habitat, (2) overfishing and stock rebuilding, (3) bycatch reporting and minimization, (4) recreational and charter sector descriptions and allocations, and (5) fishery impact statements must now include communities..
2. We have until October 1998 to submit conforming amendments or assure that the plans already conform. Need to consider these new provisions with the ongoing update of the plan for initial review in September 1997, and in the meantime, get a reading from NMFS on whether we already comply.
3. We received a letter dated December 30, 1996, making us aware of these new requirements and requesting that NMFS' activity sheets be updated once we know our schedule.
4. **Essential fish habitat**: a tasking plan will be considered by the Council in June 1997. The plan will require technical teams to identify and describe EFH for all FMPs by next April. A council final decision will be made in June 1998 on amendments to the plans. Measures to reduce the impacts of fishing on EFH will be developed over the next annual cycle, with final approval in June 1999.
5. **Overfishing and stock rebuilding**: fishery management plans already have overfishing definitions and the only rebuilding plan is for POP, and it is almost rebuilt in abundance. The overfishing definitions may need some adjustment and the teams should consider if adjustments are needed during their August team meeting. They should report to the Council in September 1997.
6. **Bycatch reporting and minimization**: the Council has implemented many measures to minimize bycatch and these will be inventoried for the June 1997 Council meeting. Bycatch also is reported. In June 1997 the Council will need to instruct staff on which additional measures to analyze to further reduce regulatory discards and thus fulfill the intent of this new FMP requirement. The staff recommends that during the call-for-groundfish-proposals this summer, that bycatch reductions be emphasized. Specific proposals will be requested, and in September the Council can develop an amendment package for initial review in April 1998, final approval in June and submission to the Secretary by October 11, 1998.

7. **Charter and recreational fisheries descriptions and allocations**: halibut charterboats measures are being considered, but do not fall under this requirement which is for FMP fisheries only. So no additional work has to be done to respond to this requirement since there is little in the way of recreational fisheries in the Council's jurisdiction for groundfish.
8. **Fishery impact statements for communities**: the Council already incorporates information on effected communities in its fishery management plan amendment analyses as appropriate, and will continue to do so.

Section 303(d)(4): North Pacific Loan Program (p. 63)

1. Council must recommend loan program for small boat and entry level IFQ fishermen by October 1, 1997. Additional information is in Section 304(d)(2)(C) on p. 67 and Appendix on p. 120.
2. Council will give initial review of amendment in June and final review in September 1997. This will be a plan amendment with authorizing language. The information is under agenda item C-2(b). Mike Grable at NMFS will write detailed regulations implementing program. Depending on the extent of the plan amendment required, we should be able to just barely make the October 1 deadline. The loan program will not be funded probably until 1999 at the earliest.

Section 304(d)(2): Fees on IFQ/CDQ Programs (p. 67)

1. Secretary must establish fees up to 3% on IFQs and CDQs.
2. NMFS is preparing fee program as Secretarial amendment to groundfish FMPs. Council will review in September and December 1997.

Section 305(a): Gear Evaluation and Notification List (p. 72)

1. By April 1998, the Secretary must publish a list of all fisheries and gears used in them and guidelines for adding new gears. Secretary has lead but Council will need to respond to information requests. The first request is a letter dated December 30, 1996 from Dr. Gary Matlock seeking list of fisheries and gears by March 1, 1997. Responded by letter on 3/31.

Section 305(b): Fish Habitat (p. 73)

1. Secretary must establish guidelines for describing and identifying essential fish habitat by April 1997. A proposed rule was published on April 23, 1997, and comment period has been extended until July 8, 1997.
2. In February, the Ecosystems Committee prepared comments that were approved by the Council and forwarded to NMFS on February 11.

Section 305(h): Central Registry System (p. 77)

1. Secretary must establish registry system by April 1997, and promulgate regulations after consulting with the Councils.
2. ANPRM published on 3/6/97 and industry asked for and was granted an extension of the public comment period to August 5, 1997.

Section 305(i): CDQ Programs (p. 78)

1. Council must establish CDQ program for groundfish and crab in Bering Sea.
2. CDQs have been approved for all species by the Council as part of the license limitation program which began Secretarial review on June 9, 1997. Council has repeatedly urged NMFS to have new multispecies CDQ programs in place for 1998 even if license program is not implemented until 1998.
3. Pollock CDQs are due to lapse at end of 1998, but will be resubmitted with inshore-offshore proposal scheduled for final Council approval in June 1998. An alternative approach would be to severe the CDQ pollock program from the inshore-offshore amendment and submit it separately as a very brief administrative amendment to remove the sunset of the current pollock program. This is because the pollock CDQ program appears to be legislatively mandated.

Section 313(f): Four-Year Reduction in Economic Discards (p. 103)

1. New Section 313(f) requires the Council to submit by January 1998, measures to reduce economic discards for a period of not less than four years. We will comply by submitting IRIU amendments for BSAI and GOA, to be implemented in 1998. We need to determine if anything needs to be done for crab, salmon and scallop FMPs, as they are fisheries under our jurisdiction.

Section 313(g): Bycatch Reduction Incentives (p. 104)

1. Council may submit system of fines to provide incentives to reduce bycatch and bycatch rates, and VBA type systems.
2. These are discretionary, but Council is working on VBA system and will review progress in 9/97.

Section 313(h)(1): Total Catch Measurement (p. 104)

1. Council must submit measures by June 1, 1997 to ensure total catch measurement in each fishery under its jurisdiction, that will include accurate enumeration, at a minimum, of target species, economic discards, and regulatory discards. Our current catch reporting measures based on observers and the blend system may satisfy this requirement. We need feedback from NMFS and then the Council should determine next steps. Obviously, if what the Council has done so far is insufficient, then we will have failed to meet the June 1, 1997 deadline. In that case, we need to request an extension.

Section 313(h)(2): Weighing of Fish (p. 104)

1. Council must submit a plan to Congress by January 1, 1998, to allow for weighing by fish processors and processing vessels, unless such measures are determined to be unnecessary to meet catch measurement requirements.
2. In October 1994, Council approved a requirement for all processors in the directed pollock fishery to weigh all pollock harvest on a scale and intended that the program be implemented within two years. NMFS published an ANPRM on 2/20/96, but there has been little further action on this matter because of technical problems with finding scales that perform accurately at-sea, and lack of funds for scale inspectors.
3. NMFS will require that certified scales be used in all CDQ operations beginning in 1998 for new

CDQ programs. The Council Chairman, as directed by the Council in February 1997, wrote a letter to NOAA on 2/13/97 urging funding for the certified scale program so that the new CDQ programs could be implemented.

4. Concerning groundfish fisheries, application of scale measurements of total weight will depend on finding a scale that works accurately and consistently at sea. Until such a scale is found and certified for use and a certification program is established, the current approaches for measuring fish weight through volumetrics must suffice, unless the Council is informed otherwise by NMFS.

Section 313(i): Report on Full Retention (p. 105)

1. Council must submit to the Secretary by October 1, 1998, a report on the advisability of requiring full retention and utilization. We will report first season IRIU results by October 1998 for the BSAI and GOA, if the program is approved and implemented by the Secretary.

Section 401: Vessel Registration and Information Management System (p. 107)

1. Secretary must publish proposed rule by October 1997 to implement a standardized fishing vessel registration and information management system on a regional basis. He must consult with states, commissions, and councils in developing the system.

Section 406: NAS Ecosystems Report (p. 114)

1. The Secretary must establish a panel by April 1997 to develop recommendations to expand the application of ecosystems principles in fishery conservation and management activities, and report the panel's findings to Congress by October 1998. The panel must include Council respresentatives among others.
2. Formal panel name is Fisheries Systems Research Advisory Panel. Dr. Fluharty was nominated on 3/14 and approved on 4/21/97.

Appendix: NAS Report on IFQ/CDQ (pp. 118-119)

1. NAS must consult with councils and develop an IFQ policy report by October 1, 1998, with a draft due by January 1, 1998. NAS also must consult with the North and West Pacific councils, communities and organizations to develop a comprehensive performance review of the CDQ programs by October 1, 1998.
2. February 1997 Council meeting: Informed that there will be two panels with 15 members each. FR notice within a week and then people will have to submit statement of interest. There should be a letter coming to the Council. Lauber/Behnken nominated on 3/20. Behnken accepted on 5/2/97.

Appendix: Bycatch to Charities Report (p. 120)

1. The Secretary must conduct a study of the contribution of bycatch to charitable organizations and report to Congress by October 1997. We may need to provide information.

Appendix: Russia Report (p. 120)

1. On schedule to be completed and submitted by 9/30/97 deadline.

AGENDA C-9(b)
JUNE 1997

Calendar No. 422

104TH CONGRESS *2d Session*	SENATE	REPORT 104–276

SUSTAINABLE FISHERIES ACT

REPORT

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 39

MAY 23, 1996.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
24–744 WASHINGTON : 1996

should be considered in developing plans, amendments and regulations.

Section 116(e) would amend the definitions applicable to section 311 to include the transshipment at sea of fish products by foreign vessels in the definition of "provisions of this Act" for enforcement purposes.

Section 117.—North Pacific and Northwest Atlantic Ocean Fisheries

This section of the reported bill would amend section 313 and 314 of the Magnuson Act to deal with a number of conservation issues in the North Pacific and extend the authorization of appropriations for the Northwest Atlantic Ocean Fisheries Reinvestment Program. Section 117(a) would amend the title of section 313 of the Magnuson Act to read "NORTH PACIFIC FISHERIES CONSERVATION" and add four new subsections to address bycatch reduction, the measurement of catches, and the full utilization and retention of economic discards in fisheries under the jurisdiction of the North Pacific Council. New section 313(f) would require the North Pacific Council to lower, on an annual basis for at least four years, the total amount of economic discards occurring in the fisheries under its jurisdiction. This subsection is meant to ensure that the bycatch reduction requirements that would be added to the Magnuson Act by the reported bill would result in an actual significant reduction in the total amount of economic discards in North Pacific fisheries. Under the changes to fishery management plan requirements (section 302(a) of the Magnuson Act) that would be made by the reported bill, the North Pacific Council would be required to include measures in each plan to minimize bycatch and, as a second priority, minimize the mortality of bycatch that cannot be avoided. New section 313(f) would emphasize the reduction of economic discards, or bycatch which fishermen choose not to retain. Reductions in the North Pacific of regulatory discards, or bycatch which fishermen are required by regulation not to retain would be accomplished primarily through the new plan requirements in section 302(a).

New section 313(g) of the Magnuson Act would provide the North Pacific Council with authority to recommend a system of fees in a fishery to provide incentives to reduce bycatch and bycatch rates. The fees would not be allowed to exceed one percent of the estimated annual ex-vessel value of the target species in the fishery. New subsection (g) would also provide an exemption from the IFQ moratorium in section 303(d) of the Magnuson Act (as amended by the reported bill) to allow the North Pacific Council to submit measures which provide allocations of regulatory discards to individual fishing vessels as an incentive to reduce per vessel bycatch and bycatch rates. Any regulatory discard allocations would not be allowed to be transferable for monetary consideration and would be required to be reallocated on an annual basis. The North Pacific Council could not submit nor could the Secretary approve any such measures unless they would result in an actual reduction in regulatory discards, and unless an accurate enumeration of the target species, economic discards and regulatory discards is available in the fishery. The North Pacific Council would be authorized to include any additional restrictions deemed appropriate on the trans-

ferability of regulatory discard allocations. Such additional restrictions may be necessary to ensure the enforceability of regulatory discard allocations or for other reasons determined by the Council.

New section 313(h) would require the North Pacific Council to submit measures to ensure the total catch measurement in each fishery under its jurisdiction by June 1, 1997. To the extent the measures do not require the weighing of fish, the North Pacific Council and Secretary would be required to submit a plan to Congress by January 1, 1998 to allow for weighing, unless the Council determines that weighing is not necessary to ensure the total catch measurement in a fishery.

New section 313(i) would require the North Pacific Council to submit a report to the Secretary by June 1, 1999 on the advisability of requiring the full retention and full utilization of economic discards under its jurisdiction. The report is not intended to prevent the North Pacific Council from submitting, nor the Secretary from approving, measures to require the full retention and full utilization of economic discards or other types of bycatch prior to June 1, 1999, as long as such measures are consistent with the other requirements of the Magnuson Act, as amended by the reported bill.

Section 117(b) of the reported bill would amend section 314 of the Magnuson Act to authorize annual appropriations of $5,000,000 in each of the fiscal years through 2000 for the Northwest Atlantic Ocean Fisheries Reinvestment Program.

Section 118.—Transition to Sustainable Fisheries

Section 118 would amend Title III of the Magnuson Act by adding two new sections authorizing activities to facilitate the attainment of sustainable fisheries. In many fisheries, both in the United States and throughout the world, too many fishermen are chasing too few fish. Such excess harvesting capacity may result in social and economic pressure to raise the allowable catch levels in the fishery, increase competition among fishermen, and reduce economic stability of fishery participants. One mechanism to address this problem is a "buyout" program in which fishing capacity is reduced by making payments to fishermen for removing excess vessels or permits. Section 118(a) would add a new section 315 to the Magnuson Act establishing procedures for conducting such a fishing capacity reduction program.

Under new section 315(a), the Secretary, with the approval of the appropriate Council and in consultation with interested parties, would be authorized to conduct a voluntary buyout program if the Secretary determines that: (1) the program is cost effective and necessary for a fishery rebuilding effort or to achieve fishery conservation and management goals; and (2) the management plan for the fishery is consistent with the proposed program and contains adequate measures to ensure that the total allowable catch for the fishery is not exceeded and to prevent replacement of fishing effort removed by the program. New section 315(a) also would establish that the objective for a buyout program is to obtain the maximum sustained reduction in fishing capacity, at the least cost, in a minimum period of time. To achieve that objective, the Secretary would be authorized to pay fishermen to relinquish fishing permits and to scrap fishing vessels or permanently prevent their further use

in fishing. The first use of such paym
loan or lien on the vessel or permit, ir
teed debt. The Committee intends tha
a vessel is removed from the fi y, a
be removed as well.

New section 315(b) would authorize fu
reduction program by any combination
the Saltonstall-Kennedy Act, for fisher
an industry fee system, or from states,
vate organizations.

New section 315(c) addresses procedu
dustry fee system to fund a buyout prog
tem is necessary, the Secretary, with
priate Council, would be authorized to c
sess industry willingness to invest in a l
a portion of the program costs through
ducting the referendum, the Secretary
and inform all permit and vessel owner
the program and required to pay fees.
of the participants voting in the referer
approve the industry fee system. An indu
new section would not be authorized to
vessel value of landings and would rema
time as any debt obligation incurred to f
is fully paid. Fees collected to pay a d
fund a buyout program would be paid int
ing capacity reduction fund of the Gener
clusively for the purpose of making payr
tion. The Committee intends that any
would be used solely for a buyout progran

New section 315(d) would require the
with the Council and other interested pa
mentation plan for a fishing capacity rec
would define criteria for eligibilit esta
gram participation, and be publis in
60-day public comment period prior to i
A plan that includes industry fees or any
be approved by the Secretary unless an
been adopted by the fishermen through a

Section 118(b) of the reported bill woul
report to Congress on the role of the Fed
dizing changes in the capacity of U.S. fis
influencing aggregate capital investment i

Section 118(c) of the reported bill woul
to the Magnuson Act on the transition
New section 316 would authorize disaste
fishery failure due to a fishery resource di
retary to develop a sustainable developm
ery under Federal management. Subsecti
would authorize the Secretary to develop
fishery that is overfished or for which a f
is being developed. The subsection is not
Secretary with new authority to devel
plans. Exercise of the authority provided

The bill clerk read as follows:

A bill (S. 39) to amend the Magnuson Fishery Conservation and Management Act to authorize appropriations, to provide for sustainable fisheries, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Hutchison amendment No. 5383, to make certain modifications to provisions with regard to regional fishery management councils.

AMENDMENT NO. 5383

The PRESIDING OFFICER (Mr. FRIST). The pending question is the Hutchison amendment, No. 5383. There will be 4 minutes of debate, equally divided, on the amendment.

Mr. STEVENS. Mr. President, while we are waiting the manager on the Democratic side, I have a parliamentary inquiry.

Was the managers' amendment that was adopted last evening printed in the RECORD?

The PRESIDING OFFICER. Yes, it is. It is on page S10944.

Mr. STEVENS. Mr. President, I ask unanimous consent that a summary of the managers' amendment be printed in the RECORD at this point, and that it be printed in the permanent RECORD following the managers' amendment of yesterday.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SUMMARY OF MANAGER'S AMENDMENT TO S. 39

AUTHORIZATION OF APPROPRIATION

The manager's amendment authorizes appropriations through fiscal year (FY) 1999 for the purposes of carrying out the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

DEFINITIONS

The amendment defines a number of new terms for the process of the Magnuson Act and amends a number of existing definitions. New defined terms include: "bycatch"; "charter fishing"; "commercial fishing"; "economic discards"; "essential fish habitat"; "fishing community"; "individual fishing quota"; "overfishing"; "Pacific Insular areas"; "recreational fishing"; "regulatory discards"; "special areas"; and "vessel subject to the jurisdiction of the United States." The amendment amends the existing definition of "optimum" with respect to the yield of fishery to mean the amount of fish prescribed on the basis of the maximum sustainable yield "as reduced" (rather than "as modified") by any relevant economic, social, or ecological factor. This change prevents the maximum sustainable yield of a fishery from being exceeded.

BYCATCH REDUCTION

The amendment adds a new national standard to the Magnuson Act requiring that, to the extent practicable, conservation and management measures minimize bycatch and minimize the mortality of bycatch that cannot be avoided. The amendment specifically requires the Councils to establish standard reporting methods under fishery management plans to assess the amount and type of bycatch occurring in each fishery, and to include measures to minimize bycatch to the maximum extent they can, and to minimize the mortality of bycatch that cannot be avoided in the first place. The amendment provides the Councils with the new tools of harvest preferences and other harvest incentives to achieve this bycatch reduction. In addition, the amendment requires the Councils to assess the type and amount of fish being caught and released alive in recreational fisheries, and include measures to ensure the extended survival of such fish.

The amendment requires the Secretary of State to seek to secure international agreements for bycatch standards and measures equivalent of those of the United States.

The amendment requires the North Pacific Council, in carrying out the new bycatch requirements, to reduce the total amount of bycatch occurring in the North Pacific, and authorizes the North Pacific Council to use, in addition to harvest preferences or other harvest incentives, fines and non-transferable annual allocations of regulatory discards as incentives to reduce bycatch and bycatch rates. The amendment requires the North Pacific Council to submit a report on the advisability of requiring the full retention and full utilization of the economic discards in the North Pacific that cannot be avoided in the first place. The Council must report on any measures it already has approved, or approves during the period of the study, to require full retention or full utilization, and is not meant to preclude the Council from taking all actions that it can to achieve these goals.

The amendment requires the Secretary to conclude within nine months the collection of data in the program to assess the impact on fishery resources of incidental harvest by shrimp trawl fisheries, and to conduct additional data collection and evaluation activities for stocks identified by the program which are considered to be overfished. Within 12 months of enactment, the Secretary must complete a program to develop technology, devices, and changes in fishing operations necessary to minimize the incidental mortality of bycatch in the course of shrimp trawl activity to the extent practicable as measured against the level of mortality which occurred in a fishery before November 29, 1990. Any measures taken are required to be consistent with measures that are applicable to fishing throughout the range within the United States by the bycatch species.

OVERFISHING

The amendment defines "overfishing" to mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis. It requires the Councils to specify, in each FMP, criteria for determining when a fishery is overfished and to include measures to rebuild any overfished fishery. It also requires the Secretary to report annually to Congress and the Councils on the status of fisheries, and to identify fisheries that are overfished or approaching a condition of being overfished using the Council's overfishing criteria. The Secretary is required to notify the Council immediately if a fishery is overfished.

Within one year of the Secretary's annual report, the appropriate Council must submit an FMP, amendment or regulation to prevent overfishing in fisheries determined to be approaching that condition, and to stop overfishing and begin to rebuild fisheries classified as overfished. For an overfished fishery, the Councils must specify as short a time period as possible to stop the overfishing, taking into account the harvest status and biology of the overfished stock, the needs of fishing communities, recommendations by international organizations in which the United States participates, and interaction between the stock and the ecosystem. The duration cannot exceed 10 years except under extraordinary circumstances. The Secretary is required to prepare an FMP or amendment if a Council fails to take sufficient action within one year on an FMP, amendment or regulations to rebuild an overfished fishery. The amendment allows the Secretary to recommend appropriate measures to the Council, and requires that the allocation of both overfishing restrictions and recovery benefits be fairly and equitably distributed among sectors of the fishery.

The manager's amendment allows the Secretary to use interim authority to halt overfishing for up to 180 days, with one additional 180 day period, provided that a public comment period on the measure is provided.

HABITAT PROTECTION

The amendment defines "essential fish habitat" for the purposes of the Magnuson Act as "waters and substrate necessary to fish for spawning, breeding, or growth to maturity." It requires the Councils to identify essential fish habitat under each FMP, to minimize, where practicable, adverse impacts on the habitat caused by fishing, and to identify actions that should be considered to encourage the conservation and enhancement of essential fish habitat. The Secretary is required to establish guidelines to assist the Councils in describing and identifying essential fish habitat and to review programs administered by the Department of Commerce to ensure they further the conservation and enhancement of essential fish habitat. Federal agencies are required to consult with the Secretary with respect to any action authorized, funded or proposed to be undertaken that may adversely affect any essential fish habitat identified under the Magnuson Act.

The amendment authorizes the Councils (similar to existing law) to comment on and make recommendations to the Secretary and other Federal or State agencies on any agency actions that may affect habitat, including essential fish habitat, and requires the Councils to comment on and make recommendations on agency activities that in the view of the Council are likely to substantially affect the habitat, including essential fish habitat, of an anadromous fishery resource.

Upon notification of any action authorized, funded, undertaken, or proposed to be authorized, funded, or undertaken by a Federal agency that may adversely affect essential fish habitat, the Secretary is required to recommend measures that can be taken to conserve the habitat. Federal agencies must respond in writing to such recommendations, and explain reasons for not following any recommendations.

COUNCIL REFORM

The amendment requires Council members to recuse themselves from voting on Council decisions that would have a "significant and predictable effect" on their financial interests. Such a decision is defined as one where there is "a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery." This language is intended to prevent Council members from voting on decisions that would bring substantially disproportionate financial benefits to themselves, but not to prevent Council members from voting on most matters on which they have expertise.

The Secretary, in consultation with the Council, is required to select a "designated official" with Federal conflict-of-interest experience to attend Council meetings and make determinations on conflicts of interest. The determinations will occur at the request of the affected Council member or at

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Chris Oliver N 1-7111

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To CHRIS OLIVER	From P.P.R.N
Co.	Co. ELLELL OLIVER
Dept. DEPUTY	Phone # 26-7116
Fax # 271-2817	Fax #

Ted Stevens
United States Senator For Alaska

FOR IMMEDIATE RELEASE
Friday, October 7, 1994

Contact: Press Office
(202) 224-5209

BI-PARTISAN EFFORT TO TACKLE FISH WASTE AND BYCATCH INTRODUCED
Bill would Reform Council, Protect Against Overfishing

Senators Ted Stevens (R-AK) and John Kerry (D-MA), senior members of the Senate Commerce Committee, today introduced legislation mandating the reduction of waste and bycatch in the fisheries off Alaska and the rest of the United States.

The provisions were part of sweeping legislation to reauthorize the Magnuson Fishery Conservation and Management Act (S.2538), commonly known as the 200-mile limit law.

"This bill underscores our bi-partisan commitment in the Senate to tackle waste and bycatch issues," Stevens said. "We must slash waste now, before it's too late. Future generations are looking to us to stop these appalling practices."

"The bill also includes important new requirements for individual transferable quota (ITQ) systems," Stevens noted. "There has been considerable interest in laying basic ground rules for these new management systems."

Stevens went on to say that he is confident this bill will provide a solid foundation on which to build consensus for the reauthorization of the Magnuson Act next year.

The Stevens/Kerry legislation incorporates all of the operative provisions of Stevens' "North Pacific Fishery Waste Reduction Act" which he introduced in April of this year.

The legislation requires fishery management councils to assess bycatch and to minimize mortality caused by economic and regulatory discards in each fishery management plan it prepares.

For the North Pacific, the bill requires the Council to incorporate provisions to reduce bycatch, economic and regulatory discards, as well as to reduce processing waste, and to achieve full retention and full utilization over a five-year period.

The legislation also gives fishery management councils the authority to provide a harvest preference or other incentives for

- more -

fishing vessels, within each gear group, that employ fishing practices which result in less bycatch.

More than 740 million pounds of groundfish were dumped overboard in the North Pacific last year. The groundfish total does not include millions of pounds of bycatch -- prohibited species caught out of season incidentally and required to be tossed overboard. A study commissioned by the Alaska Department of Fish and Game states that 16.7 million pounds of halibut, 16.6 million crabs, 370,000 salmon and 770,260 pounds of herring were discarded last year.

"In addition to the provisions from my earlier bill, we have also created a new definition for the term 'overfishing,'" Stevens said. "Our bill requires each council to include in each fishery management plan specific criteria for determining when fisheries are overfished or approaching such a condition. We hope to get the Councils to establish a mechanism to provide sufficient warning so that preventative measures can be put in place before any additional fisheries become overfished," Stevens said.

Each council will have one year to submit appropriate fishery management plans to prevent the overfishing of fisheries approaching that condition, and to stop overfishing and begin to rebuild fisheries that are already overfished.

If the council fails to take action to begin this process within one year, the Secretary will be required to prepare an appropriate fishery management plan or plan amendment.

"None of our fisheries in Alaska are overfished. I intend to make sure they stay that way with these provisions," Stevens said.

The measure also includes provisions to reform the council process. The bill would prevent members from voting on certain matters that benefit them financially, but does not require such widespread recusal by members that the councils would be rendered ineffective.

"I still strongly believe in the goal Senator Magnuson and I had for the original act -- that the councils should be made up of the people directly affected by fishery management decisions," Stevens said.

Council members would be required to recuse themselves from voting on council decisions that would have a "significant and

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predictable effect" on their financial interests. A council decision would be considered to have a "significant and predictable effect" if there is "a close causal link between the Council decision and an expected benefit, shared only by a minority of persons within the same industry sector or gear group, to the financial interest" of the council member. //

"This language will prevent council members from voting on decisions benefitting only themselves or a minority in their gear group, but will not prevent them from expressing views or from voting on most matters on which they have expertise," Stevens said.

The measure also increases council reporting requirements, and includes a provision to require a roll call vote for the record at the request of any council member.

With regard to individual transferable quotas, the legislation prevents the Secretary of Commerce from approving any ITQ plans until guidelines are promulgated. The guidelines, among other things, must: provide for the fair allocation of fishing privileges; address methods of providing for new entrants; and provide requirements for the effective monitoring and enforcement of ITQ systems.

The bill would require ITQ plans that have already been approved or implemented to come into compliance with the new ITQ guidelines by June 30, 1997.

The legislation also includes language requiring that conservation measures and ITQ plans take into account the importance of the harvest of fishery resources to fishery dependent communities.

# # #

AGENDA C-9(c)
JUNE 1997

GROUNDFISH FISHERY MANAGEMENT PLAN AMENDMENT PROPOSAL
North Pacific Fishery Management Council

Name of Proposer: Alaska Marine Conservation Council **Date:** August 15, 1996

Address: Box 101145, Anchorage, AK 99510

RECEIVED AUG 15 1996

Telephone: (907) 277-5357

Fishery Management Plan: Groundfish

Brief Statement of Proposal:

Bycatch continues to be an unresolved problem in federally managed fisheries. AMCC requests the NPFMC to consider a suite of methods for bycatch reduction through bycatch avoidance. Some suggested methods are contained in the attached Framework for Bycatch Reduction.

Objectives of Proposal: (What is the problem?)

To advance the goal of measureable bycatch reduction.

Need and Justification for Council Action: (Why can't the problem be resolved through other channels?)

Some voluntary efforts have been made but action must be taken for fleet-wide goals to be met.

Foreseeable Impacts of Proposal: (Who wins, who loses?)

The health of the fisheries and the North Pacific ecosystem will benefit and, as a consequence, all sectors of the industry with fidelity to the North Pacific and a commitment to sustainability.

Are there Alternative Solutions? If so, what are they and why do you consider your proposal the best way of solving the problem?

No alternative solutions at this time.

Supportive Data & Other Information: What data are available and where can they be found?

The National Academy of Sciences Bering Sea Ecosystem Report (1996) established scientific link between large industrial scale fishing and species declines in the Bering Sea; ADF&G; Observer data.

Signature:

Dorothy Childers, Exec. Dir.

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ALASKA MARINE CONSERVATION COUNCIL
Box 101145 Anchorage, Alaska 99510
(907) 277-5357; 277-5975 (fax); amcc@igc.apc.org

FRAMEWORK FOR BYCATCH REDUCTION

August 1996

The following standards and steps must be incorporated into fishery management plans and bycatch management programs under the Comprehensive Rationalization Plan (CRP) in order to meet conservation goals for sustainability of the fishiseries and the ecosystems of which they are a part.

1. Any bycatch proposal implemented by the Council as part of the CRP should be comprehensive. A comprehensive bycatch proposal is one that addresses all categories of bycatch including non-commercial species, prohibited species, economic discards and regulatory discards.

2. Any bycatch proposal should result in the lowering of total removals from the ocean ecosystem. That means not only lowering bycatch rates, but all bycatch totals across all gear types (phased in if necessary).

3. Any bycatch program should involve as much input from fishermen as possible.

4. Any bycatch program should be integrated with the observer program as much as possible, recognizing the inevitable trend toward better information from observers as the data from which all future management programs will be based.

5. Any bycatch program can achieve the best results with positive incentives rather than punitive regulations. Some examples include:

- Help fishermen convert to cleaner gear;
- Extend seasons for cleaner gear types where bottom trawling is eliminated (PSCs could be reduced and the season extended because caps would not be reached as quickly using cleaner gear);
- Allocate more fish to cleaner gear types. Increased allocation for jig and pots for cod, and pots for yellowfin sole and rock sole could be done right now providing for much reduced bycatch, less impact on marine habitat, and year round fisheries for coastal communities.

6. Any bycatch program should entail mechanical techniques available to reduce bycatch to the maximum extent practicable such as:

- Eliminate bottom trawling;

(over)

- Restrict trawl net size and horsepower;
- Crank down prohibited species caps;
- Eliminate net loss fisheries (fisheries in which the ex-vessel value of bycatch is greater than the ex-vessel value of targeted catch);
- Require electronic reporting equipment on board to allow daily transmission of catch and bycatch data;
- Require catch and bycatch estimates by weight;
- Limit speed of trawl tows without increasing bycatch of juvenile fish.

* * * * *

FISH CLEAN...FISH LONGER!

Essential Fish Habitat Amendment
Updated Tasking Plan
June 3, 1997

Introduction

The Magnuson-Stevens Act amendments call for the Secretary to make recommendations to the Council on the description and identification of essential fish habitat (EFH), for the councils to amend their fishery management plans accordingly, and for the councils to add provisions to the plans that will minimize to the extent practicable the impacts of fishing on the habitat. The councils have until October 1998 to submit their EFH amendments. NMFS will be providing guidelines on the EFH task, primarily based on their proposed rule and on the discussions at a national workshop held in Silver Springs the week of May 5th. It is stressed that these are just guidelines and not mandates, and that every region of the country has a little (or a lot) different situation. Therefore the plan amendments and approaches will differ accordingly. However, the goal is to produce quality, meaningful amendments and EFH documents that will be useful to managers in their efforts to restore and maintain habitat for sustainable fisheries.

It should also be kept in mind that many of the same people who provide annual stock assessment updates will be leaned on to do at least the initial examination of EFH for their species. There will be some extra funding for additional help, but not all that much. NMFS has S/K funds for FY 1997 in two proposals, one of $650,000 to split five ways among the NMFS regions ($130k for Alaska), and $350,000 for HQ data collection and mapping. The FY1998 Presidential budget is seeking an $8.8 million boost, of which $3 million would go to EFH. The Councils may also get a bump in budget and may be able to hire an analyst for EFH or contract some of the work out. All these things take a long time to move into action once the funding is available. The reality, as will be shown below, is that there is about a seven-month window from July 1, 1997 to January 31, 1998 for getting most of the work done, and that will pass by very quickly, considering that the normal stock assessments are due then also, as well as work on other amendments and regulatory actions.

Schedule

The October 1998 submission written into the Act provides for a relatively short timeline for such a large undertaking, especially when the schedule of council meetings is taken into account. Specifically for the North Pacific Council, below is the schedule to which the teams working on EFH will adhere based on the NMFS Core team meeting of May 20-21.

June 18, 1997 Council approves tasking for EFH. Council establishes technical team(s) for each fishery management plan to develop EFH amendments. The technical team membership for the following plans include:

BSAI Groundfish	(Fritz, Witherell, Ackley/Vining)
GOA Groundfish	(Lowe, Witherell, O'Connell)
BSAI Crab	(Reeves, Witherell, Murphy)
Scallop	(Kruse, Witherell)
High Seas Salmon	(Hurd, Dalburg, Keonings/Eggers)

Team will include representatives from NMFS, the State of Alaska, Council, and others as appropriate. There will also be a representative of the NMFS Core Team.

Council's Ecosystem Committee will be assigned to steer the team activities and act as sounding board as necessary throughout the process. An SSC subgroup may be needed as a sounding board as well.

July 8-9, 1997: Technical teams for groundfish meet in Seattle to review EFH information and assemble the Preliminary EFHA (Essential Fish Habitat Assessment). Technical teams for scallops, crab, and salmon will assemble Preliminary EFHAs via e-mail and teleconference.

July - 15-17, 1997: Core team meets in Juneau to review and finalize preliminary EFHAs for all plans.

Summer - Fall 1997: Team will work on developing EFH amendment using technical guidance from NMFS and the national workshop. They will meet with the fishery management plan teams in September and November. GIS maps will be produced for Final EFHA. There will be opportunity for public involvement at council meetings. Also need to find way to solicit and incorporate traditional information.

February 3, 1998: Teams will present a rough draft of their work product (draft EA/RIR, plan amendment language, and draft Final EFHA) at the Council's February meeting to check that they are on track and on target.

March 13, 1998: Team sends out draft documents to Council, SSC and AP for pre-meeting review. NMFS Core Team sends document and findings up through SOC.

April 20, 1998: Council approves draft EFH amendment for public review. The Regional Administrator is expected to provide preliminary SOC recommendations and

comments to Council.

Early May 1998: Public meetings held on behalf of Council and NMFS. These comments are sent to Council and SOC.

June 9, 1998: EFH on Council agenda for final approval. NMFS Regional Administrator brings final SOC recommendations to Council. Council takes final action.

September 1998: Council and NMFS staff work together to finalize amendment for Secretarial review. Transmit date for SOC review begins sometime before October 11, 1998.

FACA Restrictions

NOAA GC has made it clear that to avoid FACA (Federal Advisory Committee Act) restrictions, only federal personnel must be involved in drafting the Secretary's EFH recommendations to the councils. To make this technical separation, the NMFS Core Team will have representatives on the technical teams and it is the Core Team that will be tasked to develop preliminary recommendations for the Secretary in early March and final recommendations for June 1998.

All team members need to work closely together. There should be sufficient interaction between federal and non-federal employees throughout this process so that there are no surprises for either the SOC or the Council. Otherwise, the schedule will be in extreme jeopardy if, at the June 1998 meeting, the Secretary's recommendations are not acceptable to the Council. We need to be able to anticipate and resolve any problems and differences of opinion before the June meeting.

Work Products

There will be two basic types of work products for each plan. First will be a document that is patterned after the existing SAFE document. It will identify and describe EFH for each species in the groundfish complex, using the same species and species groups as in the SAFE. This will facilitate the development of the document and its review by the council and public because of the current familiarity with the SAFE layout. This EFHA (Essential Fish Habitat Assessment) should be a living document that can be updated annually or whenever new information becomes available. Eventually it will be backed up by a CD-ROM or other storage device with GIS-layered information on each area off Alaska. But for now, the EFHA must be readable and informative so that it is used, and not just placed on the back shelf somewhere. Its contents will be described further below.

The second work product is the actual plan amendment. Each plan (BSAI groundfish, GOA groundfish, BSAI crab, scallop, and salmon) will need to be amended. The problem with plan amendments, of course, is that they end up in plans, and very few people want to drag a full FMP around with them, so they tend to get stashed on back shelves, quickly falling into desuetude for all

but the really ambitious. Plus it is a major pain to amend the plans with new information.

Nonetheless, a plan amendment is required by the Act. So it is proposed that the plan amendment contain the tables and text describing EFH for each species, but not the maps. If there is significant new information a plan amendment may be required. Otherwise, the plan would stay the same, but new information could be added to the EFHA as necessary. It is likely that GIS maps would be updated as new information becomes available.

One complication in this process is that the Council is required to amend their plans to mitigate fishing effects on habitat. Because such action would (1) rely on information about EFH, which will not be available until mid-1998, and (2) require major economic impact analysis to complete, it is anticipated that gear impact amendments will not be considered until sometime in the fall of 1998, possibly as part of the 1998-1999 proposal cycle.

So, for the next nine months, the teams will be doing primarily biological type studies to identify and describe EFH, not work on economic impact analyses to support the removal of a specific gear type from a specific area. That will require major study and come later if appropriate.

The Four-Level Classification Scheme

Species and their stages must be classified by levels, based on available information. According to the proposed rule, there will be four levels.

Level 1: Presence/absence distribution data are available for some or all portions of the geographic range of the species.

Level 2: Habitat-related densities of the species are available.

Level 3: Growth, reproduction, or survival rates within habitats are available.

Level 4: Production rates by habitat are available.

These are explained more thoroughly on pp. 6-7 of the draft technical guidance document from NMFS. At first blush, it seems likely that most groundfish species will fall in level 1, thus leading to broad areas identified as EFH. Each species will be described in terms of each of four life stages: eggs, larvae, juveniles, and adults. For pollock, this may lead to one massive grey area on the chart. For certain rockfish or crab, on the other hand, we may be able to develop much more localized areas. Text and tables will provide information on the biological requirements for each life history stage.

Regulatory text in the proposed rule expands on usage of the tiers. If only Level 1 information is available, EFH is everywhere a species is found. If levels 2 through 4 information is available, habitats valued most highly through this analysis should be considered essential for the species. Prey habitat may also be considered EFH if appropriate.

It appears that the analyst will have considerable latitude in defining EFH for each species and its life stages. The real task of the teams will be to come out with something that is useful. Rather than attempting to develop "the complete scientific treatis on EFH in North Pacific waters", the goal of the team should be eventually to try to home in on the truly essential EFH. While some analysts are going to have a proclivity for turning out a benchmark compendium, our goal should be to come out with something that is more streamlined and thus useful to the interested sectors and managers providing for sustainable fisheries management. The bottom line is that we should not just strive for describing all habitat, but should look for hotspots of higher biological value that should be treated with caution or exempted from fishing disturbances altogether. It most likely will take considerable time and research, beyond this current effort, to develop this focus, but that is the direction we should be headed in.

Hotspots will be based on some derivation of "biological value". At the workshop, various tables for presenting this information were considered. One approach was to describe habitat for a particular species in terms of three concepts: rarity, sensitivity, and exposure. Rarity connotes availability. Is there a lot of a particular habitat type available? Or is it relatively rare, and thus needs greater attention. It may be no more complicated than a measure of relative quantity from a map. Sensitivity connotes vulnerability. Is the habitat a very sensitive coral reef or an immense ever shifting sand/mud bottom? Sensitivity might be described in terms of resilience of the habitat, persistence and how restorative it is either on site or by natural substitution somewhere else. And finally, exposure is considered in terms of the potential of adverse effects or probability for disturbance from activity either by fishing or other developments. So a summary table for a species might look something like this:

Species X	EFH Level	Rarity	Sensitivity	Exposure	
Eggs	I	L	L	L	Summarize Into A Measure of Biological Value
Larvae	I	L	L	L	
Juveniles	I	L	L	H	
Adults	II-III	L	L	H	

The conclusion for each species from the above considerations is to identify specific areas of high concern, and also to lay the groundwork for research. And then finally, as the hotspots begin to focus in sharper detail, the Council may be required to take action to protect those hotspots. We also need to be aware, that when a species reaches level 4, the council will need to define target production levels and how much habitat is needed to maintain or achieve those levels.

The Preliminary EFHA should contain the area defined as Level 1(presence/absence) for each species.

These areas would be tentatively defined as EFH for most species. It was suggested that the areas containing 95% of the population be defined, thereby not including areas where strays have been found. It was further noted by the Core team that more discrete areas of EFH would be preferred. In some cases, level 2 information may be available for adults from NMFS survey data. It was suggested that as a first approximation, EFH for adults would be defined as the high density area containing 50% of the population. In addition, spawning areas or other important habitat areas would be detailed and mapped if known.

Structure of the EFHA

Each species or species complex will have its own chapter. As indicated on p. 10 of the technical guidance, the general distribution and geographic limits of EFH for each life history stage should be present in the form of maps. GIS presentation will be the longer term goal.

The major sections of each species chapter need to be further refined, but the national workshop came up with the following sections (keyed to the technical guidance document):

1. Identification of EFH (pp. 8-9)

   This will include the mapping requirements on p. 10. It will include conclusions on which level of information is available for the species and life stage, and on the biological value of the EFH as discussed above. Remember that we will also need to treat prey species either by separate chapter or within the species chapters (pp. 19-20).

2. Identification of non-fishing threats (pp. 11-18)

   This includes everything that is non-fishing. Pollution, development, dredging, forestry practices, construction, mining, etc. For groundfish, this will most likely not be a big emphasis, but for salmon, the chapter should be rather large.

3. Identification of fishing threats and management measures (pp.18-19)

   Here is where we get into some very sensitive information, how one gear type or another impacts the EFH. The industry will be on point to see what is written here and the information on which it rests.

   While the Magnuson-Stevens Act requires that FMPs include management measures that minimize adverse effects to the extent practicable, adding management measures is going to require considerable economic work. Therefore, it could be argued, as it has been above, that those measures will not be proposed in this first go around on EFH by October 1998, but must wait until after the EFH has been identified and approved by the Council. We simply will not have time to draft highly contentious regulatory or plan amendments on something as controversial as trawling in the BSAI in time for approval for June 1998. And it should

not be done anyway, until all the information on what really constitutes EFH is compiled.

4. Identification of Conservation and Enhancement Measures (pp. 18-19)

   As stated above, this activity will come later, though we will be discussing it somewhat in identifying current practices.

5. Research Needs (pp. 20-21)

   Each FMP needs to identify research needs and priorities. These should fall out naturally from the information provided in the foregoing sections. Identifying research needs will set the stage hopefully for obtaining more funds for field research and focusing that research.

In structuring the document, we will need to determine if it is more efficient to combine sections 2-5 above into one overarching chapter, rather than in the individual species chapters. We will also need to consider how to incorporate traditional knowledge in the pertinent sections.

In addition to the above sections of the EFHA, the Core team agreed to prepare an additional chapter on sensitive and productive habitats. It was noted that habitats such as eel grass beds, coral, kelp beds, etc., are likely be used by several fish species as EFH during some life history stage. Yet these more discrete areas may be extremely productive. As such, the team established a habitat technical team (Jeff Short, Matt) to prepare criteria and describe this habitat. A draft chapter may be ready for Core team review in July.

UPDATE

At its May meeting, the Core team agreed to the proposed contents of the EFHA as discussed above. At this point, the Technical team members will need to go to work on gathering and providing the information in suitable and compatible format as proposed by Lowell Fritz. Preliminary write-ups for each species will be done by the major biologist(s) that provide regular SAFE information to the plan teams each year. This initial information gathering activity should not be a lengthy one. Only about a week or two of intensive effort should be put into this initial activity, and then the team should meet to review the available information and determine next steps prior to the Core team meeting July 15-17, 1997.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, Maryland 20910

MAY 16 1997

RECEIVED
MAY 16 1997

Mr. Richard B. Lauber
Chairman
North Pacific Fishery Management Council
605 West 4th Avenue
Anchorage, Alaska 99501-2252

Dear ~~Mr. Lauber~~ Rich:

The Sustainable Fisheries Act revised section 302(j) of the Magnuson-Stevens Fishery Conservation and Management Act, with regard to Council members' ability to vote on matters that would have a significant and predictable effect on a financial interest disclosed in accordance with existing regulations. As a result, the National Marine Fisheries Service (NMFS) must amend 50 CFR part 600. Attached for your Council's review is a draft proposed rule that would change section 600.225 on rules of conduct, and section 600.325 on financial disclosure.

The draft was prepared by a committee of the regional attorneys who advise the Councils, in consultation with the Department of Commerce's senior ethics attorney. Maggie Hayes, the NOAA Assistant General Counsel for Fisheries, will discuss this draft with those attending the Council Chairmen's meeting in San Juan on June 6.

The schedule for implementation of this rule calls for the final rule to be published by September 1, 1997, ahead of the October 11 deadline set in the statute. At this time, we are distributing the draft proposed rule for internal NMFS and Council review. Our objective is to receive and address internal comments prior to the publication of the proposed rule; additional comments from the public (and the Councils) will be requested during a comment period on the proposed rule. To keep to this schedule, please provide me your comments by June 20. Note that this draft is not intended for distribution to the public at this time.

Sincerely,

Gary

Gary C. Matlock, Ph.D.
Director, Office of
Sustainable Fisheries

Attachment

Billing Code: 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. ; I.D.]

RIN

Magnuson-Stevens Act Provisions; Financial Disclosure

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

ACTION: Proposed rule.

SUMMARY: NMFS issues this proposed rule to revise the rules of conduct and financial disclosure regulations applicable to Regional Fishery Management Council (Council) nominees, appointees, and voting members. The proposed revisions would implement a provision of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) that was amended by the Sustainable Fisheries Act (SFA) in 1996. The new provision prohibits Council members from voting on matters that would have a significant and predictable effect on a financial interest disclosed in accordance with existing regulations. The recusal requirement will not become effective until the Secretary of Commerce (Secretary) promulgates final regulations, which is scheduled to occur by October 11, 1997.

DATES: Comments must be received by [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments should be sent to Dr. Gary C. Matlock, F/SF, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Margaret Frailey Hayes, Assistant General Counsel for Fisheries, National Oceanic and Atmospheric Administration Office of General Counsel, 301-713-2231.

SUPPLEMENTARY INFORMATION:

In the 1986 amendments to the Magnuson Act (Public Law 99-659), Congress created a requirement for voting members and executive directors of each Council to disclose any financial interest they held in the harvesting, processing, or marketing of fishery resources under the jurisdiction of their respective Council. The financial interests of the member included those held by that member, the spouse, minor child, or partner of the member, and any organization (other than the Council) in which the member was serving as an officer, director, trustee, partner, or employee. The amendments made 18 U.S.C. 208, which generally prohibits persons from making decisions on behalf of the Federal Government during their employment when a conflict of interest arises, inapplicable to Council members and executive directors if they disclosed their financial interests as required by the statute. If a member did not comply with the financial disclosure requirements, the prohibitions and penalties of 18 U.S.C. 208 would apply.

Congress intended that Council members could have a direct

financial interest in fisheries. Governors are required to nominate persons who are "knowledgeable" or "experienced" regarding the conservation and management or commercial or recreational harvest of the fishery resources within the jurisdiction of the Council (16 U.S.C. 302(b)(2)(A)). Congress also believed, however, that the public has a right to know of any voting Council member's financial interests in fishery matters under the purview of a Council. Council members could participate in matters of general public concern that were likely to have a direct and predictable effect on their financial interests in harvesting, processing, or marketing activities in a fishery if such interests were disclosed on the member's statement of financial interests. Even if their financial interests were reported, however, they could not participate in a particular matter primarily of individual concern in which they had a financial interest under rules now codified at 50 CFR 600.225(b)(8)(i).

On October 11, 1996, the President signed into law the SFA, which made numerous amendments to the Magnuson-Stevens Act (16 U.S.C. 1801 et seq.). This proposed rule would amend 50 CFR 600.225, Rules of Conduct, and 50 CFR 600.235, Financial Disclosure, to implement the Magnuson-Stevens Act amendments.

Section 107 of the SFA revised the financial disclosure and conflicts of interest sections of the Magnuson-Stevens Act. New section 302(j) requires the disclosure by affected individuals (Council nominees, appointees, and voting members, including the

Indian representative on the Pacific Council if he or she is not subject to disclosure or recusal requirements under Indian tribal government laws) of financial interests in any harvesting, processing, or marketing activity that is being, or will be undertaken, within any fishery under the jurisdiction of the individual's Council. The financial interests include those of the affected individual's spouse, minor child, or partner, or any organization other than the Council in which the individual is serving as an officer, director, trustee, partner, or employee. The SFA expressly excludes executive directors from the financial disclosure reporting requirements.

The most significant revision is the addition of a new provision that would prohibit an affected individual from voting on a Council decision that would have a significant and predictable effect on the affected individual's financial interests in harvesting, processing, or marketing activities. That effect exists if there is a close causal link between the Council decision and an "expected and substantially disproportionate benefit" to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery.

This rule would define "expected and substantially disproportionate benefit" as a quantifiable positive or negative impact with regard to a matter likely to affect a fishery or sector of the fishery in which the affected individual has a significant interest, as indicated by (1) a greater than 10

percent interest in the total harvest of the fishery or sector of the fishery in question, (2) a greater than 10 percent interest in the marketing or processing of the total harvest of the fishery or sector of the fishery in question, or (3) full or partial ownership of more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery in question.

Under the proposed rule, an affected individual who is a representative of an association would be required to disclose the financial interests of the association in harvesting, processing, or marketing activities that are or will be undertaken within any fishery under the jurisdiction of his or her Council. The financial interests of the association would be considered as separate from the financial interests of its members. A vote on a Council decision that might have a positive or negative impact on the members of the association generally would not be considered to have a significant and predictable effect on the financial interests of the representative. Likewise, a vote on a decision that could have some effect on the interests of the association is not necessarily a vote that would have a significant and predictable effect on the affected individual's interests. However, if, for example, a vote on a Council decision involved eliminating the entire gear sector that the association represented, such that the viability of the association were threatened, the decision might be considered to have a significant and predictable effect on the affected

individual's financial interests, and he or she should recuse him or herself from voting on that decision.

The proposed regulations would also remove 50 CFR 600.225((b)(6)(ii), which prohibits a Council member from voting on any matter of general public concern that is likely to have a "direct and predictable effect" on a member's financial interest unless it has been disclosed. That language would be replaced with new § 600.325.

An affected individual would be able to recuse him or herself by simply announcing an intent not to vote on a Council decision that is likely to have a direct and predictable effect on that individual's financial interest.

The proposed regulations would provide that, if an affected individual has a significant interest that prohibits him or her from voting, he or she may still participate in Council deliberations on that matter.

The proposed regulations would set out the process for raising the issue of whether a Council decision would have a significant and predictable effect on an individual's financial interest, the information that would be considered in making that determination, and procedures for review of a determination. The proposed regulations would specify the NOAA General Counsel attorney advising the Council as the designated official who would determine whether the affected individual must recuse him or herself. The determination by the NOAA attorney would be based upon the information contained in the member's financial

disclosure report and any other reliable and probative information provided in writing. All information provided would be made part of the public record for the decision.

If the NOAA attorney determines that the member may not vote, the member may state for the record how he or she would have voted.

Any Council member would be able to file a request for review of the determination to the NOAA General Counsel within 10 days of the determination. The NOAA General Counsel would issue a decision within 30 days from the date of receipt of the request for review, and the review would be limited to the record before the NOAA attorney at the time of the determination. If the General Counsel's decision reverses a recusal determination, that decision may not be treated as cause to invalidate or reconsider the Council's action.

The proposed regulations would implement the part of section 307(1) that makes it unlawful for an affected individual to knowingly and willfully fail to disclose or to falsely disclose any financial interest required to be disclosed or to knowingly vote on a Council decision in violation of section 302(j). The penalties for violation include removal of the affected individual from the Council and/or a civil penalty of up to $100,000 per violation.

Classification

This rule has been determined to be not significant for purposes of 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 proposed rule, if [illegible] would not have a significant economic impact [illegible] a substantial number of small entities. This proposed rule would only implement statutory provisions of the SFA relative to the disclosure of financial interests of Council nominees, appointees, and members in harvesting, processing, or marketing activities that are or will be undertaken in fisheries under the jurisdiction of the individual's Council. As such, it would have no effect on the conduct of business of any small entities.

[PRA -- no effect unless disclosure forms are changed.]

List of Subjects in 50 CFR Part 600

Fisheries, Fishing.

Dated:

For the reasons set out in the preamble, 50 CFR part 600 is proposed to be amended as follows:

PART 600--MAGNUSON-STEVENS ACT PROVISIONS

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

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

2. In § 600.225, the last sentence in paragraph (b)(4) is removed, and paragraph (b)(8) is revised to read as follows:

§ 600.225 Rules of conduct.

* * *

(b) * * *

(8) No Council member may participate personally and substantially as a member through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise in a particular matter primarily of individual concern, such as a contract, in which he or she has a financial interest.

3. Section 600.235 is revised to read as follows:

§ 600.235 Financial disclosure.

(a) Definitions. For purposes of this section:

(1) "Affected individual" means an individual who is--

(i) Nominated by the Governor of a state or appointed by the Secretary to serve as a voting member of a Council in accordance with section 302(b)(2) of the Magnuson-Stevens Act; or

(ii) A representative of an Indian tribe appointed to the Pacific Council by the Secretary under section 302(b)(5) of the Magnuson-Stevens Act who is not subject to disclosure and recusal requirements under the laws of an Indian tribal government.

(2) "Designated official" means an attorney designated by the NOAA General Counsel.

(b) Reporting. (1) The Magnuson-Stevens Act requires the disclosure by each affected individual of any financial interest

of the affected individual in any harvesting, processing, or marketing activity that is being, or will be, undertaken within any fishery under the jurisdiction of the individual's Council, and of any such financial interest of the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee. The information required to be reported must be disclosed on NOAA Form _____, "Statement of Financial Interests for Use by Voting Members and Nominees of Regional Fishery Management Councils" (Financial Interest Form), or such other form as the Secretary may prescribe.

(2) The report must be filed by each nominee for Secretarial appointment with the Assistant Administrator by April 15 or, if nominated after March 15, one month after nomination by the Governor. A seated voting member appointed by the Secretary must file a Financial Interest Form with the Executive Director of the appropriate Council within 45 days of taking office; must file an update of his or her statement with the Executive Director of the appropriate Council within 30 days of the time any such financial interest is acquired or substantially changed by the affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee; and must update his or her form annually and file that update with the Executive Director of the

appropriate Council by February 1 of each year.

(3) The Executive Director must currently provide copies of the financial disclosure forms and all updates to the NMFS Regional Administrator for the geographic area concerned, the Regional Attorney who advises the Council, the Department of Commerce Assistant General Counsel for Administration, and the NMFS Office of Sustainable Fisheries. The completed financial interest forms will be kept on file in the office of the NMFS Regional Administrator for the geographic area concerned and at the Council offices, and will be made available for public inspection at such offices during normal office hours.

(4) Councils must retain the disclosure form for each affected individual for at least 5 years after the expiration of that individual's last term.

(c) Restrictions on voting. (1) No affected individual may vote on any Council decision that would have a significant and predictable effect on a financial interest disclosed in a report filed under paragraph (b) of this section.

(2) As used in this section, a Council decision will be considered to have a "significant and predictable effect on a financial interest" if there is a close causal link between the decision and an expected and substantially disproportionate benefit to the financial interest of any affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee,

relative to the financial interests of other participants in the same gear type or sector of the fishery.

(3) "Expected and substantially disproportionate benefit" means a [illegible]ifiable positive or negative impact with regard to matter likely to affect a fishery or sector of the fishery in which the affected individual has a significant interest, as indicated by:

(i) A greater than 10 percent interest in the total harvest of the fishery or sector of the fishery in question;

(ii) A greater than 10 percent interest in the marketing or processing of the total harvest of the fishery or sector of the fishery in question; or

(iii) Full or partial ownership of more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery in question.

(d) Voluntary recusal. An affected individual who believes that a Council decision would have a significant and predictable effect on that individual's financial interest disclosed under paragraph (b) of this section may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision.

(e) Participation in deliberations. Notwithstanding paragraph (c) of this section, an affected individual may participate in Council deliberations relating to the decision after notifying the Council of the voting recusal and identifying the financial interest that would be affected.

(f) Requests for determination. (1) At the request of an affected individual, the designated official shall determine for the record whether a Council decision would have a significant and predictable effect on that individual's financial interest. The determination will be based upon a review of the information contained in the individual's financial disclosure form and any other reliable and probative information provided in writing. All information considered will be made part of the public record for the decision. The affected individual may request a determination by notifying the designated official--

(i) Within a reasonable time before the Council meeting at which the Council decision will be made; or

(ii) During a Council meeting before a Council vote on the decision.

(2) The designated official may initiate a determination on the basis of--

(i) His or her knowledge of the fishery and the financial interests disclosed by an affected individual; or

(ii) Written and signed information received within a reasonable time before a Council meeting or, under extraordinary circumstances, during a Council meeting before a Council vote on the decision.

(3) At the beginning of each Council meeting, or during a Council meeting at any time reliable and probative information is received, the designated official shall announce the receipt of information relevant to a determination concerning recusal, the

nature of that information, and the identity of the submitter of such information.

(4) If the designated official determines that the affected individual may not vote, the individual may state for the record how he or she would have voted. However, a reversal of that determination under paragraph (g) may not be treated as cause for invalidation or reconsideration of the Council's decision.

(g) Review of determinations. (1) Any Council member may file a written request to the NOAA General Counsel for review of the designated official's determination. A request for review must be received within 10 days of the determination.

(2) A request must include a full statement in support of the review, including a concise statement as to why the Council's decision did or did not have a significantly disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery, and why the designated official's determination should be reversed.

(3) The NOAA General Counsel must complete the review and issue a decision within 30 days from the date of receipt of the request for review. The NOAA General Counsel will limit the review to the record before the designated official at the time of the determination.

(h) Exemption from other statutes. The provisions of 18 U.S.C. 208 do not apply to an affected individual who is in compliance with the requirements of this section for filing a

financial disclosure report.

(i) Violations and penalties. It is unlawful for an affected individual to knowingly and willfully fail to disclose, or to [illegible] disclose, any financial interest as required by this section, or to knowingly vote on a Council decision in violation of this section. In addition to the penalties applicable under § 600.735, a violation of this provision may result in removal of the affected individual from Council membership.

AGENDA C-9
JUNE 1997
SUPPLEMENTAL

Toksook Bay Traditional Council

RESOLUTION NO. 97-05-019

TITLE: A RESOLUTION OF THE TOKSOOK BAY TRADITIONAL COUNCIL URGING THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC) TO ACT NOW TO COMPLY WITH THE MAGNUSON-STEVENS ACT REQUIREMENTS TO MINIMIZE BYCATCH.

WHEREAS, Toksook Bay Traditional Council is a Tribal governing body for the federally recognized Native Village of Toksook Bay; and

WHEREAS, The communities in Nelson Island, as well as in other coastal villages in western Alaska, depends heavily on halibuts,crabs, herrings and salmons as their main subsistence food; and

WHEREAS, Over 750 million pounds of marine life was dumped into Bering Sea and Gulf of Alaska in 1994, as well as over 17 million pounds of halibut, over 15 million pounds of crab, 4 million pounds of herring and 195,000 pounds of salmon; and

WHEREAS, The declining population of many marine mammals and seabirds who are dependent upon fish for food calls into question the ecological health of our waters; and

WHEREAS, These sources are the economic and cultural lifeblood for many Alaskans who depend on the sea for their livelihoods and subsistence;and

WHEREAS, This continued wanton waste undermines any long-term management plan for sustained commercial,subsistence or recreational fisheries, and places Alaska's coastal communities at risk; and

WHEREAS, Wanton waste occurring in the Federal waters of Bering Sea and Gulf of Alaska is of utmost concern for all culturally, economically and ecologically; and

WHEREAS, The U.S. Congress overwhelmingly passed the Magnuson-Stevens Act with strong, new national mandates directing all regional Fishery Management Councils to minimize bycatch and waste; and

WHEREAS, The U.S. Congress included in this Act a special section to further strengthen and support this national mandate, and that this section was directed specifically to requiring that the North Pacific Fishery Management Council minimize bycatch; and

WHEREAS, The U.S. Congress passed this Act in full recognition of previous and pending bycatch management actions by the North Pacific Management Council with the clear intent that this Council be required to take new action to minimize by catch from existring levels; and

P.O. Box 37048, Toksook Bay, Alaska 99637-7048 (907) 427-7114 FAX (907) 427-7714

Page Two: Resolution No. 97-05-019

NOW, THEREFORE, BE IT RESOLVED by the Toksook Bay Traditional Council, that the North Pacific Fishery Management Council take new action now to comply with the requirements of the Magnuson-Stevens Act which explicitly mandates further action by this Council to minimize the level of bycatch and waste occurring in Federal waters off Alaska's coast.

ADOPTED AND SIGNED this 27th day of May, 1997 at the meeting where quorum of the Council was present.

Joseph Asuluk, Sr.
Chairmana

ATTESTED BY:

James Charlie, Sr.
Executive Director & CEO

City of False Pass

P.O. Box 50 • False Pass, Alaska 99583-0050
Telephone (907) 548-2319 • Fax (907) 548-2214

MAY 27

Resolution 97-24
Resolution by the City of False Pass
Urging the North Pacific Fishery Management Council
to act now to comply with the new Magnuson Stevens Act
Requirements to Minimize Bycatch

WHEREAS, over 750 million pounds of marine life was dumped into the Bearing Sea and Gulf of Alaska in 1994, as well as over 17,000,000 million pounds of halibut and over 15,000,000 crabs; and

WHEREAS, declining populations of many marine mammals and seabirds, also dependent upon fish for food, calls into question the ecological health of our waters; and

WHEREAS, these resources are the economic and cultural lifeblood for many Alaskans who depend on the sea for their livelihoods and subsistence; and

WHEREAS, this continued wanton waste undermines any long term management plan for sustained commercial, subsistence or recreational fisheries, and places Alaska's coastal communities at risk; and

WHEREAS, wanton waste occurring in the Federal waters of the Bearing Sea and Gulf of Alaska is of utmost concern culturally, economically, and ecologically; and

WHEREAS, the United States Congress overwhelmingly passed the Magnusson-Stevens Act with strong, new national mandates directing all regional Fishery Management Councils to minimize bycatch and waste; and

WHEREAS, the United States Congress included in this Act a special section to further strengthen and support this national mandate, and that this section was directed specifically to requiring that the North Pacific Fisheries Management Council minimize bycatch; and

WHEREAS, the United States Congress passed this Act in full recognition of previous and pending bycatch management actions by the North Pacific Fisheries Management Council with the clear intent that this council be required to take new action to minimize bycatch from existing levels;

NOW, THEREFORE, BE IT RESOLVED by the False Pass City Council that the North Pacific Fishery Management Council take new action now to comply with the requirements of the Magnusson-Stevens Act which explicitly mandate further action by the Council to minimize the level of bycatch and waste occurring in Federal waters off Alaska's coast.

PASSED AND APPROVED by a duly constituted quorum of the City of False Pass, Alaska, this 20th day of May 1997.

John J. Nickels

John Nickels II, Mayor

ATTEST: Donald G. Cluka

Donald G. Cluka, City Clerk

0-9

Technical Guidance to Implement the Essential Fish Habitat Requirements for the Magnuson-Stevens Act

This document provides technical assistance for the description, identification, conservation, and enhancement of essential fish habitat (EFH), and is designed to aid Fishery Management Councils (Councils) in implementing the EFH requirements of sections 303 and 305 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, 16 U.S.C. et seq.). This manual also describes how the National Marine Fisheries Service (NMFS), acting on behalf of the Secretary of Commerce (Secretary), will implement its EFH requirements under the Magnuson-Stevens Act. These requirements include developing and providing information and recommendations to the Councils to assist in identifying EFH, adverse impacts to EFH (including adverse impacts from fishing), and actions to conserve and enhance EFH. Additionally, the manual elaborates on the procedures for the statutorily required consultations for actions undertaken by any state or Federal agency that may adversely affect EFH. Finally, it is intended to be updated regularly as new and innovative methods are available in habitat identification and mapping.

The text of the proposed regulation is marked as "***Regulatory Text***". Where additional guidance, explanation, or examples are provided, that material follows the appropriate section of the proposed regulation and is identified as "***Additional Information***".

Definition of EFH

Regulatory Text

Essential fish habitat 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" includes aquatic areas and their associated physical, chemical, and biological properties that are used by fish, and may include 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 a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle.

Additional Information

As defined in section 3(10) of the Magnuson-Stevens Act, EFH is "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." Examples of "waters" that may be considered EFH include open waters and wetlands, estuarine and riverine habitats, wetlands hydrologically connected to productive water bodies. Water quality is interpreted to be a component of this definition. EFH should consider water to provide the appropriate parameters of quality such as physical, chemical, and biological properties. This may address nutrient

levels, oxygen concentrations, turbidity levels, among others. The interpretation of "substrate" includes artificial reefs and shipwrecks if those areas provide EFH. Substrate may also include entirely or partially submerged structures, such as jetties. "Biological communities" could include mangroves, tidal marshes, mussel beds, cobble with attached fauna, mud and clay burrows, coral reefs, and submerged aquatic vegetation. Migratory routes such as rivers and passes serving as passageways to and from anadromous fish spawning grounds should be considered EFH. The definition of EFH may include habitat for an individual species or an assemblage of species, whichever is appropriate within each FMP.

Purpose and Introduction

Regulatory Text

(a) Purpose. This subpart provides guidelines for the description, identification, conservation, and enhancement of, and adverse impacts to, EFH. These guidelines provide the basis for Councils and the Secretary to use in adding the required provision on EFH to an FMP, i.e., description and identification of EFH, adverse impacts on EFH (including minimizing, to the extent practicable, adverse impacts from fishing), and other actions to conserve and enhance EFH. This subpart also includes procedures to implement the consultation requirements for all Federal and state actions that may adversely affect EFH.

Additional Information

Section 305(b)(1)(A and B) of the Magnuson-Stevens Act mandates that,

> (A) The Secretary shall, within 6 months of the date of enactment of the Sustainable Fisheries Act, establish by regulation guidelines to assist the Councils in the description and identification of essential fish habitat in fishery management plans (including adverse impacts on such habitat) and in the consideration of actions to ensure the conservation and enhancement of such habitat. The Secretary shall set forth a schedule for the amendment of fishery management plans to include the identification of essential fish habitat and for the review and updating of such identifications based on new scientific evidence or other relevant information.
>
> (B) The Secretary, in consultation with participants in the fishery, shall provide each Council with recommendations and information regarding each fishery under that Council's authority to assist it in the identification of essential fish habitat, the adverse impacts on that habitat, and the actions that should be considered to ensure the conservation and enhancement of that habitat.

The role of habitat in supporting the productivity of organisms has been thoroughly documented in the ecological literature, and the linkage between habitat availability and fishery productivity has been clearly established for several fishery species. Because habitat is an essential element

for sustaining the production of a species, the goals of FMPs cannot be achieved if the managed species do not have a sufficient quantity of suitable habitat.

From the broadest perspective, fish habitat is the geographic area where the species occurs at any time during its life. That area should be described in terms of ecological characteristics including biological, physical, and chemical parameters, location, and time. Ecologically, essential habitat includes structure or substrate that focus distribution (e.g., coral reefs, marshes, or kelp beds) and other characteristics that are less distinct (e.g., turbidity zones, thermoclines, or fronts separating water masses). Spatially, habitat use may shift over time due to climatic change, human uses, or other factors. Habitat not currently used should be considered when establishing long-term goals for EFH and species productivity. Habitat restoration will be a vital tool to recover degraded habitats, improve habitat quality and quantity, with benefits to the species and society.

Fishery species use habitat for spawning, breeding, migration, feeding and growth, and for shelter to increase survival. However, most habitats provide only a subset of these functions. Fish habitat utilized by a species can change with life history stage, abundance of the species, competition from other species, and environmental variability in time and space. The type of habitat available, its attributes, and its functions are important to species productivity and societal benefits.

The health and productivity of fish populations are dependent on habitat quantity and quality. As defined in section 3 of the Magnuson-Stevens Act, fish includes finfish, mollusks, crustaceans, and all other forms of marine animal and plant life, other than marine mammals and birds. Congress stated that habitat considerations should receive increased attention for the conservation and management of fishery resources (section 2(a)(9)). This manual describes how NMFS interprets the statutory definition of EFH and outlines procedures to assist Councils in describing, identifying, conserving, and enhancing EFH.

This manual and the included proposed regulations are based on five general principles. First, the description and identification of EFH must be based on the best information available. Second, in cases where little information is available, the guidelines require a conservative approach to describing and identifying EFH, erring on the side of inclusiveness, to ensure adequate habitat protection. Third, the guidelines must be sufficiently broad for many different species in many different areas, as well as for varied physical and ecological processes that affect habitat quantity and quality. Fourth, the procedures for describing and identifying EFH should be scientifically defensible. Finally, the ecological relationships among species and between the species and their habitat require, where possible, that an ecosystem approach be used in assessing EFH of a managed species or species assemblage. Where possible, this ecosystem approach should be used in assessing the EFH of a given species or assemblage.

Requirements of the Magnuson-Stevens Act

The Magnuson-Stevens Act requires several actions to be taken by the Secretary, Fishery Management Councils, and other Federal agencies.

The Magnuson-Stevens Act requires the Secretary to undertake several actions regarding fish habitat:

- Develop guidelines, by regulation, to assist the Councils to describe and identify EFH (including adverse effects) and conservation and enhancement measures, by April 11, 1997.

- Develop schedules for amending FMPs for EFH, and for future periodic review of EFH amendments.

- After consulting with fishing participants and other interested parties, provide each Council with recommendations and information regarding EFH for each fishery under that Council's authority.

- Review programs administered by the Department of Commerce and ensure that relevant programs further the conservation and enhancement of EFH.

- Provide information to other Federal agencies to further the conservation and enhancement of EFH.

- Recommend conservation measures for any action undertaken by any state or Federal agency that may adversely affect EFH.

The Magnuson-Stevens Act requires or authorizes actions by the Councils, including:

- Councils are required to submit FMP amendments to the Secretary to implement the EFH and other new FMP requirements, by October 11, 1998.

- Councils may comment on and make recommendations to the Secretary and any Federal or state agency concerning any activity, or proposed activity, authorized, funded, or undertaken by any Federal or state agency that may adversely affect the habitat, including EFH, of a fishery under its authority.

- Councils must comment on, and make recommendations to, the Secretary and any Federal or state agency concerning an activity that is likely to substantially affect the habitat, including EFH, of an anadromous fishery.

The Magnuson-Stevens Act requires actions by Federal agencies, including:

- Federal agencies must consult with the Secretary regarding any activity, or proposed activity, authorized, funded, or undertaken by the agency that may adversely affect EFH.

- Within 30 days of receipt of a recommendation, Federal agencies are required to provide the Secretary and any Council that comments on an activity, or proposed activity, with a written description of the measures proposed by the agency for avoiding, mitigating or offsetting the impact of the activity on EFH. If this response is inconsistent with the recommendations of the Secretary, the agency must explain why it is inconsistent.

The statutory requirements of the Magnuson-Stevens Act affect those fisheries managed by a FMP. Presently, there are 36 FMPs managed by the Councils and 3 Secretarial FMPs. For those Secretarial plans, NMFS is responsible for implementing the EFH requirements for plan amendments.

I. EFH FMP Amendments

Scope of EFH

Regulatory Text

(b) Scope. An EFH provision in an FMP must include all fish species in the Fishery Management Unit (FMU). An FMP 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 Act.

Additional Information

The Councils must describe and identify EFH for only those species managed under a FMP. According to the Magnuson-Stevens Act, EFH may only be designated through an amendment to a FMP. However, Councils are not precluded from identifying the habitat required by other species not covered in a FMP and taking steps to protect it. To the extent that such habitat requirements enhance the ecosystem approach to FMPs, the Councils are encouraged to identify such habitat. However, those habitats of currently non-managed species may not be considered EFH.

The proposed regulation requires that EFH be described and identified for all species in a FMU. In order to address this task, the Councils and NMFS may elect to prioritize their actions. The Councils and NMFS may: 1) describe and identify EFH for the dominant species in the management unit and infer the habitat requirements for the other species in the management unit from that of the dominant species, if appropriate; 2) group species with similar habitat requirements and make one EFH determination for the group; or 3) establish a method to streamline the amendment process to assist in amending all FMPs by the October 11, 1998, deadline in the Magnsuon-Stevens Act.

Caution should be taken when inferring the habitat requirements of a group of species. Care should be given to ensure that habitat requirements of the dominant species truly reflects the habitat requirements of other species within that group. If this is not addressed, habitat that is important to a subset of a group could be diminished because that subset is a smaller but still important component of the entire group of species.

Description and Identification of EFH

Regulatory Text

§600.810 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 useful 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 and on the geographic range of the managed species. Information is also required on the temporal and spatial distribution of each major life history stages (defined by developmental and functional shifts). Since EFH should be identified for each major life history stage, data should be collected on the distribution, density, growth, mortality, and production of each stage within all habitats 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.

Additional Information

"Other sources" of information may include fishers with local or traditional knowledge of the status and trends in particular fisheries. In many instances, this information may not be available via refereed journals or scientific research. These sources may provide information in areas where scientific information has not been collected or documented. These non-traditional data sources may be incorporated into data collection processes via workshops conducted during

development of EFH recommendations. Additional data sources may include Federal, state and local agencies, universities, non-governmental organizations, refereed journals, etc.

Regulatory Text

(C) The following approach should be used to gather and organize the data necessary for identifying EFH. Information from all levels will be useful in identifying EFH, and the goal of this procedure should be 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 existing and potential habitats. Care should be taken to ensure that all 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., relative densities) are available for the habitats occupied by a species or life history stage. Because the efficiency of sampling gear is often affected by habitat characteristics, strict quality assurance criteria are required to ensure that density estimates are comparable among 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 a healthy ecosystem.

Additional Information

The process for gathering information should be initiated at Level 1 and progress through the various levels as more information on habitat functions becomes available. Information from all levels will be useful in identifying EFH, and the goal of this procedure should be to include as

many levels of analysis as possible within the constraints of the available data. The approach presented herein for describing and identifying EFH relies upon the best available information regarding species distribution, abundance, habitat usage, physical, chemical, and biological habitat parameters, and habitat function. Where the best available information is subject to differing interpretations, or is limited in scope, best professional judgement should be used. Councils should strive to obtain data sufficient to describe habitat at the highest level of detail (i.e., Level 4) and provide the regulated community (i.e., those individuals proposing activities that may adversely effect EFH) with an unambiguous interpretation of the description and identification EFH. This approach provides a framework for identifying research needs and collecting additional information to improve our understanding of EFH.

To identify EFH, basic information is needed on current and historic stock size and on the geographic range of the managed species (and prey species where appropriate). Information is also required on the timing and location of major life history stages (defined by developmental and functional shifts). Since EFH should be identified for each major life history stage, data should be collected on the distribution, density, growth, mortality, and production of each stage within all habitats occupied by the species. Different levels of data may be available for different life history stages of a species (e.g., data for eggs may be at Level 1, while data for adults may be at Level 3). Information on the physical, chemical, and biological parameters of habitats is also needed. These data should be obtained from the peer-reviewed literature, data reports and "gray" literature, data files of government resource agencies, and any other potential source of quality information.

Using Level 1 data, the only scientifically defensible statement that can be made about the importance of a habitat may be that the species (or life history stage) does or does not occur in the habitat. At this level of data availability, EFH is everywhere a species has been found.

At the Level 1 of data availability, the risk-averse approach is to define EFH as everywhere the species is likely to occur, noting any areas of known significance to reproduction, feeding, or growth to maturity.

Regulatory Text

(ii) <u>EFH determination.</u> (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 apply this information in a risk-averse fashion, erring on the side of inclusiveness to ensure adequate protection for EFH of managed species. If only Level 1 information is available, EFH is everywhere a species is found. If Levels 2 through 4 information is available, habitats valued most highly through this analysis 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.

(B) If a species is overfished or recovering from a population decline, all habitats used by the species should be considered essential in addition to certain historic habitats

that are necessary to support the recovery of the population and for which restoration is feasible.

(C) EFH will always be greater than or equal to the "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 and sufficient information exists to determine the necessary habitat to support the target production goal, then EFH for a 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 managed species or species assemblage at a target production goal that supports a sustainable fishery and a healthy ecosystem. Councils must establish target production goals for the fish species in the FMU of an FMP as a goal of the FMP. In determining a target production goal that supports a sustainable fishery and a healthy ecosystem, the Secretary and the appropriate Council(s) should consider: (1) The prey requirements of the managed species; (2) the extent to which the managed species is prey for other managed species or marine mammals; (3) the production necessary to support a sustainable fishery; and (4) other ecological functions provided by the managed species. If degraded or inaccessible 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 feasible, then EFH should include those habitats that would be essential to the species to obtain increased yields.

Additional Information

The information obtained through this analysis will allow Councils to assess the relative value of habitats in relation to the productivity of a fish species. Habitats valued most highly through this analysis should be considered essential for the species. Habitats of intermediate and low value, however, may also be essential. For example, low-value habitat may be extensive in its geographic coverage, and the productivity derived from the cumulative habitat area may be essential in meeting target productions levels. Similarly, if a species is recovering from a population decline, all habitats used by the species should be considered essential in addition to some historic habitats that are potentially valuable. Additionally, intermediate and low value habitats may be valuable for mitigation, enhancement, or restoration.

Mapping EFH

Regulatory Text

(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 should 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 and information in the description of EFH varies, the description is ultimately determinative of the limits of EFH.

Additional Information

Different types of habitats may be presented using maps. For example, if submerged aquatic vegetation (SAV) has been identified as EFH for a species, the general distribution of SAV should be mapped over the geographic range of the species. If EFH for a species includes habitat that supports a specific prey organism, this prey habitat should be identified separately and presented on the habitat maps as well.

The number and integration of multiple data layers into individual maps will be dependent upon the type of information, as well as data format, of the available data. Where possible, overlapping layers of information displayed on a single map will be useful. However, in early stages of this process, individual maps of information may be practical. As more information becomes available, map products should be enhanced.

Maps are intended to be used in consultation process, especially in the development of EFH assessments. These maps are intended to assist project applicants in understanding the distribution of EFH for managed species. As noted in the regulation above, however, information displayed via a map is intended only to provide supplementary information. Descriptions of EFH included in FMPs provide the statutorily required determination of the limits of EFH.

Adverse Effects to EFH: Non-fishing Related

This section provides guidance concerning the identification in FMPs of potential adverse effects of Federal and state activities on EFH, as well as conservation, management and enhancement opportunities associated with such activities.

EFH provisions in FMPs must identify and describe the following: (1) activities with known or potential adverse effects on EFH (threats); (2) actions required to counter threats to the existing and historic EFH; and (3) actions to conserve, restore or enhance EFH. In this context, "restore" means to reestablish the habitat and associated functions to a desired level that ensures the greatest long-term continued productivity of fish stocks and that is based on feasibility and historic information; and "enhance" means to improve the habitat and associated functions to a desired level that is based on feasibility and historic information. EFH amendments should assess impacts cumulatively and individually for all activities that adversely affect EFH. The ultimate goal in the identification of potential adverse effects is to incorporate the highest level of analysis possible, e.g., cumulative impacts on a watershed basis, including some form of ecological risk assessment. The steps involved in identifying and describing adverse effects on EFH, and a suggested process to avoid them, should be presented in a hierarchical fashion.

Regulatory Text

(3) <u>Non-fishing related activities that may adversely affect EFH</u> – (i) <u>Identification of adverse effects.</u> FMPs must identify activities that have potential adverse effects on EFH quantity and quality. Broad categories of activities may include, but are not limited to: dredging, fill, excavation, mining, impoundment, discharge, water diversions, thermal additions, runoff, placement of contaminated material, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH. If known, an FMP should describe the EFH most likely to be affected by these activities. For each activity, the FMP should describe the known or potential impacts to EFH. These descriptions should explain the mechanisms or processes that cause expected deleterious effects and explain the known or potential impacts on the habitat function.

(ii) <u>Cumulative impacts analysis.</u> To the extent practicable, FMPs should identify and describe those activities that can influence habitat function on an ecosystem or watershed scale. This analysis should include a description of the ecosystem or watershed, the role of the managed species in the ecosystem or watershed, and the impact on the ecosystem or watershed of removal of the managed species. An assessment of the cumulative and synergistic effects of multiple threats, including natural adverse effects (such as storm damage or climate-based environmental shifts), and an ecological risk assessment of 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.

Additional Information
For the identification and description of adverse effects on EFH, FMPs should provide a scientific basis for concluding that the potential or known adverse effects are a result of the identified activities. Examples of scientific justification include, but are not limited to: peer-reviewed articles and reports; resource agency publications that have been subjected to internal agency review; agency data products, such as research findings, on-going evaluations and scientific knowledge of species, ecosystems, or watershed systems; ocean temperature, dissolved oxygen and salinity logs; fish landings reports; satellite and aerial imagery data products; and testimonies of individuals with a demonstrated expertise regarding the appropriate resources.

Potential biological and physical impacts resulting from adverse impacts on habitat may include, but are not limited to carcinogenic effects, bioaccumulation of toxic materials, clogged gills, reduced visibility for prey capture, or reduced cover from predators.

Regulatory Text
(iii) Mapping adverse impacts. The use of a GIS or other mapping system to analyze and present these data in an FMP is suggested for documenting impacts identified under paragraph (a)(3)(i) of this section and required when the analysis in paragraph (a)(3)(ii) is conducted.

Additional Information
When mapping/GIS is used, Councils should strive to develop compatible applications. Mapping of cumulative impacts may include: Corps of Engineers permits, nationwide general permit activities, state programmatic general permits, National Pollutant Discharge Elimination System permits, power and other facilities, agricultural sites, hydropower facilities, and others. Assessment of cumulative impacts may be completed at the watershed level, with the tracking of activities by watershed, county, or other appropriate scale.

Regulatory Text
(iv) Conservation and enhancement. FMPs should include options to minimize the adverse effects identified pursuant to paragraphs (a)(3)(i) and (ii) of this section and identify conservation and enhancement measures. Generally, non-water dependent actions should not be located in EFH. Actions not in EFH but that may result in significant adverse affects on EFH should be avoided if less environmentally harmful alternatives are available. If there is no alternative, these actions should be minimized. If avoidance and minimization will not adequately protect EFH, mitigation to conserve and enhance EFH will be recommended. These recommendations may include, but are not limited to:

(A) Avoidance and minimization of adverse impacts on EFH. Environmentally sound engineering and management practices (e.g., seasonal restrictions, dredging

methods, and disposal options) should be employed for all dredging and construction projects. Disposal of contaminated dredged material, sewage sludge, industrial waste or other materials in EFH should be avoided. Oil and gas exploration, production, transportation, and refining activities in EFH should be avoided, where possible, and minimized and mitigated if unavoidable.

(B) Restoration of riparian and shallow coastal areas. Restoration measures may include: Restoration of functions of riparian vegetation by reestablishing endemic trees or other appropriate native vegetation; restoration of natural bottom characteristics; removal of unsuitable material from areas affected by human activities; and replacement of suitable gravel or substrate to stream areas for spawning.

(C) Upland habitat restoration. This may include measures to control erosion, stabilize roads, upgrade culverts or remove dikes or levees to allow for fish passage, and the management of watersheds.

(D) Water quality. This includes use of best land management practices for ensuring compliance with water quality standards at state and Federal levels, improved treatment of sewage, and proper disposal of waste materials.

(E) Watershed analysis and subsequent watershed planning. This should be encouraged at the local and state levels. This effort should minimize depletion/diversion of freshwater flows into rivers and estuaries, destruction/degradation of wetlands, and restoration of native species, and should consider climate changes.

(F) Habitat creation. Under appropriate conditions, habitat creation may be considered as a means of replacing lost EFH. However, habitat creation at the expense of other naturally functioning systems must be justified (e.g., marsh creation with dredge material placed in shallow water habitat).

Additional Information

Activities addressed by the above recommendations may affect living marine resources directly and indirectly through habitat loss and/or modification. These effects, combined with cumulative effects from other activities in the ecosystem, may contribute to the decline of some species. In general, maintenance of naturally functioning habitats should always be the preferred option. This may be accomplished by avoiding the action or relocating it to a less environmentally sensitive location. Then, remaining adverse effects should be minimized through changes in project design. Finally, mitigation should be used to offset any remaining impacts to EFH. The preferred type of mitigation is enhancement, then restoration, and finally creation of new habitat.

Provided below are three examples of activities that may adversely affect EFH (construction activities, forestry practices, and sand and gravel mining), as well as conservation and

enhancement measures. These examples are provided to demonstrate what types of information may be included within EFH recommendations and amendments.

1. Construction Activities

Construction activities within watersheds and in coastal marine areas can impact fish habitat. These activities affect living marine resources directly and indirectly through habitat loss and/or modification. Many of these projects are of sufficient scope to singly cause significant long-term or permanent adverse impacts on aquatic habitat; however, most are small-scale projects causing minor losses or temporary disruptions. The significance of small-scale projects lies in the cumulative and synergistic effects resulting from a large number of these activities occurring in a single watershed.

Construction, in and adjacent to, waterways often involves dredging and/or filling activities, which result in elevated suspended solids emanating from the project area. The distance the turbidity plume moves from the point of origin is dependent upon tides, currents, nature of the substrate, scope of work, and preventive measures employed by the contractor. Excessive turbidities can abrade sensitive epithelial tissues, clog gills, decrease egg buoyancy, and reduce light penetration, thereby affecting photosynthesis of phytoplanktonic and submerged vegetation thereby causing localized oxygen depression. Suspended sediments subsequently settle, which can destroy or degrade productive shellfish beds and spawning sites.

Dredging can degrade productive shallow water and destroy marsh habitat or resuspend pollutants, such as heavy metals, pesticides, herbicides, and other toxins. Concomitant with dredging is spoil disposal, which traditionally occurred on marshes or in open water where temporary or permanent degradation or destruction may occur. Shoreline stabilization can cause gross impacts when intertidal and sub-tidal habitats are filled, or when benthic habitats are scoured by reflective wave energy. It can also cause subtle effects that result in gradual elimination of the ecological zone between the shore and the water.

An example of an adverse impact of a specific activity follows. Construction activities associated with development result in a loss of habitat diversity along the water's edge. Bulkheading, filling, and construction of attendant port features result in general water quality degradation that reduces the biotic diversity of important productive areas. Dredging and dredged material disposal, filling of aquatic habitats to create fastland for port improvement or expansion, and degradation of water quality are the most serious perturbations arising from port development.

Conservation Measures:

* when reviewing open water disposal permits for dredged material, state and Federal agencies should identify the direct and indirect impacts such projects may have on EFH.

* filling of wetlands should not be permitted in or near nursery areas. Mitigating or compensating measures should be employed where filling is unavoidable. Project proponents must demonstrate that project implementation will not negatively affect EFH.

* best engineering and management practices (e.g., seasonal restrictions, dredging methods, disposal options, etc.) should be employed for all dredging and in-water construction projects. Such projects should be permitted only for water dependent purposes when no feasible alternatives are available. Project proponents should demonstrate that project implementation will not negatively affect EFH.

* the disposal of contaminated dredge material, sewage sludge, and industrial waste should not be allowed in EFH.

* facilities should be relocated upland when possible.

Enhancement Measures:

* explore use of clean dredged material to restore/rebuild oyster reefs, wetlands, cover benthic waste sites, and other beneficial use opportunities.

* the creation of new habitat at the expense of another naturally functioning system (e.g., marsh creation with dredge material placed in shallow water habitat) must be justified, given best available information, through a demonstrated net gain in EFH.

2. Forestry Practices

Federal lands management has allowed activities to occur which have degraded riparian and riverine habitat in the National Forests, thereby contributing to the decline of marine and anadromous fishes. The effects of forest activities conducted within the framework of these land use plans include effects on marine and anadromous species and significant habitat from timber harvest, road construction, grazing, mining, outdoor recreation, small hydropower development, and water conveyance permitting. These actions have reduced physical, biological and channel connectivity between streams and riparian areas, floodplains, and uplands; increased sediment yields (leading to pool filling and elimination of spawning and rearing habitat); reduced or eliminated large woody debris; reduced or eliminated the vegetative canopy (leading to increased temperature fluctuations); altered peak flow timing; increased water temperature, decreased dissolved oxygen, caused streams to become straighter, wider, and shallower; and have degraded water quality by adding toxic chemicals through mining and pest control. These effects, combined with cumulative effects from activities on nonfederal lands, have contributed to the decline of marine and anadromous fish species.

Conservation Measures:

* riparian buffer zones of appropriate size and design should be required on any forested land adjacent to waterways that include EFH. The buffers should provide all processes that create and maintain fish habitat, particularly shade, stream bank integrity, and recruitment of large woody debris.

* enforcement of best forestry management practices for ensuring water quality standards at state and Federal levels should be strongly encouraged.

* watershed analysis and subsequent watershed planning at the local and state levels should be strongly encouraged.

Enhancement Measures:

* upland habitat restoration should be encouraged. Restoration of upland habitat should include measures to control erosion, stabilize roads, upgrade culverts for fish passage, and manage watershed uses.

* restoration of riparian areas should be encouraged. Restoration goals should restore functions of riparian vegetation by reestablishing mature conifers or other appropriate vegetation.

* fence to protect riparian areas from grazing/trampling.

* revegetate riparian areas with stable vegetation.

(See Murphy, M.L. 1995. Forestry Impacts on Freshwater Habitat of Anadromous Salmonids in the Pacific Northwest and Alaska -- Requirements for Protection and Restoration, U.S. Dept. of Commerce, NOAA, Coastal Ocean Office)

3. Sand and Gravel Mining

Mining for sand, gravel, and shell stock in coastal and estuarine waters can result in the loss of infaunal benthic organisms, modifications of substrate, changes in circulation patterns, and decreased dissolved oxygen concentrations at deeply excavated sites where flushing is minimal. Sand and gravel mining tends to result in suspended materials at the mining sites, and turbidity plumes may move several kilometers from individual sites. Resuspended sediments may contain contaminants such as heavy metals, pesticides, herbicides and other toxins. Mining also results in changes in sediment type or sediment quality, often over areas measurable in

square kilometers. Deep borrow pits created by mining may become seasonally or permanently anaerobic.

Conservation Measures:

* gravel extraction sites should be situated outside the active floodplain and the gravel should not be excavated from below the water table.

* larger rivers and streams should be used preferentially to small rivers and streams.

* braided river systems should be used preferentially to other river systems.

* gravel and/or sand removal quantities should be strictly limited so that gravel recruitment and accumulation rates are sufficient to avoid extended impacts on channel morphology and anadromous fish habitat.

* gravel bar skimming should only be allowed under restricted conditions.

* pit excavations located on adjacent floodplain or terraces should be separated from the active channel by a buffer designed to maintain this separation for two or more decades.

* prior to extraction, a thorough review should be undertaken of potentially toxic sediment contaminants in or near the stream bed where gravel removal operations are proposed or where bed sediments may be disturbed (upstream and downstream) by the operations. Also, extracted aggregates and sediments should not be washed directly in the stream or river within the riparian zone.

* removal or disturbance of instream roughness elements during gravel extraction activities should be avoided. Those that are disturbed should be replaced or restored.

* gravel extraction operations should be managed to avoid or minimize damage to stream/river banks and riparian habitats.

* the cumulative impacts of gravel and sand extraction should be addressed by Federal, state, and local resource management and permitting agencies and considered in the permitting process.

* an integrated environmental assessment, management, and monitoring program should be a part of any gravel or sand extraction operation, and encouraged at Federal, state, and local levels.

* plan and design mining activities to avoid significant resource areas (such as consolidated sand ledges, sand dollar beds, or algae beds).

* plan and design mining activities with minimum area and depth to minimize recolonization times (deep holes should be avoided).

* mitigation and restoration should be an integral part of the management of gravel and sand extraction policies.

Enhancement Measures:

* remove unlike material as part of the mining operation to help restore natural bottom characteristics.

* remove material from areas where accumulation is caused by human activities.

* return gravel to stream areas needing such for additional spawning.

(See NMFS National Gravel Extraction Policy, 1996. National Marine Fisheries Service).

Adverse Effects to EFH: Fishing Activities

Regulatory Text

(4) <u>Fishing activities that may adversely affect EFH.</u> -- (i) Adverse effects from fishing may include physical disturbance of the substrate, and loss of and 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 gear types used in waters described as EFH. 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 a substantial adverse effect on EFH, based on the assessment conducted pursuant to paragraph (a)(4)(ii).

(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 the marine ecosystem, including the fishery; the nature and extent of

the adverse effect on EFH; and whether the benefit to the EFH achieved by minimizing the adverse effect justifies the cost to the fishery.

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

(i) Fishing gear restrictions. These options may include, but are not limited to: limit seasonal and areal uses of trawl gear and bottom longlines; restrict net mesh sizes, traps, and entanglement gear to allow escapement of juveniles and non-target species; reduce fish and shellfish traps set near coral reefs and other hard bottoms; limit seasonal and areal uses of dredge gear in sensitive habitats; prohibit use of explosives and chemicals; restrict diving activities that have potential adverse effects; prohibit anchoring of fishing vessels in coral reef areas and other sensitive areas; and prohibit 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 gear types during spawning, migration, foraging and nursery activities; and designating zones to limit effects of fishing practices on certain vulnerable or rare areas/species/life history stages.

(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.

Additional Information

Harvest limits could address the take of "live rock," SAV including eelgrass, kelp beds, and other marine habitats.

Adverse impacts from fishing may include direct, large-scale substrate damage that leads to habitat destruction through alteration of sediment types, or losses of benthic organisms. FMPs should include management options that minimize adverse impacts, to the extent practicable, and identify potential conservation and enhancement measures. Because fishing activities fall within the regulatory control of the Councils and the Secretary, it is incumbent upon NMFS and the Councils to gather sufficient information to support evaluation of these options, however, the assessment to be included in the FMP will be limited to the best available information at the time.

Prey Species

Regulatory Text

(6) Prey species. Loss of prey is an adverse effect on a managed species and its EFH; therefore, FMPs should identify the major prey species for the species in the FMU

and generally describe the location of prey species' habitat and the threats to that habitat. Adverse effects on prey species may result from fishing and non-fishing activities.

Additional Information

The habitat of prey species should not be included as EFH for managed species. Rather, Councils should identify the prey species for the species managed under the FMP, and should describe the habitat of those significant prey species to help in determining if there are activities that would adversely affect their habitat. This analysis should be included in the "adverse effects" section of the EFH FMP amendment, rather than in the description and identification of EFH section. The Councils should consider loss of prey habitat with the resultant loss of prey, as an adverse effect on a managed species.

Regulatory Text

(7) Identification of vulnerable habitat. FMPs should identify vulnerable EFH. In determining whether a type of EFH is vulnerable, Councils should consider:

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

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

(iii) The rarity of the habitat type.

(8) 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; or indirect adverse effects such as sea level rise, global warming and climate shifts; and non-gear 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 gear on EFH should be included in this section of the FMP. If an adverse effect is identified and determined to be an impediment to reaching target long-term production levels, then the research needed to quantify and mitigate that effect should be identified in this section.

Additional Information

An initial inventory of available environmental and fisheries data sources relevant to the managed species should be useful in describing and identifying EFH. This inventory should also help to identify major species-specific habitat data gaps. Gaps in data availability (i.e., accessibility, use 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. The recommendations may include basic life history information that will result in the comprehensive identification of the habitat requirements of the species (or species

assemblages), including all life stages, as well as habitat-related information that defines the interrelationship between the species, its environment and the food web (e.g., drifter studies to determine current flows, and tagging studies for determination of migratory pathways and habitat-use patterns).

Review of EFH in FMPs

Regulatory Text

(9) Review and revision of EFH components of FMPs. Each Council and NMFS are expected to periodically review the EFH components of FMPs. 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. Such a review of information should be conducted as recommended by the Secretary, but at least once every five years.

Optional Components of EFH

(b) Optional components. An FMP may include a description and identification of, and contain management measures to protect, the habitat of species under the authority of the Council, but not contained in the FMU. However, such habitat may not be considered EFH.

Additional Information

Councils may elect to address the habitat needs of species that are not included within a FMU. In those cases, NMFS does not preclude the Councils from doing so. FMPs exist that use this process to address the importance of those habitats or those species to the FMU. According to the Magnuson-Stevens Act, however, habitat of non-managed species is not considered EFH. Therefore, the EFH consultation requirements would not apply for NMFS with respect to those additional habitats for non-managed species.

NMFS' EFH Recommendations and Information

(C) Development of EFH recommendations. After reviewing the best available scientific information, and in cooperation 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. 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 written recommendation and comments to the Council(s).

Additional Information

The process of developing recommendations should coordinate with existing Council procedures as much as possible. NMFS and the Councils should collaborate to implement existing methods for FMP amendment development and modify these methods as necessary to accommodate the EFH requirements according to the Magnuson-Stevens Act.

The contents of EFH identification recommendations may vary depending on the amount of supporting information available for the species being considered. For EFH, presence/absence data for a species with "Level 1" information (see Section IV.B.2.i) will support a simple graphical display, while the more complex data sets expected at "Level 3" will support more detailed comparison of life history stages and habitat types to yield displays of distribution over time. For mitigative measures, the level of detail will be dictated by a combination of species and impact information. Point source discharges, designated disposal sites, and known pollutant loads may provide sufficient information to develop mitigative measures for certain impacts in specific areas, perhaps even with seasonal restrictions. Such determinations will be made by NMFS and the Councils based on the available information for each species or species assemblage.

FMP Amendment Schedule

The Magnuson-Stevens Act requires that NMFS develop a schedule for amending FMPs. NMFS will develop the amendment schedule based on discussions with each Council, thereby balancing pressures from other priorities and staff availability. NMFS will use the schedule to anticipate when its contributions will be needed by each Council. Several factors are likely to affect EFH amendment schedules:

- Is there sufficient information to prepare an EFH amendment early in the 18-month period or is the amount and quality of habitat data available expected to improve later in the amendment period?

- Can the EFH amendment be combined with a FMP amendment that may already be anticipated within the 18-month amendment period?

- Could certain aspects of the information available on life history, adverse effects, EFH, and/or mitigative measures for one species be applied to more than one FMP, thereby expediting the amendment process?

- Will staff resources constrain the pace or order of work on EFH amendments?
- How will preparation and approval tasks for all EFH amendments be distributed over the 18-month period, both for the Councils and NMFS?
- Does the FMU occupy a unique habitat or does it overlap with other FMUs?

To arrange workloads during the 18-month amendment period, each Council should notify NMFS of its intended EFH amendment schedule within 1 month of publication of final guidelines in the Federal Register. NMFS will combine those schedules into a master list of all proposed EFH amendments and make the schedule available to the public. Further discussion may be needed to balance amendment schedules with resource availability.

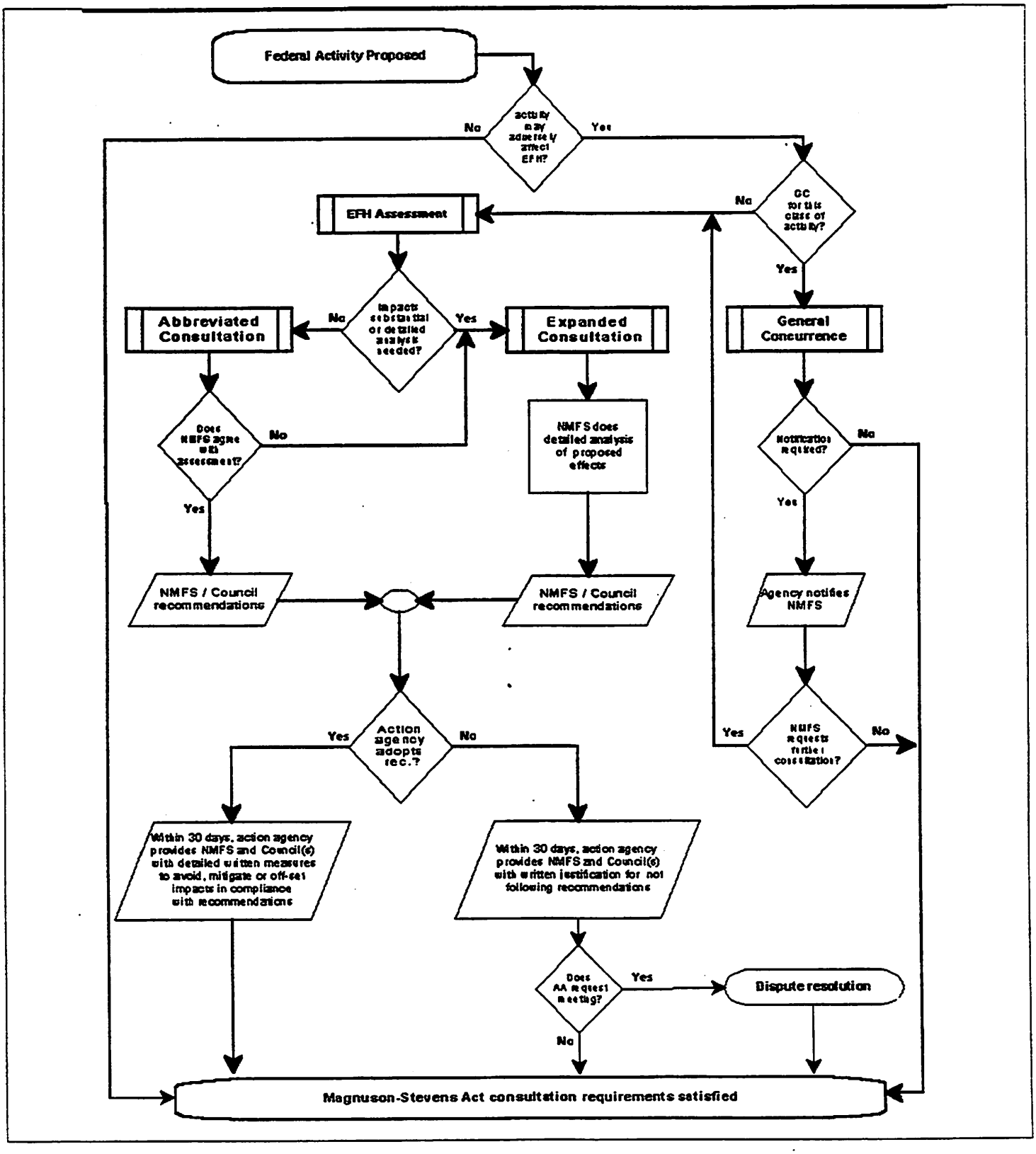
NMFS and the Councils will develop processes to coordinate in the development of EFH recommendations and amendments. Processes to collect, assess, and implement information for the recommendations should include meetings and conferencing. Workshops are suggested in order to involve interested participants and to ensure that adequate and appropriate information is considered in the development of EFH recommendations and amendments. As noted previously, NMFS and the Councils should implement, as possible, current procedures for amending FMPs.

II. Consultation Procedures

This section of the regulation addresses the coordination and consultation requirements of the Magnuson-Stevens Act. These include the requirement that: Federal agencies must consult with the Secretary on all activities, or proposed activities, authorized, funded, or undertaken by the agency, that may adversely affect EFH; and the Secretary and the Councils provide recommendations to conserve EFH to Federal or state agencies on such activities. EFH conservation recommendations are measures recommended by the Councils or NMFS to a Federal or state agency to conserve 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. These actions are mandated by sections 305(b)(2-4) of the Magnuson-Stevens Act. The following guidance for a coordination and consultative process should assist all parties involved to clearly and consistently interpret and implement the requirements of the Magnuson-Stevens Act.

The following diagram is included to clarify the overall consultation procedure identified in the regulation.

Diagram of Essential Fish Habitat Consultation Process



Regulatory Text

§600.815 Coordination and consultation on actions that may adversely affect EFH.

(a) General -- (1) Scope. One of the greatest long-term threats to the viability of the Nation's fisheries is the decline in the quantity and quality of marine, estuarine, and other riparian habitats. These procedures address the coordination and consultation requirements of sections 305(b)(1)(D) and (305(b)(2-4) of the Magnuson-Stevens Act. The consultation requirements of the Magnuson-Stevens Act provide that: Federal agencies must consult with the Secretary on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH; and the Secretary and the Councils provide recommendations to conserve EFH to Federal or state agencies. EFH conservation recommendations are measures recommended by the Councils or NMFS to a Federal or state agency to conserve 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. The coordination section requires the Secretary to coordinate with, and provide information to, other Federal agencies regarding EFH. These procedures for coordination and consultation allow all parties involved to understand and implement the consultation requirements of the Magnuson-Stevens Act.

(2) Coordination with other environmental reviews. Consultation and coordination under sections 305(b)(2), and 305(b)(4) of the Magnuson-Stevens Act may be consolidated, where appropriate, with interagency coordination procedures required by other statutes, such as the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Clean Water Act, Endangered Species Act, and the Federal Power Act, to reduce duplication and improve efficiency. For example, a Federal agency preparing an environmental impact statement (EIS) need not duplicate sections of that document in a separate EFH assessment, provided the EIS specifically and fully evaluates the effects of the proposed action on EFH, notes that it is intended to function as an EFH assessment, is provided to NMFS for review, and meets the other requirements for an EFH assessment contained in this section. NMFS comments on these documents will also function as its response required under section 305(b)(4) of the Magnuson-Stevens Act.

(3) Designation of Lead Agency. If more than one Federal or state agency is involved in an action (e.g., authorization is needed from more than one agency), 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.

(4) 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. Federal and state agencies empowered to authorize, fund, or undertake actions that could

adversely affect EFH should contact NMFS and the Councils to become familiar with the designated EFH, and potential threats to EFH, as well as opportunities to promote the conservation and enhancement of such habitat.

(b) Council comments and recommendations to Federal and state agencies -- (1) Establishment of procedures. Each Council should establish procedures for reviewing activities, or proposed activities, authorized, funded, or undertaken by state or Federal agencies that may affect the habitat, including EFH, of a species under its authority. Each Council may identify activities of concern by: directing Council staff to track proposed actions; recommending that the Council's habitat committee identify activities of concern; entering into an agreement with NMFS to have the appropriate Regional Director notify the Council of activities that may adversely impact EFH; or by similar procedures. Federal and state actions often follow specific timetables which may not coincide with Council meetings. Councils should consider establishing abbreviated procedures for the development of Council recommendations.

(2) Early involvement. Councils should provide comments and recommendations on proposed state and Federal activities of interest as early as practicable in project planning to ensure thorough consideration of Council concerns by the action agency.

(3) Coordination with NMFS. The Secretary will develop agreements with each Council to facilitate sharing information on actions that may adversely affect EFH and in coordinating Council and NMFS responses to those actions.

(4) Anadromous fishery resources. For the purposes of the consultation 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 where some life stage inhabits waters under the Council's authority.

Additional Information

In cases of species that may be considered anadromous, but are not typical anadromous species, the Councils may wish to consult with NMFS to determine whether that species should be treated as a anadromous species in the same context as traditional anadromous species such as salmon.

As a result of this interpretation of section 305(b)(3)(B) of the Magnuson-Stevens Act, adverse impacts to anadromous fish habitat under the authority of a Council will include all anadromous species, not just those that are managed under an FMP. Therefore, Councils should consult on activities that may have an adverse impact on the habitat of an anadromous species that is found in waters under their jurisdiction, even if an FMP for the anadromous species does not exist.

Regulatory Text

(C) Federal agency consultation -- (1) Interagency coordination. Both Federal and state agencies are encouraged to coordinate their actions with NMFS to facilitate the early identification of potential adverse effects on EFH. This will allow consideration of measures to conserve and enhance EFH early in the project design. The consultation requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act differ for Federal and state agencies. Only Federal agencies have a mandatory statutory requirement to consult with NMFS regarding actions that may adversely affect EFH, pursuant to section 305(b)(2) of the Magnuson-Stevens Act. NMFS is required under section 305(b)(4) to provide EFH recommendations regarding both state and Federal agency actions that could adversely affect EFH (see §600.810(a)(3) for further guidance on actions that could adversely affect EFH). Both Federal and state agencies are encouraged to develop agreements (or modify existing agreements) with NMFS to meet the consultation requirements in a manner to increase efficiency and to fully meet the requirements of the EFH provisions.

(2) 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.

(3) General Concurrence -- (I) 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 to result in minimal adverse effects individually and cumulatively. General Concurrences may be national or regional in scope.

(ii) Criteria. (A) 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:

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

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

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

(B) 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 (c)(3)(ii)(A) of this section. For example, NMFS may provide General Concurrence for additional actions contingent upon project size limitations, seasonal restrictions, or other conditions.

(iii) 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 (c)(3)(ii) of this section, NMFS, in consultation with the 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 determines that individual actions that fall within the General Concurrence would adversely affect EFH, NMFS will notify the Federal agency that abbreviated or expanded consultation is 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.

(iv) Notification and further consultation. NMFS may request notification for activities covered under a General Concurrence if NMFS concludes there are circumstances under which such activities 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 activities covered under the General Concurrence. NMFS may require further consultation for these activities on an individual action. Each General Concurrence should establish specific procedures for further consultation.

(v) Public review. Prior to providing a 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.

(vi) Revisions to General Concurrences. NMFS will periodically review and revise its findings of General Concurrence, as appropriate.

(4) EFH Assessments -- (I) Preparation requirement. Federal agencies (or designated non-Federal representatives) must complete an EFH assessment for any action that may adversely affect EFH, except for those activities covered by a General Concurrence. Where appropriate, Federal agencies may combine requirements for environmental documents such as Endangered Species Act Biological Assessments pursuant to 50 CFR part 402 or National Environmental Policy Act documents and public notices pursuant to 40 CFR part 1500, with their EFH Assessment. This document must include all of the information required in paragraph (c)(4)(ii) of this section and the requirements for other applicable environmental documents to be considered a complete assessment.

(ii) Mandatory contents. The assessment must contain:

(A) A description of the proposed action.

(B) An analysis of the effects, including cumulative effects, of the proposed action on EFH and the managed and associated species, including their life history stages.

(C) The Federal agency's conclusions regarding the effects of the action on EFH.

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

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

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

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

(D) An analysis of alternatives to the proposed action, including alternatives that could avoid or minimize adverse effects on EFH.

(E) Proposed mitigation.

(F) Other relevant information.

(iv) 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.

(5) Abbreviated consultation procedures -- (I) Purpose. Abbreviated consultation allows NMFS to quickly determine whether, and to what degree, a Federal agency action may adversely affect EFH. The abbreviated consultation process is appropriate for Federal actions that would adversely affect EFH when, in NMFS' judgment, the adverse effect(s) of such actions could be alleviated through minor modifications to the proposed action.

(ii) Notification by agency. The Federal agency must notify NMFS and the appropriate Council 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 must normally 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.

(iii) Submittal of EFH Assessment. The Federal agency must submit a completed EFH assessment to NMFS for review in accordance with paragraph (c)(4) of this section. If either the Federal agency or NMFS believes expanded consultation will be necessary, the Federal agency must initiate expanded consultation concurrently with submission of the EFH Assessment. Federal agencies will not have fulfilled their consultation requirement

under paragraph (a)(1) of this section until timely notification and submittal of a complete EFH Assessment.

(iv) NMFS response. NMFS must respond in writing as to whether it concurs with the findings of the assessment. NMFS' response shall indicate whether expanded consultation is required. If additional consultation is not necessary, NMFS' response must include any necessary EFH conservation recommendations to be used by the Federal action agency. NMFS will send a copy of its response to the appropriate Council.

(v) Timing. The Federal action agency must submit its complete EFH Assessment to NMFS as soon as practicable, but at least 60 days prior to a final decision on the action, and NMFS must respond in writing within 30 days. If notification and the EFH Assessment are combined with other environmental reviews required by statute, then the statutory deadline for those reviews apply to the submittal and response. If NMFS and the Federal action agencies agree, a compressed schedule will be used in cases where regulatory approvals cannot accommodate 30 days for consultation, or to conduct consultation earlier in the planning cycle for proposed actions with lengthy approval processes.

(6) Expanded consultation procedures -- (I) Purpose. Expanded consultation is appropriate for Federal actions that would result in substantial adverse effects to EFH and/or require more detailed analysis to enable NMFS to develop EFH conservation recommendations.

(ii) Initiation. Expanded consultation begins when NMFS receives a written request from a Federal action agency to initiate expanded consultation. The Federal action agency's written request must include a completed EFH Assessment in accordance with paragraph (c)(4) of this section. Because expanded consultation is required for activities that may potentially have substantial adverse impacts on EFH, Federal action agencies are encouraged to provide the additional information identified under paragraph (c)(4)(iii) 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.

(iii) NMFS response. NMFS will:

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

(B) Conduct a site visit, if appropriate, to assess the quality of the habitat and to clarify the impacts of the Federal agency action.

(C) Evaluate the effects of the action on EFH, including cumulative effects.

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

(E) Formulate EFH conservation recommendations and provide the recommendations to the Federal action agency and the appropriate Council.

(iv) Timing. The Federal action agency must submit its complete EFH Assessment to NMFS as soon as practicable, but at least 120 days prior to a final decision on the action, and NMFS must conclude expanded consultation within 90 days of submittal of a complete Assessment unless extended by NMFS with notification to the Federal action agency. If notification and the EFH Assessment are combined with other statutorily required environmental reviews, then the statutory deadlines for those reviews apply to the submittal and response. NMFS and Federal action agencies may agree to use a compressed schedule in cases where regulatory approvals cannot accommodate a 60 day consultation period.

(v) Best scientific information. The Federal action agency must provide NMFS with the best scientific information available, or reasonably accessible during the consultation, regarding the effects of the proposed action on EFH.

(vi) 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 its expanded consultation. If NMFS and the Federal action agency agree to an extension, the Federal action agency must 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 data available to NMFS.

(7) Responsibilities of Federal action agency following receipt of EFH conservation recommendations -- (I) Federal action agency response. Within 30 days after receiving an EFH conservation recommendation (or at least 10 days prior to final approval of the action, if a decision by the Federal agency is required in less than 30 days), the Federal action agency must provide a detailed response in writing to NMFS and the appropriate Council. 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 the recommendations of NMFS, 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.

(ii) Dispute resolution. After receiving a Federal action agency response that is inconsistent with the recommendations of NMFS, the Assistant Administrator 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. Memoranda of agreement with Federal action agencies will be sought to further define such dispute resolution processes.

(8) Supplemental consultation. A Federal action agency must resume consultation with NMFS following either abbreviated or expanded consultation if the agency substantially revises its plans for the action in a manner that may adversely affect EFH or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations. Additionally, where Federal oversight, involvement, or control over the action has been retained or is authorized by law, the Federal action agency must resume consultation if new EFH is designated that may be adversely affected by the agency's exercise of its authority.

(d) NMFS recommendations to state agencies -- (1) Establishment of Procedures. Each Region should establish procedures for identifying actions or proposed actions authorized, funded, or undertaken by state agencies that may adversely affect EFH, and for identifying the most appropriate method for providing EFH conservation recommendations to the state agency.

(2) Coordination with Federal consultation procedures. When an activity that may 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 paragraph (C) of this section.

Relationships Between the Magnuson-Stevens Act and ESA

According to the ESA, areas have been identified as "critical habitat" for species that are listed as threatened or endangered. Many of the terms used in the Magnuson-Stevens Act and the ESA are similar but have different interpretations. This section provides clarification of the similarities, differences and interrelations between the two laws, and information on how NMFS will combine consultation requirements pursuant to ESA and EFH into one process.

Geographic Scope of ESA and EFH

For the purposes of the ESA, "critical habitat" includes areas occupied by the species at time of listing, as well as those unoccupied areas that are deemed "essential for the conservation of a species."

In most cases, NMFS has determined that the listed species' current range should be designated as critical habitat since these areas are necessary for the conservation of the species. As a result, NMFS' application of critical habitat has been broad in predominantly freshwater areas. However, NMFS has not always designated critical habitat in marine areas for salmonid species. This is representative of one difference in the scope of these laws.

"Essential fish habitat" as defined in the Magnuson-Stevens Act includes "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." NMFS interpretation of "necessary" is "the habitat required to support a sustainable fishery and a healthy ecosystem".

EFH will be designated on the basis of information which indicates that certain habitat areas or conditions are necessary to sustain the fishery and a healthy ecosystem. One component of the data used will likely consist of presence/absence information when more detailed information does not currently exist. Use of presence/absence data may result in the designation of broad geographic areas, similar to critical habitat designations. EFH may be broader if historic habitat areas (e.g., areas above dams or diversions) are deemed necessary to sustain harvestable population levels. In some cases, EFH will also be broader than critical habitat if EFH includes marine areas.

Where critical habitat and EFH co-occur for the same species, they will likely overlap significantly, at least in the near term. This is primarily due to the current lack of data which could permit refinement of critical habitat to key production areas sufficient to conserve listed populations. Even if such data were available, it is not clear if such a refined habitat designation would be greater or less than habitat which is necessary to sustain harvestable population levels.

Species Units

NMFS' policy of applying the ESA definition of "species" to anadromous salmonid species is based on Evolutionarily Significant Units (ESU), or populations that: (1) are reproductively isolated from other population units of the same species, and (2) represent an important component in the evolutionary legacy of the biological species.

Under the Magnuson-Stevens Act, EFH will be designated for all fisheries managed by Councils in fishery management plans (FMP). The management unit in the Pacific Fisheries Management Council's FMP for ocean salmon fisheries off Washington, Oregon, and California includes "those stocks of salmon and steelhead that are harvested in the fishery conservation zone off the coasts of Washington, Oregon, and California." The stocks are based on geographic zones. For example, for coho salmon, the FMP covers two management units, one south of Leadbetter Point (WA) and one north of Cape Falcon (OR). The 'south of Leadbetter Point' unit is comprised of the stocks: Columbia River, Oregon coastal, and California coastal. The 'north of Cape Falcon' unit is comprised of the stocks: Columbia River, Washington coastal, Puget Sound, and southern British Columbia. For purposes of ESA listings and management, this same geographic area covered by the two FMP management units is divided into six ESUs (one is listed as threatened, two are proposed for listing, two are candidates for listing, and one is not a candidate). Thus, overlap between essential fish habitat and listed species will be patchy in the case of salmonids.

Definition of Effects in ESA and EFH

Neither law provides an explicit definition of "adverse effect". The definitions for "levels of effect" as applied to ESA Section 7 consultations are:

> No effect: if the proposed action will literally have no effect whatsoever on the species and/or critical habitat, not a small effect or an effect that is unlikely to occur. Furthermore, actions that result in a 'beneficial effect' do not qualify as a no effect determination."
>
> May affect, not likely to adversely affect: when effects on the species or critical habitat are expected to be beneficial, discountable, or insignificant. Beneficial effects have positive effects without resulting in any adverse effects to the species or habitat over a short- or long-term period.
>
> May affect, likely to adversely affect: more than a negligible potential to have adverse effects on the species or critical habitat.... For the purposes of Section 7, any action which has more than a negligible potential to result in 'take' is likely to adversely affect a proposed/listed species.
>
> Jeopardy: to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." (50 CFR, Section 402.2).

There are two *levels of effect* mentioned in Section 305(b)(3) of Magnuson-Stevens Act: "may adversely affect habitat" and "likely to substantially affect habitat."

Force of the Recommendations for ESA and EFH

Under the ESA, action agencies *must* comply with: "reasonable and prudent measures" issued in cases of "no jeopardy" where there may be take; and with "reasonable and prudent alternatives" in cases of "jeopardy". Action agencies *may* comply when NMFS issues conservation "recommendations" in cases of "no jeopardy."

Under the ESA, the action agency makes the initial determination of whether a proposed activity will have an adverse effect on a listed species. NMFS intervenes only if the action agency determines that an action "may affect" a listed species. The action agency is motivated to address the effects determination under the ESA, due to the legal provisions of the ESA.

According to the Magnuson-Stevens Act, action agencies must provide a detailed response in writing to any Council commenting on the action, as well as to the Secretary. The response shall

include a "description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat." If the response is inconsistent with the recommendations of the Secretary, the agency shall explain its reasons for not following the recommendations. Under the Act each Federal agency "shall consult" with NMFS regarding any Federal or federally-funded or state or state-funded action that "may affect" any essential fish habitat or is "likely to substantially affect" an anadromous fishery resource under its authority.

Consultative Processes for ESA and EFH

Under sections 305(b)(1)(D), 305(b)(2), and 305(b)(4) of the Magnuson-Stevens Act, consultation on EFH is required. This consultation may be consolidated with interagency coordination procedures required by other statutes. In the case of concurrent ESA review processes, consultation activities will be coordinated to the extent possible.

NMFS will coordinate EFH and ESA consultations in the following manner:

NMFS will state in the Biological Opinion or consultative letter that the consultation fulfills both ESA and EFH requirements;

When critical habitat and EFH are the same, and the biological assessment fulfills the requirements of the EFH assessment, the ESA consultative process will apply and will satisfy the EFH consultation requirements;

In joint ESA/EFH consultations with the U.S. Forest Service and the BLM, the Level 1 team review done under ESA will cover the EFH consultation requirement;

Where there are no listed species, EFH and other statutorily required consultations will be done concurrently, pursuant to NMFS' authority under the Magnuson-Stevens Act and other appropriate statutes;

Projects that go forward under ESA section 7 because they are covered by a previous consultation to which they are tiered and which resolved effects on EFH at the programmatic level (i.e. programmatic consultations, nationwide permits, State Programmatic General Permits) or because the action agency has determined "no effect", are determined to be in compliance with the EFH consultation requirements.

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, Maryland 20910

C-9

APR 2 2 1997

MEMORANDUM FOR: Interested Parties

FROM: James P. Burgess James P. Burgess
Acting Director
Office of Habitat Conservation

SUBJECT: Essential Fish Habitat Proposed Rule

Attached please find the proposed rule to implement the Magnuson-Stevens Act's requirement to develop guidelines to assist Fishery Management Councils (Councils) to describe and identify essential fish habitat (EFH) in fishery management plans (including adverse impacts on such habitat) and to consider actions to conserve and enhance such habitat, that was published in the Federal Register on April 23, 1997. This proposed rule represents a significant step forward for habitat conservation because it reaffirms the fact that the viability of our fishery resources is inexorably linked to the quantity and quality of their habitats. The proposed regulations would establish a process for Councils to identify and describe EFH, including adverse impacts to that habitat, per the requirements of the Magnuson-Stevens Act. The Act also requires the Secretary, in consultation with fishing participants, to provide each Council with recommendations and information regarding each fishery under a Council's authority to assist it to identify EFH, the adverse impacts on that habitat, and actions that should be considered to conserve and enhance that habitat. The proposed rule would establish procedures to carry out that mandate.

In addition, the Magnuson-Stevens Act requires that Federal agencies consult with the Secretary on any activity, or proposed activity, authorized, funded, or undertaken, that may adversely affect EFH. The Secretary, acting through NMFS, must respond with recommendations for measures to conserve EFH. NMFS must provide recommendations on state authorized, funded, or undertaken activities that may adversely affect EFH as well. The proposed rule would also establish procedures to implement these consultation requirements.

The comment period on the proposed rule will extend until ~~May 23, 1997~~ July 8, 1997. Comments on the proposed rule should be sent to the Director, Office of Habitat Conservation, Attention: EFH, NMFS, 1315 East-West Highway, Silver Spring, MD 20910-3282. In addition, NMFS is planning to hold four public meetings in Secaucus, NJ, New Orleans, LA, Seattle WA, and Anchorage or Juneau, AK during the comment period to receive oral comments from the affected public. The specifics of these meetings (date, time, and exact location) are being developed and will be announced in a future Federal Register notice.

Attachment

loading, and unloading, should be considered where these items affect overall costs.

29. Section 101–40.303–3 is revised to read as follows:

§ 101–40.303–3 Equitable distribution of traffic among carriers.

When more than one mode of transportation or more than one carrier within a mode can provide equally satisfactory service at the same aggregate cost and all modes are equally fuel efficient, the traffic should be distributed as equally as practicable among the modes and among the carriers within the modes. When socially or economically disadvantaged carriers and women-owned carriers are among the eligible competing carriers, positive action will be taken to include such carriers in the equitable distribution of traffic.

30. Section 101–40.303–4 is revised to read as follows:

§ 101–40.303–4 Most fuel efficient mode.

When more than one mode can satisfy the service requirements of a specific shipment at the same lowest aggregate delivered cost, the mode determined to be the most fuel efficient should be selected. In determining the most fuel efficient mode, consideration should be given to such factors as use of the carrier's equipment in "turn around" service, proximity of carrier equipment to the shipping activity, and ability of carrier to provide the most direct service to the destination points.

31. Section 101–40.304 is amended by revising paragraph (a) and by removing paragraph (d) to read as follows:

§ 101–40.304 Description of property for shipment.

(a) Each shipment shall be described on the bill of lading or other shipping document as provided in the applicable tender offered to the Government by the carrier or as provided in the agreement negotiated with the carrier by the Government or in accordance with the carrier's tariff. Trade names such as "Foamite" or "Formica" or general terms such as "vehicles," "furniture," or "Government supplies," shall not, unless specifically negotiated with the carrier by the Government, be used as bill of lading descriptions.

* * * * *

§ 101–40.305–1 [Removed and Reserved]

§ 101–40.305–2 [Removed and Reserved]

32. Sections 101–40.305–1 and 101–40.305–2 are removed and reserved.

33. Section 101–40.305–3 is revised to read as follows:

§ 101–40.305–3 Negotiations by executive agencies.

Executive agencies are authorized to negotiate with carriers in establishing or modifying rates, charges, classification ratings, services, and rules or regulations for freight transportation.

34. Section 101–40.306 is revised to read as follows:

§ 101–40.306 Rate tenders to the Government.

Under the provisions of sections 10721 (rail) and 13712 (motor) of the ICC Termination Act of 1995 (49 U.S.C. 10721 and 13712), common carriers are permitted to submit tenders to the Government which contain transportation rates and/or charges for accessorial services that are lower than those published in tariffs applicable to the general public; and the Government may solicit from carriers offers to provide transportation and accessorial services at rates and/or charges lower than those published in tariffs applicable to the general public. Rate tenders may be applied to shipments made by the Government on behalf of foreign governments. In addition, rate tenders may be applied to shipments other than those made by the Government provided the total benefits accrue to the Government; that is, provided the Government pays the charges or directly and completely reimburses the party that initially pays the freight charges. (Interpretation of Government Rate Tariff for Eastern Central Motor Carriers Association, Inc., 332 I.C.C. 161 (1968).)

35. Section 101–40.306–2 is amended by revising the introductory text of paragraph (a) to read as follows:

§101–40.306–2 Required shipping documents and annotations.

(a) To qualify for transportation under section 10721 or 13712, property must be shipped by or for the Government on:

* * * * *

36. Section 101–40.306–3 is revised to read as follows:

§101–40.306–3 Distribution.

Each agency receiving rate tenders shall promptly submit two copies (including at least one signed copy) to the General Services Administration, Office of Transportation Audits (FW), Washington, DC 20405.

37. Section 101–40.306–4 is revised to read as follows:

§101–40.306–4 Bill of lading endorsements.

To ensure application of Government rate tenders to all shipments qualifying for their use, bills of lading covering the shipments shall be endorsed with the applicable tender or quotation number and carrier identification; e.g., "Section 13712 quotation, ABC Transportation Company, Tender No. 143." In addition, where commercial bills of lading are used rather than Government bills of lading, the commercial bills of lading shall be endorsed in conformance with the provisions set forth in § 101–40.306–2(a). (For specific regulations covering transportation generated under cost-reimbursement type contracts, see 48 CFR 47.104–3.)

Dated: December 17, 1996.

G. Martin Wagner,

Associate Administrator, Office of Governmentwide Policy.

[FR Doc. 97–10514 Filed 4–22–97; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 961030300–7090–03; I.D. 120996A]

RIN 0648–AJ30

Magnuson Act Provisions; Essential Fish Habitat (EFH)

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to issue regulations containing guidelines for the description and identification of essential fish habitat (EFH) in fishery management plans (FMPs), adverse impacts on EFH, and actions to conserve and enhance EFH. The regulations would also provide a process for NMFS to coordinate and consult with Federal and state agencies on activities that may adversely affect EFH. The guidelines are required by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The purpose of the rule is to assist Fishery Management Councils (Councils) in fulfilling the requirements set forth by the Magnuson-Stevens Act to amend their FMPs to describe and identify EFH, minimize adverse effects on EFH, and identify other actions to conserve and enhance EFH. The coordination and consultation provisions would specify procedures for adequate consultation with NMFS on activities that may adversely affect EFH.

DATES: Written comments on the proposed rule must be received on or before May 23, 1997.

ADDRESSES: Comments should be sent to the Director, Office of Habitat Conservation, Attention: EFH, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3282. Copies of the Technical Assistance Manual, previous advance notices of proposed rulemaking (ANPR), draft environmental assessment (EA) and finding of no significant impact (FONSI), and "Framework for the Description, Identification, Conservation, and Enhancement of Essential Fish Habitat" (Framework) are available. (see **SUPPLEMENTARY INFORMATION**).

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

SUPPLEMENTARY INFORMATION: A copy of the ANPRs, Framework, proposed regulation, draft EA and FONSI, and Technical Assistance Manual are 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 following NMFS Offices:

Office of Habitat Conservation, Attention: EFH, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3282; 301/713–2325.

Northeast Regional Office, Attention: Habitat and Protected Resources Division, One Blackburn Drive, Gloucester, MA 01930; 508/281–9328.

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

Southwest Regional Office, Attention: Habitat Conservation Division, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802; 310/980–4041.

Northwest Regional Office, Attention: Habitat Conservation Branch, 525 N.E. Oregon St., suite 500, Portland, OR 97232; 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.

Related Documents

Concurrent with publication of this proposed rule, NMFS will make available "Technical Guidance to Implement the Essential Fish Habitat Requirements for the Magnuson-Stevens Act." This manual provides supplemental information for developing EFH recommendations and FMP amendments. The document is intended to be updated regularly as new and innovative methods are available in habitat identification and mapping. The Technical Guidance Manual is based on and will contain similar detail to that included in the Framework. The draft manual is available for comment and may be obtained from any NMFS office listed in the **SUPPLEMENTARY INFORMATION** section.

Background

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. It mandates that the Secretary of Commerce (Secretary) shall, within 6 months of the date of enactment, establish guidelines by regulation to assist the Councils to describe and identify EFH in FMPs (including adverse impacts on such habitat) and to consider actions to conserve and enhance such habitat. These proposed regulations would establish a process for Councils to identify and describe EFH, including adverse impacts to that habitat, per the requirements of the Magnuson-Stevens Act. The Magnuson-Stevens Act also requires that the Secretary, in consultation with fishing participants, provide each Council with recommendations and information regarding each fishery under that Council's authority to assist it to identify EFH, the adverse impacts on that habitat, and actions that should be considered to conserve and enhance that habitat. The proposed regulation would establish procedures to carry out this mandate. Councils must submit FMP amendments containing these new provisions by October 11, 1998.

In addition, the Magnuson-Stevens Act requires that Federal agencies consult with the Secretary on any activity authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, that may adversely affect EFH. The Secretary must respond with recommendations for measures to conserve EFH. The Secretary must provide recommendations to states as well. The regulation would also establish procedures to implement these consultative requirements.

This regulation proposes to address ecosystem considerations in fishery management. Through the 1996 Magnuson-Stevens Act reauthorization, FMPs are now required to describe and identify EFH used by managed fishery resources. In addition, FMPs are required to identify actions to ensure conservation and enhancement of EFH.

In developing this rule, NMFS published two ANPRs. The first, published in the **Federal Register** on November 8, 1996 (61 FR 57843), solicited comments to assist NMFS in developing a framework for the proposed guidelines. The second ANPR was published on January 9, 1997 (62 FR 1306). That ANPR announced the availability of the Framework. The Framework was developed to provide a detailed outline for the regulations and to serve as an instrument to solicit public comments. The document was made available to the public for comment from January 9, 1997, through February 12, 1997. During that time, NMFS held fifteen public meetings, briefings, and workshops across the nation. Eighty-eight comments were received via mail or fax, and numerous comments were received during the public meetings. NMFS considered those comments in developing the proposed regulations. In addition to the regulations, a Technical Guidance Manual is available (see **SUPPLEMENTARY INFORMATION**) to provide further details on how the Councils will identify EFH for managed species and develop amendments to their FMPs.

Relation to Other Laws

The Magnuson-Stevens Act establishes expanded requirements for habitat sections of FMPs and requires consultation between the Secretary and Federal and state agencies on activities that may adversely impact EFH for those species managed under the Act. It also requires the Federal action agency to respond to comments and recommendations made by the Secretary and Councils. For the purpose of consultation on activities that may adversely affect EFH, the description of EFH included in the FMP would be determinative of the limits of EFH. Mapping of EFH would be required in the proposed regulations to assist the public and affected parties to learn where EFH is generally located. However, due to anticipated data gaps and the dynamic nature of physical and biological habitat characteristics, maps would be used as supplementary information during the consultation process.

The Fish and Wildlife Coordination Act (FWCA) provides a mechanism for the Secretary to comment to other Federal agencies on activities affecting any living marine resources. Under the FWCA, Federal agencies are required to consult with the Secretary on habitat impacts from water development projects. The Secretary is not, however, required to consult with Federal agencies on all activities that may adversely affect habitat of managed species, nor are agencies required to

respond to Secretarial comments under the FWCA. The FWCA will continue to allow the Secretary to comment and make recommendations on Federal activities that may adversely affect living marine resources and their habitat, even if such habitat is not identified as EFH.

The Endangered Species Act (ESA) definition of "critical habitat" to describe habitats under its authority includes areas occupied by the species at the time of listing, as well as those unoccupied areas that are deemed "essential for the conservation of a species." The EFH regulations would specify that, for species listed under ESA, EFH will always include critical habitat. EFH may be broader than critical habitat if restoration of historic habitat areas is feasible, and more habitat is necessary to support a sustainable fishery. Because the statutory definition of EFH includes the full life cycle of species, including growth to maturity, EFH will also be broader than critical habitat where marine habitats have not been included in the identification of critical habitat (e.g., for anadromous salmonids listed under the ESA).

Coordination with Interested Parties

NMFS would closely coordinate the development of EFH recommendations with the appropriate Councils, fishing participants, interstate fisheries commissions, Federal agencies, state agencies, and other interested parties.

Relation Between EFH and State-Managed Waters

Many species managed under the Magnuson-Stevens Act spend some part of their life cycle in state waters (in most states 0–3 miles offshore) as well as Federal waters (generally 3–200 miles offshore). Because the statutory definition of EFH covers the entire life cycle of a species, EFH may be identified within both Federal and state waters. Therefore, the consultation provisions for activities that may adversely affect EFH may require the Secretary to consult on activities in both Federal and state waters. Councils may also comment on activities in both Federal and state waters. The requirement for Councils to institute management measures to minimize adverse effects of fishing, however, would only address those fishing activities that occur in Federal waters.

Summary of Principal Comments

The public comments focused on eight issues. A summary of these issues and the NMFS response follows.

Issue 1: Species of fish for which the Councils must describe and identify EFH. NMFS received comments suggesting that EFH should be described and identified for only those species managed by a Council in a FMP. Other interpretations suggested that "fish" includes all species inhabiting the geographic jurisdiction of a Council. The latter interpretation could include species not currently managed, but considered important by the Council. NMFS concludes that Councils should describe and identify EFH for only those species managed under an FMP. According to the Magnuson-Stevens Act, EFH can only be designated through an amendment to an FMP. The Council would not be precluded from identifying the habitat required by other species not covered in an FMP and taking steps to protect it. To the extent that such habitat requirements enhance the ecosystem approach to FMPs, the Councils would be encouraged to identify such habitat. However, those habitats of currently non-managed species would not be considered EFH.

Issue 2: Timing of the development of EFH recommendations by NMFS. Some commentors suggested that EFH for all species within a fishery management unit must be completed simultaneously. Other commentors suggested that EFH be described for only those species whose catch is a significant component of the fishery. NMFS has concluded that the law requires the Councils to identify EFH for all managed species within its jurisdiction within the Act's EFH amendment period. The Technical Guidance Manual suggests several ways that Councils may perform this task more efficiently.

Issue 3: Identification of EFH for prey species. Some comments suggested that EFH be identified for all prey species, as opposed to just the predominant prey species. Other comments suggested that identification of EFH for prey species was unnecessary because their habitat requirements are covered by the range of EFH for the managed species. NMFS has concluded that the habitat of prey species would not be included as EFH for managed species. Rather, Councils would identify the major prey species for the species managed under the FMP, and would describe the habitat of significant prey species to help in determining if there are activities that would adversely affect their habitat. This analysis would be included in the "adverse effects" section of the EFH FMP amendment, rather than the description and identification of EFH section. The Councils should consider loss of prey habitat as an adverse effect on a managed species.

Issue 4: Interpretation of what habitat is "necessary" for spawning, breeding, feeding, and growth to maturity. In the Framework, NMFS interpreted "necessary" to mean the amount of habitat needed to support a target production level which included, at a minimum, maximum sustainable yield of the fishery plus other ecological benefits such as being prey for other living marine resources. Many commentors were concerned that this connection was too narrow and suggested that either it not be included in the guidelines, thereby coupling EFH only to feeding, breeding, and growth to maturity, or expanding the definition. NMFS has concluded that the goal of linking "necessary" to production is appropriate, however, this objective has now been defined as the production necessary to support a sustainable fishery and a healthy ecosystem.

Issue 5: Intent of the EFH amendments in relation to fishing. NMFS received comments that clarification is needed regarding fishing in areas identified as EFH. NMFS has now clarified that the intent is not to preclude fishing in areas identified as EFH. Rather, the intent is to refine the Council's and NMFS' abilities to manage fishing activities by taking into account the increasing knowledge and understanding of the importance of habitat, and taking actions to minimize adverse impacts from fishing, to the extent practicable.

Many comments requested guidance on how the Councils would determine when a fishing activity has an adverse impact requiring action. NMFS has provided additional guidance on this concern by proposing to require an assessment of the impacts of all gear types used in the EFH. The assessment would consider closure areas for research to evaluate impacts. The Councils would act to prevent, mitigate, or minimize any adverse impacts from fishing, to the extent practicable, if there is evidence that a fishing practice is having a substantial adverse impact on EFH based on the assessment.

Issue 6: Interpretation of "to the extent practicable". No guidance was provided in the Framework on the exact meaning of the phrase. Some commentors expressed concern that a lack of guidance risked no additional actions being taken by Councils. Others expressed the opinion that the impacts of fishing were already known, and suggested closure areas to protect sensitive habitats. Cost-benefit analysis was also suggested. NMFS has provided additional guidance within the proposed rule. The regulation states that in determining whether minimizing an

adverse impact from fishing is practicable, Councils should consider: (1) Whether, and to what extent, the fishing activity is adversely impacting the marine ecosystem, including the managed species; (2) the nature and extent of the adverse effect on EFH; and (3) whether the cost to the fishery is reasonable.

Issue 7: NMFS' interpretation of "substrate." Commentors suggested it be modified to include artificial reefs and shipwrecks as EFH. NMFS agrees with this modification and clarifies that artificial reefs and shipwrecks could be identified as EFH.

Issue 8: Notification of projects under general concurrence. Several comments were received on general concurrences, suggesting that if no notification is required for projects that fall within a general concurrence category, NMFS would be unable to track the cumulative effects of these categories of activities. NMFS continues to state in the regulation that no notice of those actions covered by a general concurrence would be required, but only if a process is in place by the action agency to adequately assess cumulative impacts.

Comments were also received concerning opportunities for public review of general concurrences prior to final approval and implementation. Commentors were concerned that general concurrences could be established that would exempt specific activities from the consultation process without an opportunity for public review. NMFS has provided in the regulations that it would use public Council meetings, or other means, to provide opportunities for public comment on general concurrences prior to formalization. If Council review is not available, NMFS would provide other reasonable means for public review.

Compliance Requirements

While the Magnuson-Stevens Act requires Federal agencies to consult with NMFS on activities that may adversely affect EFH and respond to NMFS' recommendations, the Act did not place direct requirements for compliance with conservation and enhancement recommendations provided by NMFS. The procedures identified in the regulations however, outline a method for cooperation and coordination between agencies, and options for dispute resolution should this become necessary.

Classification

NMFS has prepared a draft environmental assessment that discusses the impact on the environment as a result of this rule. A copy of the environmental assessment is available from NMFS (see **SUPPLEMENTARY INFORMATION**).

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 proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule would establish guidelines for Councils to identify and describe EFH, including adverse impacts, and conservation and enhancement measures. The proposed regulation requires that the Councils conduct assessments of the effects of fishing on EFH within their jurisdiction. Should Councils establish regulations on fishing as a result of the guidelines and assessments of fishing gear, that action may affect small entities and could be subject to the requirement to prepare a regulatory flexibility analysis at that 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 are not mandatory, any effects on small businesses would be speculative. As a result, a regulatory flexibility analysis for this proposed rule was not prepared. This proposed rule has been determined to be not significant for the purposes of E.O. 12866.

For purposes of Executive Order 12612, the Assistant Administrator for Fisheries has determined that this proposed rule does not include policies that have federalism implications sufficient to warrant preparation of a Federalism Assessment. This proposed rule establishes circumstances and procedures for consultations between the states and NMFS or the Councils in situations where state action may adversely impact EFH in state waters. The proposed rule states that, in such circumstances, NMFS or the Councils would furnish the state with EFH conservation recommendations. NMFS' recommendations are not mandatory, and the states are not required to expend funds in a way not of their own choosing.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing.

Dated: April 17, 1997.

Charles Karnella,

Acting Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

For the reasons stated in the preamble, 50 CFR part 600 is proposed to be amended as follows:

PART 600—MAGNUSON ACT PROVISIONS

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 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" includes aquatic areas and their associated physical, chemical, and biological properties that are used by fish, and may include 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 a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle.

* * * * *

3. A new subpart is added to part 600 to read as follows:

Subpart I—Essential Fish Habitat (EFH)

§ 600.805 Purpose and scope.

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

includes procedures to implement the consultation requirements for all Federal and state actions that may adversely affect EFH.

(b) *Scope.* An EFH provision in an FMP must include all fish species in the FMU. An FMP 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 Act.

§ 600.810 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 useful 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 and on the geographic range of the managed species. Information is also required on the temporal and spatial distribution of each major life history stages (defined by developmental and functional shifts). Since EFH should be identified for each major life history stage, data should be collected on the distribution, density, growth, mortality, and production of each stage within all habitats 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 will be useful in identifying EFH, and the goal of this procedure should be 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 existing and potential habitats. Care should be taken to ensure that all 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., relative densities) are available for the habitats occupied by a species or life history stage. Because the efficiency of sampling gear is often affected by habitat characteristics, strict quality assurance criteria are required to ensure that density estimates are comparable among 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 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 apply this information in a risk-averse fashion, erring on the side of inclusiveness to ensure adequate protection for EFH of managed species. If only Level 1 information is available, EFH is everywhere a species is found. If Levels 2 through 4 information is available, habitats valued most highly through this analysis 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.

(B) If a species is overfished or recovering from a population decline, all habitats used by the species should be considered essential in addition to certain historic habitats that are necessary to support the recovery of the population and for which restoration is feasible.

(C) EFH will always be greater than or equal to the "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 and sufficient information exists to determine the necessary habitat to support the target production goal, then EFH for a 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 managed species or species assemblage at a target production goal that supports a sustainable fishery and a healthy ecosystem. Councils must establish target production goals for the fish species in the FMU of an FMP as a goal of the FMP. In determining a target production goal that supports a sustainable fishery and a healthy ecosystem, the Secretary and the appropriate Council(s) should consider: the prey requirements of the managed species; the extent to which the managed species is prey for other managed species or marine mammals; the production necessary to support a sustainable fishery; and other ecological functions provided by the managed species. If degraded or inaccessible 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 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 should 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 and information in the description of EFH varies, the description is ultimately determinative of the limits of EFH.

(3) *Non-fishing related activities that may adversely affect EFH*—(i) *Identification of adverse effects.* FMPs must identify activities that have potential adverse effects on EFH quantity and quality. Broad categories of activities may include, but are not limited to: dredging, fill, excavation, mining, impoundment, discharge, water diversions, thermal additions, runoff, placement of contaminated material, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH. If known, an FMP should describe the EFH most likely to be affected by these activities. For each activity, the FMP should describe the known or potential impacts to EFH. These descriptions should explain the mechanisms or processes that cause expected deleterious effects and explain the known or potential impacts on the habitat function.

(ii) *Cumulative impacts analysis.* To the extent practicable, FMPs should identify and describe those activities that can influence habitat function on an ecosystem or watershed scale. This analysis should include a description of the ecosystem or watershed, the role of the managed species in the ecosystem or watershed, and the impact on the ecosystem or watershed of removal of the managed species. An assessment of the cumulative and synergistic effects of multiple threats, including natural adverse effects (such as storm damage or climate-based environmental shifts), and an ecological risk assessment of 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.

(iii) *Mapping adverse impacts.* The use of a GIS or other mapping system to analyze and present these data in an FMP is suggested for documenting impacts identified under paragraph (a)(3)(i) of this section and required when the analysis in paragraph (a)(3)(ii) of this section is conducted.

(iv) *Conservation and enhancement.* FMPs should include options to minimize the adverse effects identified pursuant to paragraphs (a)(3)(i) and (ii) of this section and identify conservation and enhancement measures. Generally, non-water dependent actions should not be located in EFH. Actions not in EFH but that may result in significant adverse affects on EFH should be avoided if less environmentally harmful alternatives are available. If there is no alternative, these actions should be minimized. If avoidance and minimization will not adequately protect EFH, mitigation to conserve and enhance EFH will be recommended. These recommendations may include, but are not limited to:

(A) *Avoidance and minimization of adverse impacts on EFH.* Environmentally sound engineering and management practices (e.g., seasonal restrictions, dredging methods, and disposal options) should be employed for all dredging and construction projects. Disposal of contaminated dredged material, sewage sludge, industrial waste or other materials in EFH should be avoided. Oil and gas exploration, production, transportation, and refining activities in EFH should be avoided, where possible, and minimized and mitigated if unavoidable.

(B) *Restoration of riparian and shallow coastal areas.* Restoration measures may include: Restoration of functions of riparian vegetation by reestablishing endemic trees or other appropriate native vegetation; restoration of natural bottom characteristics; removal of unsuitable material from areas affected by human activities; and replacement of suitable gravel or substrate to stream areas for spawning.

(C) *Upland habitat restoration.* This may include measures to control erosion, stabilize roads, upgrade culverts or remove dikes or levees to allow for fish passage, and the management of watersheds.

(D) *Water quality.* This includes use of best land management practices for ensuring compliance with water quality standards at state and Federal levels, improved treatment of sewage, and proper disposal of waste materials .

(E) *Watershed analysis and subsequent watershed planning.* This should be encouraged at the local and state levels. This effort should minimize depletion/diversion of freshwater flows into rivers and estuaries, destruction/degradation of wetlands, and restoration of native species, and should consider climate changes.

(F) *Habitat creation.* Under appropriate conditions, habitat creation may be considered as a means of replacing lost EFH. However, habitat creation at the expense of other naturally functioning systems must be justified (e.g., marsh creation with dredge material placed in shallow water habitat).

(4) *Fishing activities that may adversely affect EFH.*—(i) Adverse effects from fishing may include physical disturbance of the substrate, and loss of and 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 gear types used in waters described as EFH. 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 a substantial adverse effect on EFH, based on the assessment conducted pursuant to paragraph (a)(4)(ii).

(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 the marine ecosystem, including the fishery; the nature and extent of the adverse effect on EFH; and whether the benefit to the EFH achieved by minimizing the adverse effect justifies the cost to the fishery.

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

(i) *Fishing gear restrictions.* These options may include, but are not limited to: limit seasonal and areal uses of trawl gear and bottom longlines; restrict net mesh sizes, traps, and entanglement gear to allow escapement of juveniles and non-target species; reduce fish and shellfish traps set near coral reefs and other hard bottoms; limit seasonal and areal uses of dredge gear in sensitive habitats; prohibit use of explosives and chemicals; restrict diving activities that have potential adverse effects; prohibit anchoring of fishing vessels in coral reef areas and other sensitive areas; and prohibit 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 gear types during spawning, migration, foraging and nursery activities; and designating zones to limit effects of fishing practices on certain vulnerable or rare areas/species/life history stages.

(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.

(6) *Prey species.* Loss of prey is an adverse effect on a managed species and its EFH; therefore, FMPs should identify the major prey species for the species in the FMU and generally describe the location of prey species' habitat and the threats to that habitat. Adverse effects on prey species may result from fishing and non-fishing activities.

(7) *Identification of vulnerable habitat.* FMPs should identify vulnerable EFH. In determining whether a type of EFH is vulnerable, Councils should consider:

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

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

(iii) The rarity of the habitat type.

(8) *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; or indirect adverse effects such as sea level rise, global warming and climate shifts; and non-gear 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 gear on EFH should be included in this section of the FMP. If an adverse effect is identified and determined to be an impediment to reaching target long-term production levels, then the research needed to quantify and mitigate that effect should be identified in this section.

(9) *Review and revision of EFH components of FMPs.* Each Council and NMFS are expected to periodically review the EFH components of FMPs. 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. Such a review of information should be conducted as recommended by the Secretary, but at least once every five years.

(b) *Optional components.* An FMP may include a description and identification of, and contain management measures to protect, the habitat of species under the authority of the Council, but not contained in the FMU. However, such habitat may not be considered EFH.

(c) *Development of EFH recommendations.* After reviewing the best available scientific information, and in cooperation 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. 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 written recommendation and comments to the Council(s).

§ 600.815 Coordination and consultation on actions that may adversely affect EFH.

(a) *General*—(1) *Scope.* One of the greatest long-term threats to the viability of the Nation's fisheries is the decline in the quantity and quality of marine, estuarine, and other riparian habitats. These procedures address the coordination and consultation requirements of sections 305(b)(1)(D) and 305(b)(2–4) of the Magnuson-Stevens Act. The consultation requirements of the Magnuson-Stevens Act provide that: Federal agencies must consult with the Secretary on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH; and the Secretary and the Councils provide recommendations to conserve EFH to Federal or state agencies. EFH conservation recommendations are measures recommended by the Councils or NMFS to a Federal or state agency to conserve 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. The coordination section requires the Secretary to coordinate with, and provide information to, other Federal agencies regarding EFH. These procedures for coordination and consultation allow all parties involved to understand and implement the consultation requirements of the Magnuson-Stevens Act.

(2) *Coordination with other environmental reviews.* Consultation and coordination under sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act may be consolidated, where appropriate, with interagency coordination procedures required by other statutes, such as the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the

Clean Water Act, Endangered Species Act, and the Federal Power Act, to reduce duplication and improve efficiency. For example, a Federal agency preparing an environmental impact statement (EIS) need not duplicate sections of that document in a separate EFH assessment, provided the EIS specifically and fully evaluates the effects of the proposed action on EFH, notes that it is intended to function as an EFH assessment, is provided to NMFS for review, and meets the other requirements for an EFH assessment contained in this section. NMFS comments on these documents will also function as its response required under section 305(b)(4) of the Magnuson-Stevens Act.

(3) *Designation of Lead Agency.* If more than one Federal or state agency is involved in an action (e.g., authorization is needed from more than one agency), 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.

(4) *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. Federal and state agencies empowered to authorize, fund, or undertake actions that could adversely affect EFH should contact NMFS and the Councils to become familiar with the designated EFH, and potential threats to EFH, as well as opportunities to promote the conservation and enhancement of such habitat.

(b) *Council comments and recommendations to Federal and state agencies*—(1) *Establishment of procedures.* Each Council should establish procedures for reviewing activities, or proposed activities, authorized, funded, or undertaken by state or Federal agencies that may affect the habitat, including EFH, of a species under its authority. Each Council may identify activities of concern by: directing Council staff to track proposed actions; recommending that the Council's habitat committee identify activities of concern; entering into an agreement with NMFS to have the appropriate Regional Director notify the Council of activities that may adversely impact EFH; or by similar procedures. Federal and state actions often follow specific timetables which may not coincide with Council meetings. Councils should consider establishing abbreviated procedures for the development of Council recommendations.

(2) *Early involvement.* Councils should provide comments and recommendations on proposed state and Federal activities of interest as early as practicable in project planning to ensure thorough consideration of Council concerns by the action agency.

(3) *Coordination with NMFS.* The Secretary will develop agreements with each Council to facilitate sharing information on actions that may adversely affect EFH and in coordinating Council and NMFS responses to those actions.

(4) *Anadromous fishery resources.* For the purposes of the consultation 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 where some life stage inhabits waters under the Council's authority.

(c) *Federal agency consultation*—(1) *Interagency coordination.* Both Federal and state agencies are encouraged to coordinate their actions with NMFS to facilitate the early identification of potential adverse effects on EFH. This will allow consideration of measures to conserve and enhance EFH early in the project design. The consultation requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act differ for Federal and state agencies. Only Federal agencies have a mandatory statutory requirement to consult with NMFS regarding actions that may adversely affect EFH, pursuant to section 305(b)(2) of the Magnuson-Stevens Act. NMFS is required under section 305(b)(4) to provide EFH recommendations regarding both state and Federal agency actions that could adversely affect EFH (see § 600.810(a)(3) for further guidance on actions that could adversely affect EFH). Both Federal and state agencies are encouraged to develop agreements (or modify existing agreements) with NMFS to meet the consultation requirements in a manner to increase efficiency and to fully meet the requirements of the EFH provisions.

(2) *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.

(3) *General Concurrence*—(i) *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 to result in minimal adverse effects individually and cumulatively. General Concurrences may be national or regional in scope.

(ii) *Criteria.* (A) 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:

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

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

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

(B) 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 (c)(3)(ii)(A) of this section. For example, NMFS may provide General Concurrence for additional actions contingent upon project size limitations, seasonal restrictions, or other conditions.

(iii) *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 (c)(3)(ii) of this section, NMFS, in consultation with the 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 determines that individual actions that fall within the General Concurrence would adversely affect EFH, NMFS will notify the Federal agency that abbreviated or expanded consultation is 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.

(iv) *Notification and further consultation.* NMFS may request notification for activities covered under a General Concurrence if NMFS concludes there are circumstances under which such activities 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 activities covered under the General Concurrence. NMFS may require further consultation for these activities on an individual action. Each General Concurrence should establish specific procedures for further consultation.

(v) *Public review.* Prior to providing a 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.

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

(4) *EFH Assessments*—(i) *Preparation requirement.* Federal agencies (or designated non-Federal representatives) must complete an EFH assessment for any action that may adversely affect EFH, except for those activities covered by a General Concurrence. Where appropriate, Federal agencies may combine requirements for environmental documents such as Endangered Species Act Biological Assessments pursuant to 50 CFR part 402 or National Environmental Policy Act documents and public notices pursuant to 40 CFR part 1500, with their EFH Assessment. This document must include all of the information required in paragraph (c)(4)(ii) of this section and the requirements for other applicable environmental documents to be considered a complete assessment.

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

(A) A description of the proposed action.

(B) An analysis of the effects, including cumulative effects, of the proposed action on EFH and the managed and associated species, including their life history stages.

(C) The Federal agency's conclusions regarding the effects of the action on EFH.

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

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

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

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

(D) An analysis of alternatives to the proposed action, including alternatives that could avoid or minimize adverse effects on EFH.

(E) Proposed mitigation.

(F) Other relevant information.

(iv) *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.

(5) *Abbreviated consultation procedures*—(i) *Purpose.* Abbreviated consultation allows NMFS to quickly determine whether, and to what degree, a Federal agency action may adversely affect EFH. The abbreviated consultation process is appropriate for Federal actions that would adversely affect EFH when, in NMFS' judgment, the adverse effect(s) of such actions could be alleviated through minor modifications to the proposed action.

(ii) *Notification by agency.* The Federal agency must notify NMFS and the appropriate Council 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 must normally 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.

(iii) *Submittal of EFH Assessment.* The Federal agency must submit a completed EFH assessment to NMFS for review in accordance with paragraph (c)(4) of this section. If either the Federal agency or NMFS believes expanded consultation will be necessary, the Federal agency must initiate expanded consultation concurrently with submission of the EFH Assessment. Federal agencies will not have fulfilled their consultation requirement under paragraph (a)(1) of this section until timely notification and submittal of a complete EFH Assessment.

(iv) *NMFS response.* NMFS must respond in writing as to whether it concurs with the findings of the assessment. NMFS' response shall indicate whether expanded consultation is required. If additional consultation is not necessary, NMFS' response must include any necessary EFH conservation recommendations to be used by the Federal action agency. NMFS will send a copy of its response to the appropriate Council.

(v) *Timing.* The Federal action agency must submit its complete EFH Assessment to NMFS as soon as practicable, but at least 60 days prior to a final decision on the action, and NMFS must respond in writing within 30 days. If notification and the EFH Assessment are combined with other environmental reviews required by statute, then the statutory deadline for those reviews apply to the submittal and response. If NMFS and the Federal action agencies agree, a compressed schedule will be used in cases where regulatory approvals cannot accommodate 30 days for consultation, or to conduct consultation earlier in the planning cycle for proposed actions with lengthy approval processes.

(6) *Expanded consultation procedures*—(i) *Purpose.* Expanded consultation is appropriate for Federal actions that would result in substantial adverse effects to EFH and/or require more detailed analysis to enable NMFS to develop EFH conservation recommendations.

(ii) *Initiation.* Expanded consultation begins when NMFS receives a written request from a Federal action agency to initiate expanded consultation. The Federal action agency's written request must include a completed EFH Assessment in accordance with paragraph (c)(4) of this section. Because expanded consultation is required for activities that may potentially have substantial adverse impacts on EFH, Federal action agencies are encouraged to provide the additional information identified under paragraph (c)(4)(iii) 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.

(iii) *NMFS response.* NMFS will:

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

(B) Conduct a site visit, if appropriate, to assess the quality of the habitat and to clarify the impacts of the Federal agency action.

(C) Evaluate the effects of the action on EFH, including cumulative effects.

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

(E) Formulate EFH conservation recommendations and provide the recommendations to the Federal action agency and the appropriate Council.

(iv) *Timing.* The Federal action agency must submit its complete EFH Assessment to NMFS as soon as practicable, but at least 120 days prior to a final decision on the action, and NMFS must conclude expanded consultation within 90 days of submittal of a complete Assessment unless extended by NMFS with notification to the Federal action agency. If notification and the EFH Assessment are combined with other statutorily required environmental reviews, then the statutory deadlines for those reviews apply to the submittal and response. NMFS and Federal action agencies may agree to use a compressed schedule in cases where regulatory approvals cannot accommodate a 60 day consultation period.

(v) *Best scientific information.* The Federal action agency must provide NMFS with the best scientific information available, or reasonably accessible during the consultation, regarding the effects of the proposed action on EFH.

(vi) *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 its expanded consultation. If NMFS and the Federal action agency agree to an extension, the Federal action agency must 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 data available to NMFS.

(7) *Responsibilities of Federal action agency following receipt of EFH conservation recommendations*—(i) *Federal action agency response.* Within 30 days after receiving an EFH conservation recommendation (or at least 10 days prior to final approval of the action, if a decision by the Federal agency is required in less than 30 days), the Federal action agency must provide a detailed response in writing to NMFS and the appropriate Council. 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 the recommendations of NMFS, 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.

(ii) *Dispute resolution.* After receiving a Federal action agency response that is inconsistent with the recommendations of NMFS, the Assistant Administrator 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. Memoranda of agreement with Federal action agencies will be sought to further define such dispute resolution processes.

(8) *Supplemental consultation.* A Federal action agency must resume consultation with NMFS following either abbreviated or expanded consultation if the agency substantially revises its plans for the action in a manner that may adversely affect EFH or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations. Additionally, where Federal oversight, involvement, or control over the action has been retained or is authorized by law, the Federal action agency must resume consultation if new EFH is designated that may be adversely affected by the agency's exercise of its authority.

(d) *NMFS recommendations to state agencies*—(1) *Establishment of Procedures.* Each Region should establish procedures for identifying actions or proposed actions authorized, funded, or undertaken by state agencies that may adversely affect EFH, and for identifying the most appropriate method for providing EFH conservation recommendations to the state agency.

(2) *Coordination with Federal consultation procedures.* When an activity that may 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 paragraph (c) of this section.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 970415091–7091–01; I.D. 033197D]

RIN 0648–AJ88

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper Grouper Fishery Off the Southern Atlantic States; Black Sea Bass Pot Fishery; Control Date

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

ACTION: Advance notice of proposed rulemaking; consideration of a control date.

SUMMARY: This notice announces that the South Atlantic Fishery Management Council (Council) is considering whether there is a need to impose additional management measures limiting entry into the commercial pot fishery for black sea bass in the exclusive economic zone (EEZ) off the southern Atlantic states, and, if there is a need, what management measures should be imposed. If the Council determines that there is a need to impose additional management measures, it may initiate a rulemaking to do so. Possible measures include the establishment of a limited entry program to control participation or effort in the commercial pot fishery for black sea bass. If a limited entry program is established, the Council is considering [*insert date of publication in the Federal Register*], as a possible control date. Consideration of a control date is intended to discourage new entry into the fishery based on economic speculation during the Council's deliberation on the issues.

DATES: Comments must be submitted by May 23, 1997.

ADDRESSES: Comments should be directed to the South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407–4699; Fax: 803–769–4520.

FOR FURTHER INFORMATION CONTACT: Peter Eldridge, 813–570–5305.

SUPPLEMENTARY INFORMATION: The black sea bass fishery in the EEZ off the southern Atlantic states is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the Council and is implemented through regulations at 50

C-9

Essential Habitat for Managed Species or Species Complexes

Species OR Species Complex (provide scientific and common names of each species in the complex; if most or all of the information provided on this form pertains to one species in the complex, identify it)

Atka mackerel *Pleurogrammus monopterygius*

Management Plan and Area(s) Groundfish, BSAI and GOA

Life History and General Distribution Distributed from the Gulf of Alaska to the Kamchatka Peninsula, most abundant along the Aleutians. Adult Atka mackerel occur in large localized aggregations usually at depths less than 200 m and generally over rough, rocky and uneven bottom near areas where tidal currents are swift. Adults are pelagic during much of the year, but migrate annually to moderately shallow waters where they become demersal during spawning. Spawning peaks in June through September, but may occur intermittently throughout the year. Atka mackere deposit eggs in nests built and guarded by males on rocky substrates or on kelp in shallow water. Eggs hatch in 40-45 days, releasing planktonic larvae which have been found up to 800 km from shore. Little is known of the distribution of young Atka mackerel prior to their appearance in trawl surveys and the fishery at about age 2-3 years. r-traits: young age at maturity (approximately 50% are mature at age 3), fast growth rates, high natural mortality (M=0.3) and young average and maximum ages (about 5 and 14 years, respectively). K-selected traits low fecundity (only about 30,000 eggs/female/year, large egg diameters (1-2 mm) and male nest-guarding behavior).

Fishery (e.g., gear types, age at 50% recruitment, when/where conducted, bycatch) Bottom trawls, some pelagic trawling, recruit at about age 3, conducted in the Aleutian Islands and western GOA at depths between about 70-225 m, in trawlable areas on rocky, uneven bottom, along edges, and in lee of submerged hills during periods of high current. Currently, the fishery occurs on reefs west of Kiska Island, south and west of Amchitka Island, in Tanaga Pass and near the Delarof Islands, and south of Seguam and Umnak Islands. Historically fishery occurred east into the GOA as far as Kodiak Island (through the mid-1980s), but is no longer there. Fishery used to be entirely during summer, during spawning season; now occurs throughout the year. Very "clean" fishery; bycatch of other species is minimal.

Relevant Trophic Information Important food for Steller sea lions in the Aleutian Islands, particularly during summer, and for other marine mammals (minke whales, Dall's porpoise and northern fur seal). Juveniles eaten by thick billed murres and tufted puffins. Main groundfish predators are Pacific halibut, arrowtooth flounder, and Pacific cod.

Describe any potential gear impacts on the habitats of this or other species

Bottom trawls could disturb nesting areas and epibenthos on rocks (e.g. coral)

What is the approximate upper size limit of juvenile fish (in cm)? 35 cm

Provide source (agency, name and phone number, or literature reference) for any possible additional distribution data (do not include AFSC groundfish surveys or fishery observer data)

Larvae: NMFS, Alaska Fishery Science Center, FOCI program, Ric Brodeur 206-526-4318

Juveniles: NMFS, Alaska Fishery Science Center, NMML, Richard Merrick 206-526-6173

Habitat and Biological Associations (if known) Narrative

Egg/Spawning: Eggs deposited in nests built and guarded by males on rocky substrates or on kelp in shallow water.

Larvae/Juveniles: Planktonic larvae have been found up to 800 km from shore, but little is known of the distribution of Atka mackerel until they are about 2 years old and appear in fishery and surveys.

Adults: Adults occur in localized aggregations usually at depths less than 200 m and generally over rough, rocky and uneven bottom near areas where tidal currents are swift. Adults are semi-demersal/pelagic during much of the year, but migrate annually to moderately shallow waters where the males become demersal during spawning; females move between nesting and offshore feeding areas.

Literature (provide references for information provided)

Byrd, G. V., J. C. Williams, and R. Walder. 1992. Status and biology of the tufted puffin in the Aleutian Islands, Alaska, after a ban on salmon driftnets. U. S. Fish and Wildlife Service, Alaska Maritime National Wildlife Refuge, Aleutian Islands Unit, PSC 486, Box 5251, FPO AP 96506-5251, Adak, Alaska.

Fritz, L. W. 1993. Trawl locations of walleye pollock and Atka mackerel fisheries in the Bering Sea, Aleutian Islands, and Gulf of Alaska from 1977-1992. AFSC Processed Report 93-08, NMFS, 7600 Sand Point Way, NE, Seattle, WA 98115. 162 pp.

Gorbunova, N.N. 1962. Razmnozhenie i razvite ryb semeistva terpugovykh (Hexagrammidae) (Spawning and development of greenlings (family Hexagrammidae)). Tr. Inst. Okeanol., Akad. Nauk SSSR 59:118-182. In Russian. (Trans. by Isr. Program Sci. Trans., 1970, p. 121-185 in T.S. Rass (editor), Greenlings: taxonomy, biology, interoceanic transplantation; available from the U.S. Dep. Commer., Natl. Tech. Inf. Serv., Springfield, VA., as TT 69-55097).

Kajimura, H. 1984. Opportunistic feeding of the northern fur seal Callorhinus ursinus, in the eastern north Pacific Ocean and eastern Bering Sea. NOAA Tech. Rept. NMFS SSRF-779. USDOC, NOAA, NMFS, 49 pp.

Lee, J.U. 1985. Studies on the fishery biology of the Atka mackerel *Pleurogrammus monopterygius* (Pallas) in

Use the following abbreviations: U=Unknown NA=not applicable

EFH Level:

0: No systematic sampling has been conducted for this species and life stage; may have been caught opportunistically in small numbers during other surveys.

1: Presence/absence distribution data are available for some or all portions of the geographic range.

2: Habitat-related densities are available. Density data should reflect habitat utilization, and the degree that a habitat is utilized is assumed to be indicative of habitat value.

3: Habitat-related growth, reproduction, or survival rates are available. 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: Habitat-related production rates are available. Essential habitats are those necessary to maintain fish production consistent with a sustainable fishery and a healthy ecosystem.

Location where found (in waters of these depths) CHOOSE ALL THAT APPLY:

BCH=beach (intertidal)
ICS=inner continental shelf (1-50 m)
MCS=middle continental shelf (50-100 m)
OCS=outer continental shelf (100-200 m)
USP=upper slope (200-1000 m)
LSP=lower slope (1000-3000 m)
BSN=basin (>3000 m)
BAY=nearshore bays, give depth if appropriate (e.g., fjords)
IP=island passes (areas of high current), give depth if appropriate

Where found in water column CHOOSE ONE:

D=demersal (found on bottom)
SD/SP=semi-demersal or semi-pelagic if slightly greater or less than 50% on or off bottom
P=pelagic (found off bottom, not necessarily associated with a particular bottom type)
N=neustonic (found near surface)

Bottom Types CHOOSE ALL THAT APPLY:

M=mud	S=sand	R=rock
SM=sandy mud	CB=cobble	C=coral
MS=muddy sand	G=gravel	K=kelp

SAV=subaquatic vegetation (e.g. eelgrass, not kelp)

Oceanographic Features CHOOSE ALL THAT APPLY:

UP=upwelling G=gyres F=fronts CL=thermo- or pycnocline E=edges

Other:

1) List any known physico-chemical tolerances (e.g., temperature, salinity, dissolved oxygen) and any known environmental toxicities
2) List any known biological associations (e.g., pollock larvae with jellyfish, crabs juveniles with epibenthos)

Distribution Maps

Please draw the distributions of eggs (spawning distribution of adults), larvae, juveniles and adults (non-spawning distribution) of the species on the blank charts provided and label appropriately. If possible, please outline the area which you think encircles about 95% of the life stage, and further define the area where about 50% of them reside for an average year. I realize this is really a stretch for many species but work with me on this. Use the charts of adult and juvenile distributions provided for reference (which came from one or both of the publications listed below), as well as the NOAA NOS charts in the NMML library (which exist for the species listed in the table below). If there are one or more representative species of a complex, please identify the species and complex and draw separate distributions by life stage. **This doesn't mean that you are drawing essential fish habitat.**

ADULT AND JUVENILE DISTRIBUTIONS (ATTACHED)

Allen, M. J., and G. B. Smith. 1988. Atlas and zoogeography of common fishes in the Bering Sea and northeastern Pacific. U.S. Dep. Commer., NOAA Tech. Rept. NMFS 66, 151 p.

Wolotira, R. J., Jr., T. M. Sample, S. F. Noel, and C. R. Iten. 1993. Geographic and bathymetric distributions for many commercially important fishes and shellfishes off the west coast of North America, based on research survey and commercial catch data, 1912-84. U.S. Dep. Commer., NOAA Tech. Memo. NMFS-AFSC-6, 184 p.

ADDITIONAL ADULT, LARVAL, JUVENILE, AND SPAWNING DISTRIBUTIONS

Distribution maps and written descriptions for the following listed species are contained in data atlases (in large format) assembled by NOAA-NOS. These are available in the NMML library for reference and can be found on top of the reprint file cabinets. The West Coast of North America Atlas includes the Bering Sea and Aleutian Islands, but the Bering, Chukchi, and Beaufort Sea Atlas does not include the Gulf of Alaska.

	Coastal and Ocean Zones, Strategic Assessments: Data Atlas	
Species	West Coast of North America	Bering, Chukchi, and Beaufort Seas
Pollock	X	X
Pacific cod	X	
Pacific Ocean Perch	X	
Sablefish	X	
Atka mackerel	X	
Yellowfin Sole		X
Alaska plaice		X
Rock sole		X
Greenland turbot		X
Flathead sole	X	X
Arrowtooth flounder	X	X
Starry flounder	X	X
English sole	X	
Dover sole	X	
Salmon (all)	X	X
Capelin, Eulachon, Smelt		X
Red, Blue, Golden King Crab	X	X
Bairdi Tanner crab	X	X
Opilio Tanner crab		X
Red squid	X	X

the north Pacific Ocean. Bull. Fish. Res. Dev. Agency, 34, pp.65-125.

Levada, T.P. 1979. Comparative morphological study of Atka mackerel. Pac. Sci. Res. Inst. Fish. Oceanogr. (TINRO), Vladivostok, U.S.S.R., Unpublished manuscript.

Levada, T.P. 1979. Some data on biology and catch of Atka mackerel. Pac. Sci. Res. Inst. Fish. Oceanogr. (TINRO), Vladivostok, U.S.S.R., Unpublished manuscript.

Lowe, S.A. and L.W. Fritz. 1996. Atka mackerel. *In* Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of the Bering Sea/Aleutian Islands Regions as Projected for 1997. North Pacific Fisheries Management Council, P.O. Box 103136, Anchorage, AK.

Lowe, S.A. and L.W. Fritz. 1996. Atka mackerel. *In* Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of the Gulf of Alaska as Projected for 1997. North Pacific Fisheries Management Council, P.O. Box 103136, Anchorage, AK.

McDermott, S.F. and S.A. Lowe. 1997. The reproductive cycle and sexual maturity of Atka mackerel (*Pleurogrammus monopterygius*) in Alaskan waters. Fishery Bulletin 95: 321-333.

Morris, B. F. 1981. An assessment of the living marine resources of the central Bering Sea and potential resource use conflicts between commercial fisheries and Petroleum development in the Navarin Basin, Proposed sale No. 83. Anchorage, AK: USDOC, NOAA, NMFS, Environmental Assessment Division.

Musienko, L. N. 1970. Razmnozheine i razvitie ryb Beringova morya (Reproduction and development of Bering Sea fishes). Tr. Vses. Nauchno-issled. Inst. Morsk. Rybn. Koz. Okeanogr. 70: 161-224 In P.A. Moiseev (ed.), Soviet fisheries investigations in the northeastern Pacific, Pt. 5, Avail. Natl. Tech. Info. Serv., Springfield, VA as TT 74-50127.

NMFS. 1995. Status review of the Unites States Steller sea lion (*Eumetopias jubatus*) population. National Marine Mammal Laboratory, Alaska Fishery Science Center, National Marine Fisheries Service, 7600 Sand Point Way, NE, Seattle, WA 98115.

Orlov, A. M. 1996. The role of mesopelagic fishes in feeding of Atka mackerel in areas of the North Kuril islands. Publ. Abstract in Role of forage fishes in marine ecosystems. Symposium held Nov 1996, AK Sea Grant, U. Alaska, Fairbanks

Yang, M-S. 1996. Trophic role of Atka mackerel in the Aleutian Islands. Publ. Abstract in Role of forage fishes in marine ecosystems. Symposium held Nov 1996, AK Sea Grant, U. Alaska, Fairbanks.

Zolotov, O.G. 1993. Notes on the reproductive biology of *Pleurogrammus monopterygius* in Kamchatkan waters. J. of Ichthy. 33(4), pp. 25-37.

Provide the following information for the species or representative species of a group; Use the abbreviations provided on the next page. If there are known seasonal (reproductive/spawning) or diurnal movements, label and discuss separately. For seasonal information, give months and reproductive stage description (e.g., Spawning: Jan-Mar)

SPECIES: Atka mackerel

Stage - EFH Level	Duration or Age	Diet/Prey	Season/Time	Location	Water Column	Bottom Type	Oceano-graphic Features	Other
Eggs 0	40-45 d	NA	summer	IP,ICS	D	GR,R,K	U	develop 3-20°C optimum 9-13°C
Larvae 0	up to 6 mos	U copepods?	fall-winter	U	U N,P?	U	U	2-12°C optimum 5-7°C
Juveniles 0	1/2-2 yrs of age	U copepods & euphausiids?	all year	U	U	U	U	3-5°C
Adults 1 or 2 not all habitats have been sampled	3+ yrs of age	copepods euphausiids meso-pelagic fish (myctophids)	spawning (May-Oct) non-spawning (Nov-Apr) tidal/diurnal, year-round?	ICS and MCS, IP MCS and OCS, IP ICS,MCS, OCS,IP	D (males) SD females SD/D all sexes D when currents high/day SD slack tides/night	GR,R,K	F,E	3-5°C all stages >17 ppt only

LATE COMMENT C-9

TRUSTEES FOR ALASKA

A NonProfit, Public Interest, Environmental Law Firm

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501-2101 (907) 276-4244 (907) 276-7110 Fax

June 12, 1997

Rick Lauber
Chairman
North Pacific Fishery Management Council
605 W. 4th Ave., #306
Anchorage, Ak. 99501

Re: Magnuson-Stevens Act bycatch minimization mandates

Dear Chairman Lauber,

Recent Council actions suggest that it will not meet Congress' time sensitive bycatch reduction mandates in the Sustainable Fisheries Act of 1996. Trustees for Alaska writes with the hope of shedding some light on the mandatory nature of the legal requirements for further bycatch reduction by the Council and to urge the Council expeditiously to comply with such mandates.

As an initial matter, Trustees for Alaska is a non-profit, public interest, environmental law firm working for over 21 years on marine and other conservation issues in Alaska. Trustees has considerable experience advocating in policy and legal forums for the sustainable use of marine resources.

As the Council is well aware, there currently exists huge levels of bycatch of our marine resources in federally-managed fisheries off Alaska's shores. In 1994 alone -- the last year for which publicly available data exist -- over 750 million pounds of groundfish were tossed overboard, either dead or dying. In addition, tremendous amounts of halibut (> 17 million lbs.), crab (> 15.5 million individual crab), herring (almost 4 million lbs.) and salmon (almost 200,000 fish) were indiscriminately harvested and wasted in federally-managed groundfish fisheries. In 1992 and 1993 these numbers were equally astonishing in their vastness.[1]

[1] The source of these numbers are the executive summaries of the yearly reports entitled: Discards In The Groundfish Fisheries Of The Bering Sea/Aleutian Islands And The Gulf Of Alaska, prepared by Pacific Associates for the State of Alaska Department of Fish and Game.

The Law

After many years of escalating bycatch amounts, Congress could no longer ignore the issue and included within the Sustainable Fisheries Act specific directives to first, avoid bycatch, and second, to the extent it could not be wholly avoided, to minimize the mortality of the bycatch so that it may retain its link in the marine ecosystem. Given the complexity of fisheries management as it has evolved over the years, Congress expressed the bycatch reduction directives in a refreshingly straightforward and common sense manner.

First, Congress established a new policy of fisheries management which "encourages development of practical measures that minimize bycatch and avoid unnecessary waste of fish . . . ." § 2(c)(3), 16 U.S.C. § 1801(c)(3). In applying this policy, Congress included within the National Standards for Fishery Management Plans, with which all FMPs must be consistent, the specific directive that

> [c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

§ 301(a)(9), 16 U.S.C. § 1851(a)(9).

Continuing its bycatch reduction journey from the general to the more specific, Congress then provided that

> [a]ny fishery management plan which is prepared by any Council . . . with respect to any fishery, shall . . . include conservation and management measures that, to the extent practicable and in the following priority -- (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.

§ 303(a)(11), 16 U.S.C. § 1853(a)(11). To ensure that its mandates were addressed by Councils in a timely manner, Congress also provided that "[n]ot later than 24 months after the date of the enactment of" the Sustainable Fisheries Act, each Council must prepare FMP amendments to address § 303(a)(11). § 303 note, 16 U.S.C. § 1853 note.

Finally, in completing its journey, Congress focused specifically on a region of the country where bycatch had reached alarming levels: the North Pacific. Adding to the bycatch reduction mandates applicable to the rest of the fisheries of the United States, Congress mandated that the North Pacific Council implement

> conservation and management measures to lower, on an annual basis for a period of not less than four years, the total amount of economic discards in [North Pacific fisheries].

§ 313(f), 16 U.S.C. § 1862(f). With this subsection, Congress "emphasize[d] the reduction of economic discards, or bycatch which fishermen choose not to retain," with the goal of "actual significant reduction in the total amount of economic discards in North Pacific Fisheries." S. Rep. No. 104-276, 104th Cong., 2d Sess., 33 (1996). Congress specifically tied the substance and timing of the implementation of these measures to § 303(a)(11), thus doing what it could to ensure expeditious reduction in bycatch. § 313(f), 16 U.S.C. § 1862(f).

To achieve perfect clarity in the application of these directives to specific fisheries, Congress defined the key terms relevant to these directives. Congress expansively defined "bycatch" to mean "fish which are harvested in a fishery, but which are not sold or kept for personal use . . . includ[ing] economic discards and regulatory discards." § 3(2), 16 U.S.C. § 1802(2). Recognizing the importance of all marine life to the health and diversity of the marine ecosystem, Congress broadly defined the term "fish," to include "finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds." § 3(12), 16 U.S.C. 1802(12).[2] Congress defined "economic discards as those "fish which are the target of a fishery, but which are not retained because they are of undesirable size, sex, or quality, or for other economic reasons." § 3(9), 16 U.S.C. § 1802(9).

Simply put, Congress' directive to the North Pacific Fishery Management Council is that it implement, by October 11, 1998 (24 months after the enactment of the Sustainable Fisheries Act, § 303 note, 16 U.S.C. § 1853 note), conservation and management measures which, in the first instance, minimize the catch of fish harvested in a fishery but which are not kept. § 303(11), 16 U.S.C. § 1853(11); S. Rep. No. 104-276, 104th Cong., 2d Sess., 14 (1996). Further, fish that are bycatch yet cannot be avoided, should, to the extent practicable, be returned alive to the sea. *Id.* Finally, the North Pacific Council must reduce, "on an annual basis for a period of not less than four years," the amount of targeted fish which are caught and which are nevertheless discarded due to undesirable characteristics. § 313(f), 16 U.S.C. § 1862(f). The law could not be more clear.

The Problem

Council staff, however, appears to believe either that Congress' bycatch minimization mandates do not apply to the North Pacific or that they are satisfied by pre-Sustainable Fisheries Act FMP amendments. Trustees bases this statement on a December 1996 Staff Tasking memorandum from North Pacific Fishery Management Council executive director Clarence Pautzke to the Council and the Council's Science and Statistical Committee and Advisory Panel (attached).

Alarmingly, director Pautzke does not inform the Council in his memo on Magnuson-Stevens Act tasking of Congress' § 303(a)(11) directive. Consequently, the Council is not addressing how bycatch in North Pacific fisheries can be, in the first instance, avoided, and in the second instance, and to the extent practicable, returned alive to the sea.

To the extent that Council staff somehow believe that existing conservation and management measures satisfy § 303(a) legal mandates, staff is mistaken. Congress recognized that existing measures were not sufficient to address the bycatch problem and

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[2] As legal protections are already in existence which address the intentional or unintentional take of marine mammals and birds, Congress had no need to address in the Sustainable Fisheries Act the bycatch of such species. See e.g., Marine Mammal Protection Act, 16 U.S.C. §§ 1361 -- 1407; Migratory Bird Treaty Act, 16 U.S.C. §§ 703 -- 712.

therefore provided directives in the Sustainable Fisheries Act for Councils to implement *new* measures to lower bycatch from existing levels. § 303(a)(11), 16 U.S.C. § 1853(a)(11).). That this is so is reinforced by the Act's legislative history, where it is stated that "[r]eductions in the North Pacific of . . . bycatch . . . would be accomplished primarily through the *new* plan requirements in section 30[3](a) (sic.)"). S. Rep. No. 104-276, 104th Cong., 2d Sess., 33 (1996) (emphasis added).

Director Pautzke did state that the Council's improved retention/improved utilization programs "may address" the § 313(f) directive to reduce economic discards on an annual basis for a period of at least four years, although he considers this a "matter of interpretation." Pautzke memo at 3. Congress' directive, however, simply leaves no room for ambiguity, and the IR/IU programs simply do not satisfy it.

The IR/IU programs simply do not lower on an annual basis the total amount of economic discards occurring in the fisheries under Council jurisdiction. As an initial matter, the Council already has missed the first year to which this directive applied.

Additionally, while it is true that the first year of the IR/IU programs calls for 100% retention of pollock and cod, this only potentially satisfies the § 313(f) directive for two fisheries under the Council's jurisdiction. There is no further reduction in economic discards under these programs until year five, when flatfish retention requirements kick in.

As Congress made clear, moreover, compliance with the § 313(f) directive is tied to the § 303(a)(11) directive. *See* 16 U.S.C. § 1862(f). Section 303(a)(11), in turn, requires bycatch minimization for each fishery management plan prepared by the Council. 16 U.S.C. § 1853(a)(11). The IR/IU programs do not do this.

Furthermore, the fact that Congress explicitly tied compliance with the § 313(f) directive to implementation of § 303(a)(11) leads to further problems with Council staff's reliance on IR/IU to satisfy Congress' § 313(f) directive. As Congress stated in the Act's legislative history, the North Pacific Council is not precluded from "approving measures to require the full retention/full utilization of economic discards . . . *as long as such measures are consistent with the requirements of the Magnuson Act* as amended by" the Sustainable Fisheries Act. S. Rep. No. 104-276, 104th Cong., 2d Sess., 34 (1996) (emphasis added). Therefore, the Council has a duty to lower economic discards in the first instance through *avoiding catching the fish in the first place.* 16 U.S.C. § 1852(a)(11); *see also* S. Rep. No. 104-276, 104th Cong., 2d Sess., 14 (1996) ("The priority for reducing bycatch under the new standard would be to *minimize or avoid catching* bycatch species where possible.") (emphasis added).

Because the IR/IU programs have insufficient mechanisms to monitor the fate of those fish which, under the old rule, would have been discarded, the Council cannot rely on them to demonstrate avoidance. The IR/IU programs are not set up to reveal whether unwanted fish are being avoided, or simply retained for fish meal production. For this

reason as well, IR/IU does not satisfy the Council's duty to comply with Congress' § 313(f) directive.

With each passing month, the Council reduces its ability to implement these directives by the statutory deadline. Chairman Lauber, we urge you to take decisive action at the Kodiak Council meeting to establish a course of action for implementing the bycatch requirements. As the statute makes clear, this course of action must involve a comprehensive approach including a reduction of each category of bycatch and a sound method for measuring the effectiveness of the Council's action.

Thank you for your consideration of these comments. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Peter Van Tuyn
Litigation Director

cc: Senator Ted Stevens
NMFS-Ak

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director

DATE: December 10, 1996

SUBJECT: Staff Tasking

ESTIMATED TIME

3 HOURS

ACTION REQUIRED

(a) Review status of current tasking.
(b) Review Magnuson-Stevens Act tasking.
(c) Industry Implementation Team report and IFQ tasking
(d) Review groundfish proposals and task staff accordingly.

BACKGROUND

(a) Current tasking

Item D-4(a)(1) is an updated list of current Council actions including regulatory amendments, plan amendments, reports, and Committee meetings. Based on current Council direction, it looks like the majority of Council staff time between now and April will be devoted to: (1) development of IFQ program amendments initiated at this meeting; (2) finalization of the halibut charter management study, and further development of local-level management options; (3) further development on the issue of halibut subsistence fishery management; (4) completion of an analysis of limited processing allowances for catcher vessels (pending further Council direction); (5) coordination and assistance on observer program development; (6) coordination and assistance on Ecosystem Committee actions; and (7) follow through with Magnuson-Stevens Act amendments.

There are also a few other items which have previously been tasked by the Council, but have remained on the 'back burner' pending other priorities, or Magnuson Act direction. These include the Skipper Licensing Program, Vessel Bycatch Accounts (VBAs), and further work on a BSAI pollock IFQ program. Analysis of the Skipper Licensing Program would have to be completed by April, with final Council action in June, in order to be implemented in 1998, concurrent with the vessel licensing program. A primary hurdle for this analysis has been, and remains, a lack of accessible data tying individual skippers to associated vessels and landings over time. Gleaning this information from log books and individual fish tickets will be both time and labor intensive. One of the provisions of the Council's License Limitation Program was a skipper reporting system which, if implemented, could provide the kinds of information currently lacking.

Where the Council left off on VBAs was with the review of a draft discussion paper by Dr. Joe Terry, and the need to further address potential elements and options for such a program. The current Magnuson-Stevens Act language would also affect the design of a VBA program. Formal analyses of an IFQ program for the BSAI pollock fisheries would consume a majority of staff economists' time for several months. A critical question is

timing of further Council development of IFQs. The National Academy of Sciences must develop a draft IFQ policy report by January 1, 1998, and a final report by October 1, 1998. We cannot submit to the Secretary a new IFQ plan until October 1, 2000. Assuming it takes six to eight months to develop draft regulations after the Council makes a final decision, such decision could be scheduled for February 2000 and major development and analysis should occur in 1999, leaving 1997 and 1998 for other issues.

We just need to get direction from the Council on whether and how to proceed with these three issues, as well as the proposed limited processing allowance for catcher vessels (addressed under C-5), and a few additional items discussed below.

The Council previously requested more information on crab bycatch in the pot cod fisheries - a proposal is included in the package of groundfish proposals below (supported by the Council's Crab Plan Team) which recommends analyses of several measures to address bycatch of crab in the pot cod fisheries, including potential PSC caps, closed areas, gear modifications, and seasonal closures to protect molting crab.

Finally, the BSAI inshore/offshore pollock allocations, and CDQs for pollock, expire at the end of 1998 - analyses of a potential replacement program would need to begin around the middle of 1997.

Limited time will be available to work on new groundfish amendment proposals between now and April, but some could be completed for initial review in June, depending on the magnitude of analysis, on Magnuson Act tasking, and on other Council priorities. Further work on the GOA IR/IU package would be conducted primarily by NMFS staff, for initial review in April.

So, the items for which we need specific Council tasking guidance at this meeting are:

* Skipper Licensing program
* VBAs
* Crab bycatch in pot fisheries analyses/amendments
* Limited processing for catcher vessels

(b) Magnuson-Stevens Act tasking

As we look at the overall tasking picture, it will also be necessary to incorporate directives from the recent Magnuson Act reauthorization. Several different summaries are available regarding these directives, some of which are included in your notebooks. Item D-4(b)(1) is a summary compiled by Council staff; Item D-4(b)(2) is a letter from NMFS which specifically addresses the items for which the Council appears to be directly responsible; Item D-4(b)(3) is the actual language from the Sustainable Fisheries Act for those items tasked to the Council. These items are included for your reference - the major items for Council consideration are summarized below for purposes of the staff report:

1. Describe and identify essential fish habitat for the fisheries within 24 months, based on guidelines that the Secretary of Commerce must establish within six months - this item will likely involve Council staff assistance in the latter part of 1997 and early 1998. Cindy Hartman from NMFS is here to give the Council a brief report on this specific initiative.

2. Submit to SOC a North Pacific Loan Program by October 1, 1997 for small vessel fishermen to purchase IFQs. Establish fee programs for IFQ and CDQ holders (up to 3% of ex-vessel value), and submit to the Secretary, a program to have up to 25% of fees collected used to underwrite small vessel and entry level fishermen (underwrite the North Pacific Loan Program). Development of these fee programs will require considerable staff time in the first half of 1997.

3. Assist in the preparation of a comprehensive report on both the sablefish/halibut IFQ program and the CDQ programs in conjunction with the National Academy of Sciences, to be published for public review by January 1, 1998 and completed by October 1, 1998.. Includes Council consultation and conduct of public hearings in each Council region. This effort will likely require considerable assistance of Council staff in the latter half of 1997, and during early 1998.

4. By June 1, 1997, the Council shall submit conservation and management measures to ensure total catch measurement in each fishery under its jurisdiction. Such measures shall ensure the accurate enumeration, at a minimum, of target species, economic discards , and regulatory discards. By January 1, 1998, the Council needs to submit a plan for weighing fish if that is not included already, if such weighing is necessary to meet requirements for enumeration of the catch. The first part of this mandate appears to be largely satisfied by existing programs in the North Pacific (observer program and other reporting and monitoring requirements). Regarding the second part, the Council and NMFS have already initiated some weighing requirements, and future requirements are discretionary, policy decisions.

5. By October 1998, the Council shall submit bycatch provisions to create a standardized reporting methodology to assess the amount and type of bycatch in each fishery, and include conservation and management measures to minimize mortality of bycatch and overall bycatch. This provisions appears related to #4 above, and may already be addressed by existing Council/NMFS management and monitoring programs.

6. By October 1, 1998, the Council shall submit a report on the advisability of requiring full retention by fishing vessels and full utilization by U.S. fish processors of economic discards.

7. By January 1998, the North Pacific Council shall submit measures to reduce economic discards on an annual basis for a period of at least four years. The Council's proposed IR/IU programs may address this requirement, though they do not specifically include a four year, step-wise reduction. This will likely be a matter of interpretation.

8. By September 30, 1997, the Council shall develop a description of the institutional structures in Russia pertaining to stock assessment, management, and enforcement for fishery harvests in the Bering Sea, and recommendations for improving coordination between U.S. and Russia for managing and conserving Bering Sea fishery resources of mutual concern.

9. Review and amend FMPs (definitions and regulations, for example) for consistency with the new Act, and revise Council SOPPs to reflect requirements of the Act. This is primarily an administrative exercise requiring minimal overall staff time.

The following additional items are tasked to the SOC, but will likely require some degree of Council assistance:

1. Within two years submit a report on extent to which ecosystem management principles are being utilized by Councils.

2. Establish a central registry system for limited access permits within six months of passage of the bill. This could require considerable Council attention.

3. By October 1997, complete a study of the contribution of bycatch to charitable organizations by commercial fishermen.

A

4. Develop list of all fisheries and fishing gears used in fisheries for publication in FR.

5. Assist in preparation of vessel registration information management system (PR due by October 1997).

Item D-4(b)(4) is a letter from Rollie Schmitten to the Council emphasizing implementation of the new Magnuson Act amendments as the agency's top priority over the next two years, and urging the Council to make the same commitment. Item D-4(b)(5) summarizes current major items, both Magnuson Act amendments and other Council initiated amendments, and associated timelines over the next 18-24 months.

(c) Sablefish/halibut IFQ program amendments

Pursuant to the Council's newly adopted cycle for considering amendments to the IFQ program, we also need to review proposed amendments and determine which should proceed to analysis. The cycle calls for initial review in April, final action in June, and implementation in the following year. Any amendments forwarded at this meeting would be for implementation in 1998. The Council's IFQ Industry Implementation Team met in October and developed the report to the Council contained under Item D-4(c)(1). The Team is recommending development of seven of the proposed amendments to the program - these are highlighted in the report. Team Chair Jeff Stephan is available to address the Council on the specifics of these items.

Last September the Council discussed the issue of subsistence fishing for halibut, and the fact that such fishing is currently managed under sport fish regulations. The gist of that discussion was that we should probably be developing an explicit category for managing these fisheries, with attendant regulations for those fisheries such as allowable gears types, interactions with halibut CDQ fisheries, etc. The Council suggested the formation of a working group to be appointed by the Council Chairman. Council staff and agency staff have had a preliminary meeting on this issue (report is under B-1), and we are now in the position of rounding out the group suggested by the Council in December. Development of a subsistence category, and attendant regulations, will take staff time and coordination with affected fishermen, and other agencies, over the next several months. It is possible that we could have something in place for 1998.

Revisions to the Council's Area 4 catch sharing plan are also going to be required, though that should not be a big item in terms of staff time.

(d) Review new groundfish proposals and task staff

In September the Council took a preliminary look at the 43 proposals received during this past summer's groundfish amendment cycle (Plan Team summary is under Item D-4(d)(1)). The proposals covered a broad spectrum of issues and areas, though several of the proposals were specific to the GOA pollock and cod fisheries. The Council took no action, but requested that staff develop a more 'thematic' approach to evaluating the proposals. Item D-4(d)(2) attempts to organize the various proposals for Council consideration.

Item D-4(d)(3) contains letters received since our September Council meeting.

ARLC

C-9

THE TATITLEK CORPORATION
BOARD RESOLUTION 97-5

A RESOLUTION OF THE TATITLEK CORPORATION URGING THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL TO ACT NOW TO COMPLY WITH THE NEW MAGNUSON - STEVENS ACT REQUIREMENTS TO MINIMIZE BYCATCH

WHEREAS, over 750 million pounds of marine life was dumped into the Bering Sea and Gulf of Alaska in 1994, as well as over 17,000,000 million pounds of halibut and over 15,000,000 crabs; and

WHEREAS, declining populations of many marine mammals and sea birds, also dependent upon fish for food, calls into question the ecological health of our waters; and

WHEREAS, these resources are the economic and cultural lifeblood for the many Alaskans who depend on the sea for their livelihoods and subsistence; and

WHEREAS, this continued wanton waste undermines any long term management plan for sustained commercial, subsistence or recreational fisheries, and places Alaska's coastal communities at risk; and

WHEREAS, wanton waste occurring in the Federal waters of the Bering Sea and the Gulf of Alaska is of utmost concern culturally, economically, and ecologically; and

WHEREAS, the United States Congress overwhelmingly passed the Magnuson - Stevens Act with strong, new national mandates directing all regional Fishery Management Councils to minimize bycatch and waste; and

WHEREAS, the United States Congress included in this Act a special section to further strengthen and support this national mandate, and that this section was directed specifically to requiring that the North Pacific Council minimize bycatch; and

WHEREAS, the United States Congress passed this Act in full recognition of previous and pending bycatch management actions by the North Pacific Council with clear intent that this Council be required to take new action to minimize bycatch from existing levels;

THE TATITLEK CORPORATION
BOARD RESOLUTION 97-5

NOW, THEREFORE, LET IT BE RESOLVED by The Tatitlek Corporation, that the North Pacific Fishery Management Council take new action now to comply with the requirements of the Magnuson - Stevens act which explicitly mandates further action by the Council to minimize the level of bycatch and waste occurring in Federal waters off Alaska's coast.

DATED THIS 12 DAY OF June 1997, 1997

Calvin Totemoff
Chairman of the Board

ATTESTED TO:

Lloyd A. Allen
Secretary

AMCC

C-9

JOINT STATEMENT ON MINIMIZING BYCATCH

June 1997

The undersigned organizations join together to urge the North Pacific Fishery Management Council (the Council) to initiate new action to minimize bycatch. The Magnuson-Stevens Fishery Conservation and Management Act explicitly requires that the Council act, before October 11, 1998, to further minimize bycatch. Current management measures do not meet this new and higher standard.

In particular, we note that groundfish and prohibited species bycatch levels remain excessively high. In 1994 (the last year for which data are publicly available), the fishing industry in the North Pacific threw overboard over 751 million pounds of dead and dying groundfish, 17.2 million pounds of halibut, 16 million crabs, just under 4 million pounds of herring, and approximately 197,000 salmon. Excessively high bycatch levels represent biologically unsound fishing practices. High bycatch levels also present important economic and allocative dilemmas for our fishing industry and communities.

Congress recognized the serious nature of the bycatch problem by adding a new rigorous bycatch standard to the reauthorized law. Congress also added a requirement that the Council amend all fishery management plans to include new measures to minimize bycatch. These mandates are not subject to the Council's discretion. By law, new amendments are required to comply with the new and higher standard. This new and higher standard explicitly requires measures to avoid, rather than retain and use, all types of bycatch, including economic and regulatory discards.

Although in Alaska we have done better than other parts of the country in establishing some bycatch limits, Congress recognized that more needs to be done to minimize bycatch in our fisheries. Their commitment to this goal is reflected in their repeated mention of the scope of the bycatch problem in the North Pacific region, their mandates directed specifically to our region, and the deadlines they included in the law for quick, meaningful action.

We call on the Council to act swiftly to comply with Congress' new conservation mandate.

Dorothy Childers
Alaska Marine Conservation Council

~~Linda Behnken~~ JAMES SWIFT
Alaska Longline Fishermen's Association

Jude Hensler
Bering Sea Fishermen's Association

Dean Paddock
Bristol Bay Driftnetters Association

Bruce Schachtler
Kodiak Seiners Association

Bob Alverson
Fishing Vessel Owners Association

Arni Thomson
Alaska Crab Coalition

Robert Ward
Homer Charter Association

Robert Wurm
Kodiak Vessel Owners Association

Shari Gross
Halibut Association of North America

(over)

Dan Albrecht
Yukon River Drainage
Fisheries Assn.

James Nestic
City of Old Harbor

John R. Merculief
City of St. Paul

Richard Zacharof
Tribal Government of St. Paul

Native Village of Eyak

Savoonga Native Corporation

Alan Parks
Alaska Skippers and Crewmembers Assn

Fred Munson
Greenpeace

Native Village of Nanwalek

City of Savoonga

Tatitlek Corporation

Alexie Jimmie
United Villages, Inc. (Toksook Bay,
Tununak, Chefornak, Nightmute)

AM C-9

United Villages, Inc.
P.O. Box 37148
Toksook Bay, Alaska 99637
Ph. (907) 427-7827 Fax (907) 427-7915

RESOLUTION NO. 97-00-04

A RESOLUTION OF THE UNITED VILLAGES, INC. URGING THE NORTH PACIFIC MANAGEMENT COUNCIL TO ACT NOW TO COMPLY WITH THE NEW MAGNUSON-STEVENS ACT REQUIREMENTS TO MINIMIZE BYCATCH.

WHEREAS: Over 750 million pounds of marine life was dumped into the Bering Sea and Gulf of Alaska in 1994, as well as over 17 million pounds of halibut, over 15 million pounds of crabs, 4 million pounds of herring and 195,000 pounds of salmon, and;

WHEREAS: Declining populations of many marine mammals and seabirds, also dependent upon fish for food, calls into question the ecological health of our waters, and;

WHEREAS: These resources are the economic and cultural lifeblood for many Alaskans who depend on the sea for their livelihood and subsistence, and;

WHEREAS: This continued wanton waste undermines any long-term management plan for sustained commercial, subsistence or recreational fisheries, and places Alaska's coastal communities at risk, and;

WHEREAS: Wanton waste occurring in the Federal waters of the Bering Sea and Gulf of Alaska is of utmost concern culturally, economically and ecologically, and;

WHEREAS: The United States Congress overwhelmingly passed the Magnuson-Stevens Act with strong, new national mandates directing all regional Fishery Management Council's to minimize bycatch and waste, and;

WHEREAS: The United States Congress included in this Act a special section to further strengthen and support this national mandate, and that this section was directed specifically to requiring that the North Pacific Fishery Management Council minimize bycatch, and;

WHEREAS: The United States Congress passed this Act in full recognition of previous and pending bycatch management actions by the North Pacific Fishery Management Council with the clear intent that this Council be required to take new action to minimize bycatch from existing levels;

NOW, THEREFORE BE IT RESOLVED: By the United Villages, Inc., that the North Pacific Fishery Management Council take new action now to comply with the requirements of the Magnuson-Stevens Act which explicitly mandate further action by this Council to minimize the level of bycatch and waste occuring in Federal waters off Alaska's coast.

PASSED and ADOPTED this 6th day of June, 1997 by the support and majority of UVI Board of Directors.

Board of Director Chairman

Attested by:

C4

Parks

CITY OF HOMER
HOMER, ALASKA

RESOLUTION 97-48

A RESOLUTION OF THE CITY COUNCIL OF HOMER, ALASKA URGING THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL TO ACT NOW TO COMPLY WITH THE NEW MAGNUSON-STEVENS ACT REQUIREMENTS TO MINIMIZE BYCATCH.

WHEREAS, over 750 million pounds of marine life was dumped into the Bering Sea and Gulf of Alaska in 1994, as well as over 17 million pounds of halibut, over 15 million crabs, 4 million pounds of herring and 195 thousand salmon; and

WHEREAS, declining populations of many marine mammals and seabirds, also dependent upon fish for food, calls into question the ecological health of our waters; and

WHEREAS, these resources are the economic and cultural lifeblood for many Alaskans who depend on the sea for their livelihoods and subsistence; and

WHEREAS, this continued wanton waste undermines any long-term management plan for sustained commercial, subsistence or recreational fisheries, and places Alaska's coastal communities at risk; and

WHEREAS, wanton waste occurring in the Federal waters of the Bering Sea and Gulf of Alaska is of utmost concern culturally, economically, and ecologically; and

WHEREAS, the United States Congress overwhelmingly passed the Magnuson-Stevens Act with strong, new national mandates directing all regional Fishery Management Council's to minimize bycatch and waste; and

WHEREAS, the United States Congress included in this Act a special section to further strengthen and support this national mandate, and that this section was directed specifically to requiring that the North Pacific Council minimize bycatch; and

WHEREAS, the United States Congress passed this Act in full recognition of previous and pending bycatch management actions by the North Pacific Council with the clear intent that this Council be required to take new action to minimize bycatch from existing levels.

NOW, THEREFORE BE IT RESOLVED by the City Council of Homer, Alaska, that the North Pacific Fishery Management Council take new action now to comply with the requirements of the Magnuson-Stevens Act which explicitly mandate further action by this Council to minimize the level of bycatch and wast occurring in Federal waters off Alaska's coast.

PASSED and ADOPTED by the Homer City Council this 9th day of June, 1997.

CITY OF HOMER

JACK CUSHING, MAYOR

ATTEST:

MARY E. CALHOUN, CMC, CITY CLERK

C9

City of False Pass

P.O. Box 50 • False Pass, Alaska 99583-0050
Telephone (907) 548-2319 • Fax (907) 548-2214

Resolution 97-24
Resolution by the City of False Pass
Urging the North Pacific Fishery Management Council
to act now to comply with the new Magnuson Stevens Act
Requirements to Minimize Bycatch

WHEREAS, over 750 million pounds of marine life was dumped into the Bearing Sea and Gulf of Alaska in 1994, as well as over 17,000,000 million pounds of halibut and over 15,000,000 crabs; and

WHEREAS, declining populations of many marine mammals and seabirds, also dependent upon fish for food, calls into question the ecological health of our waters; and

WHEREAS, these resources are the economic and cultural lifeblood for many Alaskans who depend on the sea for their livelihoods and subsistence; and

WHEREAS, this continued wanton waste undermines any long term management plan for sustained commercial, subsistence or recreational fisheries, and places Alaska's coastal communities at risk; and

WHEREAS, wanton waste occurring in the Federal waters of the Bearing Sea and Gulf of Alaska is of utmost concern culturally, economically, and ecologically; and

WHEREAS, the United States Congress overwhelmingly passed the Magnusson-Stevens Act with strong, new national mandates directing all regional Fishery Management Councils to minimize bycatch and waste; and

WHEREAS, the United States Congress included in this Act a special section to further strengthen and support this national mandate, and that this section was directed specifically to requiring that the North Pacific Fisheries Management Council minimize bycatch; and

WHEREAS, the United States Congress passed this Act in full recognition of previous and pending bycatch management actions by the North Pacific Fisheries Management Council with the clear intent that this council be required to take new action to minimize bycatch from existing levels;

NOW, THEREFORE, BE IT RESOLVED by the False Pass City Council that the North Pacific Fishery Management Council take new action now to comply with the requirements of the Magnusson-Stevens Act which explicitly mandate further action by the Council to minimize the level of bycatch and waste occurring in Federal waters off Alaska's coast.

PASSED AND APPROVED by a duly constituted quorum of the City of False Pass, Alaska, this 20th day of May 1997.

John J. Nickels

John Nickels II, Mayor

ATTEST: Donald G. Cluko

Donald G. Cluko, City Clerk

GREENPEACE

June 12, 1997

Richard Lauber, Chairman
North Pacific Fishery Management Council
605 West 4th Ave., Suite 306
Anchorage, AK 99501-2252

Dear Chairman Lauber,

We appreciate the work the North Pacific Council and it's staff have done so far to assure compliance with the new provisions of the Magnuson-Stevens Sustainable Fisheries Act (SFA). We would like to take this opportunity to provide you with some suggestions that could help all of us better understand the work your council is undertaking, as well as contribute to that effort. We would also like to register a few concerns we have with the compliance process to date.

Changes to Fishery Management Plans

Our first set of suggestions deal with the requirement to amend all existing fishery management plans (FMPs) to reflect the new provisions in the Magnuson Act. According to page 3 of the memo distributed to the council by Dr. Pautzke as part of the Executive Directors report at the April, 1997 council meeting, "the plan teams are working on a major rewriting of the groundfish and crab FMPs, due in September 1997 for initial review, and final review in February 1998. It is believed that most of the tasks and sub-tasks listed in Section 5.B. (of the SFA) have been addressed already with previous plan amendments."

It would be extremely helpful for the public, industry and environmental groups to be able to see exactly which changes where made to the FMPs to comply with the SFA, and exactly which previous actions are considered to have fulfilled the other individual mandates for FMPs under the SFA. This could be done simply by highlighting the changes or previous actions and referencing them back to the SFA requirement they are designed to meet. That would enable everyone to easily comment on the appropriateness of the change (or lack thereof), and make constructive suggestions for additional changes. This would be similar to what the New England Fishery Management Council has begun to do. They have created a schedule for when each individual SFA requirement would be included into each and every individual FMP for which they are responsible.

4649 Sunnyside Avenue N. • Seattle, WA 98103 • Tel (206) 632-4326 • Fax (206) 632-6122

Adding New SFA Definitions to the FMPs

According to a letter from National Marine Fisheries Service (NMFS) Regional Administrator to the North Pacific Council dated 2/20/97, none of the definitions, such as "overfishing" or Optimum" (except for Individual Fishing Quota), that have been revised in the SFA "are contained in the Council's FMPs or in regulations." The letter finishes by saying "On the basis of our review, we have determined that the Council has no particular reason to amend any of its definitions to make them consistent with those in the SFA."

However, if one looks at the BS/AI Groundfish FMP (January 1995, the most current), on pages 4-3 and 4-4, there are operational definitions for overfishing and optimum yield. Looking specifically at the "optimum yield" definition in the 1995 FMP, it contains provisions that were removed from the Magnuson Act definition and does not contain important additions included in the new SFA language. Specifically, the wording in the FMP allows for "a plus or minus deviation from the ABC for the purpose of promoting economic, social or ecological objectives", whereas the new SFA definition only allows OY "to be prescribed on the basis of MSY from the fishery, as REDUCED by any relevant social, economic, or ecological factor."(1) Also missing from the FMP definition is the phrase after "will provide the greatest benefit to the nation" in the SFA, which is "...taking into account the protection of the marine ecosystems."(2)

We phoned NMFS to ask about the obvious inconsistency between what the SFA requires, and the fact that the several of the definitions that the NMFS letter claims are not in the FMPs are clearly contained in the FMPs. We were told by Ron Berg on June 12th that because the SFA definition just says 'optimum', but the FMP's definition says 'Optimum Yield', that strictly speaking, therefore, it doesn't apply.

In point of fact, the definition in the SFA reads: "The term 'optimum', with respect to the yield from a fishery, means..."(3) Clearly it refers to optimum yield as it exists in the FMP. The fact that NMFS would try to pretend it doesn't is frankly embarrassing. There was no explanation for why the definition of overfishing, which also clearly appears in the FMP, should not be changed to be consistent with the SFA. Claiming it doesn't exist in the FMP is ludicrous.

We are extremely concerned with the actions of NMFS described above. Changing the definitions in the FMPs to be consistent with the SFA is a simple but important part of an entire process of reopening the FMPs. The FMPs need to reflect not just the wording changes in definitions in the SFA, but to comply with the intent of those changes, as well as changes in the new national standards, as well as other changes in emphasis in several sections of the SFA. In a number of cases, these are new, higher standards to which the SFA holds the regional councils. These definitions need to be changed to comply with the changes in the SFA.

NMFS Guidance on SFA Compliance

Frankly, the fact that NMFS wants to argue that "optimum, with respect to the yield from a fishery" doesn't mean the same as "optimum yield" and therefore no changes to FMPs need to be looked at, does not give us much confidence in their desire comply with either the spirit or the letter of the law contained in the new SFA.

Further adding to our concern is that, in Dr. Pautzke's April 1997 memo (pages 3 & 8) to the council on SFA compliance, he requests guidance from NMFS in several areas in determining compliance. Specifically, he requests guidance as to what sections in the FMPs already comply with the new SFA as a result of previous plan amendments, and whether the current catch reporting system meets the requirements of the new North Pacific section of the SFA. According to Dr. Pautzke, as of June 12th, no response had been received from NMFS. This is despite the fact that the first drafts of the new FMPs, theoretically containing revised sections to comply with the SFA, are due to be presented to the council in September.

Additionally, the deadline for submitting to the Secretary "conservation and management measures to ensure total catch measurement in EACH fishery under the jurisdiction of the council" is June 1, 1997.(4) Even though that deadline for submission of a plan is passed, according to Dr. Pautzke, NMFS has still failed to give guidance to the council as to what is necessary to comply with this requirement.

There is a further requirement that "if the above (Catch Measurement) requirements do not require fish processors and fish processing vessels to weigh fish, the council and Secretary shall submit a plan to Congress by January 1, 1998, to allow for weighing...unless the council determines that such weighing is not necessary to meet the requirements of this (Catch Measurement) subsection."(5)

The council approved a plan for a pilot at sea weighing program for pollock in October of 1994. However, despite letters from the Council, requirements in the SFA for weighing in the new CDQ fishery, and the above referenced requirement in the North Pacific section of the SFA for weighing, NMFS has still not made available funds for certification of scales.(6) This is simply unacceptable. The problem is not that the technology does not exist. It is in use in quite a number of at sea processing vessels around the world. It is even used in at least one U.S. factory trawler operating in the Bering Sea pollock fishery for internal record keeping. The fact that this program has been, and continues to be delayed by NMFS even though it was passed by the Council 2 ½ years ago and is now mandated by the SFA, again calls into question NMFS commitment to vigorously implement the SFA.

Total Catch Measurement/Total Weight Measurement

We are hampered in our ability to comment specifically on the council's compliance with the "Catch Measurement" requirements laid out in the North Pacific section of the SFA because the council hasn't received any guidance from NMFS on this point. However, from reading the law and Dr. Pautzke's compliance memo, several points seem clear.

Congress is not satisfied, as Dr. Pautzke posits on page 8 of his compliance memo, that "The Council's current catch reporting system using observers, weekly processor reports, and the blend system, likely fulfills Congress' expectations on this provision." Congress clearly knew what the current catch reporting system is, and yet they specifically called for it's improvement "in EACH fishery under the council's jurisdiction" and for it to "ensure the accurate enumeration, at a minimum, of target species, economic discards and regulatory discards," in a section of the SFA specifically targeted at the North Pacific.(7)

Congress went so far as to specifically prescribe is the very next paragraph that this should include total weight measurement. This is clearly prescribed in this paragraph for "...ALL fish processing vessels..." and is clearly linked to the requirement in the above paragraph for it to occur in "ALL fisheries under the council jurisdiction."(8) No where does it say that it only needs to happen for the pollock fishery.

In plain English, we contend that it is clear that the North Pacific Council needs to submit a plan requiring total weight measurement for all fish processing vessels and fish processors for every fishery under it's jurisdiction by June 1, 1997, as a minimum to comply with the above referenced section of the SFA on Catch Measurement.

Bycatch

For the record, Greenpeace supports the Alaska Marine Conservation Council's comments to the North Pacific Council concerning council compliance with the Magnuson Act. There are clearly new, higher standards that the council is being held to for the avoidance of bycatch.(9) We encourage the council to work closely with environmental groups and members of the industry and public to come up with, design, pass and implement programs to further avoid bycatch that will comply with the new requirements in the SFA. We also support Dr. Pautzke's idea to specifically call for proposals to meet these and other new requirements of the SFA.

Conclusion

We appreciate the work done to date by the Council, their staff and the NMFS staff to implement the new provisions of the SFA. Clearly however, more work needs to be done than has been done to date on; revising the definitions in the FMPs to make them consistent with the SFA; passage of programs to further reduce/avoid bycatch; and the implementation of a better system of catch measurement/total weight measurement in all the North Pacific Council's fisheries. Also clearly ongoing work to revise the FMPs to comply with new, higher standards contained in sections of the SFA, including the new national standards, must continue.

Thank you for the opportunity to present our views on this issue.

Sincerely,

Fred Munson,
Ken Stump,
Greenpeace

1. Magnuson Fishery Conservation and Management Act of 1976 - As Revised 14 October 1996 based on S. 39 as Passed by the Senate and House., Mid-Atlantic Fishery Management Council, Section 3, definition (28-B), page 11.
2. ibid., definition (28-A), page 11.
3. ibid., definition (28), page 11.
4. ibid., Section 313. (h)-(1), page 83.
5. ibid., Section 313. (h)-(2), page 83.
6. North Pacific Fishery Management Council, Executive Directors Report on the Council's Magnuson Act Compliance, April 1997, Agenda B-1, p. 9
7. Magnuson Act, Revised 14 October 1996, Section 313. (h)-(1), page 83.
8. ibid., Section 313. (h)-(1) and (2), page 83.
8. ibid., Section 301. (a)-(9), page 32.