

NATIONAL MARINE FISHERIES SERVICE PROCEDURE 03-201-16

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03-201 Essential Fish Habitat

Essential Fish Habitat Consultations for Army Corps of Engineers Channel Maintenance
Dredging

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SUMMARY OF REVISIONS: Renewed in June 2019 with the addition of a section on ‘impacts outside of the channel’. The initial directive was put into effect on February 2, 2018.

Signed

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I. Introduction

This procedure provides internal guidance to assist the National Marine Fisheries Service (NMFS) on essential fish habitat (EFH) consultations under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) for Army Corps of Engineers (USACE) (or non-federal designee) maintenance dredging of federal navigation channels. This guidance addresses projects that include in-channel (width and depth of the channel) impacts (also referred to as the project boundary). In addition, EFH consultations must consider all direct and indirect impacts, including impacts outside the federal channel, which should be addressed on a case by case basis.

Under MSA, NMFS must provide conservation recommendations to federal action agencies on actions that adversely affect EFH. Such recommendations should include measures to avoid, minimize, mitigate or otherwise offset adverse effects on EFH.

This procedure does not result in environmental impacts because it serves to clarify existing regulatory requirements and does not change any requirements associated with EFH. Nothing in this procedure is intended to require reevaluation of any

previously completed EFH consultations. This guidance does not create or confer any right or benefit (substantive or procedural) for or on any person or operate to bind the public.

II. Objective

Three scenarios are presented below along with clarification of the baseline environmental conditions from which the EFH consultation would be conducted. This guidance also clarifies the conditions under which NMFS would not make any additional EFH conservation recommendations for in-channel maintenance impacts. In all cases, USACE (or non-federal designee) coordination with NMFS enables the agencies to have shared understanding and agreement on the path forward.

III. Guidance

Scenario A - New channel or widening/deepening of existing channel

If a new navigation channel is proposed where there has been no prior construction and EFH may be adversely impacted, the action will require an EFH consultation. Similarly, an existing channel that is proposed for widening or deepening beyond its current footprint or depth will also be considered a new action that will require an EFH consultation if EFH may be adversely impacted. The consultation should include avoidance and minimization of adverse impacts of dredging the new channel, widening/deepening the existing channel, and impacts of any anticipated future maintenance activities, as well as compensatory mitigation for the permanent or temporary loss of EFH resources. The baseline environmental conditions for these types of actions will be the present day habitat condition at the time the project commences.

Scenario B – Existing channel undergoing maintenance with no prior EFH consultation

For an existing channel where no prior EFH consultation has occurred, the USACE (or non-federal designee) must engage in EFH consultation if the action may adversely affect EFH. The consultation should be completed as early as practicable and prior to commencing maintenance dredging, including in channels where previous maintenance dredging has taken place. In this case, the consultation should include avoidance and minimization of adverse impacts of the maintenance activities, as well as compensatory mitigation for the permanent or temporary loss of EFH resources that currently exist in the channel. The baseline environmental conditions will be the condition of the site at the time the present maintenance activity commences, not the condition of the channel before original construction, nor the condition of the channel prior to any earlier maintenance dredging. Like Scenario A, impacts for anticipated future periodic maintenance (e.g., periodic maintenance dredging) should be considered part of the proposed action and be addressed in the EFH consultation. EFH conservation recommendations, if any, should address the current and future impacts of the maintenance dredging only, not those associated with the original dredging to create the channel, nor any previous channel

maintenance dredging.

Scenario C – Existing channel undergoing maintenance with prior EFH consultation

For an existing channel that is proposed for maintenance and the USACE (or non-federal designee) has previously completed an EFH consultation, impacts within the channel should have been covered by the original consultation. If the prior EFH consultation evaluated the impacts for the full suite of planned maintenance activities including the periodic loss of ecological function for the planned maintenance dredging schedule into the future, no additional EFH conservation recommendations for in-channel impacts should be needed unless there are changes to dredging methods, changes to the environment, or changes to our understanding of how the project affects EFH (see Consultation Reinitiation).

Impacts Outside of the Channel:

Direct and indirect impacts outside of the federal channel should be addressed on a case by case basis. If the potential direct and indirect impacts that have not been covered by prior EFH consultations are identified by the USACE (or non-federal designee), EFH consultation should be initiated. If these impacts are not identified until they occur, the USACE (or non-federal designee) should initiate EFH consultation immediately after the occurrence.

Elevation:

In all three scenarios, if there is disagreement between the federal action agency and NMFS, efforts to resolve the issue at the lowest level will be pursued. In the event resolution has not been reached through this process, the EFH regulations at 50 C.F.R. § 600.925(k)(2) directs further review of decisions inconsistent with NMFS recommendations. If a federal agency decision is inconsistent with a NMFS EFH conservation recommendation, the Assistant Administrator for NMFS may request a meeting with the head of the federal agency, as well as with any other agencies involved, to discuss the action and opportunities for resolving any disagreements.

Consultation Reinitiation:

The EFH regulations specify that “[a] Federal agency must reinitiate consultation with NMFS if the agency substantially revises its plans for an action in a manner that may adversely affect EFH or if new information becomes available that affects the basis for NMFS EFH Conservation Recommendations.” 50 C.F.R. § 600.920(l). Therefore, in the scenarios presented above, once an EFH consultation has been completed, future in-channel impacts associated with cycles of periodic maintenance dredging will not generally trigger the need for reinitiation. New information that affects the basis for prior conservation recommendations either within or outside of the channel, such as changes to dredging methods, changes to the environment, or changes to our understanding of how the project affects EFH, must also be considered in determining the need for reinitiation.

Background:

EFH is defined in Section 3(10) of the MSA as water and substrate necessary to fish for spawning, feeding, breeding, or growth to maturity. Section 305(b)(2) of the MSA requires federal action agencies to consult with NMFS for any federal action or proposed federal action authorized, funded, or undertaken that may adversely affect EFH. EFH regulations define an adverse effect to EFH as any impact that reduces quality and/or quantity of EFH. 50 C.F.R. § 600.910. The regulations further provide that adverse effects may include “direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions.” *Id.*

EFH consultations are only required of federal agencies. Section 305(b)(4) requires NMFS to provide recommendations (which may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH) to conserve EFH to federal or state agencies for activities that would adversely affect EFH. 50 C.F.R. § 600.920. A federal agency is not required to carry out these recommendations, but must provide written response to NMFS within 30 days after receiving an EFH conservation recommendation. *Id.*

In the case of a response that is inconsistent with NMFS conservation recommendations, the federal 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 action and the measures needed to avoid, minimize, mitigate, or offset such effects. *Id.*