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(b) *Section 18 emergency exemptions.* [Reserved]

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[FR Doc. 02–701 Filed 1–16–02; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 82

RIN 0920–ZA00

Methods for Radiation Dose Reconstruction Under the Energy Employees Occupational Illness Compensation Act of 2000

AGENCY: Department of Health and Human Services.

ACTION: Interim Final Rule; Reopening of Comment Period.

SUMMARY: The Department of Health and Human Services(DHHS), is reopening the comment period for the interim final rule for dose reconstruction for certain claims for cancer under the Energy Employees Occupational Illness Program Act (EEOICPA) that was published in the **Federal Register** of Friday, October 5, 2001. After considering these comments, comments previously received, and comments from the Advisory Board on Radiation and Worker Health (ABRWH) DHHS will publish a final rule.

DATES: Any public written comments not submitted at the meeting of the ABRWH must be received on or before Wednesday, January 23, 2002.

ABRWH must submit any comments and recommendations on the interim final rule to DHHS by Wednesday, February 6, 2002.

ADDRESSES: Submit written comments to: Attention—DoseReconstruction Comments, Department of Health and HumanServices, National Institute for Occupational Safety andHealth (NIOSH), Robert A. Taft Laboratories, MS–C34, 4676Columbia Parkway, Cincinnati, OH 45226, Telephone: (513) 533–8450, Fax: (513) 533–8285, e-mail: *NIOCINDOCKET@CDC.GOV.*

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director,Office of Compensation Analysis and Support, NationalInstitute for Occupational Safety and Health, 4676 ColumbiaParkway, Cincinnati, Ohio 45226, Telephone 513–841–4498(this is not a toll free number). Information requests may also be submitted by e-mail to *OCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION: On October 5, 2001, HHS published an interim final rule establishing methods for radiation dose reconstruction to be conducted for certain cancer claims filed under EEOICPA, Public Law 106–398 [See FR Vol. 66, No. 194, 50978]. The notice included a public comment period that ended on November 5, 2001. However, DHHS is requesting the ABRWH to conduct a review of its dose reconstruction methods. ABRWH will be conducting its review during a meeting of the ABRWH scheduled for Tuesday, January 22, 2002 and Wednesday, January 23, 2002.

To permit HHS to consider the ABRWH review and any comments and recommendations of ABRWH in the rulemaking, DHHS will reopen the public comment period. This will also provide the public with the opportunity to participate in this review. The public comment period will be reopened to include the ABRWH meeting transcript and any statements submitted for the record of that meeting in the docket for this rule. DHHS will also accept additional public written comments submitted to its docket office on or beforeWednesday, January 23, 2002. The record for this rulemaking will close on Wednesday, February 6, 2002, by which time ABRWH must submit any comments and recommendations on the interim final rule to DHHS.

Dated: January 14, 2002.

Tommy G. Thompson,

Secretary.

[FR Doc. 02–1318 Filed 1–16–02; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 126

[USCG–2001–10164]

RIN 2115–AG17

Alternate Compliance Program; Incorporation of Offshore Supply Vessels

AGENCY: Coast Guard, DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: On October 23, 2001, we published a direct final rule (66 FR 53542). The direct final rule notified the public of our intent to incorporate Offshore Supply Vessels (OSVs) into the Alternate Compliance Program (ACP). This action will improve the flexibility of regulations governing OSVs by providing an alternative method for vessel design, inspection, and certification without compromising existing safety standards. We have

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FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, contact Lieutenant Benjamin Nicholson, United States Coast Guard Office of Design and Engineering Standards (G-MSE), at 202–267–0143, or e-mail him at *BNicholson@comdt.uscg.mil.*

Dated: January 10, 2002.

Joseph J. Angelo,

Acting Assistant Commandant for Marine Safety and Environmental Protection.

[FR Doc. 02–1251 Filed 1–16–02; 8:45 am]

BILLING CODE 4910–15–U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 961030300–1007–05; I.D. 120996A]

RIN 0648–AJ30

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

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

ACTION: Final rule.

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

If further changes to the EFH regulations are warranted in the future, NMFS will propose changes through an appropriate public process.

DATES: Effective on February 19, 2002.

ADDRESSES: Requests for copies of the Environmental Assessment (EA) or related documents should be sent to EFH Coordinator, Office of Habitat Conservation, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3282. The EA and related documents are also available via the internet at: *http://www.nmfs.noaa.gov/habitat.*

FOR FURTHER INFORMATION CONTACT: Jonathan Kurland, NMFS EFH Coordinator, 301/713–2325; fax 301/713–1043; e-mail jon.kurland@noaa.gov.

SUPPLEMENTARY INFORMATION:

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. NMFS published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** on November 8, 1996 (61 FR 57843) to solicit comments to assist NMFS in developing an approach for the proposed regulations. NMFS published a second ANPR on January 9, 1997 (62 FR 1306) to announce the availability of the "Framework for the Description, Identification, Conservation, and Enhancement of Essential Fish Habitat" (Framework) and to solicit additional public comment. The Framework provided a detailed outline for the proposed regulations. NMFS held 15 public meetings, briefings, and workshops across the nation during the public comment period on the Framework and issued a proposed rule on April 23, 1997 (62 FR 19723). NMFS held an additional 6 public meetings and numerous briefings nationwide during the comment period on the proposed rule and issued an interim final rule on December 19, 1997 (62 FR 66531). The interim final rule took effect on January 20, 1998.

NMFS decided to issue the regulations as an interim final rule in 1997 for two reasons. First, NMFS decided to provide an additional comment period to allow another opportunity for affected parties to provide input prior to the development of a final rule. Second, NMFS determined that it would be advantageous to implement the EFH provisions of the Magnuson-Stevens Act for a period of time via interim final regulations, which would afford an opportunity to gain experience adding EFH information to fishery management plans and carrying out consultations and coordination with Federal and state agencies whose actions may adversely affect EFH. NMFS planned to use the additional comments and its experience implementing the interim final rule to make any necessary changes in the final rule.

The comment period on the interim final rule closed on March 19, 1998 (63 FR 8607, February 20, 1998). On November 8, 1999, NMFS reopened the comment period (64 FR 60731) to announce its intention to proceed with development of a final rule and to request additional public comments on four specific issues: how to improve the regulatory guidance on the identification of EFH; how to improve the regulatory guidance on minimizing the effects of fishing on EFH; whether the final rule should provide additional guidance on using existing environmental reviews to satisfy EFH consultation requirements; and whether to revise in the final rule the requirement for Federal agencies to prepare EFH Assessments as part of the EFH consultation process.

In total, NMFS provided five separate public comment periods for this rulemaking totaling 270 days. NMFS also held numerous public meetings and briefings to explain the EFH requirements for interested parties and to solicit their input. Based on the comments received, as well as NMFS' experience implementing the interim final rule, NMFS identified a number of improvements that would clarify and simplify the regulations. NMFS incorporated those changes in the final rule.

Although NMFS is finalizing this rule, NMFS recognizes that there remains a great deal of interest in the EFH regulations from various stakeholders. There is a diversity of opinions on the best way to integrate habitat and ecosystem considerations into fishery management. NMFS is actively evaluating these issues, and will continue to work with stakeholders to use the best available scientific information regarding habitat and ecosystem principles in fishery management decisions. For example, NMFS will hold a workshop in the coming months to examine the concepts underlying ecosystem-based approaches to marine resource management, followed by a second workshop to develop technical guidelines for implementing an ecosystem-based approach to fishery management. NMFS is also developing new environmental impact statements that will reexamine the EFH sections of many FMPs. NMFS will evaluate the efficacy of the EFH final rule in light of these activities and will apply the lessons learned as appropriate. If further changes to the EFH regulations are warranted, NMFS will propose changes through an appropriate public process.

Overview of the EFH Regulations

The final rule retains the same overall structure as the interim final rule, with minor organizational and editorial changes to improve clarity. These clarifications do not constitute substantial changes to the rule. Subpart J of 50 CFR part 600 contains guidelines to assist Councils in developing the EFH components of FMPs. Subpart K of 50 CFR part 600 contains procedures for coordination, consultations, and recommendations for Federal and state agency actions that may adversely affect EFH. NMFS is finalizing both subparts together so that all interested parties will understand the implications of areas being identified as EFH. The final rule contains no major substantive changes from the interim final rule, although the final rule includes numerous clarifications, simplifications, and editorial improvements intended to make the regulations easier to use.

Under subpart J, Councils must identify in FMPs EFH for each life stage of each managed species in the fishery management unit. Councils should organize information on the habitat requirements of managed species using a four-tier approach based on the type of information available. Councils must identify as EFH those habitats that are necessary to the species for spawning, breeding, feeding, or growth to maturity. Councils must describe EFH in text and must provide maps of the geographic locations of EFH or the geographic boundaries within which EFH for each species and life stage is found. Councils should identify EFH that is especially important ecologically or particularly vulnerable to degradation as "habitat areas of particular concern" (HAPC) to help provide additional focus for conservation efforts. Councils must evaluate the potential adverse effects of fishing activities on EFH and must include in FMPs management measures that minimize adverse effects to the extent practicable. Councils must identify other activities that may adversely affect EFH and recommend actions to reduce or eliminate these effects.

Subpart K contains procedures for implementing the EFH coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. NMFS will make available descriptions and maps of EFH to

promote EFH conservation and enhancement. The regulations encourage Federal agencies to use existing environmental review procedures to fulfill the requirement to consult with NMFS on actions that may adversely affect EFH, and they contain procedures for abbreviated or expanded consultation in cases where no other environmental review process is available. Consultations may be conducted at a programmatic and/or project-specific level. In cases where adverse effects from a type of actions will be minimal, both individually and cumulatively, a General Concurrence procedure further simplifies the consultation requirements. The regulations encourage coordination between NMFS and the Councils in the development of recommendations to Federal or state agencies for actions that would adversely affect EFH. Federal agencies must respond in writing within 30 days of receiving EFH Conservation Recommendations from NMFS. If the action agency's decision is inconsistent with NMFS' EFH Conservation Recommendations, the agency must explain its reasoning and NMFS may request further review of the decision. EFH Conservation Recommendations are non-binding.

Effect on Approved FMP EFH Provisions

The final rule modifies portions of the guidelines to Councils for developing the EFH components of FMPs (Subpart J of the rule). Although the changes do not constitute substantial revisions to the guidelines contained in the interim final rule, some of the clarifications and explanations in the final rule result in minor changes to the Secretary's interpretation of the mandatory contents of FMPs. Existing FMP EFH provisions were approved (or in some cases partially approved) by the Secretary pursuant to the interim final rule. Councils are not required to develop immediate amendments to those FMPs to address any changes in regulatory guidelines pursuant to this final rule. To the extent that changes to approved FMPs are necessary to meet the standards of the final rule, Councils should incorporate those changes during the next regular review and revision of FMP EFH provisions. Section 600.815(a)(9) of the final rule (renumbered from § 600.815(a)(11) of the interim final rule) states that Councils should conduct such reviews as recommended by the Secretary, but at least once every five years.

Related Documents

NMFS prepared a draft internal technical guidance manual for EFH in conjunction with the interim final rule. That guidance will be superseded with guidance for the final rule. The draft technical guidance, the Framework, the EA, and other related documents that led to this final rule are available via the internet or by mail upon request (see **ADDRESSES**).

Comments and Responses

NMFS received approximately 3,300 written comments during the two comment periods on the interim final rule. Commenters included Fishery Management Councils, Federal agencies, state agencies, fishery groups, environmental groups, non-fishing industry groups, other non-governmental organizations, academicians, citizens groups, and numerous individuals. The comments and responses discussed below are arranged by topic to parallel the organizational structure of the interim final rule.

1. Comments Asking for Additional Opportunity to Comment on the Rule or to be Involved in the Designation of EFH

Comment A: Several commenters requested that the public comment period be extended and development of the final rule be delayed to allow the public to better assess EFH implementation.

Response A: NMFS disagrees that additional time is needed for public comment. NMFS provided five separate public comment periods on the EFH regulations, for a total of 270 days, which generated more than 3,600 separate written public comments. NMFS published the regulations as an interim final rule for the express purpose of allowing additional comments and gaining experience implementing the EFH provisions of the Magnuson-Stevens Act before issuing a final rule. Since the public comments received during each comment period raised similar issues and concerns with the EFH regulations, NMFS has had ample opportunity to gain understanding of the range of topics and opinions raised by the public and has made many revisions to the EFH regulations to address public comments.

Comment B: Several commenters criticized NMFS for failing to engage non-fishing stakeholders in the development of the EFH regulations and for failing to develop mechanisms to consider non-fishing interests in the EFH regulations.

Response B: NMFS disagrees that non-fishing groups were not given the opportunity to be included in this rulemaking. NMFS held numerous public meetings, briefings, and workshops to engage all interested parties in the development of the EFH regulations and held five separate public comment periods. In addition, NMFS met with every stakeholder group that asked to discuss how the regulations might affect them, including many prominent non-fishing organizations. Many of the changes to the regulations, from the proposed rule to the interim final rule and from the interim final rule to the final rule, responded directly to non-fishing stakeholder concerns.

Comment C: Two commenters requested that NMFS suspend the designation of EFH for Pacific salmon until after final revisions to the EFH regulations are made, since the EFH provisions of the Pacific salmon FMP had not been completed at the time NMFS reopened the comment period on the interim final rule. These commenters also asked NMFS to reopen the comment period on the rule again after the Pacific salmon EFH designations are in effect for a period of time.

Response C: NMFS approved the designation of EFH for Pacific salmon on September 27, 2000 (65 FR 63047). The Magnuson-Stevens Act prescribes a strict time frame for Secretarial action on an FMP amendment following submission by a Council, including an opportunity for public comment on what action the Secretary should take. NMFS cannot delay Secretarial review, and sees no need for another formal comment period on the EFH regulations to gauge implementation of Pacific salmon EFH. Nevertheless, if problems arise related to Pacific salmon EFH, NMFS will address them as appropriate.

Comment D: Several non-fishing industry groups commented that NMFS did not make necessary information on the consultation process available to commenters when the comment period for the interim final rule was reopened in November 1999. Some of these commenters referred specifically to their pending Freedom of Information Act (FOIA) request for copies of documents related to the EFH consultation process and every individual consultation that had occurred to date.

Response D: NMFS' intent in reopening the public comment period on the interim final rule in November 1999 was to solicit comments from interested parties on four specific issues: the scope of EFH designations, documentation of measures to minimize adverse fishing impacts to EFH, the use of existing environmental review

procedures for EFH consultations, and the preparation of EFH Assessments (64 FR 60731). NMFS asked commenters to answer based on their individual experience under the interim final rule. NMFS did not request that commenters conduct a program review of the EFH consultation process, nor did NMFS ask for comments on the totality of experience gained through all of the consultations completed thus far. The information requested by the commenters under FOIA was not necessary to enable the commenters to provide answers to NMFS' questions regarding their experience under the interim final rule, and analysis of that information was not a prerequisite to providing informed comments.

Comment E: One commenter noted that the absence of lists of species managed under FMPs and prey species in the proposed and interim final rules made it more difficult to provide meaningful comment on the EFH regulations.

Response E: NMFS determined that providing lists of managed and prey species in the EFH regulations was unnecessary. NMFS' intent in soliciting public comment on the regulations was to seek input on the process of identifying EFH and implementing the other EFH provisions of the Magnuson-Stevens Act, and not on how to identify EFH for specific managed species. Furthermore, the list of managed species changes whenever Councils develop management plans for new species. Nonetheless, the EA that accompanied publication of the interim final rule contained a list of managed species, and this list has been updated in the revised EA. Since the list will continue to change over time, interested parties should contact the Councils to obtain the most updated information on managed species. EFH cannot be designated for non-managed prey species, so a list of such species is not directly relevant to the rule.

Comment F: Several non-fishing groups commented that Fishery Management Councils should include representation of non-fishing interests.

Response F: The Secretary appoints members of each Council from lists of individuals recommended by the Governors of applicable states. Section 302(b)(2)(A) of the Magnuson-Stevens Act states that the appointed members of each Council "must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned." There is ample flexibility in this requirement to allow for a broad range of representation on Councils. For example, a rancher from Idaho formerly served as a member of the Pacific Fishery Management Council.

Comment G: One commenter noted that the rule contains no provisions to ensure that non-fishing interests receive timely notification of Council meetings.

Response G: There are ample mechanisms through which interested parties can obtain information regarding Council meetings, and it is unnecessary to ensure such notification in the EFH regulations. Section 302(i) of the Magnuson-Stevens Act requires timely public notice of Council meetings in local newspapers and the **Federal Register**. All Councils have internet sites, most of which post the schedule and agendas for upcoming meetings. Additionally, interested parties can call Councils directly to receive information on upcoming meetings, and many Councils maintain mailing lists and send agendas to interested parties. NMFS encourages all interested parties to participate in the Council process.

Comment H: Both fishing and non-fishing groups commented that NMFS should engage local stakeholders in the process of EFH identification.

Response H: NMFS agrees and continues to encourage public involvement in EFH identification via the Council process. Section 305(b)(1)(B) of the Magnuson-Stevens Act requires NMFS, in consultation with participants in the fishery, to provide recommendations and information to assist Councils in EFH identification. NMFS typically solicits this input from the public via the Council process. Each Council holds numerous meetings throughout the year that focus on habitat and other issues related to fishery management. These meetings include public scoping meetings and public hearings and are specifically designed to engage interested parties in fishery management decisions, including decisions related to EFH identification. Furthermore, many Councils have habitat advisory panels. NMFS encourages interested parties to seek membership on Council advisory panels.

2. General Concerns with the Rule

Comment A: Several non-fishing groups commented that the EFH regulations are too complex, ambiguous, and burdensome.

Response A: NMFS has attempted to improve the clarity of the EFH regulations by eliminating wordiness, increasing specificity of the language, improving the efficiency of certain procedures, and reorganizing several sections. These changes should make the regulations easier to use and should promote better understanding of how to implement the EFH provisions of the Magnuson-Stevens Act. Councils, Federal agencies, and other interested parties should benefit from the modifications that were made to the EFH regulations.

Comment B: Two non-fishing industry groups expressed concern that their comments on the proposed rule were not addressed and asked NMFS to revisit their initial concerns. The comments questioned NMFS' authority to address non-fishing activities and said that the EFH coordination, consultation, and recommendation requirements of the regulations are burdensome and duplicative.

Response B: NMFS considered all comments received on the proposed rule, but did not accept all of the recommendations for changes to the rule. NMFS responded to the cited comments in the preamble to the interim final rule at 62 FR 66539–66540 and 66543. NMFS revisited these concerns while developing the final rule and concluded that, with the exception of changes described herein to clarify and streamline portions of the rule, no additional changes are warranted.

Comment C: One commenter questioned NMFS' approach to implementing the EFH provisions in light of the commenter's concerns about the U.S. Fish and Wildlife Service's efforts to protect bull trout under the Endangered Species Act.

Response C: Bull trout are not managed under the Magnuson-Stevens Act and the commenter's concerns are unrelated to the EFH regulations.

3. Comments in Favor of Implementing the Rule Without Substantial Changes

Comment A: Numerous commenters, primarily from conservation groups, expressed concern about the extended comment period and delay in promulgating the final rule, and questioned NMFS' commitment to implementing the EFH regulations. Many commenters urged NMFS to finalize the EFH regulations immediately without weakening them.

Response A: NMFS has been implementing the EFH regulations since January 1998, 30 days following publication of the interim final rule. The final rule benefitted from public comments on ways to improve the EFH regulations, and it incorporates many of the suggestions NMFS received.

Comment B: Several commenters supported the rule but expressed

concern that the EFH regulations impose an additional burden on the already heavy workload of NMFS personnel without offering new budgetary or staff resources. These commenters were concerned that resources may be diverted from other priorities to EFH, or that insufficient NMFS staff levels may slow the EFH consultation process.

Response B: NMFS agrees that the EFH mandate will impose additional work on NMFS staff and has taken this into consideration in crafting the final rule to minimize duplication and maximize efficiency. For example, NMFS encourages agencies to use existing environmental review procedures to complete EFH consultations. Additionally, NMFS has created options such as the General Concurrence and programmatic consultations that will help streamline the EFH consultation process. NMFS has redirected staff from other tasks as necessary to fulfill the new requirements of the Magnuson-Stevens Act.

Comment C: Several individuals and organizations from Alaska remarked that the future of fishing in Alaska depends on marine habitat, and thus the rule is important for Alaska fisheries.

Response C: NMFS agrees. The final rule is intended to benefit marine, estuarine, and riverine habitats of federally managed species and help promote sustainable fisheries in Alaska and nationwide.

4. Comments Regarding Definition of Terms in the Rule

Comment A: Several commenters questioned NMFS' interpretation of the statutory definition of EFH, wherein NMFS interpreted the meaning of several key terms: "waters," "substrate," necessary," and "spawning, breeding, feeding, and growth to maturity." Some commenters asked whether, for purposes of identifying EFH, the term "waters" may include wetlands or riparian areas in proximity to waters occupied by a managed species. Other commenters suggested that NMFS remove the interpretation that "waters" and "substrate" can include biological properties, stating that the references to biological features inappropriately expand the definition of EFH. Two commenters thought that the interpretation of "substrate" should explicitly include historically important substrate areas that may have been modified by human activity. One commenter said that the word "structures," which is part of the interim final rule interpretation of the word "substrate," should not refer to human-made structures such as oil platforms, but only to natural structures that support fish. Several commenters took the opposite view and wanted the rule to encourage identifying artificial reefs, jetties, and shipwrecks as EFH. Other commenters objected to the narrowed interpretation of "necessary" in the interim final rule and recommended that NMFS return to the approach in the proposed rule where "necessary" meant the habitat required to support a sustainable fishery and a health ecosystem.

Response A: NMFS is not modifying its interpretation of the statutory definition of EFH in the final rule. The final rule retains the language in § 600.805(b)(2) of the interim final rule stating that EFH may be identified in waters of the United States, as defined in 33 CFR 328.3, which includes wetlands. EFH is limited to aquatic areas, so it may not include riparian habitats. As explained in the preamble to the interim final rule at 62 FR 66533, NMFS disagrees that interpreting "waters" and "substrate" to include "biological properties" and "biological communities" respectively is an impermissible expansion of the statutory definition of EFH. Certain biological properties of water and substrate are fundamental components of habitat and are necessary to maintain the function of habitat for fish. NMFS is not modifying the interpretation of "substrate" to discuss historically important substrate areas because the potential identification of historic habitats as EFH is addressed adequately in § 600.815(a) of the rule. NMFS is not modifying the interpretation of "substrate" to exclude human-made structures, because in some cases such structures can provide valuable habitat for managed species. As discussed in the preamble to the interim final rule at 62 FR 66534, structures such as artificial reefs, jetties, and shipwrecks may be identified as EFH in an FMP if they meet the criteria for EFH identification in the rule. The interpretation of "necessary" in the final rule continues to include the clarifying phrase "and the managed species' contribution to" a healthy ecosystem because it would be inappropriate for the rule to suggest that EFH must include habitats for species other than managed fish.

Comment B: Many commenters objected to or asked for clarification of the definition of "adverse effect" in §§ 600.810(a) and 600.910(a). Most of these commenters said the definition is vague and can be interpreted too broadly to include even effects that are of no consequence or significance to EFH. One commenter asked to what extent an activity must reduce the quality and/or quantity of EFH to trigger action. Some commenters thought that the example of a loss of prey being an adverse effect to EFH exceeds the proper interpretation of what constitutes EFH. These commenters felt that prey is not part of EFH so should not be referenced in a definition of "adverse effect." One commenter recommended that the definition of "adverse effect" in the rule address only statistically significant adverse effects and provide for documentation of probabilities of error when predicting adverse effects. Another commenter focused on the statutory requirement for Federal agencies to consult with NMFS regarding actions that may adversely affect EFH and said NMFS' definition of "adverse effect" illegally negates the statutory duty of other agencies to decide what effects are adverse.

Response B: NMFS is modifying the definition of "adverse effect" in response to comments. The revised definition retains the original standard that an adverse effect is any impact that reduces the quality and/or quantity of EFH. The definition clarifies the types of alterations that may be included and explains that such modifications to habitat are only considered adverse effects if they reduce the quality and/or quantity of EFH. The definition also clarifies that adverse effects to EFH may result from actions occurring within EFH or outside of EFH. NMFS disagrees with the comments that loss of prey is beyond the appropriate scope of adverse effects to EFH. The revised definition specifically mentions the loss of or injury to prey species and their habitats as potential adverse effects to EFH because, as mentioned above, prey can be a vital component of habitat for managed species. NMFS disagrees that only statistically significant adverse effects should be considered because the Magnuson-Stevens Act contains no such limitations. A much more inclusive definition of "adverse effect" is necessary in the regulations to clarify what kinds of potential effects should be addressed in FMPs and in the coordination, consultation, and recommendation process for Federal and state agency actions. Federal agencies retain the discretion to make their own determinations as to what actions may fall within NMFS' definition of "adverse effect."

Comment C: One commenter said that the definition of "healthy ecosystem" should not say that such areas should be similar to undisturbed ecosystems, because hardly any ecosystem could be characterized as pristine or entirely undisturbed. Another commenter asked

for an explanation of the terms "species richness" and "resilience" within the definition of "healthy ecosystem."

Response C: NMFS does not agree that the regulations should omit the reference to undisturbed ecosystems. The definition of "healthy ecosystem" in the rule refers to comparing ecological features of ecosystems. Saying that healthy ecosystems should be similar to comparable undisturbed ecosystems is intended to convey that the basic functions of such ecosystems have not been altered by anthropogenic events, and not that such ecosystems are entirely pristine. The term "species richness" refers to biodiversity. The term "resilience" refers to the ability of a healthy ecosystem to withstand a certain level of environmental stress yet maintain its ecological functions.

Comment D: One commenter inferred that best professional judgment will be necessary to evaluate available data and identify EFH, and asked for a definition of "best professional judgment" in the final rule. The commenter asked what process NMFS envisions for gathering a range of scientific opinions and how NMFS will overcome the disadvantages of expert panels.

Response D: NMFS decided not to add a definition of "best professional judgment." The regulations do not specifically call for using such judgments, so a definition is unnecessary. NMFS recognizes that professional opinion must be factored into EFH-related decisions by Councils, Federal agencies, and NMFS, but NMFS sees no need to define a separate process for considering professional opinions related to EFH as opposed to professional opinions on other matters.

Comment E: One commenter said that NMFS had overstepped its authority by referring to EFH "protection" when the Magnuson-Stevens Act uses the words "conservation and enhancement" of EFH.

Response E: NMFS reviewed the EFH regulations carefully to ensure that word usage reflected the intent of the Magnuson-Stevens Act. For instance, language in § 600.815(a)(2)(ii)(A) of the interim final rule was revised in the final rule (now in § 600.815(a)(1)(iv)(A)) to replace "protected" with "identified" as follows: "Councils should interpret this information in a risk-averse fashion, to ensure adequate areas are identified as EFH for managed species." In other cases, use of the term "protection" was appropriate. For example, § 600.905(a), which reads, "The purpose of these procedures is to promote the protection of EFH in the review of Federal and state actions that may adversely affect EFH" is consistent with section (2)(b)(7) of the Magnuson-Stevens Act, which states that one of the Act's purposes is to "promote the protection of EFH in the review of projects conducted under Federal permits, licenses, or other authorities that affect such habitat."

5. Comments on the Purpose and Scope of the Rule

Comment A: Numerous commenters endorsed the use of the precautionary principle in identifying EFH. Several said that EFH should be identified for all marine fish species, and not just those managed under an FMP. Other commenters said that EFH designations should consider all relevant ecosystem components, including prey for managed species. A few commenters thought the regulations should call for identifying all areas as EFH until proven otherwise.

Response A: NMFS addressed similar comments from the proposed rule in the preamble to the interim final rule at 62 FR 66534. The Magnuson-Stevens Act requires that each FMP describe and identify EFH, and it is not appropriate to extend this requirement to species not managed under an FMP. NMFS agrees that EFH designations should account for pertinent features of the ecosystem such as prey, as noted in the interpretation of EFH in § 600.10. However, only the habitat necessary to managed species may be considered EFH. The final rule retains language in § 600.815(a) stating that Councils should interpret habitat information in a risk-averse fashion when identifying EFH. NMFS does not agree that all areas should be identified as EFH until proven otherwise, because EFH designations must be based on available scientific information indicating that the specified habitat is necessary for the managed species.

Comment B: Some commenters objected to the interim final rule restricting EFH designations to the outer limits of the U.S. Exclusive Economic Zone (EEZ), and thought that Councils should be required to address adverse effects to EFH in waters beyond the EEZ.

Response B: As explained in the preamble to the interim final rule at 62 FR 66535, areas beyond the EEZ cannot be identified as EFH, and Federal agencies need not consult with NMFS regarding the effects of actions on habitats beyond the EEZ. However, Councils may promote the protection of managed species' habitats outside the EEZ, and NMFS will use that information as appropriate in discussions regarding international actions.

Comment C: One commenter said that NMFS should delete from § 600.805(b) the language saying that a Council may describe, identify, and protect the habitat of species not in a fishery management unit, but such habitat may not be considered EFH. The commenter said that under the Magnuson-Stevens Act, Councils may only develop FMPs for identified species and may not act to describe, identify, or protect the habitat of other species. The commenter also said that Councils have no authority under the Magnuson-Stevens Act to protect the habitat of any fish.

Response C: The preamble to the interim final rule at 62 FR 66534 notes that the Magnuson-Stevens Act does not preclude Councils from identifying habitat (other than EFH) of a fishery resource under its authority even if the species is not managed under an FMP. Council action to protect the habitats of managed or non-managed species is limited to protecting habitats from fishing activities. Councils have no authority to protect habitats from other activities, although they may comment to state and Federal agencies on non-fishing activities under section 305(b)(3) of the Act.

Comment D: One organization commented that the regulations should consider recreationally important species, including the economic value of recreational fisheries, in any actions taken pursuant to the rule.

Response D: NMFS agrees. EFH must be identified for all species in the fishery management unit of an FMP, including recreationally important species. Actions taken by a Council, NMFS, or a Federal or state action agency to address threats to EFH should account for the recreational as well as commercial value of fishery resources dependent on EFH. However, no specific changes to the rule are necessary to provide for consideration of recreational fisheries.

Comment E: A few commenters urged regional flexibility in the regulations so Councils can develop their own EFH designations and procedures for tracking actions that may adversely affect EFH.

Response E: NMFS agrees. The final rule contains national guidelines for Councils but provides sufficient flexibility to account for the variety of managed species and to address regional variations in the availability of scientific information and differences in Council operating procedures nationwide.

6. Comments on Using an Ecosystem or Watershed Approach to Resource Management

Comment A: A number of commenters representing non-fishing interests stated that the Magnuson-Stevens Act does not authorize a risk-averse or ecosystem approach to EFH. These commenters thought that the focus should be limited to fish species and not ecosystem principles.

Response A: NMFS provided a detailed response to this comment in the preamble to the interim final rule at 62 FR 66532–66533, and the response remains the same. In summary, the Magnuson-Stevens Act provides authority for the link between EFH and the managed species' contribution to a healthy ecosystem in a number of places. Ecosystem concepts are common in the statutory definitions of "fishery resources," "conservation and management," and "optimum." The fact that the Magnuson-Stevens Act directs the Councils to address the degradation and loss of EFH from both fishing and non-fishing activities through conservation and enhancement measures further reflects support for the ecosystem-based management of marine and anadromous fisheries. Ecosystem management encourages sustainable resource use and recognizes the uncertainties inherent in management and the need to make risk-averse decisions. This regulation embraces those concepts and urges Councils to seek environmental sustainability in fishery management, within the current statutorily prescribed fishery management framework (i.e., management by FMPs).

Comment B: A number of commenters from Louisiana stated that the rule places too much emphasis on species managed under FMPs, to the detriment of activities that are designed to protect and restore the coastal ecosystem. The commenters expressed concern that the focus on habitat for federally managed species would undermine the importance of ecosystem components besides federally managed fish species and potentially hinder Louisiana's extensive efforts to restore coastal wetlands as authorized under the Coastal Wetlands Planning, Protection, and Restoration Act (also known as the Breaux Act).

Response B: The rule is intended to promote the conservation and enhancement of EFH for federally managed species through means other than traditional harvest management. The EFH provisions are designed to encourage a broader, ecosystem approach to meet the requirements of the Magnuson-Stevens Act. NMFS recognizes the importance of Louisiana's coastal restoration efforts and is an active partner in implementing the Breaux Act. Although the final rule requires Federal agencies to consult with NMFS on any activity "that may adversely affect EFH," including habitat restoration projects, EFH and ecosystem restoration can be compatible. NMFS works closely with other agencies and the private sector to ensure that restoration projects proceed expeditiously while considering and minimizing any temporary or permanent adverse effects to EFH. The rule recognizes the importance of ecosystem restoration and states that EFH may be designated for certain historic habitats for which restoration is technologically and economically feasible.

Comment C: Commenters from Louisiana wanted NMFS to examine the state's coastal management program and its relationship to the rule. These commenters asked NMFS to exempt from the final rule Louisiana's state programs and Federal activities in Louisiana with existing review procedures, and/or place an emphasis on programmatic consultations and General Concurrences for these actions.

Response C: NMFS highlighted its interaction and coordination with the states and state coastal zone management programs in the preamble to the interim final rule at 62 FR 66536. NMFS has no authority to exempt Federal and state actions in Louisiana from the EFH consultation and recommendation requirements of the Magnuson-Stevens Act. As outlined in Subpart K, NMFS encourages Federal action agencies to combine EFH consultations with other environmental review processes and to complete programmatic consultations and General Concurrences where appropriate.

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

Comment A: Where the rule states that "EFH can be inferred" based on a species' distribution among habitats and on information about the species' habitat requirements and behavior, one commenter wanted the rule to require that the Councils clearly identify instances when EFH is designated based on these inferences.

Response A: The rule provides guidance to the Councils to evaluate all available information and use specified criteria to identify EFH. In some cases, Councils may need to use their best scientific judgement. To help explain how Councils identify EFH in FMPs, including cases where EFH is based on inferences, the final rule includes new language advising Councils to explain the analyses conducted to distinguish EFH from all habitats potentially used by a species. Councils must also demonstrate that the identification of EFH is based on the best scientific information available.

Comment B: Several groups of commenters expressed concern about the guidance in § 600.815(a)(2)(ii)(B) of the interim final rule that states all habitats, including historic habitats, "should be considered essential" if a species is overfished and habitat loss or degradation may be contributing to the species being overfished. One of these commenters stated that this was unreasonable because not all habitat used by an overfished species is essential. Another commenter wanted NMFS to require that the Councils establish a stronger link between the loss of habitat and its contribution to overfishing before it is considered essential. Several commenters wanted this provision deleted from the rule entirely, while others wanted to see all habitat for overfished species identified as EFH. One commenter evaluated the provisions for designating EFH for overfished species in the context of the Endangered Species Act (ESA). This commenter stated that the EFH provisions appear inconsistent with the way in which NMFS evaluates habitat in the ESA. The commenter noted that in NMFS' implementation of the ESA, the agency recognizes that currently available habitat is sufficient for conservation for some species. These commenters stated that identifying EFH in areas historically used by fish may not be the best means to ensure the conservation and enhancement of EFH.

Response B: NMFS agrees that it might not always be appropriate to identify as EFH all current habitats as well as certain historic habitats. NMFS has changed the guidance related to determining EFH for overfished species, now in § 600.815(a)(1)(iv)(C), to state that all habitats currently used by the species "may be considered essential" (versus "should be considered essential") if a species is overfished and habitat loss or degradation may be contributing to the species being overfished. Councils should make this determination on a case-by-case basis.

All FMP conservation and management measures, including identifying the limits of EFH for overfished species, must be based on the best scientific information available. As addressed in the preamble to the interim final rule at 62 FR 66537, the rule advocates a risk-averse approach to

identifying EFH because of the uncertainty in our knowledge of habitat and its relation to fisheries production. Councils should take particular care when inadequate information exists on overfished stocks to ensure that habitat losses do not hinder the stock rebuilding.

EFH and the habitat components of the ESA are authorized under different legislative mandates and have unique objectives. EFH must be designated for all federally managed species. Conservation and enhancement measures for EFH, if implemented by the agencies with relevant jurisdiction, should help prevent the need to list species under the ESA.

Comment C: One commenter wanted the guidance in § 600.815(a)(2)(ii)(F) of the interim final rule to be deleted from the regulations. This commenter stated that the Magnuson-Stevens Act only authorizes designation of existing habitat as EFH and does not provide the authority to identify EFH for degraded or inaccessible habitat.

Response C: NMFS responded to similar comments in the preamble to the interim final rule at 62 FR 66534, and upon further consideration takes the same position. The provision of the rule that allows the designation of inaccessible or degraded habitat as EFH is consistent with the EFH provisions of the Magnuson-Stevens Act. Section 2 of the Magnuson-Stevens Act recognizes that habitat losses have resulted in a diminished capacity to support sustainable fisheries and that the protection of habitat is necessary to prevent overfishing and rebuild overfished stocks. The restoration of degraded or inaccessible habitats may therefore be necessary to maintain or rebuild sustainable fisheries.

Comment D: Several commenters wanted the final rule to restrict EFH designation to the habitat required to maintain commercial fisheries at optimal yield or another quantitative measure of the status of a stock.

Response D: NMFS provided a detailed response to this comment in the preamble to the interim final rule at 62 FR 66533, and, upon further consideration, still takes the same position. The Magnuson-Stevens Act states that one of its purposes is to provide for the preparation and implementation of FMPs that will achieve and maintain the optimal yield from each fishery. Therefore, NMFS has linked the guidelines for identifying EFH to sustainable fisheries as is appropriate under the Magnuson-Stevens Act. The rule states that FMPs should identify sufficient EFH to support a population adequate to maintain a sustainable fishery and the managed species' contributions to a healthy ecosystem. When considering the EFH requirements of a managed species, the rule advises Councils to describe and identify enough habitat to support the total population, of which optimal yield is a subset, not just the individual fish that are removed by fishing.

Comment E: Several commenters wanted the final rule to establish incentives for improving the data available for identifying EFH. These commenters thought a research agenda should be developed to collect the information needed to identify EFH with Level 2, 3, and 4 data.

Response E: NMFS agrees that a prioritized EFH research agenda would be beneficial. The final rule asks the Councils to set priority research needs to improve upon the description and identification of EFH, the identification of threats to EFH from fishing and non-fishing activities, and the development of conservation and enhancement recommendations. The rule also encourages the Councils to strive to describe habitat based on the highest level of detail (i.e., Level 4). Additionally, the final rule says that Councils and NMFS should periodically review and revise the EFH components of FMPs based on available pertinent information. NMFS is working within the constraints of available funding to conduct additional research to improve the designations of EFH.

Comment F: One port authority stated that the EFH designations should undergo a formal rulemaking process.

Response F: NMFS disagrees. Councils identify EFH within the existing statutory and regulatory process for FMP development and amendment, which provides numerous opportunities for public involvement. All Council deliberations on fishery management measures are open to the public, and all Council meeting agendas are published in the **Federal Register**. Additionally, NMFS publishes notices of availability and solicits public comments for FMPs and amendments received for Secretarial review. NMFS also publishes a public notice of decision in the **Federal Register**.

Comment G: A member of the recreational fishing community commented that the rule should be revised to require the identification of EFH for species assemblages, not individual species. Another commenter asked that Councils describe EFH separately within each FMP rather than making broad regional designations.

Response G: The final rule clarifies that every FMP must describe and identify EFH for each life stage of each managed species, but if appropriate, EFH may be designated for assemblages of species or life stages that have similar habitat requirements. If an FMP designates EFH for species assemblages, it must include a justification and scientific rationale.

Comment H: One Council stated that the specification that tables must be used to describe EFH may constrain the development of useful EFH descriptions. The Council stated that textual EFH descriptions would be more helpful.

Response H: NMFS agrees, and the final rule does not require that EFH be described in tables. The final rule clarifies that FMPs must describe and identify EFH in text and should use text and tables as appropriate to summarize information on variables that control or limit distribution, abundance, reproduction, growth, survival, and productivity.

Comment I: Many commenters stated that the final rule should allow the Councils to identify EFH within state and Federal waters. One commenter wanted to see EFH designations based on the biological needs of each species, not geographic or political boundaries.

Response I: NMFS agrees, and addressed these comments in the preamble to the interim final rule at 62 FR 66535. The Magnuson-Stevens Act requires Councils to describe and identify EFH based on the biological requirements of all life stages of the managed species, with no limitations placed on the geographic location of EFH. EFH may be designated in state or Federal waters, but may not be designated beyond the United States exclusive economic zone.

Comment J: One commenter from a non-fishing industry group expressed concern that EFH might be designated in upland areas where fish habitat does not exist. One commenter from a conservation group and a commenter from a fishing group recommended that Councils be allowed to designate EFH in riparian corridors and on other dry lands that influence the productivity of aquatic areas.

Response J: EFH is defined in the Magnuson-Stevens Act as those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. The EFH regulations interpret this definition by defining "waters" and "substrate." "Waters" include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate. "Substrate" includes

sediment, hard bottom, structures underlying the waters, and associated biological communities. EFH can only be designated in aquatic areas. EFH cannot be designated in riparian habitat or on dry land, although actions in these areas that may adversely affect EFH do require consultation with NMFS. The definition of "adverse effect" in the final rule clarifies that adverse effects to EFH may result from actions occurring within EFH or outside of EFH.

Comment K: Several commenters, including fishing and non-fishing groups and some government agencies, expressed concern that the EFH designations made under the interim final rule are extremely broad. Non-fishing groups commented that NMFS arbitrarily designated all habitat as EFH rather than designating "necessary" or "essential" habitats, as the statute requires. In contrast, one commenter thought that the guidance in § 600.815(a)(2)(ii) of the interim final rule that asks the Councils to identify EFH as the habitats areas "valued most highly" and "most commonly used" was not sufficiently inclusive to capture all the areas that should be identified as EFH.

Response K: Councils were justified in designating broad areas as EFH based on the guidance in the interim final rule. For many species there is little available scientific information linking the biological requirements of managed species to specific habitats. In such cases the rule encourages Councils to interpret available information in a risk-averse fashion. Moreover, NMFS is undertaking research in several regions to obtain additional scientific information. As further information becomes available, EFH designations will be refined.

NMFS has also taken steps to clarify in the final rule that EFH identification should emphasize necessary habitats for fish, based on available information. To reduce confusion about what habitats generally should be considered essential, the final rule omits language from the interim final rule saying that "habitats of intermediate or low value may also be essential, depending on the health of the fish population" because this concept is covered elsewhere in the rule. The final rule also clarifies that if sufficient information is available, EFH should be identified as the habitats supporting the highest relative abundance; growth, reproduction, or survival rates; and/or production rates within the geographic range of a species. Furthermore, the final rule encourages Councils to identify EFH based on the highest level of information available, and states that EFH should not be designated if there is no information available and if habitat usage cannot be inferred from other means, such as information on a similar species.

Comment L: Two conservation groups expressed concern about specific elements of Amendment 14 to the Pacific Coast Salmon FMP.

Response L: These comments were not relevant to the EFH regulations.

8. Comments on the Sources and Quality of Information Used to Identify EFH

Comment A: Commenters representing fishing and non-fishing interests and environmental groups wanted to see NMFS use all good quality information to identify EFH. Some of these commenters wanted the standard of "best scientific information" to be replaced with a standard of "best available information from all sources," including fishing interests. Some commenters also wanted this standard of information to extend to NMFS' EFH Conservation Recommendations.

Response A: Section 600.815(a)(1)(ii)(B) of the final rule reflects that Councils should use information from the best available sources to identify EFH, including peer-reviewed literature, unpublished scientific reports, data files of government resource agencies, fisheries landing reports, and other sources of information. As stated in the preamble to the interim final rule at 62 FR 66536, NMFS intended to have the Councils use the best available information from a variety of sources, and the Magnuson-Stevens Act requires NMFS to consult with participants in the fishery before submitting its recommendations to the Councils to assist in developing the EFH components of FMPs. However, all information should be evaluated with regard to reliability, so the final rule clarifies that Councils should consider different types of information according to its scientific rigor. NMFS intends to continue using the best available sources of information to develop EFH Conservation Recommendations to Federal and state agencies.

Comment B: One marine conservation group thought the requirement that Councils must demonstrate their use of best available science in the identification of EFH may place an inappropriate burden of proof on the Councils.

Response B: The final rule maintains the requirement that Councils demonstrate that the best scientific information available was used in the description and identification of EFH, consistent with national standard 2. Section 301(a) of the Magnuson-Stevens Act requires all fishery management plans, and any regulation promulgated to implement such plans, to be consistent with the national standards. National standard 2 requires that fishery conservation and management measures be based on the best scientific information available. Applying this standard to the identification of EFH is appropriate and necessary to comply with the Magnuson-Stevens Act.

Comment C: A commenter representing non-fishing industry interests wanted the final rule to require the Councils to record, and make available for public review and comment, the scientific basis for all Council decisions. Another commenter wanted to require a list of all judgments for which data were not available and recommended that this list of data gaps be used to set a research agenda.

Response C: All Council deliberations on fishery management measures are open to the public, and adopted measures must be based on the best scientific information available. The final rule clarifies that FMPs should identify species-specific habitat data gaps. The final rule also clarifies that FMPs should contain recommendations for research needed to improve upon the description and identification of EFH, the identification of threats to EFH from fishing and non-fishing activities, and the development of conservation and enhancement measures for EFH.

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

Comment A: As discussed separately above, NMFS received numerous general comments in favor of implementing the regulations without substantial changes, many of which mentioned specific support for the approach used in the interim final rule for organizing information used to designate EFH.

Response A: The final rule retains the four-level approach for organizing information used to designate EFH. However, the final rule clarifies that Level 1 information encompasses a variety of types of distribution data, which may be derived from systematic presence/absence sampling and/or may include information collected opportunistically. Since distribution data are lacking for a number of managed species, especially in Alaska, the final rule clarifies that habitat use for a given species or life stage may be inferred, if appropriate, based on information on a similar species or another life stage. The final rule also clarifies that if there is no information on a given species or life stage, and habitat usage cannot be inferred from

other means, EFH should not be designated.

Comment B: One commenter recommended that NMFS develop an incentives program or funding mechanism to encourage data collection to support identifying EFH with Level 3 or 4 data, as described in the interim final rule. Another commenter said that EFH should be categorized and prioritized according to its availability, vulnerability, and utilization.

Response B: For most species managed under the Magnuson-Stevens Act, available information on habitat requirements falls into Levels 1 or 2 (distribution or relative abundance data). NMFS agrees that having Level 3 or 4 data (rates of habitat-related growth, reproduction, or survival, or production rate data) would enable the Councils to refine the designations of EFH. NMFS is pursuing budget initiatives and partnerships with others to encourage the development of this type of information. Regarding the characterization and prioritization of EFH, NMFS agrees that the categories mentioned by the commenter are valid considerations for evaluating habitats. However, NMFS does not agree that the regulations should require EFH to be categorized, because requisite information to categorize EFH in this fashion is not available in many cases. Where Councils have more information on the ecological importance or vulnerability of portions of EFH, they may identify those areas as Habitat Areas of Particular Concern.

Comment C: One commenter said that further mechanisms are necessary to delineate important habitats based on habitat characteristics rather than the distribution of fish species. The commenter recommended adding to the regulations guidance that is complementary to the four-level approach but is based on an assessment of ecological significance and function of habitat.

Response C: NMFS agrees that where sufficient information is available, EFH designations should specify those habitat features that contribute most to the growth, reproduction, and survival of managed species (Level 3) or, ideally, those habitats with the highest production rates (Level 4) for each species. The final rule clarifies that this type of information, if available, should be used to identify EFH as the habitats supporting the highest growth, reproduction, survival, and/or production rates within the geographic range of a species. Currently, however, in most cases the best available scientific information is fish distribution (Level 1) or relative abundance (Level 2) data. Additional guidance linking EFH to habitat function, beyond the clarification mentioned above, is not necessary at this time because the rule already explains how to use Level 3 and 4 information to identify habitats with the highest ecological function for managed species.

10. Comments on the Guidelines for Determining the Limits of EFH

Comment A: One commenter representing waterfowl management efforts said that the importance of long-term sustainability of coastal wetlands habitat is overshadowed by the narrow focus of the EFH regulations on achieving optimal yield from a fishery.

Response A: As explained in the preamble to the interim final rule at 62 FR 66533, the Magnuson-Stevens Act states that FMPs must achieve the optimum yield from each fishery on a continuing basis, and determinations of optimal yield should take into account the protection of marine ecosystems. There is no inherent inconsistency between the overall objectives of promoting the conservation of coastal wetlands for waterfowl and promoting the conservation of EFH that is necessary to support a sustainable fishery and the managed species' contribution to a healthy ecosystem (including avian predators of managed species). However, specific wetlands management activities may not always advance both these objectives, and should be evaluated on a case-by-case basis.

Comment B: An alliance of Pacific northwest conservation groups commented that habitats that were historically used by salmon but are currently degraded or inaccessible should be included in EFH.

Response B: NMFS agrees that EFH should include historic habitats in certain circumstances. The final rule retains language in § 600.815(a) allowing the inclusion of such habitats as EFH, provided that the habitats are necessary to support rebuilding the fishery and that restoration is technologically and economically feasible.

Comment C: One organization commented that the Magnuson-Stevens Act defines EFH in terms of life history characteristics for managed species, whereas the interim final rule interprets EFH in terms of productivity.

Response C: The guidelines for determining the limits of EFH emphasize the habitat functions that have the most benefits to fish during the life stages contained in the statutory definition of EFH: spawning, breeding, feeding, and growth to maturity. Thus, the guidelines refer to habitats that support the highest productivity of managed species at each life stage. The regulations must make this connection between species and productivity to offer guidance on how to identify EFH based on the habitat needs of managed species at each life stage.

Comment D: One commenter asked who will determine whether it is economically feasible to restore degraded or inaccessible habitat in connection with the provision of the interim final rule that allows Councils to identify such areas as EFH.

Response D: The final rule retains language from the interim final rule saying that the Secretary and the appropriate Council(s) determine whether, for purposes of potentially identifying degraded or inaccessible aquatic habitat as EFH, restoration of such habitats is technologically and economically feasible. Through the Magnuson-Stevens Act process for developing FMPs and amendments, there are numerous opportunities for public comment on any proposal to designate degraded or inaccessible habitat as EFH, including the economic feasibility or infeasibility of restoration.

11. Comments on the Relationship Between EFH and Critical Habitat

Comment A: Several commenters said that EFH should be restricted to waters and substrate only and must always be greater than or equal to "critical habitat" identified for managed species that are listed as threatened or endangered under the ESA. Several other commenters thought it was inappropriate for the interim final rule to state a relationship between EFH and "critical habitat" that will always apply for ESA listed species. These commenters thought that the extent of EFH for listed species should be left to the Councils to decide on a case-by-case basis.

Response A: In the preamble to the interim final rule at 62 FR 66537, NMFS responded to similar comments that were critical of the corresponding provision in the proposed rule, and noted that the interim final rule contained modifications to help distinguish between EFH and critical habitat. NMFS maintained that it is appropriate for the rule to state that EFH will always be greater than or equal to the aquatic portions of critical habitat because, for example, important adult marine habitats for endangered salmonids have not been identified as critical habitat. Upon further consideration of this issue, NMFS agrees that there could conceivably be some

circumstances where this relationship between EFH and critical habitat might not be appropriate, so the word "always" is not appropriate in this provision of the regulations. The term "will" in the EFH regulations is used descriptively and does not denote an obligation to act, but apparently the use of "will" in combination with "always" implied to some readers a mandatory requirement. Therefore, the final rule states that areas described as EFH "will normally" (rather than "will always") be greater than or equal to aquatic areas that have been identified as critical habitat. NMFS agrees with the commenters who stated that EFH must be limited to aquatic areas.

Comment B: One commenter addressed the explanation in the preamble to the interim final rule at 62 FR 66537 stating that directed fishing of listed species is not permitted. This commenter said that rather than focus on non-fishing related threats to managed species that are listed under the ESA, NMFS should control indirect fishing effects on listed runs (which NMFS assumes to mean bycatch).

Response B: Salmon managed under the Pacific Coast Salmon FMP and the Atlantic Salmon FMP are the only species that currently are both listed under the ESA and managed under the Magnuson-Stevens Act. The 1996 amendments to the Magnuson-Stevens Act included a new requirement that fishery management measures minimize bycatch and, to the extent bycatch cannot be avoided, minimize the mortality of bycatch. Amendment 14 to the Pacific Coast Salmon FMP addresses this requirement by providing guidance for minimizing salmon bycatch and bycatch mortality, and by establishing salmon bycatch reporting specifications. The Atlantic Salmon FMP minimizes bycatch by prohibiting the possession of Atlantic salmon in the EEZ. The Magnuson-Stevens Act also requires evaluation of threats to EFH from non-fishing activities, so NMFS cannot divert all efforts to bycatch reduction at the expense of addressing threats from activities other than fishing.

12. Comments on the Effects of Fishing on EFH

Comment A: Some commenters expressed concern that the EFH regulations imply that fishing is the major, if not only, cause of habitat degradation.

Response A: NMFS disagrees with the commenters' perception of the interim final rule. Fishing and non-fishing activities have potential adverse effects on habitat and the regulations address both. The regulations provide guidance to Councils and procedures for Federal agencies on how to address adverse effects from non-fishing activities on EFH. The Magnuson-Stevens Act specifically requires that FMPs minimize to the extent practicable adverse fishing effects on EFH, so the regulations also include sections that focus on habitat impacts from fishing.

Comment B: One commenter expressed concern that the EFH provisions are being used arbitrarily to prevent the use of certain fishing gears, rather than to protect EFH based on scientific information.

Response B: NMFS disagrees with the commenter's opinion. The EFH provisions require Councils to minimize to the extent practicable the adverse effects on EFH caused by fishing. The Magnuson-Stevens Act and the EFH regulations address impacts caused by fishing activities in general and do not target specific gear types. Councils must evaluate the effects of all fishing activities (e.g., each gear type) on EFH, and fishery management measures must be based on the best scientific information available.

Comment C: One commenter from the commercial fishing community remarked that the size and duration of time/area closures, mentioned in the EFH regulations as an option for managing adverse effects from fishing, must be considered carefully since these management measures can impact the socioeconomic status of fishermen and their families.

Response C: NMFS agrees. By including the language "to the extent practicable" in the requirement to minimize adverse fishing impacts, Congress intended for fishery managers to take both ecological and socioeconomic effects of measures into consideration in determining whether it is appropriate to adopt particular management measures. The final rule clarifies the guidance to Councils for determining whether it is practicable to minimize an adverse effect from fishing, and states that Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation.

13. Comments on the Evaluation of the Effects of Fishing

Comment A: One commenter expressed concern about the quality of information that Councils were using to conduct assessments of the effects of fishing on EFH as required by the interim final rule, and recommended that NMFS provide Councils with a standard of review for non-scientific information such as "gray" literature, videos, and anecdotal information. Other commenters suggested that NMFS provide guidance to Councils for how to fulfill their obligation to minimize adverse fishing effects on EFH to the extent practicable when information is lacking.

Response A: NMFS agrees that further guidance is warranted to explain how Councils should consider available information. The final rule clarifies the requirement for Councils to examine the effects of fishing on EFH, and refers to this analysis as an "evaluation" rather than an "assessment" to avoid confusion with the requirement to perform an EFH Assessment during consultations as described in Subpart K. The final rule retains language from the interim final rule advising Councils to complete the evaluation using the best scientific information available, as well as other appropriate information sources, as available. When information is lacking, or when Councils use non-peer-reviewed or non-scientific information to augment the evaluation, the final rule states that Councils should consider the different types of available information according to its scientific rigor.

Comment B: Several commenters said that Councils did not adequately evaluate adverse effects from fishing in their EFH FMP amendments and urged NMFS to establish specific requirements, such as requiring Councils to classify the level of impacts according to gear type, to guide Councils in completing fishing impact evaluations.

Response B: The EFH regulations require Councils to evaluate the potential adverse effects of fishing activities on EFH so that Councils will be informed when making decisions regarding minimization of adverse effects to EFH from fishing. NMFS did not fully approve those EFH FMP amendments that did not meet this requirement.

Based upon experience implementing the interim final rule, NMFS agrees that the regulations should clarify the requirements for conducting fishing impact evaluations, and NMFS has modified the rule accordingly. Specifically, the final rule requires Councils to describe each fishing activity, review and discuss all available relevant information (such as information regarding the intensity, extent, and frequency of any adverse effect on EFH; the type of habitat within EFH that may be affected adversely; and the habitat functions that may be disturbed), and provide conclusions regarding whether and how each fishing

activity adversely affects EFH. The final rule also clarifies that Councils should consider the cumulative impacts of multiple fishing activities on EFH in the fishing impact evaluation.

Comment C: Two commenters recommended that the EFH regulations be revised to advise Councils to document and assess in FMPs all management actions taken prior to the enactment of the EFH provisions that benefit habitat before recommending new measures to conserve and enhance EFH.

Response C: NMFS agrees that it is useful for Councils to document and consider any past management actions that provide habitat protection. The final rule recommends that Councils list past management actions that minimize potential adverse effects on EFH and describe the benefits of those actions to EFH in the evaluation of fishing impacts on EFH.

14. Comments on the Threshold That Requires Councils to Minimize Adverse Effects of Fishing on EFH

Comment A: One commenter questioned use of the words "prevent" and "mitigate" in the portion of the EFH regulations that states, "Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable..." The commenter indicated that use of these words is inappropriate since the Magnuson-Stevens Act only authorizes Councils to "minimize" adverse fishing effects on EFH.

Response A: NMFS disagrees. By using the words "prevent" and "mitigate" in this provision of the EFH regulations, NMFS' intent is to give Councils the flexibility to adopt the approach that is most suitable to meet the statutory obligation to minimize adverse fishing effects on EFH. For instance, it might be more effective for Councils to act to prevent particularly damaging adverse effects rather than allowing all types of effects to occur with some degree of minimization.

Comment B: The interim final rule stated that Councils must minimize to the extent practicable adverse effects on EFH from fishing if there is evidence that a fishing practice is having an identifiable adverse effect on EFH. Some commenters from conservation groups were pleased that NMFS replaced the word "substantial" (from the proposed rule) with "identifiable," stating that "identifiable" is closer to the intent of the statute in terms of indicating the threshold at which Councils must take action to minimize adverse fishing effects to EFH. Others expressed concern that the word "identifiable" is inappropriate since this language does not appear in the Magnuson-Stevens Act and may still raise the threshold for action above that set by the Act. Commenters also expressed concern that the need to demonstrate an "identifiable" adverse effect might lead the Councils to inaction. Furthermore, commenters questioned the meaning of the descriptors for the term "identifiable," offered in both the preamble to the interim final rule and the draft technical guidance manual, that "identifiable means both more than minimal and not temporary in nature." Some commenters recommended that the EFH regulations require Councils to demonstrate adverse impacts scientifically and make the specific connection between adverse impacts and reduced stock productivity before taking action to minimize these impacts.

Response B: As discussed in the preamble to the interim final rule at 62 FR 66538, NMFS' intent was to provide guidance to Councils for determining when to act to minimize adverse fishing effects to EFH. Such action is warranted to regulate fishing activities that reduce the capacity of EFH to support managed species, not fishing activities that result in inconsequential changes to the habitat. In response to commenters' concern over the word "identifiable" in the interim final rule, NMFS modified this section to read, "Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature" based on the Councils' evaluation of the potential adverse effects of fishing. Temporary impacts are those that are limited in duration and that allow the particular environment to recover without measurable impact. Minimal impacts are those that may result in relatively small changes in the affected environment and insignificant changes in ecological functions.

It is not appropriate to require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take action to minimize adverse fishing impacts to EFH to the extent practicable. Such a requirement would raise the threshold for action above that set by the Magnuson-Stevens Act. The final rule encourages Councils to use the best available science as well as other appropriate information sources when evaluating the impacts of fishing activities on EFH, and to consider different types of information according to its scientific rigor.

Comment C: Several conservation groups criticized Councils for not adopting any new measures to minimize adverse effects from fishing activities and requested that NMFS require in the EFH regulations that new measures be taken to comply with the Magnuson-Stevens Act. Many of the same groups commented that NMFS should develop documentation requirements for Councils to demonstrate compliance with the requirement to minimize adverse fishing impacts to EFH to the extent practicable.

Response C: The final rule clarifies that Councils should document compliance with the requirement to minimize to the extent practicable adverse effects on EFH caused by fishing. When there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature, Councils should identify in FMPs a range of potential new actions that could be taken to address adverse effects on EFH; include an analysis of the practicability of potential new actions; and adopt any new measures that are necessary and practicable. However, new measures may not be necessary in all cases. The final rule requires that FMPs explain the reasons for Councils' conclusions regarding the past and/or new actions that minimize to the extent practicable the adverse effects of fishing on EFH.

Comment D: One commenter suggested that NMFS revise the EFH regulations to require Councils to adopt framework measures to address fishing impacts.

Response D: NMFS disagrees with this suggestion. It is not necessary or appropriate to add a requirement to the EFH regulations that Councils use framework measures as the mechanism to address fishing impacts. Rather, Councils should decide which administrative approach is most appropriate to use to meet the requirements of the EFH provisions.

Comment E: Several conservation groups recommended that each fishing activity be prohibited until it can be demonstrated that the activity does not adversely affect EFH.

Response E: NMFS disagrees. The approach suggested by the commenters would not be consistent with the statutory requirement to minimize adverse effects on EFH "to the extent practicable" and would have significant adverse socioeconomic impacts. The EFH provisions of the Magnuson-Stevens Act and the EFH regulations provide adequate mechanisms to evaluate the effects of fishing activities on EFH and ensure the minimization of adverse impacts on such habitat.

Comment F: Two commenters recommended that NMFS provide clearer guidance on how to interpret the term "practicable" and how Councils should carry out practicability analyses to comply with the statutory requirement to minimize to the extent practicable adverse effects on EFH caused by fishing. Another commenter noted that the phrase "consistent with national standard 7" in the section on conducting practicability analyses is unnecessary since all actions must be consistent with national standard 7 under the Magnuson-Stevens Act.

Response F: The final rule clarifies the guidance for considering practicability. The revised language eliminates redundancy and advises Councils to consider long- and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation. The final rule retains a reference to national standard 7 to provide context for the consideration of the costs and benefits of potential management measures.

Comment G: One commenter requested that NMFS reinsert the words "the marine ecosystem" in place of "EFH" in the following passage from § 600.815(a)(3)(iv) of the interim final rule: "Councils should consider whether, and to what extent, the fishing activity is adversely impacting EFH..." The commenter stated that the language used in the proposed rule was a more accurate reflection of the spirit of the Magnuson-Stevens Act.

Response G: NMFS disagrees. The Magnuson-Stevens Act requires Councils to address the effects of fishing on EFH, not on the entire marine ecosystem. The final rule incorporates editorial changes to eliminate redundancy, and therefore omits language cited by the commenter. The cited paragraph appears at § 600.815(a)(2)(iii) of the final rule.

Comment H: One commenter suggested that the EFH regulations clarify that Councils must address the effects of fishing covered under one FMP on EFH covered under another FMP.

Response H: NMFS agrees. The final rule clarifies that each FMP must minimize to the extent practicable adverse effects from fishing on EFH, including EFH designated under other Federal FMPs. The final rule also clarifies that each FMP must contain an evaluation of the potential adverse effects of fishing on EFH designated under the FMP, including effects of each fishing activity regulated under the FMP or other Federal FMPs.

Comment I: Several commenters recommended that NMFS revise the EFH regulations to indicate what constitutes grounds for disapproval of the portion of FMPs pertaining to minimization of fishing impacts.

Response I: Disapproval is warranted if an FMP or amendment is not consistent with the national standards, other provisions of the Magnuson-Stevens Act, or other applicable law. The EFH regulations provide guidance on meeting the EFH requirements of the Act, and failure to follow the guidance may lead to disapproval or partial approval of an FMP or amendment. It is unnecessary to state the grounds for disapproval in the regulations.

Comment J: One commenter recommended that NMFS require Councils to coordinate with states and other authorities to provide conservation recommendations when Council-managed fisheries adversely affect EFH outside Federal jurisdiction.

Response J: The Magnuson-Stevens Act does not authorize NMFS to require Councils to coordinate with or provide recommendations to states or other authorities, although Councils have authority under the Act to provide recommendations to states regarding actions that may affect the habitat of species under Council jurisdiction. When Council-managed fisheries adversely affect EFH in state waters, the Council should coordinate with the affected state(s) when developing management strategies.

15. Comments on the Identification of Specific Industries with Potential Adverse Effects on EFH

Comment A: Two commenters thought that the final rule should identify specific industries that adversely impact EFH.

Response A: During the comment period for the proposed rule, many commenters objected to their particular industries or activities being highlighted as having potential adverse effects on EFH. Many pointed out that non-fishing activities do not always adversely impact fish habitat. Some industries pointed out that they are involved in restoration efforts and that some of their activities have been documented as producing positive effects on fisheries, not adverse effects. In the preamble to the interim final rule at 62 FR 66540, NMFS acknowledged that many industries take certain actions specifically to improve fish habitat even if other activities conducted by the industry may adversely affect fish habitat. Therefore, the final rule avoids singling out specific industries or activities that have the potential to adversely affect EFH.

Comment B: One port authority asked NMFS to clarify that "non-water dependent activities," as used in the interim final rule, excludes port development and maintenance activities. The commenter's request extended to other location-dependent activities such as bridge and utility/cable-line installation and maintenance.

Response B: Although NMFS has removed from the regulations the reference to specific non-water dependent activities, any Federal action that may adversely affect EFH is subject to consultation regardless of water dependency.

Comment C: Several non-fishing industry commenters asked NMFS to explain its authority for asking the Councils to identify non-fishing activities, and stated that the Magnuson-Stevens Act appears only to provide authority to identify fishing activities.

Response C: NMFS addressed this concern in the preamble to the interim final rule at 62 FR 66539–66540 and continues to disagree that its authority is limited to addressing fishing activities. One of the stated purposes of the Magnuson-Stevens Act is to promote the protection of EFH through the review of projects conducted under Federal permits, licenses, or other authorities that affect, or have the potential to affect, such habitat. These projects include non-fishing activities. Section 303(a)(7) of the Magnuson-Stevens Act requires FMPs to address the effects of fishing on EFH and identify other actions to encourage the conservation and enhancement of EFH. The statute does not limit these measures to pertain only to fishing activities. A necessary first step to identifying conservation and enhancement measures is to identify adverse effects.

Comment D: One commenter representing non-fishing industry interests wanted the final rule to require that FMPs document actual adverse effects to EFH, rather than potential adverse effects.

Response D: NMFS disagrees. Documentation of actual adverse effects in most cases depends on site-specific factors, whereas the intent of this portion of the rule is to identify the types of activities that can commonly cause adverse effects. The final rule omits language stating that FMPs must identify activities that "have the potential to adversely affect EFH" and instead says that FMPs must identify activities "that may adversely affect EFH." This change will make the standard for identifying threats to EFH consistent with the standard for actions

that require consultation under section 305(b)(2)of the Magnuson-Stevens Act.

16. Comments on Cumulative Impacts Analysis

Comment A: Many commenters, primarily environmental organizations and some individual commenters, wanted the final rule to mandate that the FMPs contain a cumulative impacts analysis of fishing and non-fishing activities on EFH.

Response A: NMFS agrees that FMPs should provide an analysis of cumulative impacts, but does not agree that such an analysis should be mandatory. The final rule clarifies that, to the extent feasible and practicable, FMPs should analyze how the cumulative impact of fishing and non-fishing activities influence the function of EFH on an ecosystem or watershed scale.

Comment B: Commenters representing non-fishing interests asked that cumulative impact analysis concentrate on a more clearly defined and focused group of watershed activities. The commenters also wanted to know what time period the cumulative impact analysis should address and why cumulative risk assessments would be conducted at all, since they are likely to be time consuming and expensive.

Response B: NMFS has clarified the cumulative impacts analysis language in the final rule. A cumulative impacts analysis is intended to evaluate the effect on EFH of impacts occurring within a watershed or marine ecosystem that may result from individually minor but collectively significant actions. It should consider the effects of all actions that affect the quantity and/or quality of EFH spanning a time frame deemed appropriate by the Councils. The resulting analysis will improve NMFS' and the Councils' ability to examine actions within a watershed or marine ecosystem that adversely affect EFH and will highlight the potential for future concerns. The final rule retains language stating that the FMPs should contain such an analysis to the extent feasible and practicable.

Comment C: One commenter requested that the word "minor" be removed from the description of what can cause cumulative impacts from § 600.815(a)(6) of the interim final rule.

Response C: NMFS disagrees. The intent of a cumulative impacts analysis is to address potential effects of actions that may appear minor individually, yet have more serious consequences when viewed in the aggregate. Thus, the final rule retains language stating that cumulative impacts can result from individually minor, but collectively significant actions taking place over a period of time.

Comment D: One commenter stated that the final rule should require the Councils to gather data to analyze cumulative impacts and that the quantity and quality of data should guide the conclusions on cumulative impacts. The commenter also wanted the FMPs to indicate which impacts are supported by data.

Response D: National standard 2 requires that all conservation and management measures, including those that arise from a cumulative impacts analysis, be based upon the best scientific information available. NMFS agrees that the quantity and quality of available data should guide Councils' conclusions on cumulative impacts, although Councils should also consider that cumulative impacts may not be easily discernable from available data.

17. Comments on the Guidance for Identifying Actions to Encourage the Conservation and Enhancement of EFH

Comment A: Two commenters addressed the guidance for general conservation and enhancement recommendations found in § 600.815(a)(7)(ii) of the interim final rule. One of the commenters focused on the statement that "Activities that may result in significant adverse effect on EFH should be avoided where less environmentally harmful alternatives are available." The commenter questioned the use of the term "significant" here as opposed to "identifiable" in § 600.815(a)(3) of the interim final rule and said that NMFS appears to be condoning an increased level of habitat disturbance for non-fishing activities. The commenter also suggested replacing "should be avoided" with "will be avoided" in this sentence. Another commenter, representing non-fishing interests, wanted NMFS to delete the reference to "protecting" EFH in this portion of the regulations.

Response A: In the final rule NMFS deleted a large portion of the section entitled "Conservation and enhancement" that appeared in the interim final rule at § 600.815(a)(7), including the language referenced by the commenters. The deleted paragraphs contained general recommendations and options for EFH conservation and enhancement to assist Councils in developing the required provision of FMPs discussing measures to conserve and enhance EFH. However, NMFS determined that such general recommendations do not need to be codified in regulations and that including this information in the final rule could lead to confusion since the general recommendation might not apply equally in all areas. The shortened section dealing with conservation and enhancement recommendations appears in the final rule at § 600.815(a)(6).

Comment B: One commenter wanted NMFS to clarify that habitat creation should be reserved for mitigating habitat losses or restoring native fish populations and should not alter natural habitats.

Response B: As discussed above, the rule no longer contains any general recommendations for habitat creation or other methods to conserve and enhance EFH. Conservation and enhancement recommendations in FMPs must include options to avoid, minimize, or compensate for adverse effects to EFH. If appropriate, habitat creation may be a means of compensating for lost or degraded habitat. However, converting naturally functioning systems to another type of habitat warrants justification within an ecosystem context.

Comment C: One state commenter asked for clarification on how the Councils will evaluate the effectiveness of each recommended mitigation measure (i.e., conservation and enhancement option). The commenter asked that the FMPs include feedback mechanisms to assess the effectiveness of, and establish a monitoring program for, recommended mitigation measures.

Response C: The final rule does not require Councils to evaluate the effectiveness of each recommendation in FMPs for EFH conservation and enhancement. Council recommendations, however, should be based on the best scientific information available. NMFS and Councils may suggest monitoring requirements or other appropriate measures in their recommendations on state and Federal agency actions under sections 305(b)(3) and (4) of the Magnuson-Stevens Act.

Comment D: One commenter representing non-fishing interests wanted NMFS to delete the requirements of § 600.815(a)(5) of the interim final rule that require Councils to identify non-fishing activities that may adversely affect EFH. Several commenters representing non-fishing interests wanted NMFS to delete the language in § 600.815(a)(7)(i) of the interim final rule that refers to conservation and enhancement measures for non-fishing activities. The commenters thought that the language addressing non-fishing activities exceeded the statutory authority of the Magnuson-Stevens Act and should be limited to fishing activities. The

commenters also stated that since the rule does not require listing conservation and enhancement recommendations for fishing activities, then it cannot do so for non-fishing activities.

Response D: NMFS disagrees and maintains that it has statutory authority to address non-fishing activities. NMFS has clarified the language in the final rule that discusses the identification of non-fishing activities that may adversely affect EFH in § 600.815(a)(4) and conservation and enhancement recommendations in § 600.815(a)(6), but these modifications did not change the substantive requirements of the rule. One stated purpose of the Magnuson-Stevens Act is to promote the protection of EFH through the review of projects conducted under Federal permits, licenses, or other authorities that affect, or have the potential to affect, such habitat. These projects include non-fishing activities. Section 303(a)(7) of the Magnuson-Stevens Act requires FMPs to address the effects of fishing on EFH and identify other actions to encourage the conservation and enhancement of EFH. The statute does not limit these measures to fishing activities only. Likewise, section 305(b)(2) of the Magnuson-Stevens Act requires consultation for any federal action that may adversely affect EFH regardless of whether it is a fishing or non-fishing activity.

Comment E: Several non-fishing interests wanted the final rule to require the Councils to report on current conservation and enhancement practices and use data to identify how further conservation and enhancement of EFH is possible with additional measures. One commenter said that FMPs should document existing conservation measures before recommending new measures.

Response E: Councils must recommend appropriate measures for conservation and enhancement of EFH. These measures may include new recommendations or existing, routine practices of industry or other organizations that minimize potential harm to fish habitat. All Council recommendations should be based on the best scientific information available.

Comment F: A port authority asked that the Councils be required to consider the economic impacts to non-fishing maritime interests of making recommendations for minimizing adverse effects to EFH. The commenter pointed out that the rule requires the Councils to consider whether it is practicable to recommend conditions to minimize adverse effects from fishing. Given the economic importance of ports, the commenter thought that the Councils should apply the same standard of practicability to other recommendations for minimizing adverse effects to EFH from port maintenance and development activities.

Response F: As explained in the preamble to the interim final rule at 62 FR 66540, non-fishing and fishing impacts are held to different standards in the EFH regulations because of differences in the applicable provisions of the Magnuson-Stevens Act. Section 303(a)(7) of the Magnuson-Stevens Act requires that FMPs minimize effects of fishing on EFH to the extent practicable, and NMFS and the Councils manage fishing activities through regulations that must consider costs and benefits of required management measures. The requirement in Section 303(a)(7) of the Magnuson-Stevens Act for Councils to recommend conservation and enhancement measures for non-fishing activities does not mention practicability, and it is the responsibility of the agencies with relevant jurisdiction to determine whether it is practicable to implement Council recommendations. Nevertheless, Council recommendations should be reasonable.

18. Comments on Habitat Areas of Particular Concern

Comment A: Some commenters requested that NMFS delete all references to Habitat Areas of Particular Concern (HAPCs), saying that in encouraging Councils to designate HAPCs, NMFS is going beyond the scope of the EFH provisions since the Magnuson-Stevens Act does not specifically authorize the development of a subset of habitat within EFH. One commenter asked NMFS to clarify how the designation of HAPCs will be used to protect EFH, and specifically, how it will affect implementation of the consultation process. Other commenters urged NMFS to require Councils to designate HAPCs for all species and to hold HAPCs to a higher standard of protection.

Response A: NMFS disagrees that development of HAPCs as a subset of EFH goes beyond the scope of the Magnuson-Stevens Act. The statutory definition of EFH is broad, encompassing all habitat necessary for fish to carry out their basic life functions. HAPCs provide a mechanism to acknowledge areas where more is known about the ecological function and/or vulnerability of portions of EFH.

The designation of HAPCs is a valuable way to highlight priority areas within EFH for conservation and management. For example, a General Concurrence that is proposed for actions affecting HAPCs should be subject to a higher level of scrutiny than a General Concurrence not affecting HAPCs. Proposed fishing activities that might threaten HAPCs may likewise receive a higher level of scrutiny. NMFS has no authority to regulate activities other than fishing that may adversely affect EFH or HAPCs, so NMFS cannot impose protective measures for HAPCs through the consultation process. However, NMFS may recommend such measures to the applicable Federal or state action agency.

NMFS cannot require Councils to designate HAPCs. Any higher degree of protection for areas designated as HAPCs would result from having more available information about the function or sensitivity of the habitat, or the human-induced threats to the habitat, which may justify more stringent or precautionary management approaches.

Comment B: Some commenters recommended that the EFH regulations be revised to direct Councils to use HAPCs as the principal means to meet the requirements of the EFH provisions.

Response B: While HAPCs help to focus EFH conservation priorities, HAPCs are localized areas that are especially vulnerable or ecologically important. Healthy populations of fish require not only these relatively small habitats, but also other suitable areas that provide necessary habitat functions to support larger numbers of fish. HAPCs can highlight valuable and/or vulnerable habitats, but alone are not intended to comprise the areas necessary to support healthy stocks of fish throughout all of their life stages.

Comment C: One commenter requested that NMFS add a provision to the EFH regulations to allow stakeholders to petition NMFS to designate HAPCs.

Response C: It is not appropriate to add an HAPC petitioning provision to the rule, because HAPCs should be proposed through the Council process. NMFS encourages interested parties to participate in the identification of HAPCs through the Council process. Council meetings occur regularly throughout the year and are open to the public.

Comment D: The interim final rule listed four criteria for identifying HAPCs. One commenter requested that NMFS change the term "criteria" to more accurately reflect that the four items are "considerations."

Response D: NMFS agrees and has changed "criteria" to "considerations."

Comment E: One commenter requested that NMFS revise the first

consideration for HAPCs to distinguish between current and historical importance of ecological function provided by a particular habitat. The commenter also noted that this consideration should be expanded to include a determination as to whether the area in question serves more than one ecological function.

Response E: NMFS disagrees that a revision to this portion of the rule is necessary. The HAPC consideration regarding ecological importance may include both currently and historically important areas, provided that restoration of historic habitat functions is technologically and economically feasible. Additionally, Councils have flexibility to identify areas as HAPC that provide one or more important ecological functions.

Comment F: One commenter requested that NMFS define the word "rarity" in the fourth consideration for HAPC designation.

Response F: The fourth consideration for HAPC designation is the rarity of the habitat type. NMFS disagrees that a definition of "rarity" in the rule is needed, but suggests that Councils consider as rare those habitats that are less common than other habitats in a particular geographic area.

Comment G: One commenter recommended that the EFH regulations be revised to require Councils to address all four HAPC considerations to designate an area as an HAPC.

Response G: NMFS disagrees. Councils may designate HAPCs based on one or more of the four specified considerations, because any one of the considerations may provide sufficient basis for distinguishing a subset of EFH from the remainder of EFH.

Comment H: One commenter recommended that the EFH regulations be revised to require Councils to use information sources that meet a high scientific standard to designate HAPCs.

Response H: National standard 2 states that conservation and management measures shall be based upon the best scientific information available. This standard applies to all fishery management actions, including HAPC designation, and the final rule reemphasizes this point. Section 600.815(a)(1)(ii)(B) states, "Councils should obtain information to describe and identify EFH from the best available sources, including peer-reviewed literature, unpublished scientific reports, data files of government resource agencies, fisheries landing reports, and other sources of information." The final rule further clarifies that Councils should consider different types of information according to its scientific rigor. Since HAPCs are a subset of EFH, the same standard applies to HAPC designation.

Comment I: One Council requested that NMFS rename HAPCs "EFH-HAPCs" to distinguish them from HAPCs identified by the Council prior to enactment of the EFH provisions of the Magnuson-Stevens Act.

Response I: The final rule does not change the terminology for HAPCs because doing so would likely result in unnecessary confusion. Councils had the ability to identify particularly important habitat areas prior to the development of the EFH regulations, and may now identify such areas in the context of EFH. If a Council chooses to refer to HAPCs identified under the EFH regulations as "EFH-HAPCs," it may do so. NMFS encourages the Councils to determine whether their previous identification of important habitats should be designated as HAPCs under the final rule.

Comment J: One commenter questioned why the draft technical guidance manual would not be reopened for public review and comment given that it elaborates on the considerations on which to base HAPC designations.

Response J: The rationale for not soliciting additional public comment on the guidance is discussed in the preamble to the interim final rule at 62 FR 66532. The draft technical guidance will be superseded with appropriate guidance for the final rule.

Comment K: One Council stated that all mid-Atlantic estuaries should be considered as HAPCs because they function as spawning grounds and/or nursery areas for many managed species.

Response K: The rule allows Councils to designate HAPCs in FMPs based on the ecological importance of an area of EFH, its sensitivity to anthropogenic degradation, whether it is or will be subject to stress from development, or its rarity. The commenting Council may designate HAPCs as appropriate using these guidelines.

19. Comments on New FMPs, FMP Amendments, and Updates

Comment: A Council suggested that the final rule encourage updating the EFH information in FMPs whenever better information becomes available, rather than just once every five years. Several conservation groups commented that the regulations should require that new FMPs and modifications to existing FMPs continue to comply with the EFH requirements of section 303(a)(7) of the Magnuson-Stevens Act. Another commenter asked for clarification of what constitutes new information worthy of updating the EFH portions of an FMP. The same commenter recommended that NMFS amend the regulations regarding Stock Assessment and Fishery Evaluation (SAFE) reports at 50 CFR 600.315(e) to require the inclusion of EFH information, rather than keeping such information optional as in the current regulations.

Response: NMFS agrees that the EFH components of FMPs should be revised as warranted based on available pertinent information. The final rule clarifies this point and encourages Councils to outline the procedures that will be used to review and update EFH information. The final rule also explains some of the types of information that Councils should review. The final rule does not establish a threshold level of information that should prompt revisions to an FMP because such decisions are best made on a case-by-case basis. Regarding SAFE reports, the regulations describing these reports do not list mandatory contents, but list information that "should" or "may" be included. NMFS does not intend to make EFH information a required part of SAFE reports since Councils should be able to report on their review of EFH information using other means if appropriate.

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

Comment: One commenter said that in NMFS' recommendations to Councils regarding the EFH components of FMPs, NMFS should include a description of the extent and quality of the best available scientific information.

Response: NMFS' recommendations to Councils under § 600.815(c) may take one of two forms: suggestions for the EFH components of an FMP that precede a Council's development of a draft EFH document, or a technical and policy review of a draft EFH document prepared by a Council. In cases where NMFS' recommendations precede a Council's development of a draft EFH document, the recommendations typically will include a review of the best available science. In cases where the recommendations constitute a review of a draft Council document, it may not be necessary for the recommendations to describe the available science if that information is summarized adequately in the Council's document. Therefore, the final rule does not contain language specifying that NMFS' recommendations should address the extent and quality of the best available scientific information. Nevertheless, national standard 2

requires fishery management measures to be based upon the best scientific information available.

21. Comments on the Effect of EFH Designations on other Agencies and Other Uses of Aquatic Areas

Comment A: One commenter requested that NMFS delete reference to the word "state" in the sentence in § 600.905(a) of the EFH regulations that reads, "The purpose of these procedures is to promote the protection of EFH in the review of Federal and state actions that may adversely affect EFH." The commenter said that use of the word "state" is inappropriate since the Magnuson-Stevens Act only applies to the review of Federal actions.

Response A: NMFS disagrees. References to state actions is appropriate in this case since sections 305(b)(3) and (4) of the Magnuson-Stevens Act include provisions for NMFS and Councils to provide recommendations to state agencies on actions that could harm EFH.

Comment B: One commenter suggested that NMFS defer to the U.S. Army Corps of Engineers on matters related to dredging and contaminated dredged material.

Response B: NMFS has coordinated extensively with the Corps of Engineers on matters related to dredging and dredged material disposal and will continue to do so in the future. However, the Corps must consult with NMFS regarding its actions that may adversely affect EFH, and NMFS must provide EFH Conservation Recommendations on actions that would adversely affect EFH. NMFS and the Corps may in some cases disagree about potential impacts to EFH or appropriate measures to avoid, minimize, or offset such impacts.

Comment C: One commenter requested that NMFS clarify that owners of structures designated as EFH are not required to maintain them for the sole purpose of providing EFH.

Response C: NMFS does not have the authority to require owners of structures designated as EFH to maintain them as EFH.

Comment D: One commenter opposed designation of heavily industrialized areas, such as active ports, as EFH, stating that EFH designation would be in direct conflict with the purpose of such areas.

Response D: The Magnuson-Stevens Act requires Councils to identify as EFH those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity, regardless of whether those habitats occur in an industrialized area. NMFS disagrees that EFH designation is necessarily in conflict with heavily industrialized areas, since many active ports and other industrial areas continue to provide useful habitat for managed species.

Comment E: Several commenters expressed concern that EFH designations would affect the rights of private landowners.

Response E: NMFS addressed this concern in the preamble to the interim final rule at 62 FR 66535, and the response remains the same. EFH designation has no effect on the rights of private landowners.

Comment F: One commenter recommended that the EFH identification process should recognize existing treaties, statutes, compacts, decrees, and other laws and regulations that apply to areas under consideration for EFH designation so that the public is aware that EFH identification does not supersede other existing laws, interests, rights, or jurisdictions.

Response F: NMFS agrees that the identification of EFH in an area and any applicable regulations do not supersede the regulations, rights, interests, or jurisdictions that pertain to such an area under treaties, compacts, decrees, and other laws.

Comment G: One commenter requested that NMFS add language to the rule to recognize that non-fishing activities provide important economic and security benefits to the nation. The commenter suggested that NMFS direct the Councils to seek ways to provide for these activities while conserving EFH.

Response G: NMFS recognizes the value and contributions of non-fishing activities to the general public, but disagrees with the suggestion. NMFS and Councils have authority under the Magnuson-Stevens Act to provide recommendations to Federal and state agencies to minimize the adverse effects of non-fishing activities on EFH. It would be inappropriate to include in the EFH regulations a requirement for Council or NMFS positions on non-fishing activities to balance competing public interest factors. Council and NMFS recommendations on non-fishing activities under the Magnuson-Stevens Act are non-binding and are intended to address effects on EFH and fishery resources. Action agencies must consider the overall public interest, including the public benefits of the proposed action, when deciding whether to adopt these recommendations.

22. Comments on the Authority to Issue Regulations Regarding EFH Coordination, Consultation, and Recommendations

Comment A: A number of non-fishing industry groups questioned NMFS' authority to establish procedures by regulation for the EFH coordination, consultation, and recommendation process. These commenters questioned the need for such procedures and asserted that the Magnuson-Stevens Act does not authorize NMFS to establish requirements for other agencies as part of the EFH consultation process.

Response A: NMFS addressed similar comments in the preamble to the interim final rule at 62 FR 66542, and continues to maintain that it has the authority to issue regulations to implement the EFH coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act. Section 305(d) of the Magnuson-Stevens Act confers upon the Secretary the authority to promulgate such regulations as may be necessary to carry out any provision of the Act. Regulations are necessary to implement Sections 305(b)(1)(D) and 305(b)(2)-(4) of the Magnuson-Stevens Act so that all affected parties will understand the Secretary's interpretation of these sections of the Act and the processes and information needs associated with carrying out the specific statutory requirements. Without such regulations, there likely would be considerable confusion, inconsistency, and inefficiency amongst Federal agencies, state agencies, Councils, and NMFS regarding the implementation of these sections of the Act.

Comment B: Several non-fishing industry groups identified specific provisions of the interim final rule that they believed illustrate that NMFS has exceeded its authority. With regard to the preparation of EFH Assessments, some commenters said that the Magnuson-Stevens Act gives NMFS no authority to require other agencies to provide specific information or otherwise prescribe how they should consult with NMFS regarding EFH. Some commenters felt that EFH consultations can be addressed through existing environmental review processes under other laws (such as the National Environmental Policy Act) with no additional EFH-specific information. Some commenters said that the requirement for a finding by NMFS is not authorized by the Magnuson-Stevens Act and should not be necessary before an existing environmental review process can be used for EFH consultations. Others said

that it is inappropriate for NMFS to suggest time frames that Federal agencies should follow as part of the EFH consultation process. A few commenters said NMFS has no authority to require other agencies to use the best scientific information available regarding potential adverse effects of an action on EFH, suggesting that action agencies may simply notify NMFS of proposed actions and leave the evaluation to NMFS.

Response B: Subpart K of the regulations details the procedures and information determined by the Secretary to be necessary to carry out the specific requirements of Sections 305(b)(1)(D) and 305(b)(2)-(4) of the Magnuson-Stevens Act in an efficient and effective manner. As noted in the preamble to the interim final rule at 62 FR 66542, information in an EFH Assessment is necessary to enable NMFS to fulfill its statutory requirement to provide EFH Conservation Recommendations to Federal agencies. This cooperative exchange of information and recommendations between NMFS and Federal agencies is vital for effective consultation regarding actions that may adversely affect EFH, and is inherent in the requirement for Federal agencies to consult with NMFS.

The Magnuson-Stevens Act does not provide for an exemption from EFH consultations if another environmental review is required for an action, and other environmental reviews generally do not address specific habitat considerations for managed species of fish and shellfish. However, NMFS encourages Federal agencies to combine EFH consultations with other environmental reviews. When Federal agencies choose this approach to EFH consultation, the regulations require a finding by NMFS that the selected process provides specific EFH-related information in a timely way. A finding is necessary to ensure that consultations are implemented effectively and efficiently. It is appropriate for NMFS to require the EFH Assessment information and a finding because otherwise consultations using different environmental review processes might not fulfill the requirements of Section 305(b)(2) of the Magnuson-Stevens Act.

The final rule continues to provide time frames for abbreviated and expanded consultation, and continues to include language allowing NMFS and a Federal action agency to agree to use a compressed schedule in cases where shorter time frames are appropriate. The inclusion of time frames in the regulations helps to make consultations efficient, and NMFS recognizes the need to be flexible when consultation using those time frames is not practicable for other agencies.

Regarding the requirement for Federal agencies and NMFS to use the best available scientific information, NMFS' intent is to promote an open exchange of information regarding the effects of actions on EFH. Federal agencies may have scientific information about their actions that is not readily available to NMFS, so providing this information will help to make consultations efficient.

Comment C: A national association involved in the construction trades requested that NMFS rescind or suspend the consultation and coordination provisions of the interim final rule until an open, constructive dialog has occurred with all interested parties.

Response C: NMFS has provided numerous opportunities for constructive dialog as part of this rulemaking. NMFS held five public comment periods, 21 public meetings, and numerous briefings and meetings with individual groups, including representatives of the construction trades and other non-fishing industries. NMFS received many written comments as well as extensive verbal feedback from these groups and others interested in the EFH regulations, and NMFS has carefully considered these comments. Based in part on this productive exchange of information, NMFS decided to proceed with the final rule.

23. Comments on Coordination for the Conservation and Enhancement of EFH

Comment: One commenter criticized the section of the interim final rule that says NMFS will compile and make available to other agencies information on the locations of EFH, and that NMFS will provide information on ways to improve ongoing Federal operations to promote the conservation and enhancement of EFH. The commenter said there is no authority for what the commenter characterized as NMFS' aggressive provision of information to other agencies, and implied that NMFS is seeking to reopen approved Federal programs. The same commenter said that the final rule should allow for public access to the information NMFS provides to Federal agencies under this section of the regulations.

Response: Section 305(b)(1)(D) of the Magnuson-Stevens Act requires the Secretary to coordinate with and provide information to other Federal agencies to further the conservation and enhancement of EFH. The interim final rule addressed this requirement by stating that NMFS would provide pertinent information to Federal and state agencies. NMFS does not consider this to be improper; rather, it is an attempt to promote awareness of EFH and opportunities for conservation of EFH, as required by the Act. The final rule clarifies that EFH consultation is not required for Federal actions that were completed prior to the approval of EFH designations by the Secretary. The final rule also states that NMFS will make available to Federal and state agencies, and the general public, information on the locations of EFH, including maps and/or narrative descriptions.

24. Comments on Federal Actions Subject to EFH Consultation

Comment A: One commenter, concerned about potentially large workload requirements on Councils, NMFS, and action agencies, recommended that NMFS restrict the consultation requirements to those actions that will adversely affect EFH, rather than those that may. The commenter also recommended that NMFS establish realistic procedures and requirements for EFH consultation.

Response A: The Magnuson-Stevens Act requires Federal agencies to consult on any action that may adversely affect EFH, and NMFS cannot change this requirement by regulation. The final rule clarifies the approaches for conducting EFH consultation and simplifies the development of General Concurrences to improve the efficiency of the consultation process.

Comment B: One commenter recommended that the taking of species under special permits, such as for research and monitoring, not be subject to consultation. Another commenter recommended that projects designed to restore, improve, or protect fish habitat be excluded from consultation.

Response B: Any Federal action that may adversely affect EFH requires consultation, and NMFS cannot grant waivers for specific types of actions. The action agency must determine whether the approved action may adversely affect EFH and, if so, consult with NMFS. Not all activities result in adverse effects on EFH. Research or monitoring activities may cause no adverse effects at all, or may result in minimal impacts that could be addressed through a General Concurrence. Restoration or similar projects for beneficial purposes may still result in habitat disruption or alteration, both short- and long-term, and are subject to consultation if they may adversely affect EFH. In such cases, consultation provides an opportunity for NMFS to make EFH Conservation

Recommendations to reduce or eliminate any adverse effects.

Comment C: One commenter requested clarification on how NMFS intended to handle consultations regarding Federal programs delegated to states.

Response C: The rule requires consultation on Federal programs delegated to non-Federal entities at the time of delegation for those programs that result in activities that may adversely affect EFH. For programs that were delegated prior to the approval of EFH designations by the Secretary, EFH consultation is required when the delegation is reviewed, renewed, or revised. The delegation itself, and any review, renewal, or revision of the delegation, are Federal actions, and the Federal agency may consult with NMFS using any of the approaches for conducting consultation (§ 600.920(a)(2)) applicable for a particular delegation. Such consultations can be performed on a national or regional basis, as appropriate.

Comment D: Three commenters questioned the guidance on actions requiring EFH consultation, and specifically the guidance regarding consultation for existing or completed actions. One specifically requested clarification regarding the need for consultation on Federal reviews of actions.

Response D: The final rule clarifies that EFH consultation is not required for actions that were completed prior to the approval of EFH designations by the Secretary. In addition, the rule clarifies that consultation is required on renewals, reviews, or substantial revisions of actions only if the renewal, review, or revision may adversely affect EFH.

Comment E: One non-fishing industry trade association commented that in many cases there are statutory constraints on Federal delegations of authority to states that may prevent the delegating agency from addressing other concerns, such as EFH. The commenter said that such actions therefore should not be subject to EFH consultation.

Response E: Federal agency delegations are subject to consultation if they may adversely affect EFH, regardless of whether the agency has the discretion to condition the delegation. Many agencies provide for interagency review of these actions specifically to incorporate other concerns, and condition the delegations accordingly. If a particular agency is incapable of addressing such concerns because of statutory constraints, such information should be provided as part of the EFH Assessment during consultation. Additionally, the final rule retains a provision that NMFS will not recommend that state or Federal agencies take actions beyond their statutory authority.

Comment F: One commenter representing agricultural interests said that NMFS should establish a causal link between agricultural practices and effects to EFH before requesting consultation or providing EFH Conservation Recommendations. The commenter expressed concern that there is no clear threshold of significance or likelihood of adverse effect on EFH to trigger consultation or recommendations from NMFS or a Council.

Response F: The Magnuson-Stevens Act contains no requirement for definitive proof of an adverse effect to EFH before triggering the requirements for consultation and recommendations. Section 305(b)(2) of the Act requires Federal agencies to consult with the Secretary regarding any action or proposed action that may adversely affect EFH. Section 305(b)(3) of the Act authorizes Councils to comment on any Federal or state agency action that may affect the habitat, including EFH, of a fishery resource under Council jurisdiction, and requires such comments when a Council believes the action would substantially affect the habitat of an anadromous fishery resource. Section 305(b)(4)(A) of the Act requires NMFS to provide conservation recommendations for any Federal or state agency action that would adversely affect EFH.

Comment G: One sport diving association expressed concern about the loss of artificial reefs, jetties, shipwrecks, and other shoreline fish habitat as a result of large-scale sand replenishment projects and recommended a number of measures to address these concerns through the EFH consultation process.

Response G: If artificial structures are identified as EFH in a fishery management plan, NMFS will address potential adverse effects through the consultation process.

25. General Comments on the Coordination, Consultation, and Recommendation Procedures

Comment A: A number of non-fishing industry commenters said that the interim final rule creates a duplicative regulatory review process and recommended that NMFS exempt all activities currently subject to habitat review under other statutes from EFH consultations.

Response A: The Magnuson-Stevens Act requires consultation on all Federal actions that may adversely affect EFH. While other laws also have environmental review requirements, no other mandate specifically evaluates potential adverse effects on habitats for commercially and recreationally important species of fish. Section 2(b) of the Act states that one of Congress' purposes was "to promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat." Therefore, an important purpose of EFH consultations is to provide information to action agencies to ensure consideration of potential impacts to EFH. NMFS has no authority to exempt any Federal actions from the consultation requirements, but has provided flexibility in the rule to combine EFH consultations with other environmental reviews to avoid duplication.

Comment B: Two non-fishing interests suggested that EFH consultation provides little benefit given the comprehensive protections already in place through other environmental review processes.

Response B: Congress indicated through the EFH provisions of the Magnuson-Stevens Act that existing environmental reviews are not adequate for the conservation and management of fishery resources of the United States. Direct and indirect habitat losses have been and continue to be serious threats to the long-term sustainability of many fisheries. Fish habitat has received limited consideration in the assessment of environmental impacts for activities authorized or supported by Federal agencies. The EFH provisions enable NMFS to work cooperatively with other agencies to promote the conservation of EFH.

Comment C: Four non-fishing industry organizations recommended that the final rule make clear that EFH consultations are an information exchange process, not a separate regulatory review, and may be documented in an informal manner. A separate forestry association commenter recommended that EFH consultations be verbal since they are not binding.

Response C: NMFS disagrees with these suggestions. The EFH provisions of the Magnuson-Stevens Act require more than a simple information exchange. Federal agencies must consult with NMFS regarding actions that may adversely affect EFH and must provide detailed written responses to NMFS' EFH Conservation Recommendations. An informal process without documentation would not fulfill these

statutory requirements. Moreover, documenting EFH consultations in writing reduces the chances for errors and misunderstandings.

Comment D: One commenter suggested that NMFS write a clear explanation about the minimum steps an action agency must take to comply with this rule.

Response D: The final rule simplifies and more clearly explains the approaches for conducting EFH consultations, the level of detail and mandatory contents of an EFH Assessment, the preparation of General Concurrences, and the process for programmatic consultations. Because the rule provides flexibility for Federal action agencies to choose a particular consultation approach depending on the nature and scope of the actions that may adversely affect EFH and the opportunities for combining EFH consultation with other environmental review procedures, there is no single set of minimum steps.

Comment E: One Federal agency recommended that the final rule contain a provision allowing more flexibility regarding the timing for notification and consultation through the use of memoranda of agreement at the field level.

Response E: NMFS disagrees that memoranda of agreement are necessary. However, the final rule retains language allowing Federal agencies to combine EFH consultations with other environmental reviews, and specific time frames may be developed in findings signed by NMFS at the regional level. In cases where EFH consultation is handled separately through abbreviated or expanded consultation, the rule also allows NMFS and action agencies to use a compressed schedule, which may be agreed upon at the field level.

Comment F: One commenter expressed a need for greater clarification regarding the EFH and ESA consultation requirements and recommended a single point of contact for both programs.

Response F: NOAA is implementing a one-stop-shopping approach to coordinate EFH, ESA, and other consultative requirements in an efficient and effective manner. As part of this approach NOAA staff will assist other agencies and the public in meeting all applicable NOAA consultative requirements, which in many cases (but not all) will mean that there is one principal NOAA point of contact. In addition, the interim final rule encouraged consolidating EFH consultations with other environmental reviews and incorporating EFH Assessments into documents prepared for other purposes, such as ESA biological assessments. This language has been retained in the final regulations.

Comment G: Several states and non-fishing interests asked for clarification on how to meet the EFH requirements, including meshing multiple state and Federal environmental reviews when undertaking activities with Federal permits or funding. These commenters wanted the EFH requirements combined with existing Federal and state environmental programs.

Response G: The final rule retains provisions from the interim final rule that encourage Federal agencies to consolidate EFH consultations with other environmental reviews. Further details on the operational procedures for combining EFH consultations with other environmental reviews should be provided in findings developed by NMFS pursuant to § 600.920(f)(3) (renumbered from § 600.920(e)(3) in the interim final rule). NMFS has developed over 40 such findings with Federal agencies to date. Regarding NMFS' EFH Conservation Recommendations to state agencies, the rule continues to state that NMFS will use existing coordination procedures or establish new procedures to identify state actions that may adversely affect EFH and to determine the most appropriate method for providing EFH Conservation Recommendations to state agencies.

Comment H: Two commenters recommended that the final rule provide clarification on how NMFS and the Councils will coordinate in developing recommendations on Federal and state actions to ensure that agencies are not forced to choose between NMFS and Council recommendations.

Response H: The final rule includes a new subsection (§ 600.925(d)) stating that NMFS will coordinate with each Council to identify the types of actions on which Councils intend to comment and that NMFS will share pertinent information with the Council on such actions. However, Councils have independent authority under section 305(b)(3) of the Magnuson-Stevens Act to comment on Federal and state actions.

Comment I: One commenter recommended that the rule be strengthened to prevent the segmentation of approvals for a single overall project in a specific geographic area that includes EFH.

Response I: NMFS has no authority to prevent or restrict project approvals by other agencies. Under most circumstances, approaching project approvals in a piecemeal fashion is contrary to the environmental assessment requirements of statutes such as the National Environmental Policy Act and Clean Water Act, which call for the review of single and complete projects versus the sequential review of smaller phases of a larger project.

Comment J: Several environmental organizations expressed concern that there will be instances where an action should not go forward because its adverse impacts are so significant. These commenters expressed particular concern for actions that have no available alternatives and for which mitigation will not eliminate significant adverse impacts.

Response J: Section 305(b)(4)(A) of the Magnuson-Stevens Act directs NMFS to provide EFH Conservation Recommendations to Federal or state agencies on actions that would adversely affect EFH. The EFH Conservation Recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. NMFS could recommend that a particular Federal action should not be allowed. However, NMFS will not ask state or Federal agencies to take actions beyond their statutory authority and EFH Conservation Recommendations are not binding.

26. Comments Regarding Participation in the Consultation Process

Comment A: One Federal agency commenter advocated its participation as an active technical team member in the process of developing EFH consultative procedures.

Response A: NMFS will continue to work closely with Federal agencies when developing agency-specific procedures for EFH consultation, such as findings regarding the use of existing environmental review processes to handle EFH consultations.

Comment B: One commenter requested clarification regarding the types of entities that a Federal agency may designate as a non-Federal representative for EFH consultation purposes, and expressed concern about the potential resource expenditures for non-Federal representatives to perform these duties.

Response B: The rule places no restrictions on which entities a Federal agency may designate as non-Federal representatives for EFH consultation purposes. However, the Federal agency remains ultimately responsible for compliance with the EFH consultation provisions of the Magnuson-Stevens Act, including any costs associated with consultation. Federal agencies can reduce costs and maximize the

efficiency of required environmental analyses by combining EFH consultations with other environmental reviews.

Comment C: Two non-fishing industry associations recommended that the rule provide an opportunity for Federal permit applicants to be involved in EFH consultations, beyond the possibility of designation as a non-Federal representative. One of these commenters said that NMFS should provide public notices of consultations, individual notices to stakeholders that are likely to be affected, and opportunities for affected stakeholders to request a hearing following the issuance of any recommendations.

Response C: The Magnuson-Stevens Act requires that Federal agencies consult on actions that may adversely affect EFH. Permit applicants and other parties are under no such obligation and should confer with the applicable action agency to identify any opportunities for their involvement. It is not appropriate to provide public or personalized notices of consultations or opportunities for hearings regarding EFH Conservation Recommendations because the recommendations from NMFS are advisory in nature and because these additional steps would be inefficient, time consuming, and beyond the statutory requirements for EFH consultation.

27. Comments on EFH Assessments

Comment A: A large number of environmental groups and individual commenters wanted NMFS to retain in the regulations the requirement to prepare an EFH Assessment. Similarly, these commenters wanted the final rule to ensure that EFH Assessments are required for Federal land-based actions that may adversely affect EFH. These commenters argued that the EFH Assessment is a necessary and appropriate mechanism to evaluate effects to EFH during the consultation process.

Response A: The final rule maintains the requirement to prepare an EFH Assessment for any Federal action that may adversely affect EFH, regardless of whether the action is land-based or directly within waters designated as EFH. For actions covered by a General Concurrence, an EFH Assessment should be completed during the development of the General Concurrence and is not required for the individual actions. For actions addressed by a programmatic consultation, an EFH Assessment should be completed during the programmatic consultation and is not required for individual actions implemented under the program, except in those instances identified by NMFS in the programmatic consultation as requiring separate EFH consultation.

Comment B: Many commenters addressed the required contents of an EFH Assessment. Many environmental groups and individual commenters asked that NMFS expand the required contents of an EFH Assessment to include mitigation measures, but some cautioned that the effectiveness of many mitigation measures is unproven. Many of the commenters thought the EFH Assessment should include the additional information requirements in § 600.920(g)(3) of the interim final rule if available rather than just "if appropriate." Several commenters wanted to know when the inclusion of additional information is needed and whether it related to the need for expanded consultation. One Fishery Management Council believed that a literature review should be included in the mandatory contents of an EFH Assessment.

Response B: The final rule clarifies that the level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the Federal action. Relatively simple actions involving minor adverse effects on EFH may have very brief EFH Assessments. Actions that pose a more serious threat to EFH, or involve more complex potential adverse effects, warrant a more detailed EFH Assessment. Since an expanded consultation is meant to address actions with substantial adverse effects, in many cases it would be appropriate for expanded consultations to include the additional information in an EFH Assessment. However, there also may be cases where some of the additional information (e.g., an alternatives analysis) is warranted for an abbreviated consultation. The level of information in an EFH Assessment depends on the action, and it is not appropriate to require additional information such as literature reviews and the results of on-site inspections for every EFH Assessment.

Comment C: An industry association representing non-fishing interests wanted clarification on whether project applicants would be required to support a more detailed evaluation and incur the costs of developing Level 3 or 4 data when EFH had been identified by Level 1 or 2 data.

Response C: The description of data levels in the rule notes the type of information that the Councils will use to describe and identify EFH, whereas EFH Assessments do not require data collection for the purposes of identifying and describing EFH. The consultation requirements of the regulations apply to the Federal action agency and neither the action agency nor project applicant will be asked to collect Level 3 or 4 data as a consultation requirement. The Federal agency, however, might in some cases request information from the applicant for a Federal permit, license, or grant when the agency is completing an EFH Assessment.

Comment D: One commenter thought a written EFH Assessment should be required only when an existing environmental review procedure could not be used and indicated that otherwise the EFH Assessment requirement would be too burdensome.

Response D: The final rule maintains the requirement to prepare a written EFH Assessment for every Federal action that may adversely affect EFH. As described in the preamble to the interim final rule at 62 FR 66543, to promote efficiency, when existing environmental review processes are available the EFH Assessment should be integrated into the same processes and documents that are used to satisfy other review requirements. NMFS encourages the use of existing environmental review procedures, but such procedures must include the information that comprises an EFH Assessment to support the consultation requirement set forth in section 305(b)(2) of the Magnuson-Stevens Act.

Comment E: Some commenters wanted the final rule to reflect that a prior EFH Assessment could only be incorporated by reference into a new EFH Assessment if the Council(s) and NMFS determine it is adequate.

Response E: Prior approval from NMFS or a Council is not necessary before a Federal agency incorporates by reference a completed EFH Assessment from another action. However, to make consultations efficient and to avoid requests for additional information, NMFS encourages action agencies to ensure that EFH Assessments include all necessary information.

Comment F: One commenter cited the provision of the interim final rule regarding additional information that should be included in EFH Assessments, and recommended deleting the language that encouraged providing an alternatives analysis "particularly when an action is non-water dependent." Furthermore, this commenter thought nothing in the Magnuson-Stevens Act suggests that non-fishing, non-water dependent activities should be covered by the rule.

Response F: NMFS has deleted the reference to non-water dependent

activities from this section of the regulations because water dependency is not necessarily a more important consideration than others in determining the need for an alternatives analysis. NMFS disagrees, however, with the commenter's assertion that non-water dependent activities should not be covered by the rule. Section 305(b)(2) of the Magnuson-Stevens Act requires consultation for any federal action that may adversely affect EFH and does not distinguish between water and non-water dependent activities.

Comment G: A commenter asked NMFS to explain a statement in the response to comments on EFH Assessments in the preamble to the interim final rule at 62 FR 66545, which said that an action agency's conclusions regarding a potential adverse impact should be "well supported by relevant research." The commenter asked that NMFS use the same standard when making EFH Conservation Recommendations.

Response G: The final rule contains additional language to clarify that the level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the federal action. Simple actions involving minor adverse effects on EFH would not necessitate that an action agency's conclusions be documented by citations to relevant research, whereas more complex actions and more detailed EFH Assessments could benefit from a review of pertinent literature. NMFS agrees that its EFH Conservation Recommendations must be based on the best scientific information available, and has modified § 600.920(d) accordingly.

28. Comments on the Use of Existing Consultation or Environmental Review Procedures

Comment A: One commenter stated that it was not NMFS' responsibility to make the implementation of all Federal laws more efficient.

Response A: In emphasizing the use of existing environmental review processes for EFH consultation, NMFS seeks to make more efficient the implementation of the EFH coordination, consultation, and recommendation requirements of the Magnuson-Stevens Act, not all Federal laws.

Comment B: Many commenters expressed concern about significant project delays due to the requirements for EFH consultation, and argued that EFH consultation should occur within the normal approval times established by Federal agencies for their authorizations. Some of these commenters said that NMFS does not have the authority to set or influence time frames for EFH consultations.

Response B: The EFH regulations include numerous provisions to make EFH consultations efficient and effective, such as the use of existing environmental review procedures, General Concurrences, programmatic consultations, and options for using compressed schedules for abbreviated or expanded consultation. Regardless of the approach used for EFH consultation, NMFS will strive to provide its EFH Conservation Recommendations to action agencies within the normal public or agency comment periods for proposed actions.

Federal agencies are required by section 305(b)(2) of the Magnuson-Stevens Act to consult with the Secretary regarding actions that may adversely affect EFH. Section 305(d) of the Act authorizes the Secretary to promulgate such regulations as may be necessary to implement any provision of the Act. Accordingly, NMFS may establish time lines it considers appropriate to provide adequate notification and coordination regarding proposed actions and to allow sufficient time to prepare EFH Conservation Recommendations for actions that would adversely affect EFH. The rule allows NMFS and Federal agencies to agree to compressed consultation schedules in certain situations. In addition, existing environmental review processes may be used that allow shorter time frames for EFH consultation.

Comment C: Numerous individuals and ten conservation and fishery organizations stated that the regulatory language in the interim final rule for the use of existing environmental review procedures was adequate and should not be changed. Another two commenters requested that procedures for use of existing environmental review processes not be changed until additional experience has been gained with the use of these processes to determine whether they meet the requirements of the law.

Response C: The final rule includes only minor changes to the regulations regarding use of existing processes for EFH consultations. The changes are not substantive and are intended to clarify this portion of the rule.

Comment D: Numerous individuals and ten conservation and fishery organizations expressed concern that a specific review of potential impacts of activities that may adversely affect EFH was critical, and that NMFS should not rely wholly on other environmental review processes.

Response D: NMFS agrees, and the final rule clarifies that Federal agencies must provide NMFS with a written assessment of the effects of any action that may adversely affect EFH. While agencies may incorporate an EFH Assessment into documents prepared under another environmental review process, the assessment must still include all of the required information specified in the rule, which will ensure specific consideration of potential impacts to EFH. The final rule also explains that the level of detail in the EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse impacts on EFH.

Comment E: Three commenters recommended that the final rule require (rather than encourage) the use of existing environmental review processes for EFH consultations.

Response E: While NMFS strongly encourages the use of existing processes and has signed more than 40 findings to date with various Federal agencies at both the national and regional levels, the use of existing processes is not appropriate in all situations. An action may be so unique or infrequent that a stand-alone EFH consultation is the most efficient approach to meet the statutory requirements, or a Federal agency may prefer to complete EFH consultation prior to initiating another required consultation (e.g., under ESA). In addition, other approaches to EFH consultation, such as programmatic consultations and General Concurrences, may be more efficient for certain categories of actions.

Comment F: Three fishery or conservation organizations recommended that the rule be modified such that when using an existing process to complete EFH consultation, Federal agencies are required to notify NMFS of a proposed action according to the same time frames as in the existing process or 60–90 days prior to final agency action, whichever provides greater notice.

Response F: The final rule specifies that existing processes must provide NMFS with timely notification and states that whenever possible NMFS should have at least 60 days notice prior to a final decision, or at least 90 days if the actions would result in substantial adverse impacts. NMFS and the action agency may agree to use shorter time frames provided they allow sufficient time for NMFS to develop EFH Conservation Recommendations. Any use of an existing environmental review process for EFH consultation requires that NMFS determine that the existing or modified process satisfies the

requirements of the Magnuson-Stevens Act, and if so, make a finding before the process may be used for EFH consultation. NMFS will not make findings for existing processes that do not provide adequate time to conduct EFH consultations.

Comment G: One commenter remarked that the rule sets forth extremely stringent criteria for the use of existing environmental review processes for EFH consultations, such that no existing processes are likely to meet these criteria and all will have to be modified significantly to satisfy the requirements.

Response G: Based on NMFS' experience implementing the interim final rule, this has proven not to be the case. To date NMFS has signed more than 40 findings with Federal agencies at both the regional and national level to use existing processes for EFH consultation. Numerous EFH consultations have been completed using a variety of other review processes pursuant to the National Environmental Policy Act; Clean Water Act; Rivers and Harbors Act; Marine Protection, Research, and Sanctuaries Act; Fish and Wildlife Coordination Act; and Endangered Species Act.

Comment H: One commenter supported the use of existing procedures but noted that their use does not mean that no additional resources or time would be needed to comply with the EFH consultation requirements, because existing procedures may not have considered the specific factors involved in addressing adverse affects to EFH.

Response H: NMFS agrees. Congress declared in section 2 of the Magnuson-Stevens Act that habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States and noted that a purpose of the Act is to promote the protection of EFH in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat. The statutory mandates for Federal agencies to consult on activities that may adversely affect EFH and to respond to NMFS' EFH Conservation Recommendations were intended as new requirements. NMFS designed the approaches to EFH consultation detailed in the final rule to implement the EFH provisions in an efficient manner, using existing processes and other mechanisms to minimize additional workload.

29. Comments on the Use or Development of General Concurrences and/or Programmatic Consultations

Comment A: Two commenters asked NMFS to provide an update in the preamble to the final rule on the number of General Concurrences and programmatic consultations completed under the interim final rule and the overall status of NMFS' efforts to encourage the use of these two approaches to EFH consultations.

Response A: NMFS has completed one General Concurrence and five programmatic consultations to date. The General Concurrence applies to actions authorized by the Army Corps of Engineers New England District via programmatic general permits under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act. The programmatic consultations cover certain Minerals Management Service petroleum development activities in the central and western Gulf of Mexico; certain Corps of Engineers nationwide permits; actions authorized by the Corps of Engineers Alaska District under general permits associated with the Anchorage Wetlands Management Plan; actions authorized by the Corps of Engineers Alaska District under general permits for water, wastewater, and sanitation facilities in Alaskan villages; and land management activities undertaken by the Bureau of Land Management and the Forest Service with the Oregon Coast, Lower Columbia River, and Willamette River Provinces of Oregon. NMFS is discussing several more General Concurrences and programmatic consultations with Federal agencies, and continues to advocate the use of these approaches to help reduce the number of actions that require individual consultations.

In the course of working with Federal agencies to identify opportunities for developing General Concurrences and programmatic consultations, it became apparent to NMFS that some parties were confused about the distinction between these two approaches to EFH consultation. General Concurrences may be developed for categories of similar actions that would cause no more than minimal adverse effects on EFH individually or cumulatively. No further consultation is generally required for actions that fall within a General Concurrence. Programmatic consultations also cover categories of actions, but are not limited to actions with minimal effects on EFH and may result in identifying effects that need to be addressed separately through project-specific consultation. To help clarify the difference between General Concurrences and programmatic consultations, and to provide clearer guidance on how to conduct programmatic consultations, the final rule discusses programmatic consultations in a distinct section.

NMFS also discovered through implementing the interim final rule that although General Concurrences are meant to be an efficient way of dispensing with consultations on actions that have minimal adverse effects, the process for issuing General Concurrences has actually hindered their development. The interim final rule required NMFS to consult with the appropriate Council(s) and provide an opportunity for public review prior to issuing a General Concurrence. These requirements stemmed from comments NMFS received on the Framework and proposed rule expressing concern that General Concurrences might allow more than minimal adverse effects to EFH without some degree of oversight.

For the General Concurrence that NMFS completed, NMFS coordinated with the affected Councils. However, NMFS found the process to be cumbersome and not very beneficial. Council meeting agendas are often very full, and because General Concurrences are intended to address minor threats to EFH, the Councils did not view the proposed General Concurrence as a high priority and were not able to accommodate it immediately on their meeting agendas. Also, a discussion of the proposed General Concurrence could not be added to Council agendas at the last minute if time permitted because the Magnuson-Stevens Act does not allow additions to Council meeting agendas without public notice or within 14 days before a meeting. Since Councils meet relatively infrequently, this led to delays. After NMFS briefed the Councils, NMFS sought public comment through Council meetings and a **Federal Register** notice, but received no comments. In other cases nationwide, NMFS considered developing General Concurrences but deferred action because the time-consuming process of soliciting Council and public input led to potential General Concurrences being eclipsed by other EFH priorities. In summary, while the intent behind General Concurrences was to improve efficiency and allow NMFS and other agencies to focus more effort on actions posing a greater threat to EFH, the cumbersome process of issuing General Concurrences has discouraged their use, with little

apparent benefit in terms of public and Council review.

NMFS modified the regulations to address these procedural inefficiencies while still keeping the public and Councils informed regarding General Concurrences. The final rule omits the requirements for public review and consultation with the appropriate Council(s), but contains a new provision stating that after completing a General Concurrence NMFS will provide a copy to the appropriate Council(s) and will make the General Concurrence available to the public by posting the document on the internet or through other appropriate means. The final rule retains language allowing NMFS to review and revise General Concurrences as needed, so NMFS can make adjustments if necessary to ensure that General Concurrences only cover actions with minimal adverse effects to EFH.

Comment B: One conservation group commented that programmatic consultations do not ensure that individual projects or actions will be designed to minimize adverse effects, and thus consultation should occur at both the programmatic and project-specific level. Another organization commented that General Concurrences should not be used as an excuse to avoid project-specific consultations.

Response B: Neither programmatic consultations nor General Concurrences may be used to avoid abbreviated or expanded consultation if an action warrants individual review to evaluate potential adverse effects to EFH. The final rule clarifies that for a programmatic consultation, NMFS will respond to the Federal agency with programmatic EFH Conservation Recommendations and will identify any potential adverse effects that require project-specific consultation because they could not be addressed programmatically. In some cases, however, it may be possible to address all reasonably foreseeable adverse effects to EFH with programmatic recommendations, so there would be no need for consultation on individual actions taken as part of the program. Likewise, General Concurrences can only be used for specified actions that have no more than minimal adverse effects on EFH, and any action that does not meet that standard would require separate consultation.

Comment C: One commenter asked for clarification of the programmatic consultation process.

Response C: NMFS agrees that clearer guidance is warranted for the programmatic consultation process. The final rule discusses programmatic consultation in a distinct subsection of § 600.920 to allow easier comparison to the other approaches to conducting EFH consultations, and provides more detail on the purpose of and process for programmatic consultations.

Comment D: One commenter said the process for developing General Concurrences is vague and may be burdensome.

Response D: As discussed above, NMFS discovered through implementation that the process in the interim final rule for developing General Concurrences was more complicated and time-consuming than NMFS intended. The final rule simplifies and clarifies this process by removing the requirements for public review and consultation with the appropriate Council(s).

Comment E: Many commenters said that NMFS should develop General Concurrences or programmatic consultations to cover actions related to the specific industries or activities in which the commenters are engaged, such as port development and operations, forest products, and petroleum development. Some of these commenters asked for clarification of proponents' responsibilities when advancing such a request.

Response E: The development of a General Concurrence or programmatic consultation is initiated by NMFS or a Federal agency, although other interested parties may bring to the attention of NMFS or a Federal agency specific types of actions that might be appropriate for one of these categorical approaches to EFH consultation. Affected industries or other groups are not required to provide specific information in support of such a request, although specificity regarding the actions to be covered and their potential effects to EFH would help NMFS and the action agency evaluate such proposals.

Comment F: A few commenters addressed the standards for determining whether a General Concurrence is appropriate for a given suite of actions. Two of these commenters asked for clarification of the standard that General Concurrences may be used for actions that would not cause greater than minimal adverse effects on EFH individually and cumulatively. A Federal agency recommended that NMFS should determine before issuing a General Concurrence not only that the actions would cause no more than minimal adverse effects, but also that coastal ecosystem health, including EFH, will generally benefit as a result of the Federal actions.

Response F: Given the wide variety of Federal actions that could adversely affect EFH, NMFS decided that rather than defining "minimal adverse effects" in the rule, it is best to determine separately for each contemplated General Concurrence whether the actions would cause greater than minimal adverse effects on EFH individually and cumulatively. In general terms, however, minimal effects are those that can be considered negligible in terms of their impact on the quality or quantity of EFH due to their limited scope and/or duration. Since EFH consultation covers effects to EFH specifically rather than effects to coastal ecosystems in general, it is not appropriate to state in the rule that General Concurrences must benefit coastal ecosystem health.

Comment G: One commenter said that it should be up to the Federal action agency to determine whether programmatic consultation is appropriate for a given circumstance, and suggested that it is improper for NMFS to tell Federal agencies how to consult.

Response G: NMFS disagrees. NMFS must determine what type of EFH consultation is appropriate for any given Federal action or group of actions so that NMFS can ensure the consultation is consistent with the Secretary's interpretation of the requirements of section 305(b)(2) of the Magnuson-Stevens Act. It is important to select the appropriate approach to EFH consultation so that the exchange of information between NMFS and the Federal agency considers potential effects to EFH at a suitable level of detail, resulting in NMFS having the information necessary to provide EFH Conservation Recommendations as required by section 305(b)(4)(A) of the Magnuson-Stevens Act. If a Federal agency attempts to use a method of consultation that NMFS determines is inappropriate for a given action or actions, NMFS will advise the agency as to which approach is best suited to handle the action(s). If a Federal agency nevertheless fails to consult properly for actions that would adversely affect EFH, NMFS will provide EFH Conservation Recommendations based on the information available.

Comment H: One commenter suggested that NMFS provide an example to illustrate how a Federal agency would track actions taken under a General Concurrence, as called for in the interim final rule. The commenter also recommended that the final rule require, rather than just suggest, annual reporting from each action agency.

Response H: Tracking actions covered by a General Concurrence is necessary to ensure that the cumulative effects of the actions are no more than minimal. The final rule retains language from the interim final rule stating that tracking should include the number of actions taken under a General Concurrence, the amount and type of habitat adversely affected, and the baseline against which the actions will be tracked. For example, for a particular General Concurrence tracking could entail a Federal agency providing NMFS with periodic reports specifying this information, comparing the condition of the EFH prior to the actions with its condition after the actions, and providing any revised estimates of the number or location of actions expected during the next reporting period. The final rule does not require such reporting on an annual basis because there may be circumstances where reporting on another time cycle would be equally effective.

Comment I: One commenter said that General Concurrences should also apply to Councils, so that Councils would not comment on individual Federal actions for which a General Concurrence has been issued.

Response I: General Concurrences are a means of obviating the need for Federal agencies to consult with NMFS individually on specified types of actions that would cause no more than minimal adverse effects on EFH. The Magnuson-Stevens Act does not require Federal agencies to consult with Councils regarding EFH, and General Concurrences do not apply to comments from Councils on Federal actions. As discussed above, the final rule modifies the process for NMFS to coordinate with Councils regarding the development of General Concurrences. NMFS will provide a copy of all General Concurrences to the appropriate Council(s). If the Councils agree that the actions covered by a General Concurrence would have no more than minimal adverse effects on EFH, it is unlikely that the Councils would comment on those actions. However, Councils have independent authority under section 305(b)(3) of the Magnuson-Stevens Act to comment on federal and state agency actions that may affect the habitat of fishery resources under Council jurisdiction.

30. Comments on the Expanded Consultation Process

Comment: Several commenters representing non-fishing interests wanted NMFS to clarify the thresholds for conducting EFH consultations and EFH expanded consultations. The commenters wanted NMFS to define the "substantial adverse effects" standard for actions requiring expanded consultation, and wanted examples of federal actions that would result in expanded consultation. Also, one commenter wanted to know who would be responsible for the costs of completing an EFH Assessment if an expanded consultation was required.

Response: Section 305(b)(2) of the Magnuson-Stevens Act requires federal agencies to consult with NMFS when any Federal action may adversely affect EFH. The EFH regulations require expanded consultation for Federal actions that would result in substantial adverse effects to EFH. Generally, the action agency determines the appropriate level of consultation, although if NMFS believes that a proposed action will have substantial adverse effects on EFH, NMFS may request expanded consultation. The determination of substantial adverse effects should be based on project-specific considerations, such as the ecological importance or sensitivity of an area, the type and extent of EFH affected, and the type of activity. Substantial adverse effects are effects that may pose a relatively serious threat to EFH and typically could not be alleviated through minor modifications to a proposed action. For example, a harbor development project that requires significant dredging and filling, channel realignments, or shoreline stabilization near EFH would likely be considered to have substantial adverse effects to EFH. Regardless of the type of consultation, the action agency is responsible for preparing an EFH Assessment.

31. Comments on Supplemental Consultation

Comment: Two commenters recommended that NMFS delete the section of the rule concerning supplemental consultation. One of these commenters said there is no provision in the Magnuson-Stevens Act to reopen a consultation. The other commenter thought this section was ambiguous and said that because of this provision action agencies and affected parties will not know whether consultations are final.

Response: The provision on supplemental consultation is a necessary and appropriate part of the regulations because it informs Federal agencies that changes to the factual basis behind a completed EFH consultation may warrant reinitiating the consultation. Supplemental consultation is not necessary unless a Federal 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. It is reasonable to expect that a substantial change in circumstances may warrant review and potentially a change in EFH Conservation Recommendations.

32. Comments on NMFS' EFH Conservation Recommendations

Comment A: Several commenters asked for more information to clarify the role of EFH Conservation Recommendations. One commenter asked whether the recommendations NMFS will make on Federal or state actions that would adversely affect EFH are limited to the recommendations contained in FMPs for EFH conservation and enhancement. Another expressed confusion about the difference between EFH Conservation Recommendations and EFH Assessments.

Response A: The term "EFH Conservation Recommendations" in the final rule refers to recommendations provided by NMFS to a Federal or state agency pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act. NMFS is required to provide these recommendations regarding any Federal or state agency action that would adversely affect EFH, and Federal agencies are required to provide a detailed written response to such recommendations under section 305(b)(4)(B) of the Act. Thus, EFH Conservation Recommendations have different legal connotations than other EFH-related recommendations called for under the Magnuson-Stevens Act, such as Council recommendations to Federal or state agencies under section 305(b)(3), or recommendations for EFH conservation and enhancement in FMPs pursuant to section 303(a)(7). The final rule capitalizes the term "EFH Conservation Recommendations" to help emphasize that these recommendations differ from other EFH-related recommendations discussed in the regulations.

EFH Conservation Recommendations are not limited to the recommendations contained in FMPs for EFH conservation and enhancement under section 303(a)(7) of the Act. For EFH consultations, NMFS' EFH Conservation Recommendations are based in part on EFH Assessments prepared by Federal agencies to describe the effects of agency actions on EFH.

Comment B: One commenter said that NMFS should release its EFH Conservation Recommendations in draft form and make them available for public comment before conveying the

recommendations to a Federal or state agency.

Response B: NMFS disagrees. Providing a comment period on EFH Conservation Recommendations could result in delays for Federal and state agencies that may be relying on NMFS' input to decide on appropriate measures to avoid or minimize adverse effects to EFH. Moreover, since EFH Conservation Recommendations are non-binding, they do not impose restrictions on proposed actions. If an action agency agrees with NMFS' EFH Conservation Recommendations but determines that adopting the recommendations may result in substantial changes to a proposed action, the agency may be required to seek additional public input under other laws before taking a final action that incorporates NMFS' recommendations.

Comment C: Several commenters asked NMFS to clarify the process for providing EFH Conservation Recommendations to state agencies. Three of these commenters suggested that the final rule say specifically that state agencies are not required to consult with NMFS. A state regulatory agency asked for clarification as to when NMFS will provide EFH Conservation Recommendations to state agencies. The same agency asked whether NMFS and the Councils will provide recommendations by category of activity or adverse impact (e.g., dredging or filling) or on a case-by-case basis.

Response C: The final rule includes a clarification that the Magnuson-Stevens Act does not require state agencies to consult with the Secretary regarding EFH. The final rule retains language stating that NMFS will use existing coordination procedures or establish new procedures to identify state agency actions that may adversely affect EFH and to determine the most appropriate method for providing EFH Conservation Recommendations to state agencies. In general, NMFS will strive to provide EFH Conservation Recommendations as appropriate on individual actions during the agency or public comment period. Councils may provide general recommendations in FMPs by category of activity or adverse impact under section 303(a)(7) of the Magnuson-Stevens Act, and may comment on individual actions under section 305(b)(3) of the Act.

Comment D: A number of non-fishing industries commented that NMFS has little or no experience or expertise to evaluate non-fishing activities and provide recommendations.

Response D: NMFS has commented on a variety of non-fishing threats to fish habitat under the Fish and Wildlife Coordination Act, National Environmental Policy Act, and other statutes since the agency was established in 1970. NMFS comments on thousands of such activities every year. Under section 305(b)(4)(A) of the amended Magnuson-Stevens Act, NMFS now is required to provide conservation recommendations for any Federal or state agency action that would adversely affect EFH. While NMFS may not have extensive expertise on all such threats to EFH, the information provided by Federal agencies through the consultation process in EFH Assessments will help NMFS to understand potential adverse effects and develop appropriate EFH Conservation Recommendations.

Comment E: One commenter referenced the section of the interim final rule that said Federal agencies and NMFS must use the best scientific information available regarding the effects of proposed actions on EFH. The commenter said that NMFS should also use the best scientific information available to support its mitigation recommendations.

Response E: NMFS agrees and has modified the regulations to add that Federal agencies and NMFS also must use the best scientific information available regarding the measures that can be taken to avoid, minimize, or offset adverse effects on EFH.

33.Comments on Federal Action Agency Responsibilities After Receiving NMFS' EFH Conservation Recommendations

Comment A: Three commenters recommended that NMFS delete the provision requiring that Federal agency responses that are inconsistent with EFH Conservation Recommendations must include 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. The commenters stated that NMFS has no authority to require a scientific justification, and pointed out that agencies may reject NMFS' recommendations on non-scientific grounds.

Response A: As noted in the preamble to the interim final rule at 62 FR 66546, section 305(d) of the Magnuson-Stevens Act gives the Secretary authority to issue regulations necessary to carry out any provision of the Act, including the provision that calls for a detailed written response to NMFS' EFH Conservation Recommendations and an explanation for not following the recommendations. In the regulations, NMFS interprets this statutory requirement to include explaining the basis for any disagreement over technical matters that are within NMFS' area of expertise. NMFS acknowledges that Federal agencies may disagree with EFH Conservation Recommendations for reasons that involve economic costs, public safety considerations, or other factors unrelated to the scientific merit of the recommendations, and the rule does not require a scientific justification in such cases.

Comment B: Several commenters said that NMFS does not have the authority to request further review of Federal agency decisions that are inconsistent with EFH Conservation Recommendations.

Response B: NMFS disagrees. The process for further review of Federal agency decisions that are inconsistent with NMFS' EFH Conservation Recommendations is integral to completing interagency consultation effectively under section 305(b)(2) of the Magnuson-Stevens Act. Interagency consultations by nature involve an exchange of information between agencies, and the process for further review provides a mechanism for resolving disagreements. NMFS has no authority to compel another Federal agency to hold final actions in abeyance pending the resolution of disputes about EFH. However, since NMFS does not anticipate requesting further review very frequently, NMFS hopes that Federal agencies will agree to defer final decisions temporarily if NMFS requests further review.

Comment C: One commenter said that the process for further review must preserve the autonomy of the action agency to decide whether to implement NMFS' recommendations.

Response C: NMFS agrees. NMFS' recommendations are non-binding. If a Federal agency ultimately decides not to accept one or more recommendations, the final rule and section 305(b)(4)(B) of the Magnuson-Stevens Act merely require the agency to explain in writing the reasons for not following the recommendations.

Comment D: Several commenters requested more information about the process for further review of Federal action agency decisions that are inconsistent with NMFS' EFH Conservation Recommendations. One of these commenters said the final rule should specify a time period within which disagreements must be resolved. Another asked for the final rule to specify sequential levels of review in each agency and procedures for suspending action agency decisions during higher level review. Two of the commenters asked for more detailed procedures for involving the Councils in

higher level review of action agency decisions.

Response D: The final rule does not include a time frame for resolving disagreements, nor does it specify sequential levels of review. Likewise, the final rule does not call for suspending action agency decisions pending higher level review. NMFS relies on other agencies to agree to further review of decisions that are inconsistent with NMFS' EFH Conservation Recommendations, including the procedures and time frames for such review. Procedures for Council involvement in higher level review are already discussed in the regulations, and may be elaborated upon if appropriate in any written procedures NMFS might develop to refine the process in the future.

34.Comments on Compliance with Applicable Laws and Executive Orders

Comment A: One commenter asked for clarification on the relationship between the interim final rule and Executive Order 12962 on Recreational Fisheries.

Response A: Although the EFH regulations and Executive Order 12962 both promote the themes of sustainability and interagency cooperation, there is no direct relationship between Executive Order 12962 and the Magnuson-Stevens Act EFH provisions. Executive Order 12962 was specifically designed to restore and enhance aquatic systems to provide for increased recreational fishing opportunities nationwide. Executive Order 12962 established the National Recreational Fisheries Coordination Council (the Coordination Council) to develop and encourage partnerships between government and private sports fishing and boating groups to foster aquatic conservation that benefits recreational fisheries. The Coordination Council was to promote conservation awareness of aquatic restoration programs and evaluate the effects of Federal activities on recreational fishing. The EFH regulations pertain to all federally managed species without distinguishing between commercial and recreational fisheries. The EFH regulations establish procedures to identify important habitats and evaluate the effects of various actions on EFH, rather than on recreational or commercial fishing.

Comment B: Several commenters questioned whether NMFS had met its responsibilities under the Small Business Regulatory Enforcement Fairness Act (SBREFA), Title II of the Unfunded Mandates Reform Act, and Executive Order 12866.

Response B: The Regulatory Flexibility Act (RFA), as amended by SBREFA, requires federal agencies to prepare an initial and final regulatory flexibility analysis for a rule unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. The Assistant General Counsel for Legislation and Regulation of the Department of Commerce made such a certification to the Chief Counsel for Advocacy of the Small Business Administration, as required by 5 U.S.C. 605(b). Therefore, NMFS was not required to complete an initial or final regulatory flexibility analysis under RFA.

Under the Unfunded Mandates Reform Act, Federal agencies are required to enter a consultation process for any rulemaking that places responsibilities on another level of government (e.g., states) without paying the costs for carrying out these duties. Title II describes analyses and consultations that agencies must undertake for rules that may result in expenditures over $100 million in any year by state, local, and tribal governments, or the private sector. This rule will not require any expenditures by, nor place any responsibilities or duties on, state, local, or tribal governments, or the private sector. EFH consultations regarding Federal permits, licenses, or funding could lead the responsible Federal agency to restrict or limit the proposed action, which may result in indirect costs on the entity seeking the authorization or funding. However, any such requirements would be imposed at the discretion of the responsible Federal agency, and it would be speculative to evaluate such costs in conjunction with this rulemaking. Therefore, NMFS was not required to develop an assessment of the effects of this rule on other levels of government or the private sector.

The final rule has been determined to be significant for the purposes of Executive Order 12866. As such, NMFS submitted this rule to the Office of Management and Budget (OMB) for review and approval.

Comment C: One commenter thought the finding of no significant impact under the National Environmental Policy Act ignores the substantial amounts of staff time and other resources that Federal agencies will divert from other priorities to meet the EFH requirements.

Response C: NMFS completed a revised EA that addresses how the final rule could affect various parties, including Federal agencies. The provisions of the final rule related to Federal agency consultation with NMFS could result in an expenditure of time and resources that detracts from other activities. However, the rule implements a clear requirement in the Magnuson-Stevens Act for Federal agencies to consult with NMFS on any action that may adversely affect EFH. The rule provides guidance on required information for consultations and encourages agencies to combine the consultation process with existing environmental review procedures, so that consultations will be completed in an efficient and effective manner.

Changes from the Interim Final Rule

NMFS restructured parts of the section detailing the EFH contents of FMPs by providing a separate overview of the mandatory requirements and separating into distinct sections the guidelines for addressing general habitat information, information necessary to describe and identify EFH, and considerations for determining the limits of EFH. NMFS also restructured the section addressing fishing activities that may adversely affect EFH by separating into distinct sections the guidelines for evaluation of fishing activities and minimization of adverse effects. NMFS made these changes in response to commenters' concerns about a lack of clarity in the interim final rule, and based on NMFS' experience working with the Councils to add EFH information to existing FMPs.

NMFS reorganized parts of the coordination, consultation, and recommendation procedures by providing a separate summary of the five approaches for conducting EFH consultation; addressing the requirements for EFH Assessments before providing the procedures for each approach for EFH consultation; and placing the requirements for programmatic consultations in a distinct section. NMFS made these revisions in response to commenters' concerns that the consultation requirements were confusing and difficult to follow.

The changes to the rule are predominantly technical or administrative in nature and clarify intent or otherwise ease implementation of the EFH provisions of the Magnuson-Stevens Act. The following changes are listed in the order that they appear in the regulations. Grammatical or other minor changes are not detailed. Unless otherwise discussed below, the rationale for why changes were made from the interim final rule is contained in the Comments and Responses section.

In many cases throughout the final rule "effect" or "affect" replaces "impact" because the Magnuson-

Stevens Act uses "affect" in the applicable provision of the statute, and/or to reflect common usage of the terms in the fields of ecology and environmental assessment. Also, "Federal agency" or "agency" replaces "Federal action agency" or "action agency" in many places throughout the rule. This change eliminates redundancy and simplifies the text, particularly given that many sections of the rule only apply to Federal agencies with actions that may adversely affect EFH (i.e., Federal action agencies).

Throughout the final rule the phrase "fishery management unit" replaces the acronym "FMU" to improve understanding. "Action" replaces "proposed action" in many places to be inclusive of all types of agency actions. In several instances throughout Subpart J of the final rule "life stage" replaces "life history stage" to use the more common scientific term. In several places throughout Subpart K, "existing environmental review process" replaces "existing consultation process" to encompass environmental reviews that are not consultations per se.

In a number of places throughout the final rule, paragraphs have been renumbered and references to paragraphs and sections have been changed to reflect the renumbering.

In § 600.805, paragraph (a), "EFH provisions" replaces "provision on EFH" to improve clarity.

In § 600.805, paragraph (b), "An FMP may" replaces "A Council may" to clarify that FMPs are the appropriate vehicle to discuss habitat for species not included in the fishery management unit, if a Council chooses to do so.

In § 600.810, paragraph (a), NMFS modified the definition of "adverse effect" by deleting the parenthetical examples of direct and indirect effects and instead explaining 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." The definition also includes new language to clarify that "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."

In § 600.810, paragraph (a), the definition of "Council" omits the word "Secretarial" to be consistent with the definition of this term in § 600.305(c) and 600.910(a).

In § 600.810, paragraph (a), the definition of "habitat area of particular concern" refers to areas identified pursuant to § 600.815(a)(8) rather than § 600.815(a)(9) because the final rule includes renumbered paragraphs.

In § 600.815, paragraph (a), a new paragraph (1) entitled "Description and identification of EFH" replaces the former paragraphs (1) "Habitat requirements by life history stage" and (2) "Description and identification of EFH." As discussed above, the new organization clarifies the mandatory contents of FMPs by providing a separate overview and separating into distinct sections the guidelines for addressing general habitat information, information necessary to describe and identify EFH, and considerations for determining the limits of EFH. The language within this paragraph includes much of the language from corresponding sections of the interim final rule. Substantive changes are described below.

In § 600.815, paragraph (a), the description of Level 1 information (formerly § 600.815(a)(2)(i)(C)(*1*); now § 600.815(a)(1)(iii)(A)(*1*)) clarifies that distribution data need not necessarily be limited to systematic presence/absence sampling data. The word "distribution" replaces "presence/absence" and "geographic range" replaces "distribution." The paragraph also includes a new sentence: "Habitat use may also be inferred, if appropriate, based on information on a similar species or another life stage."

In § 600.815, paragraph (a), a new paragraph (1)(iii)(B) says that in the absence of information to identify habitat usage by a given species or life stage, EFH should not be designated.

In § 600.815, paragraph (a), the former paragraph (2)(ii)(A) (now numbered (1)(iv)(A)) includes a new introductory sentence. The word "described" replaces "obtained through the analysis" and "identified as EFH of managed species" replaces "protected as EFH for managed species." The words "at each life stage" now appear at the end of the sentence regarding Level 1 information. The sentence regarding Level 2 through 4 information appears in a different place in the paragraph to improve organization, and instead of saying the information should be used "to identify the habitats valued most highly within the geographic range of the species" the sentence includes new language to identify "habitats supporting the highest relative abundance; growth, reproduction, or survival rates; and/or production rates within the geographic range of a species." In the same paragraph "distribution" replaces "presence/absence" and the former "identify those habitat areas most commonly used" reads "identify EFH as those habitat areas most commonly used" because the purpose of the analysis is to identify EFH, if sufficient information is available. A new sentence advises Councils to explain the analyses conducted to distinguish EFH from all habitats potentially used by a species, which will improve understanding of the basis for the designations. The paragraph omits three sentences: "Areas so identified should be considered essential for the species. However, habitats of intermediate and low value may also be essential, depending on the health of the fish population and the ecosystem. Councils must demonstrate that the best scientific information available was used in the identification of EFH, consistent with national standard 2, but other data may also be used for the identification." The first of these sentences is unnecessary since references to identifying EFH now appear earlier in the paragraph. The second sentence is unnecessary and confusing since other provisions of the rule allow Councils to identify EFH broadly if warranted, and in such cases the habitats would not be regarded as intermediate or low value. The third sentence is unnecessary and redundant with the requirements of the Magnuson-Stevens Act.

In § 600.815, paragraph (a), a new paragraph (1)(iv)(B) includes more specific guidance for the text descriptions of EFH.

In § 600.815, paragraph (a), in the former paragraph (2)(ii)(B) (now numbered (1)(iv)(C)), "may" replaces "should" so that the rule permits, but no longer strongly recommends, considering all habitats currently used by a species to be essential, as well as certain historic habitats, if a species is overfished and habitat factors may be contributing to the species being identified as overfished. Councils should make this determination on a case-by-case basis. In the same paragraph, "should be reviewed and amended" replaces "should be reviewed, and the FMP amended" because in many cases the identification of EFH can be amended via a framework adjustment rather than a full FMP amendment.

In § 600.815, paragraph (a), in the former paragraph (2)(ii)(C) (now numbered (1)(iv)(D)), "Areas described as EFH will normally" replaces "EFH will always."

The final rule omits the language that appeared as § 600.815 (a)(2)(ii)(D) of the

interim final rule to eliminate redundancy.

In § 600.815, paragraph (a), the former paragraph (2)(ii)(E) (now numbered (1)(v)(E)) omits "or species assemblage" and includes two new sentences to explain the conditions for designating EFH for species assemblages.

In § 600.815, paragraph (a), in the former paragraph (2)(ii)(F) (now numbered (1)(iv)(F)), "stream or river blockages" replaces "fish blockages" to be more accurate about the problem to be address by improved fish passage techniques. The text omits the words "or quantity" before "measures" to eliminate jargon and redundancy. The word "necessary" replaces "essential" to improve consistency with the Magnuson-Stevens Act.

In § 600.815, paragraph (a), in the former paragraph (2)(iii) (now numbered (1)(v)), the final rule contains new language to clarify the guidance for mapping EFH. The changes are intended to encourage more explicit and informative EFH maps in FMPs, based on NMFS' experience with maps produced using the guidance in the interim final rule. The new language requires that FMPs include maps that display, within the constrains of available information, the geographic locations of EFH or the geographic boundaries within which EFH for each species and life stage is found. The new language also encourages Councils to map different types of habitat designated as EFH to the extent possible; to use maps to distinguish EFH from non-EFH areas; to confer with NMFS regarding national mapping standards; and to include maps of HAPCs.

Section 600.815, paragraph (a)(2) includes reorganized and expanded guidance regarding fishing activities that may adversely affect EFH (formerly addressed in paragraph (a)(3)). The final rule includes separate subsections on the evaluation of fishing activities and minimization of adverse effects, and explains in more detail the information that Councils should address in these portions of FMPs.

In § 600.815, paragraph (a), the former paragraph (3)(iv) (now numbered (2)(iii)) includes a new title, "Practicability," and omits the phrase "whether, and to what extent, the fishing activity is adversely impacting EFH, including the fishery" to eliminate redundancy. The language also omits the phrase "and whether the management measures are practicable, taking into consideration" to eliminate redundancy. To clarify the intent of considering costs and benefits, the words "the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation" replace "the long and short-term costs as well as benefits to the fishery and its EFH, along with other appropriate factors." A new sentence clarifies that Councils are not required to perform a formal cost/benefit analysis.

In § 600.815, paragraph (a), in the former paragraph (4)(i) (now numbered (2)(iv)(A)), "damage to EFH" replaces "physical damage in EFH" because adverse effects are not limited to physical effects.

Section 600.815, paragraph (3) is new. The paragraph clarifies that FMPs must identify threats to EFH from fishing activities that are managed under laws other than the Magnuson-Stevens Act, such as state managed fisheries or those fisheries managed by other agencies. The language addresses non-Magnuson-Stevens Act fishing directly, whereas the interim final rule more indirectly stated in § 600.815(a)(3)(ii) that FMPs must assess all fishing equipment types used in EFH.

In § 600.815, paragraph (a), the former paragraph (5) is now numbered (4). The title of the paragraph omits "Identification of" to reduce wordiness. The sentence "FMPs must identify activities other than fishing that may adversely affect EFH" replaces "FMPs must identify activities that have the potential to adversely affect EFH quantity or quality, or both." This change clarifies that the requirement is to identify all adverse effects to EFH from non-fishing activities. The same paragraph omits language saying that FMPs should describe the EFH most likely to be adversely affected and should explain the mechanisms that may cause the effects, because this language is redundant with the sentence saying that FMPs should describe known and potential adverse effects to EFH. The paragraph also omits two sentences regarding geographical analysis of non-fishing impacts, because Councils should have the flexibility to analyze potential impacts using any suitable approach.

In § 600.815, the former paragraph (a)(6) is now numbered (a)(5). To provide context, the explanation of cumulative impacts appears at the beginning of the paragraph rather than later. The words "the cumulative impacts of" appear before "fishing and non-fishing activities" to emphasize that the focus is cumulative effects. To emphasize EFH over other fish habitat, the term "the function of EFH" replaces "habitat function" and "EFH" replaces "the managed species' habitat." The paragraph omits the discussion of cumulative impacts from fishing that appeared in the interim final rule, because the final rule addresses cumulative impacts from fishing as part of the evaluation of fishing activities that may adversely affect EFH (§ 600.815(a)(2)(i)). The paragraph omits other language from the interim final rule that described suggested contents of cumulative impacts analyses and mapping for cumulative impacts, because Councils should have flexibility to evaluate cumulative impacts using any appropriate methods. The paragraph omits discussion of research needs pertaining to cumulative impacts because research needs are covered adequately in § 600.815(a)(9). The paragraph also omits language regarding schedules for research because Councils have no control over such schedules.

In § 600.815, the former paragraph (a)(7) is now numbered (a)(6). To more accurately reflect the statutory language, the text states that "FMPs must identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate for" adverse effects. The paragraph omits "and promote the conservation and enhancement of EFH" to better reflect the Councils' role as outlined in the EFH provisions of the Magnuson-Stevens Act. The paragraph also omits the general recommendations and options for conservation and enhancement that appeared in the interim final rule.

In § 600.815, the former paragraph (a)(8) is now numbered (a)(7). The words "may be" replace "is" because loss of prey does not always constitute an adverse effect on EFH and managed species. The first sentence omits the word "a" before "managed species" because adverse effects may apply to more than one species. To clarify that the consideration of effects to prey is consistent with the Magnuson-Stevens Act, the phrase "because the presence of prey makes waters and substrate function as feeding habitat, and the definition of EFH includes waters and substrate necessary to fish for feeding" replaces "because one component of EFH is that it be necessary for feeding." To clarify the conditions under which effects to prey should be considered, the phrase "may be considered adverse effects on EFH if such actions reduce the quality and/or quantity of EFH" replaces "may be considered adverse effects on a managed species and its EFH." The word "list" replaces "identify" and "discuss" replaces "generally describe" to be clearer about how FMPs should address prey species and their habitat. The final rule omits

the sentence from the interim final rule saying that actions that cause a reduction of the prey species population should be described and identified. This language caused confusion about the scope of the required analysis, and was substantially redundant with other text in the paragraph.

In § 600.815, the former paragraph (a)(9) is now numbered (a)(8). The final rule combines the two introductory sentences from the interim final rule to be more concise, and the word "considerations" replaces "criteria."

In § 600.815, the former paragraph (a)(10) is now numbered (a)(9). The final rule includes much more concise text to explain that FMPs should identify the research and information needed to improve upon the description and identification of EFH, the identification of threats to EFH from fishing and other activities, and the development of conservation and enhancement measures for EFH.

In § 600.815, the former paragraph (a)(11) is now numbered (a)(10). The final rule omits the words "including an update of the equipment assessment originally conducted pursuant to paragraph (a)(3)(ii) of this section" to eliminate redundancy. The final rule clarifies that Councils and NMFS should "revise or amend EFH provisions as warranted based on available information." The final rule omits the language stating that "each 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" and instead says that "FMPs should outline the procedures the Council will follow to review and update EFH information." The final rule adds a sentence to provide guidance on the type of information the Councils and NMFS should examine when updating the EFH provisions of FMPs. These changes better reflect the process for revising FMPs based on a review of current information. The language in this section also clarifies that the Councils should report on their review of EFH information as part of the annual Stock Assessment and Fishery Evaluation report. The new words "all EFH" clarify the type of information that needs to be reviewed at least once every five years.

In § 600.815, the final rule omits paragraph (b) of the interim final rule to eliminate redundancy with § 600.805(b)(1).

In § 600.815, the former paragraph (c) is now (b) and the heading includes the words "for Councils" to clarify that the EFH recommendations referred to in this paragraph are recommendations from NMFS to the Councils. The final rule adds new text explaining the intent and timing of NMFS' written recommendations to assist the Councils in identifying EFH and adverse affects to EFH, and incorporating EFH information into FMPs. The paragraph omits several sentences from the interim final rule that provided for public review of NMFS' written EFH recommendations.

In § 600.905, paragraph (c), "NMFS" replaces "the Secretary" to clarify that the NMFS is the agency responsible for working with the Councils. Additional language changes in this paragraph serve to simplify the language and reduce wordiness.

In § 600.910, paragraph (a), the final rule modifies the definition of "adverse effect" in the same manner as in § 600.810(a). The final rule omits the definition of "Council" provided in the interim final rule because the definition was originally meant to provide for NMFS' comments under section 305(b)(3) of the Magnuson-Stevens Act, allowing NMFS to comment as a Council for FMPs developed by the Secretary. This provision is unnecessary since NMFS comments will be provided under section 305(b)(4)(A).

In § 600.910, paragraph (a) also includes a new definition for "anadromous fishery resource under Council authority" to clarify that the term means an anadromous species managed under an FMP. The interim final rule discussed anadromous fishery resources in § 600.930(c), and NMFS explained that provision in the preamble to the interim final rule at 62 FR 66546. Upon further consideration, NMFS determined that § 600.930(c) and the preamble were not sufficiently clear as to what species should be considered anadromous fishery resources under Council authority for purposes of section 305(b)(3)(B) of the Magnuson-Stevens Act. Since Councils may not have sufficient expertise regarding non-managed anadromous species to provide the comments and recommendations that are required by section 305(b)(3)(B) of the Act, NMFS determined that the most appropriate interpretation of that section is for "anadromous fishery resource under Council authority" to mean those anadromous species managed under FMPs.

In § 600.915 the final rule adds the phrase "and the general public" and "EFH" replaces "such habitat."

In § 600.920, paragraph (a)(1), the phrase "actions that were completed prior to the approval of EFH designations by the Secretary" replaces the phrase "completed actions." The second sentence of the paragraph adds the phrase "if the renewal, review, or revision may adversely affect EFH" to the end of the sentence. The final rule adds a reference to paragraph (j) of this section to refer to the procedures for programmatic consultation. The final rule includes new text that describes the requirement to complete EFH consultations for emergency Federal actions that may adversely affect EFH. This addition clarifies the requirement and timing for EFH consultations for Federal actions that must be carried out in an expedited manner due to emergency circumstances. If consultation is not practicable before taking an emergency action, Federal agencies may consult after-the-fact and NMFS may provide EFH Conservation Recommendations for measures to offset any unavoidable adverse effects to EFH.

The final rule omits § 600.920(a)(2) of the interim final rule and instead describes the five approaches for conducting consultation, and discusses procedures for programmatic consultation in a separate section. Section 600.920, new paragraph (a)(3), titled "Early notification and coordination," encourages discussions of measures to conserve EFH for actions that may adversely affect EFH as early as practicable during project planning. In the interim final rule this language appeared in the procedures for abbreviated consultation but it applies equally to other types of consultation.

In § 600.920, paragraph (b), "should" replaces "must" to encourage, but not require, the lead agency to notify NMFS in writing that is representing another agency or agencies. New text provides additional clarification of when one Federal agency's EFH consultation may suffice for one of another Federal agency.

In § 600.920, paragraph (c), the final rule allows a non-Federal representative to conduct any type of EFH consultation.

In § 600.920, paragraph (d) adds a phrase clarifying that the best scientific information is needed regarding the effects of actions on EFH "and the measures that can be taken to avoid, minimize, or offset such effects.≥

In § 600.920, paragraph (e) discusses EFH Assessments. This discussion was moved from § 600.920, paragraph (g) of the interim final rule to provide better organization and understanding of the provision.

In § 600.920, paragraph (e)(1) omits the language that suggested that EFH Assessments are unnecessary for some activities, and clarifies the preparation requirements for EFH Assessments associated with the development of General Concurrences and

programmatic consultations. Additional text clarifies that "Federal agencies are not required to provide NMFS with assessments regarding actions that they have determined would not adversely affect EFH because EFH consultation is not required for such actions." The final sentence omits that words "consultation of" to eliminate confusing language.

Section 600.920 adds a new paragraph (e)(2), titled "Level of detail," to explain that the extent of information in an EFH Assessment should be based on the complexity and magnitude of the adverse affects of the action.

In § 600.920, paragraph (e)(3)(ii) adds "potential adverse" before "effects" and omits "cumulative effects" and "associated species such as major prey species, including affected life history stages." This simplifies the rule and provides consistency with the definition of "adverse effects" provided in the final rule.

In § 600.920, paragraph (e)(3)(iii) "conclusions" replaces "views" to clarify that Federal agencies must indicate their opinions regarding the results or implications of the EFH Assessment.

In § 600.920, paragraph (e)(4)(iv) omits "particularly when an action is non-water dependent."

In § 600.920, former paragraph (e) is now paragraph (f) and the heading as been changed from "Use of existing consultation/environmental review procedures" to "Use of existing environmental review procedures."

In § 600.920, paragraph (f)(1) is newly titled "Criteria" rather than "Purpose and criteria" to better reflect the content of the paragraph. The paragraph now uses acronyms for "National Environmental Policy Act" and "Endangered Species Act." The final rule adds reference to section 305(b)(4) of the Magnuson-Stevens Act and additional text to reflect that consultation under sections 305(b)(2) and 305(b)(4) of the Act, including abbreviated or expanded consultations, can be combined with existing environmental review procedures if the procedures meet or are modified to meet stated criteria.

In § 600.920, paragraph (f)(1)(i), to improve clarity "Whenever possible" replaces "However" and "provided that" replaces "if."

In § 600.920, paragraph (f)(1)(ii), the phrase "the action agency must identify that section of the document as the EFH Assessment" replaces the phrase "that section of the document must be clearly identified as the EFH Assessment" to clarify that it is the action agency's responsibility to identify an EFH Assessment when submitted as part of another document.

In § 600.920, paragraph (f)(1)(iii), "can be used to satisfy" replaces "satisfies" because even when using another environmental review process, specified procedures must be followed to fulfill the requirements of the Magnuson-Stevens Act. Also, the final rule adds reference to section 305(b)(4) of the Magnuson-Stevens Act to clarify that when consulting under section 305(b)(2), NMFS will use the process specified in a finding to provide EFH Conservation Recommendations. However, in the absence of a finding, if a Federal agency fails to consult under section 305(b)(2) of the Act, NMFS may provide EFH Conservation Recommendations under section 305(b)(4) either through another environmental review process or separately.

In § 600.920, paragraph (f)(2) is newly titled as "NMFS response to Federal agency" rather than "EFH conservation recommendation requirements" to better reflect the process described in this paragraph. The final rule replaces "consultation" with "environmental review" to clarify that the use of existing review processes is not limited to consultation processes. To eliminate redundancy, the final rule omits language reiterating the requirements of section 305(b)(4)(B) of the Magnuson-Stevens Act and the procedures for further review of Federal agency decisions. "Will" replaces "shall" since "shall" is used in the regulations only when quoting statutory language directly, to avoid confusion with the future tense, and "will" is used descriptively, as distinguished from denoting an obligation to act or the future tense. "Action agency" has been added to clarify from whom a response is needed pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act.

In § 600.920, paragraph (f)(3) includes a new phrase "to combine the EFH consultation requirements with" and removes the phrase "can be used to satisfy the EFH consultation requirements." These and other minor changes to the paragraph clarify that existing or modified environmental reviews cannot substitute for an EFH consultation but can provide the format and process for an EFH consultation.

In § 600.920, paragraph (f) is now paragraph (g). Paragraph (g)(1) omits the word "process" to emphasize the end product rather than the process.

In § 600.920, paragraph (g)(2)(i) omits "after consultation with the appropriate Council(s)." The rule no longer requires NMFS to consult with the Councils before issuing a General Concurrence.

In § 600.920, paragraph (g)(2)(ii) includes the new phrase "actions covered by a General Concurrence" to clarify what activities need to be tracked. The final rule splits the second sentence into two sentences and restructures the language to improve clarity and remove redundancy. The final rule omits "of habitat adversely affected" and includes other minor edits to increase clarity and reduce wordiness. The addition of "applicable" clarifies that tracking information related to actions covered by a General Concurrence does not need to be made available to all Councils.

In § 600.920, paragraph (g)(2)(iv), "proposed for actions that may adversely affect" replaces "developed for actions affecting" to convey that the review for potential effect to HAPCs should occur while a proposed General Concurrence is being evaluated.

In § 600.920, paragraph (g)(3), "an EFH Assessment containing a description" replaces "a written description" to clarify that a Federal agency's request for a General Concurrence must include an EFH Assessment that evaluates the anticipated effects of the actions to be covered under the General Concurrence. The final rule omits the phrase "and associated species and their life history stages," since this is implicit in an evaluation of effects to EFH. The final rule omits the phrase "after consultation with the appropriate Council(s)." The final rule also removes the phrase "and that preparation of EFH Assessments for individual actions subject to the General Concurrence is not necessary" to eliminate redundancy. "Another type of" replaces "abbreviated or expanded" to better describe the options available for consultation if a General Concurrence is not issued.

In § 600.920, paragraph (g)(4) is newly titled as "Further consultation" rather than "Notification and further consultation." "Request" replaces "require" to more accurately reflect NMFS' role in asking for further consultation for actions covered under a General Concurrence.

In § 600.920, paragraph (g)(5) is newly titled as "Notification" rather than "Public review." The rule no longer requires an opportunity for public or Council review before NMFS provides a Federal agency with a written statement of General Concurrence. The new paragraph states that NMFS will notify the appropriate Council(s) and make the General Concurrence available to the public.

In § 600.920, paragraph (g)(6) omits "findings of" to avoid confusion between establishing a finding pursuant to § 600.920(f)(3) of the final rule and issuing a General Concurrence under § 600.920(g).

Section 600.920(g) of the interim final rule addressed EFH Assessments. The final rule discusses EFH Assessments in § 600.920(e).

In § 600.920, paragraph (h)(2) is newly titled as "Notification by agency and submittal of EFH Assessment" rather then "Notification by agency." Paragraph (h)(2) is combined with former paragraph (h)(3) and condensed to provide clearer guidance on notification and submittal of an EFH assessment.

In § 600.920, the former paragraph (h)(4)is now numbered (h)(3). The final rule provides new language regarding NMFS' response to an EFH Assessment to clarify that the type of response depends upon NMFS' determination of potential adverse effects to EFH. The final rule removes "accurately" to eliminate any suggestion that a Federal agency's EFH Assessment for abbreviated consultation might include inaccuracies. The paragraph adds the words "in writing" to clarify how NMFS will request that a Federal agency initiate expanded consultation for actions that may result in substantial adverse effects to EFH. The term "additional" replaces "expanded" to more accurately describe the type of consultation being discussed. The paragraph is restructured to state more succinctly that NMFS will provide EFH Conservation Recommendations, if appropriate. Also, the final rule deletes the sentence stating that "NMFS will send a copy of its response to the appropriate Council."

In § 600.920, the former paragraph (h)(5), which is now numbered (h)(4), omits "complete" and "NMFS must receive it" to reduce wordiness.

Section 600.920, paragraph (i)(2), is newly titled "Notification by agency and submittal of EFH Assessment" rather than "Initiation." This paragraph omits "completed" to reduce wordiness. The paragraph includes the new phrase "to facilitate review of the effects of the action on EFH" to clarify why additional information identified under § 600.920(e)(4) should be submitted. To eliminate potential confusion with programmatic consultations, the paragraph omits the language that allowed a request for expanded consultation to encompass several similar individual actions within a given geographic area.

In § 600.920, paragraph (i)(3)(iv), the final rule omits the sentence stating that "NMFS will also provide a copy of the recommendations to the appropriate Council(s)."

In § 600.920, paragraph (i)(4) omits "complete" to reduce wordiness, and contains new language clarifying that NMFS and Federal agencies may agree to conduct consultation early in the planning cycle for actions with lengthy approval processes.

In § 600.920, paragraph (j) is a new section on programmatic consultation.

In § 600.920, former paragraph (j) is now paragraph (k).

Section 600.920 paragraph (k)(1) replaces "the appropriate Council" with "to any Council commenting on the action under section 305(b)(3) of the Magnuson-Stevens Act" to clarify which Councils must receive the Federal agency's written response to EFH Conservation Recommendations. The final rule adds "from NMFS" to more accurately parallel the statutory language requiring the Federal agency to provide its detailed written response within 30 days of receiving recommendations under section 305(b)(4)(A) of the Act. The final rule restructures the language from the interim final rule that required a response be provided at least 10 days prior to final approval of an action, if a decision by the Federal agency is required in fewer than 30 days. The new language requires a response at least 10 days prior to final approval only if the Federal agency's response is inconsistent with any of NMFS' EFH Conservation Recommendations, because there is no need for a 10–day review period if the Federal agency accepts NMFS' recommendations.

In § 600.920, paragraph (k)(2), "NMFS may develop written procedures" replaces "Memoranda of agreement or other written procedures will be developed" to reflect that any form of written procedures may be developed as necessary to further define review processes. The word "may" replaces "will" because written procedures may not be necessary in all cases. Also, the paragraph omits "with Federal action agencies" to reduce wordiness.

In § 600.925, paragraph (a) omits "EFH conservation recommendations" and "suggest" and adds "recommend" to be clearer and more concise.

In § 600.925, paragraph (b) omits the redundant statement that the recommendations fulfill the requirements of section 305(b)(4)(A) of the Magnuson-Stevens Act. The paragraph also omits the statement that "NMFS will provide a copy of such recommendation to the appropriate Councils."

In § 600.925, paragraph (c)(1) clarifies with new text that "the Magnuson-Stevens Act does not require state agencies to consult with the Secretary regarding EFH." "NMFS will" replaces "each NMFS region should" to convey more clearly that NMFS intends to use existing coordination procedures when making recommendations to state agencies. The final rule omits the unnecessary reference to other statutes in describing the use of existing coordination procedures. "To determine" replaces "for determining." The final rule omits the sentence stating the "NMFS will provide a copy of such recommendation to the appropriate Council(s)."

In § 600.925, paragraph (c)(2), the phrase "is authorized, funded, or undertaken" replaces "requires authorization or funding" to better reflect the requirements of the Magnuson-Stevens Act.

In § 600.925, paragraph (d) is a new paragraph, titled "Coordination with Councils," that describes how NMFS will coordinate with each Council to identify actions on which the Councils intend to comment pursuant to section 305(b)(3) of the Magnuson-Stevens Act.

Section 600.930 includes new language describing the statutory authority for Council comments and recommendations to Federal and state agencies.

In § 600.930, paragraph (a), the words "habitat, including EFH, of a species under its authority" replace "EFH of a species managed under its authority" to better reflect the statutory authority for Councils to comment on Federal or state actions. The phrase "actions of concern that would adversely affect EFH" replaces "actions that may adversely impact EFH" to convey more clearly that the Regional Administrator would screen the actions.

In § 600.930, paragraph (b), a change from passive to active voice clarifies that "Each Council should provide NMFS with copies of its comments and recommendations to state and Federal agencies."

The final rule omits § 600.930, paragraph (c) of the interim final rule because that paragraph is redundant with the new definition of "anadromous fishery resource under Council authority" in § 600.910(a).

Classification

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

Pursuant to the National Environmental Policy Act (NEPA)

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

This final rule has been determined to be significant for the purposes of Executive Order 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. As discussed in the response to comments above, NMFS received comments on the interim final rule questioning whether the agency had met its responsibilities under applicable laws requiring economic analyses. These comments did not cause any change in the certification regarding effects on small entities. As a result, NMFS was not required to prepare a regulatory flexibility analysis under the Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 601 *et seq.*). The rule provides guidelines to the Councils for developing the EFH components of FMPs in compliance with the Magnuson-Stevens Act, and the guidelines do not have the force of law. Should Councils establish fishing regulations as a result of the guidelines, those actions may affect small entities and could be subject to the requirement to prepare regulatory flexibility analyses at the time the Councils propose them. The rule also establishes consultation procedures and a process for NMFS to provide EFH Conservation Recommendations to Federal and state action agencies. However, because compliance with NMFS recommendations is not mandatory, any effects on small businesses would be speculative.

This final rule does not include policies that have federalism implications as that term is defined in Executive Order 13132. This rule establishes procedures for consultation between Federal agencies and NMFS when Federal actions may adversely affect EFH. States are not required to consult regarding EFH. The rule requires NMFS to provide conservation recommendations for any Federal or state actions that would adversely affect EFH. The Councils may comment and make recommendations on Federal and state actions that may affect EFH and must comment and make conservation recommendations concerning any Federal or state activity that is likely to substantially affect the habitat of an anadromous fishery resource under Council authority. Neither NMFS' nor the Council's recommendations are mandatory, and states are not required to respond to the recommendations. Similarly, the rule does not require any expenditures by, nor place any responsibilities or duties on, state, local, or tribal governments. Therefore, in accordance with the provisions of the Unfunded Mandates Reform Act, NMFS was not required to develop an assessment of the effects of this rule on other levels of government or the private sector.

NMFS determined that this rule does not have reasonably foreseeable coastal effects and that this action is consistent to the maximum extent practicable with the approved coastal management programs for the coastal states. Therefore, a Coastal Zone Management Act consistency determination is not needed. EFH provisions of FMPs should be provided to state coastal zone consistency coordinators for review prior to approval by the Secretary.

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act (PRA). The PRA requires OMB clearance for most planned information collections. The only information collection that derives from the rule is the requirement for Federal agencies to prepare EFH Assessments for actions that may adversely affect EFH. OMB clearance is not required for a collection of information from Federal agencies.

The rule provides guidance to the Councils on how to designate EFH and establishes a consultation process for Federal actions that may adversely affect EFH. This action will not result in a taking of private property and does not have takings implications. Accordingly, NMFS was not required to complete a Federal takings assessment.

This rule does not contain policies that have tribal implications as that term is defined in Executive Order 13175.

This rule will not have a significant adverse effect on the supply, distribution, or use of energy, and preparation of a Statement of Energy Effects under Executive Order 13211 is not required. EFH consultations result in non-binding conservation recommendations. EFH consultations regarding Federal permits, licenses, or funding could lead the responsible Federal agency to restrict or limit proposed actions, which potentially may affect entities seeking authorization or funding for projects involving energy supply, distribution, or use. However, any such requirements would be imposed at the discretion of the responsible Federal agency, and it would be speculative to evaluate the effects of such requirements in conjunction with this rulemaking.

List of Subjects in 50 CFR Part 600

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

Dated: January 7, 2002.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons stated in the preamble, NMFS amends 50 CFR part 600 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 § 600.10, the definition for "Essential fish habitat" is revised to read as follows:

§ 600.10 Definitions.

* * * * *

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

* * * * *

3. Subparts J and K of part 600 are revised to read as follows:

* * * * *

Subpart J—Essential Fish Habitat (EFH)

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

Subpart K—EFH Coordination, Consultation, and Recommendations

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

Subpart J—Essential Fish Habitat (EFH)

§ 600.805 Purpose and scope.

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

(b) *Scope*—(1) *Species covered.* An EFH provision in an FMP must include all fish species in the 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-Stevens Act.

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

§ 600.810 Definitions and word usage.

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

Adverse effect means any impact that reduces quality and/or quantity of EFH. 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.

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

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

Habitat areas of particular concern means those areas of EFH identified pursuant to § 600.815(a)(8).

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

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

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

§ 600.815 Contents of Fishery Management Plans.

(a) *Mandatory contents*—(1) *Description and identification of EFH*—(i) *Overview.* FMPs must describe and identify EFH in text that clearly states the habitats or habitat types determined to be EFH for each life stage of the managed species. FMPs should explain the physical, biological, and chemical characteristics of EFH and, if known, how these characteristics influence the use of EFH by the species/life stage. FMPs must identify the specific geographic location or extent of habitats described as EFH. FMPs must include maps of the geographic locations of EFH or the geographic boundaries within which EFH for each species and life stage is found.

(ii) *Habitat information by life stage.* (A) Councils need basic information to understand the usage of various habitats by each managed species. Pertinent information includes the geographic range and habitat requirements by life stage, the distribution and characteristics of those habitats, and current and historic stock size as it affects occurrence in available habitats. FMPs should summarize the life history information necessary to understand each species' relationship to, or dependence on, its various habitats, using text, tables, and figures, as appropriate. FMPs should document patterns of temporal and spatial variation in the distribution of each major life stage (defined by developmental and functional shifts) to aid in understanding habitat needs. FMPs should summarize (e.g., in tables) all available information on environmental and habitat variables that control or limit distribution, abundance, reproduction, growth, survival, and productivity of the managed species. The information should be supported with citations.

(B) Councils should obtain information to describe and identify EFH from the best available sources, including peer-reviewed literature, unpublished scientific reports, data files of government resource agencies, fisheries landing reports, and other sources of information. Councils should consider different types of information according to its scientific rigor. FMPs should identify species-specific habitat data gaps and deficits in data quality (including considerations of scale and resolution; relevance; and potential biases in collection and interpretation). FMPs must demonstrate that the best scientific information available was used in the description and identification of EFH, consistent with national standard 2.

(iii) *Analysis of habitat information.* (A) The following approach should be used to organize the information necessary to describe and identify EFH.

(*1*) *Level 1: Distribution data are available for some or all portions of the geographic range of the species.* At this level, only distribution data are available to describe the geographic range of a species (or life stage). Distribution data may be derived from systematic presence/absence sampling and/or may include information on species and life stages collected

opportunistically. In the event that distribution data are available only for portions of the geographic area occupied by a particular life stage of a species, habitat use 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. Habitat use may also be inferred, if appropriate, based on information on a similar species or another life stage.

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

(3) *Level 3: Growth, reproduction, or survival rates within habitats are available.* At this level, data are available on habitat-related growth, reproduction, and/or survival by life stage. The habitats contributing the most to productivity should be those that support the highest growth, reproduction, and survival of the species (or life 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 stage to habitat type, quantity, quality, and location. Essential habitats are those necessary to maintain fish production consistent with a sustainable fishery and the managed species' contribution to a healthy ecosystem.

(B) Councils should strive to describe habitat based on the highest level of detail (i.e., Level 4). If there is no information on a given species or life stage, and habitat usage cannot be inferred from other means, such as information on a similar species or another life stage, EFH should not be designated.

(iv) *EFH determination.* (A) Councils should analyze available ecological, environmental, and fisheries information and data relevant to the managed species, the habitat requirements by life stage, and the species' distribution and habitat usage to describe and identify EFH. The information described in paragraphs (a)(1)(ii) and (iii) of this section will allow Councils to assess the relative value of habitats. Councils should interpret this information in a risk-averse fashion to ensure adequate areas are identified as EFH for managed species. Level 1 information, if available, should be used to identify the geographic range of the species at each life stage. If only Level 1 information is available, distribution data should be evaluated (e.g., using a frequency of occurrence or other appropriate analysis) to identify EFH as those habitat areas most commonly used by the species. Level 2 through 4 information, if available, should be used to identify EFH as the habitats supporting the highest relative abundance; growth, reproduction, or survival rates; and/or production rates within the geographic range of a species. FMPs should explain the analyses conducted to distinguish EFH from all habitats potentially used by a species.

(B) FMPs must describe EFH in text, including reference to the geographic location or extent of EFH using boundaries such as longitude and latitude, isotherms, isobaths, political boundaries, and major landmarks. If there are differences between the descriptions of EFH in text, maps, and tables, the textual description is ultimately determinative of the limits of EFH. Text and tables should explain pertinent physical, chemical, and biological characteristics of EFH for the managed species and explain any variability in habitat usage patterns, but the boundaries of EFH should be static.

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

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

(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. EFH must be designated for each managed species, but, where appropriate, may be designated for assemblages of species or life stages that have similar habitat needs and requirements. If grouping species or using species assemblages for the purpose of designating EFH, FMPs must include a justification and scientific rationale. 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 are necessary to maintain a sustainable fishery and the managed species' contribution to a healthy ecosystem.

(F) If degraded or inaccessible aquatic habitat has contributed to reduced yields of a species or assemblage and if, 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 stream or river blockages), improved water quality measures (removal of contaminants or increasing flows), and similar measures that are technologically and economically feasible, EFH should include those habitats that would be necessary to the species to obtain increased yields.

(v) *EFH mapping requirements.* (A) FMPs must include maps that display, within the constraints of available information, the geographic locations of EFH or the geographic boundaries within which EFH for each species and life stage is found. Maps should identify the different types of habitat designated as EFH to the extent possible. Maps should explicitly distinguish EFH from non-EFH areas. Councils should confer with NMFS regarding mapping standards to ensure that maps from different Councils can be combined and shared efficiently and effectively. Ultimately, data used for mapping should be incorporated into a geographic information system (GIS) to facilitate analysis and presentation.

(B) Where the present distribution or stock size of a species or life stage is different from the historical distribution or stock size, then maps of historical habitat boundaries should be included in the FMP, if known.

(C) FMPs should include maps of any habitat areas of particular concern identified under paragraph (a)(8) of this section.

(2) *Fishing activities that may adversely affect EFH*—(i) *Evaluation.* Each FMP must contain an evaluation of the potential adverse effects of fishing on EFH designated under the FMP, including effects of each fishing activity regulated under the FMP or other Federal FMPs. This evaluation should consider the effects of each fishing

activity on each type of habitat found within EFH. FMPs must describe each fishing activity, review and discuss all available relevant information (such as information regarding the intensity, extent, and frequency of any adverse effect on EFH; the type of habitat within EFH that may be affected adversely; and the habitat functions that may be disturbed), and provide conclusions regarding whether and how each fishing activity adversely affects EFH. The evaluation should also consider the cumulative effects of multiple fishing activities on EFH. The evaluation should list any past management actions that minimize potential adverse effects on EFH and describe the benefits of those actions to EFH. The evaluation should give special attention to adverse effects on habitat areas of particular concern and should identify for possible designation as habitat areas of particular concern any EFH that is particularly vulnerable to fishing activities. Additionally, the evaluation should consider the establishment of research closure areas or other measures to evaluate the impacts of fishing activities on EFH. In completing this evaluation, Councils should use the best scientific information available, as well as other appropriate information sources. Councils should consider different types of information according to its scientific rigor.

(ii) *Minimizing adverse effects.* Each FMP must minimize to the extent practicable adverse effects from fishing on EFH, including EFH designated under other Federal FMPs. Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature, based on the evaluation conducted pursuant to paragraph (a)(2)(i) of this section and/or the cumulative impacts analysis conducted pursuant to paragraph (a)(5) of this section. In such cases, FMPs should identify a range of potential new actions that could be taken to address adverse effects on EFH, include an analysis of the practicability of potential new actions, and adopt any new measures that are necessary and practicable. Amendments to the FMP or to its implementing regulations must ensure that the FMP continues to minimize to the extent practicable adverse effects on EFH caused by fishing. FMPs must explain the reasons for the Council's conclusions regarding the past and/or new actions that minimize to the extent practicable the adverse effects of fishing on EFH.

(iii) *Practicability.* In determining whether it is practicable to minimize an adverse effect from fishing, Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation, consistent with national standard 7. In determining whether management measures are practicable, Councils are not required to perform a formal cost/benefit analysis.(iv) Options for managing adverse effects from fishing. Fishery management options may include, but are not limited to:

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

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

(C) *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.

(3) *Non-Magnuson-Stevens Act fishing activities that may adversely affect EFH.* FMPs must identify any fishing activities that are not managed under the Magnuson-Stevens Act that may adversely affect EFH. Such activities may include fishing managed by state agencies or other authorities.

(4) *Non-fishing related activities that may adversely affect EFH.* FMPs must identify activities other than fishing that may adversely affect EFH. Broad categories of such activities include, but are not limited to: dredging, filling, excavation, mining, impoundment, discharge, water diversions, thermal additions, actions that contribute to non-point source pollution and sedimentation, introduction of potentially hazardous materials, introduction of exotic species, and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH. For each activity, the FMP should describe known and potential adverse effects to EFH.

(5) *Cumulative impacts 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. To the extent feasible and practicable, FMPs should analyze how the cumulative impacts of fishing and non-fishing activities influence the function of EFH on an ecosystem or watershed scale. An assessment of the cumulative and synergistic effects of multiple threats, including the effects of natural stresses (such as storm damage or climate-based environmental shifts) and an assessment of the ecological risks resulting from the impact of those threats on EFH, also should be included.

(6) *Conservation and enhancement.* FMPs must identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate for the adverse effects identified pursuant to paragraphs (a)(3) through (5) of this section, especially in habitat areas of particular concern.

(7) *Prey species.* Loss of prey may be an adverse effect on EFH and managed species because the presence of prey makes waters and substrate function as feeding habitat, and the definition of EFH includes waters and substrate necessary to fish for feeding. Therefore, actions that reduce the availability of a major prey species, either through direct harm or capture, or through adverse impacts to the prey species' habitat that are known to cause a reduction in the population of the prey species, may be considered adverse effects on EFH if such actions reduce the quality of EFH. FMPs should list the major prey species for the species in the fishery management unit and discuss the location of prey species' habitat. Adverse effects on prey species and their habitats may result from fishing and non-fishing activities.

(8) *Identification of habitat areas of particular concern.* FMPs should identify specific types or areas of habitat within EFH as habitat areas of particular concern based on one or more of the following considerations:

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

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

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

(iv) The rarity of the habitat type.

(9) *Research and information needs.* Each FMP should contain recommendations, preferably in priority order, for research efforts that the Councils and NMFS view as necessary to improve upon the description and identification of EFH, the identification of threats to EFH from fishing and other activities, and the development of conservation and enhancement measures for EFH.

(10) *Review and revision of EFH components of FMPs.* Councils and NMFS should periodically review the EFH provisions of FMPs and revise or amend EFH provisions as warranted based on available information. FMPs should outline the procedures the Council will follow to review and update EFH information. The review of information should include, but not be limited to, evaluating published scientific literature and unpublished scientific reports; soliciting information from interested parties; and searching for previously unavailable or inaccessible data. Councils should report on their review of EFH information as part of the annual Stock Assessment and Fishery Evaluation (SAFE) report prepared pursuant to § 600.315(e). A complete review of all EFH information should be conducted as recommended by the Secretary, but at least once every 5 years.

(b) *Development of EFH recommendations for Councils.* After reviewing the best available scientific information, as well as other appropriate information, and in consultation with the Councils, participants in the fishery, interstate commissions, Federal agencies, state agencies, and other interested parties, NMFS will develop written recommendations to assist each Council in the identification of EFH, adverse impacts to EFH, and actions that should be considered to ensure the conservation and enhancement of EFH for each FMP. NMFS will provide such recommendations for the initial incorporation of EFH information into an FMP and for any subsequent modification of the EFH components of an FMP. The NMFS EFH recommendations may be provided either before the Council's development of a draft EFH document or later as a review of a draft EFH document developed by a Council, as appropriate.

(c) *Relationship to other fishery management authorities.* Councils are encouraged to coordinate with state and interstate fishery management agencies where Federal fisheries affect state and interstate managed fisheries or where state or interstate fishery regulations affect the management of Federal fisheries. Where a state or interstate fishing activity adversely affects EFH, NMFS will consider that action to be an adverse effect on EFH pursuant to paragraph (a)(3) of this section and will provide EFH Conservation Recommendations to the appropriate state or interstate fishery management agency on that activity.

Subpart K—EFH Coordination, Consultation, and Recommendations

§ 600.905 Purpose, scope, and NMFS/Council cooperation.

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

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

(c) *Cooperation between Councils and NMFS.* The Councils and NMFS should cooperate closely to identify actions that may adversely affect EFH, to develop comments and EFH Conservation Recommendations to Federal and state agencies, and to provide EFH information to Federal and state agencies. NMFS will work with each Council to share information and to coordinate Council and NMFS comments and recommendations on actions that may adversely affect EFH. However, NMFS and the Councils also have the authority to act independently.

§ 600.910 Definitions and word usage.

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

Adverse effect means any impact that reduces quality and/or quantity of EFH. 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.

Anadromous fishery resource under Council authority means an anadromous species managed under an FMP.

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

Habitat areas of particular concern means those areas of EFH identified pursuant to § 600.815(a)(8).

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

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

§ 600.915 Coordination for the conservation and enhancement of EFH.

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

familiar with areas designated as EFH, potential threats to EFH, and opportunities to promote the conservation and enhancement of EFH.

§ 600.920 Federal agency consultation with the Secretary.

(a) *Consultation generally*—(1) *Actions requiring consultation.* Pursuant to section 305(b)(2) of the Magnuson-Stevens Act, Federal agencies must consult with NMFS regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect EFH. EFH consultation is not required for actions that were completed prior to the approval of EFH designations by the Secretary, e.g., issued permits. Consultation is required for renewals, reviews, or substantial revisions of actions if the renewal, review, or revision may adversely affect EFH. Consultation on Federal programs delegated to non-Federal entities is required at the time of delegation, review, and renewal of the delegation. EFH consultation is required for any Federal funding of actions that may adversely affect EFH. NMFS and Federal agencies responsible for funding actions that may adversely affect EFH should consult on a programmatic level under paragraph (j) of this section, if appropriate, with respect to these actions. Consultation is required for emergency Federal actions that may adversely affect EFH, such as hazardous material clean-up, response to natural disasters, or actions to protect public safety. Federal agencies should contact NMFS early in emergency response planning, but may consult after-the-fact if consultation on an expedited basis is not practicable before taking the action.

(2) *Approaches for conducting consultation.* Federal agencies may use one of the five approaches described in paragraphs (f) through (j) of this section to fulfill the EFH consultation requirements. The selection of a particular approach for handling EFH consultation depends on the nature and scope of the actions that may adversely affect EFH. Federal agencies should use the most efficient approach for EFH consultation that is appropriate for a given action or actions. The five approaches are: use of existing environmental review procedures, General Concurrence, abbreviated consultation, expanded consultation, and programmatic consultation.

(3) *Early notification and coordination.* The Federal agency should notify NMFS in writing as early as practicable regarding actions that may adversely affect EFH. Notification will facilitate discussion of measures to conserve EFH. Such early coordination should occur during pre-application planning for projects subject to a Federal permit or license and during preliminary planning for projects to be funded or undertaken directly by a Federal agency.

(b) *Designation of lead agency.* If more than one Federal agency is responsible for a Federal action, the consultation requirements of sections 305(b)(2) through (4) of the Magnuson-Stevens Act may be fulfilled through a lead agency. The lead agency should notify NMFS in writing that it is representing one or more additional agencies. Alternatively, if one Federal agency has completed an EFH consultation for an action and another Federal agency acts separately to authorize, fund, or undertake the same activity (such as issuing a permit for an activity that was funded via a separate Federal action), the completed EFH consultation may suffice for both Federal actions if it adequately addresses the adverse effects of the actions on EFH. Federal agencies may need to consult with NMFS separately if, for example, only one of the agencies has the authority to implement measures necessary to minimize adverse effects on EFH and that agency does not act as the lead agency.

(c) *Designation of non-Federal representative.* A Federal agency may designate a non-Federal representative to conduct an EFH consultation 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)(B) of the Magnuson-Stevens Act.

(d) *Best available information.* The Federal agency and NMFS must use the best scientific information available regarding the effects of the action on EFH and the measures that can be taken to avoid, minimize, or offset such effects. Other appropriate sources of information may also be considered.

(e) *EFH Assessments*—(1) *Preparation requirement.* For any Federal action that may adversely affect EFH, Federal agencies must provide NMFS with a written assessment of the effects of that action on EFH. For actions covered by a General Concurrence under paragraph (g) of this section, an EFH Assessment should be completed during the development of the General Concurrence and is not required for the individual actions. For actions addressed by a programmatic consultation under paragraph (j) of this section, an EFH Assessment should be completed during the programmatic consultation and is not required for individual actions implemented under the program, except in those instances identified by NMFS in the programmatic consultation as requiring separate EFH consultation. Federal agencies are not required to provide NMFS with assessments regarding actions that they have determined would not adversely affect EFH. Federal agencies may incorporate an EFH Assessment into documents prepared for other purposes such as Endangered Species Act (ESA) Biological Assessments pursuant to 50 CFR part 402 or National Environmental Policy Act (NEPA) documents and public notices pursuant to 40 CFR part 1500. If an EFH Assessment is contained in another document, it must include all of the information required in paragraph (e)(3) of this section and be clearly identified as an EFH Assessment. The procedure for combining an EFH consultation with other environmental reviews is set forth in paragraph (f) of this section.

(2) *Level of detail.* The level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. For example, for relatively simple actions involving minor adverse effects on EFH, the assessment may be very brief. Actions that may pose a more serious threat to EFH warrant a correspondingly more detailed EFH Assessment.

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

(i) A description of the action.

(ii) An analysis of the potential adverse effects of the action on EFH and the managed species.

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

(iv) Proposed mitigation, if applicable.

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

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

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

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

(iv) An analysis of alternatives to the action. Such analysis should include alternatives that could avoid or minimize adverse effects on EFH.

(v) Other relevant information.

(5) *Incorporation by reference.* The assessment may incorporate by reference a completed EFH Assessment prepared for a similar action,

supplemented with any relevant new project specific information, provided the proposed action involves similar impacts to EFH in the same geographic area or a similar ecological setting. It may also incorporate by reference other relevant environmental assessment documents. These documents must be provided to NMFS with the EFH Assessment.

(f) *Use of existing environmental review procedures*—(1) *Purpose and criteria.* Consultation and commenting under sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act should be consolidated, where appropriate, with interagency consultation, coordination, and environmental review procedures required by other statutes, such as NEPA, the Fish and Wildlife Coordination Act, Clean Water Act, ESA, and Federal Power Act. The requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act, including consultations that would be considered to be abbreviated or expanded consultations under paragraphs (h) and (i) of this section, can be combined with existing procedures required by other statutes if such processes meet, or are modified to meet, the following criteria:

(i) The existing process must provide NMFS with timely notification of actions that may adversely affect EFH. The Federal agency should notify NMFS according to the same timeframes for notification (or for public comment) as in the existing process. Whenever possible, NMFS should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in substantial adverse impacts. NMFS and the action agency may agree to use shorter timeframes provided that they allow sufficient time for NMFS to develop EFH Conservation Recommendations.

(ii) Notification must include an assessment of the impacts of the action on EFH that meets the requirements for EFH Assessments contained in paragraph (e) of this section. If the EFH Assessment is contained in another document, the Federal agency must identify that section of the document as the EFH Assessment.

(iii) NMFS must have made a finding pursuant to paragraph (f)(3) of this section that the existing process can be used to satisfy the requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act.

(2) *NMFS response to Federal agency.* If an existing environmental review process is used to fulfill the EFH consultation requirements, the comment deadline for that process should apply to the submittal of NMFS EFH Conservation Recommendations under section 305(b)(4)(A) of the Magnuson-Stevens Act, unless NMFS and the Federal agency agree to a different deadline. If NMFS EFH Conservation Recommendations are combined with other NMFS or NOAA comments on a Federal action, such as NOAA comments on a draft Environmental Impact Statement, the EFH Conservation Recommendations will be clearly identified as such (e.g., a section in the comment letter entitled "EFH Conservation Recommendations") and a Federal agency response pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act is required for only the identified portion of the comments.

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

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

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

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

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

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

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

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

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

(3) *General Concurrence development.* A Federal agency may request a General Concurrence for a category of its actions by providing NMFS with an EFH Assessment containing a description of the nature and approximate number of the actions, an analysis of the effects of the actions on EFH, 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 (g)(2)(i) of this section, NMFS will provide the Federal agency with a written statement of General Concurrence that further consultation is not required. If NMFS does not agree that the actions fit the criteria in paragraph (g)(2)(i) of this section, NMFS will notify the Federal agency that a General Concurrence will not be issued and that another type of consultation will be required. If NMFS identifies specific types of Federal actions that may meet the requirements for a General Concurrence, NMFS may initiate and complete a General Concurrence.

(4) *Further consultation.* NMFS may request notification for actions covered under a General Concurrence if NMFS concludes there are circumstances under which such actions could result in more than a minimal impact on EFH, or if it determines that there is no process in place to adequately assess the cumulative impacts of actions covered

under the General Concurrence. NMFS may request further consultation for these actions on a case-by-case basis. Each General Concurrence should establish specific procedures for further consultation, if appropriate.

(5) *Notification.* After completing a General Concurrence, NMFS will provide a copy to the appropriate Council(s) and will make the General Concurrence available to the public by posting the document on the internet or through other appropriate means.

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

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

(2) *Notification by agency and submittal of EFH Assessment.* Abbreviated consultation begins when NMFS receives from the Federal agency an EFH Assessment in accordance with paragraph (e) of this section and a written request for consultation.

(3) *NMFS response to Federal agency.* If NMFS determines, contrary to the Federal agency's assessment, that an action would not adversely affect EFH, or if NMFS determines that no EFH Conservation Recommendations are needed, NMFS will notify the Federal agency either informally or in writing of its determination. If NMFS believes that the action may result in substantial adverse effects on EFH, or that additional analysis is needed to assess the effects of the action, NMFS will request in writing that the Federal agency initiate expanded consultation. Such request will explain why NMFS believes expanded consultation is needed and will specify any new information needed. If expanded consultation is not necessary, NMFS will provide EFH Conservation Recommendations, if appropriate, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

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

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

(2) *Notification by agency and submittal of EFH Assessment.* Expanded consultation begins when NMFS receives from the Federal agency an EFH Assessment in accordance with paragraph (e) of this section and a written request for expanded consultation. Federal agencies are encouraged to provide in the EFH Assessment the additional information identified under paragraph (e)(4) of this section to facilitate review of the effects of the action on EFH.

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

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

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

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

(iv) Discuss EFH Conservation Recommendations with the Federal agency and provide such recommendations to the Federal agency, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

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

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

(j) *Programmatic consultation*—(1) *Purpose.* Programmatic consultation provides a means for NMFS and a Federal agency to consult regarding a potentially large number of individual actions that may adversely affect EFH. Programmatic consultation will generally be the most appropriate option to address funding programs, large-scale planning efforts, and other instances where sufficient information is available to address all reasonably foreseeable adverse effects on EFH of an entire program, parts of a program, or a number of similar individual actions occurring within a given geographic area.

(2) *Process.* A Federal agency may request programmatic consultation by providing NMFS with an EFH Assessment in accordance with paragraph (e) of this section. The description of the proposed action in the EFH Assessment should describe the program and the nature and approximate number (annually or by some other appropriate time frame) of the actions. NMFS may also initiate programmatic consultation by requesting pertinent information from a Federal agency.

(3) *NMFS response to Federal agency.* NMFS will respond to the Federal agency with programmatic EFH Conservation Recommendations and, if applicable, will identify any potential adverse effects that could not be addressed programmatically and require project-specific consultation. NMFS may also determine that programmatic consultation is not appropriate, in which case all EFH Conservation Recommendations will be deferred to project-specific consultations. If appropriate, NMFS' response may include a General Concurrence for activities that qualify under paragraph (g) of this section.

(k) *Responsibilities of Federal agency following receipt of EFH Conservation Recommendations*—(1) *Federal agency response.* As required by section 305(b)(4)(B) of the Magnuson-Stevens Act, the Federal agency must provide a detailed response in writing to NMFS and to any Council commenting on the action under section 305(b)(3) of the Magnuson-Stevens Act within 30 days after receiving an EFH Conservation Recommendation from NMFS. Such a response must be provided at least 10 days prior to final approval of the action if the response is inconsistent with any of NMFS' EFH Conservation Recommendations, unless NMFS and the Federal agency have agreed to use alternative time frames for the Federal agency response. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS Conservation Recommendations, the Federal 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.

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

(l) *Supplemental consultation.* 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.

§ 600.925 NMFS EFH Conservation Recommendations to Federal and state agencies.

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

(b) *Recommendations to Federal agencies.* For Federal actions, EFH Conservation Recommendations will be provided to Federal agencies as part of EFH consultations conducted pursuant to § 600.920. If NMFS becomes aware of a Federal action that would adversely affect EFH, but for which a Federal agency has not initiated an EFH consultation, NMFS may request that the Federal agency initiate EFH consultation, or NMFS will provide EFH Conservation Recommendations based on the information available.

(c) *Recommendations to state agencies*—(1) *Establishment of procedures.* The Magnuson-Stevens Act does not require state agencies to consult with the Secretary regarding EFH. NMFS will use existing coordination procedures or establish new procedures to identify state actions that may adversely affect EFH, and to determine the most appropriate method for providing EFH Conservation Recommendations to state agencies.

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

(d) *Coordination with Councils.* NMFS will coordinate with each Council to identify the types of actions on which Councils intend to comment pursuant to section 305(b)(3) of the Magnuson-Stevens Act. For such actions NMFS will share pertinent information with the Council, including copies of NMFS' EFH Conservation Recommendations.

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

Under section 305(b)(3) of the Magnuson-Stevens Act, 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 the agency that, in the view of the Council, may affect the habitat, including EFH, of a fishery resource under its authority. Councils must provide such comments and recommendations concerning any activity that, in the view of the Council, is likely to substantially affect the habitat, including EFH, of an anadromous fishery resource under Council authority.

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

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

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