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AN INTRODUCTION TO THE ESSENTIAL FISH HABITAT (EFH) CONSULTATION PROCESS FOR THE SOUTH ATLANTIC REGION

Professor Kim Diana Connolly*

Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.

Magnuson-Stevens Act, Section 305¹

If the federal government is involved in an activity that might impact “essential fish habitat” (EFH),² even if the government is merely processing a permit or license,³ a required consultation⁴ first must take place to assess potential impacts to this habitat. Because most of the South Atlantic area coastline has been identified as essential fish habitat,⁵

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¹ Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. § 1855(b)(2) (2000).

² For general information about EFH, see National Oceanic and Atmospheric Administration Fisheries, *Essential Fish Habitat*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat.htm> (accessed Feb. 6, 2003).

³ See *infra* nn. 51 - 53 and accompanying text.

⁴ See *infra* section III.

⁵ South Atlantic Fishery Management Council, *Final Habitat Plan For The South Atlantic Region: Essential Fish Habitat Requirements For Fishery Management Plans Of The South Atlantic Fishery Management Council*. Plans include: The Shrimp Fishery Management Plan; The Red Drum Fishery Management Plan; The Snapper Grouper Fishery Management Plan; The Coastal Migratory Pelagics Fishery Management Plan; The Golden Crab Fishery Management Plan; The Spiny Lobster Fishery Management Plan; The Coral, Coral Reefs, And Live/Hard Bottom Habitat Fishery Management Plan; The Sargassum Habitat Fishery Management Plan; and The Calico Scallop Fishery

such consultations have become routine for hundreds of activities annually.⁶ For purposes of this article, "South Atlantic" refers to the area under the jurisdiction of the South Atlantic Fishery Management Council (SAFMC).⁷ The SAFMC is headquartered in Charleston, South Carolina, and is responsible for the conservation and management of fish stocks off the coasts of North Carolina, South Carolina, Georgia, and eastern Florida as far south as Key West.⁸ Note that the South Atlantic area discussed in this article is smaller than the broader region covered by the Southeast Regional Office of the National Marine Fisheries Service (NMFS),⁹ which includes the eight coastal states from North Carolina to Texas, as well as Puerto Rico and the U.S. Virgin Islands.

As will be discussed in this article, a consultation involves an "action agency"¹⁰ asking NMFS for its opinion of what impact a proposed activity

Management Plan <http://www.safmc.net/habitat/FMPro?-DB=content&-Lay=main&pageid=about&-Format=default.html&-find> (Oct. 1998) (accessed Feb. 2, 2003) (1998 SAFMC EFH Final Plan) at 7.

⁶ For example, most public notices issued by the Charleston District Office of the United States Army Corps of Engineers pursuant to section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and section 404 of the Clean Water Act (33 U.S.C. § 1344) contain a paragraph with language stating that "this notice initiates the Essential Fish Habitat consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act" and providing approximate acreage of impact for the proposed project. *See, e.g.*, Charleston District, Corps of Engineers and S.C. Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, Joint Public Notice, Dewees Island Property Owners Association (June 21, 2002); Charleston District, Corps of Engineers and S.C. Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, Joint Public Notice, Sunset Cay, LLC (Sept. 27, 2002). Nationally, NMFS completes about 8,000 consultations annually. National Marine Fisheries Service, *Essential Fish Habitat: FAQs* (Jan. 2002) (available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/factsheets/faq.pdf>) (accessed Feb. 10, 2003).

⁷ *See* South Atlantic Fisheries Management Council, <http://www.safmc.net> (accessed Feb. 3, 2003). The SAFMC is responsible for conservation and management of fish within federal waters known as the Exclusive Economic Zone, an area from 3 miles to 200 miles offshore, <http://www.safmc.net/aboutus/fmpro?-db=content&-format=default.html&-view> (accessed Feb. 17, 2003). However, identification of EFH is a broader task and is designed to examine and identify all habitat, including areas within state jurisdiction for other purposes. *See* 50 C.F.R. § 600.805(b)(2) ("Councils may describe, identify, and protect habitats of managed species beyond the exclusive economic zone.").

⁸ *See* National Oceanographic and Atmospheric Administration, *Fishery Management Councils*, <http://www.noaa.gov/nmfs/councils.html> (accessed Feb. 6, 2003).

⁹ *See* National Marine Fisheries Service, *NMFS Introduction*, <http://caldera.sero.nmfs.gov/director/intro.htm> (accessed Feb. 10, 2003).

¹⁰ The author uses the term "action agency" to refer to the federal agency proposing

might have on designated EFH.¹¹ In some cases, consultations require an action agency to do little more than follow the environmental procedures it would otherwise employ.¹² In other cases, consultations require much more work.¹³ In all cases, EFH consultations are intended to protect habitat that managed fish species need to complete their life cycles.¹⁴ This article will discuss what is required for an EFH consultation, describe where and how EFH has been designated in the South Atlantic area, and provide sources for further information regarding EFH consultations.

I. WHAT IS THE STATUTORY BASIS FOR THE EFH CONSULTATION REQUIREMENT?

The Sustainable Fisheries Act of 1996 (SFA),¹⁵ identifying the contribution of habitat loss and degradation on fishery declines,¹⁶ amended the Magnuson-Stevens Act¹⁷ to create a program to protect "essential fish habitat."¹⁸ The statute defined EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity."¹⁹ The legislation authorized a regulatory program to provide detailed identification of such habitat and obligatory consultation regarding all fishery and non-fishery activities receiving federal funding, permitting, or authorization that could impact EFH.²⁰ In December 1997, the NMFS²¹ promulgated an interim final rule to implement the EFH

to undertake, approve, or fund the proposed project. This term does not appear in the EFH regulations.

¹¹ See *infra* section III.

¹² See *infra* nn. 56 - 65 and accompanying text.

¹³ See *infra* nn. 87 - 90 and accompanying text.

¹⁴ American Oceans Campaign, NMFS, and American Fisheries Society, *Protecting and Restoring Essential Fish Habitat*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/protectingandrestoringefh.htm> (accessed Feb. 10, 2003).

¹⁵ S. 39, a bill to amend the Magnuson Fishery Conservation and Management Act to authorize appropriations, to provide for sustainable fisheries, and for other purposes, became Pub. L. No. 104-297, Title I, § 101, 110 Stat. 3560 (1996).

¹⁶ *Id.* at 101, amending 16 U.S.C. § 1801 to add "(9) One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats. Habitat considerations should receive increased attention for the conservation and management of fishery resources of the United States."

¹⁷ 16 U.S.C. §§ 1801 - 1883.

¹⁸ *Id.* at § 1855(b).

¹⁹ *Id.* at § 1802(10).

²⁰ *Id.* at § 1855(b).

²¹ The National Marine Fisheries Service is typically referred to as NMFS, though it

provisions.²² This interim final rule added two new subparts to the Code of Federal Regulations governing fishery activities.²³ After much delay, NMFS issued a final rule in January 2002.²⁴ Little changed between the interim and final rule²⁵ despite concerns raised by some stakeholders.²⁶

The initial stage of EFH implementation involved identification of the relevant habitat.²⁷ To accomplish this goal, the SFA called upon the existing structure of Regional Fishery Management Councils (Councils)²⁸ to describe and identify EFH for any fishery managed under the Magnuson-Stevens Act,²⁹ based on guidelines established by NMFS.³⁰ The Fishery Management Councils were created through the original Fishery Conservation and Management Act in 1973³¹ for the conservation and orderly utilization of the fishery resources of the United States.³²

To assist the Councils in identifying EFH, NMFS issued two primary

has changed its official name to "NOAA Fisheries." See <http://www.nmfs.noaa.gov/> (accessed Feb. 9, 2003). To minimize confusion, throughout this article, the author will use the older, more traditional name, NMFS.

²² 62 Fed. Reg. 66,531 (1997), codified in 50 C.F.R. pt. 600 (2002).

²³ 50 C.F.R. pt. 600.

²⁴ 67 Fed. Reg. 2343 (Jan. 17, 2002).

²⁵ *Id.* at 2344. The rulemaking archives are available at NOAA Fisheries, *EFH Rulemaking Archives*, http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfish_habitat_archives.htm (accessed Feb. 3, 2003).

²⁶ Concern about the new EFH requirements resulted in five separate public comment periods on the rule and numerous public meetings and briefings before the rule was made final. 67 Fed. Reg. at 2344.

²⁷ 16 U.S.C. § 1853 (a)(7).

²⁸ There are eight Fishery Management Councils: Caribbean Fishery Management Council; Gulf Fishery Management Council; Mid-Atlantic Fishery Management Council; New England Fishery Management Council; North Pacific Fishery Management Council; Pacific Fishery Management Council; South Atlantic Fishery Management Council; and the Western Pacific Fishery Management Council. National Oceanographic and Atmospheric Administration, *Fishery Management Councils*, <http://www.noaa.gov/nmfs/councils.html> (accessed Feb. 6, 2003).

²⁹ 16 U.S.C. § 1853(a)(7). Habitat considerations were incorporated into most Fishery Management Plans prior to the EFH provisions being adopted. H.R. Subcomm. on Fisheries Conservation, Wildlife and Oceans, Comm. on Resources, Penelope D. Dalton, Assistant Administrator For Fisheries National Oceanic And Atmospheric Administration, *Testimony On The Essential Fish Habitat Provisions Of The Magnuson-Stevens Fishery Conservation And Management Act*, 106th Cong., 2nd Sess. (Mar. 9, 2000) (available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/final%20EFH%20testimony.htm>) (accessed Feb. 10, 2003).

³⁰ 16 U.S.C. § 1855(b)(1)(A).

³¹ Pub. L. No. 94-265, 90 Stat. 331 (1973).

³² *Id.*

guidelines: the 1997 interim final rule³³ and a Technical Assistance Manual.³⁴ The statute required the Councils to submit to NMFS their Fishery Management Plan amendments implementing EFH requirements within two years of SFA passage,³⁵ or by October 11, 1998. Although some amendments were delayed, all fisheries now have approved EFH amendments.³⁶ Section IV below discusses the identified EFH in the South Atlantic Region.

EFH consultations differ from consultations that may be required under the Endangered Species Act (ESA).³⁷ ESA section 7(a)(2)³⁸ requires each federal agency to ensure that its actions are not likely to jeopardize the continued existence of federally-listed threatened or endangered species or result in the destruction or adverse modification of such species' designated "critical habitat."³⁹ This ESA requirement is implemented through a consultation between an "action agency" and NMFS⁴⁰ pursuant to regulatory guidelines,⁴¹ and through the development

³³ Department of Commerce, National Oceanic and Atmospheric Administration, Magnuson-Stevens Act Provisions; *Essential Fish Habitat, Interim Final Rule*, 62 Fed. Reg. 66,531 (1997).

³⁴ NOAA Fisheries Office of Habitat Conservation, *Technical Guidance to NMFS for Implementing the Essential Fish Habitat Requirements for the Magnuson-Stevens Act* (Jan. 9, 1998) (available at [http://www.nmfs.noaa.gov/habitat/habitatprotection/images/Final%20IFRTEchManual\(Jan9\)2.pdf](http://www.nmfs.noaa.gov/habitat/habitatprotection/images/Final%20IFRTEchManual(Jan9)2.pdf)) (accessed Feb. 8, 2003).

³⁵ Pub. L. No. 104-297, Title I, § 108(b), 110 Stat. 3575 (1996).

³⁶ A summary of submission and public comment period dates can be found at NOAA Fisheries, *Essential Fish Habitat: Designations and Descriptions for EFH*, http://www.nmfs.noaa.gov/habitat/habitatprotection/efh_designations.htm (accessed Feb. 4, 2003).

³⁷ 16 U.S.C. §§ 1531 - 1544.

³⁸ *Id.* at § 1536(a)(2).

³⁹ Interestingly, the ESA uses the term "essential" in its definition of critical habitat for a threatened or endangered species: "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* at § 1532(5)(A) (emphasis added).

⁴⁰ The U.S. Fish and Wildlife Service perform consultation for a number of land-based species. Generally, the National Marine Fisheries deals with those species occurring in marine environments and anadromous fish, while the Fish and Wildlife Service is responsible for terrestrial and freshwater species and migratory birds. The EFH rule itself was subject to inquiry regarding ESA compliance. 62 Fed. Reg. at 66,547 - 66,548 (Dec. 19, 1997).

of a biological assessment and a biological opinion.⁴² In fulfilling the “no-jeopardy” mandate under the ESA, the action agency must consider fully any conclusions and recommendations of the biological opinion that may affect listed species or critical habitat prior to taking action.⁴³ If the ESA consultation process involves a permit or license applicant, the timing of the consultation process is left up to agreement among NMFS, the action agency, and the applicant.⁴⁴ Sometimes, a particular species may be both an ESA-listed species with designated critical habitat as well as a managed species under the Magnuson-Stevens Act with identified EFH.⁴⁵ In 2001, NMFS published helpful guidance regarding species that may require both types of consultation.⁴⁶

II. WHEN ARE CONSULTATIONS REQUIRED?

The EFH provisions of the Magnuson-Stevens Act require “consultation” with NMFS when a proposed federal activity may “adversely” affect identified EFH.⁴⁷ “Adverse affect” means that the proposed activity may have an impact that reduces the quality and/or quantity of EFH.⁴⁸ Adverse effects may include site-specific, or habitat-wide impacts that are direct (e.g., contamination or physical disruption) or

⁴¹ 50 C.F.R. § 402.14.

⁴² 16 U.S.C. § 1536(c).

⁴³ *Id.* at § 1536(b).

⁴⁴ *Id.* at § 1536(b)(2). Note that once the process is initiated, strict deadlines apply to the consultation, including a 180-day time period for completion of the biological opinion. *Id.* § 1536(c). An applicant may also engage in an optional “early consultation” on ESA issues. U.S. Fish and Wildlife Service, *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, ch. 3 (available at <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>) (accessed Feb. 19, 2003).

⁴⁵ See, e.g., NOAA Fisheries Northwest Regional Office, *Overlap of Vacated Critical Habitat Designations & Designated Essential Fish Habitat for Pacific Salmon and Steelhead* (available at http://www.nwr.noaa.gov/1habcon/habweb/VacatedCH/EFH_OverlapMap.pdf) (accessed Feb. 10, 2003) (showing a map of the overlap of designated EFH for Pacific Salmon and Steelhead with Critical Habitat for both species (vacated by court order, Apr. 30, 2002)).

⁴⁶ National Marine Fisheries Service, *Guidance for Integrating Magnuson-Stevens Fishery Conservation and Management Act, EFH Consultations with Endangered Species Act, section 7 Consultations* (Jan. 2001) (available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/images/guidance1.pdf>) (accessed Feb. 9, 2003).

⁴⁷ 16 U.S.C. § 1855(b)(2).

⁴⁸ 50 C.F.R. § 600.810.

indirect (e.g., loss of prey), including individual, cumulative, or synergistic consequences of actions.⁴⁹ NMFS and the action agency must use the best scientific information available to assess the effects of the proposed action on EFH, although they may also consider other appropriate sources of information.⁵⁰

Federal agencies must consult not only for actions undertaken by that agency, but also for any actions authorized or funded by the agency, when such actions may adversely affect EFH.⁵¹ This requirement creates a very broad set of activities that require EFH consultations, including dredging, fill, excavation, mining, impoundment, discharge, water diversions, actions that contribute to non-point pollution and sedimentation, introduction of potentially hazardous materials, and conversion of aquatic habitat.⁵² An agency also must consult on renewals, reviews, or substantial revisions to actions that may adversely affect EFH.⁵³ Accordingly, this requirement can have a considerable impact on the actions of private parties.

III. WHAT DO EFH CONSULTATIONS ENTAIL?

Consultation can be approached in different manners depending on the activity for which consultation has been sought.⁵⁴ NMFS has identified five types of consultation to assess the EFH ramifications of proposed actions:⁵⁵ existing procedure, programmatic consultations, general

⁴⁹ *Id.*

⁵⁰ *Id.* at § 600.920(d).

⁵¹ *Id.* at § 600.920(a).

⁵² The Coastal Society, *The Essential Fish Habitat Provisions of the Magnuson-Stevens Act*, The Coastal Society Bulletin, Vol. 21(2) (Thomas E. Bigford ed., 1999) (available at <http://www.nmfs.noaa.gov/habitat/habitatprotection/coastalsociety.htm>) (accessed Feb. 10, 2003).

⁵³ 50 C.F.R. § 600.920(a).

⁵⁴ For a detailed overview of the consultation process, see Office of Habitat Conservation, National Marine Fisheries Service, *Essential Fish Habitat Consultation Guidance* (Nov. 1999) (available at <http://www.nmfs.noaa.gov/habitat/efh/Consultation/TOC.html>) (accessed Feb. 4, 2003) (“Consultation Guidance”). NMFS wrote this document “to facilitate the use of existing environmental review procedures as the primary mechanism for EFH consultations, streamline the consultative requirements for activities minimally affecting EFH, and establish a consistent, efficient approach to conducting programmatic and individual consultations.” *Id.* at Introduction.

⁵⁵ State agencies are not subject to EFH consultation requirements, although when a state and federal agency both are involved in authorizing or funding a project that could adversely affect EFH, the regulations provide that “NMFS will provide the appropriate state agencies with copies of EFH conservation recommendations developed as part of

concurrence, abbreviated assessments, and expanded assessments. This section will discuss the requirements of such consultations in detail.

A. Existing Procedures

To the extent that NMFS believes other consultation or environmental review procedures satisfy EFH requirements, EFH consultation can be consolidated with such other procedures to determine potential impacts to EFH.⁵⁶ Consolidation is appropriate when: (1) the other process provides NMFS with timely notification of actions that may adversely affect EFH (“timely” typically means within 60 days, unless substantial adverse impacts are anticipated, in which case it means 90 days);⁵⁷ (2) an assessment (meeting the requirements for EFH Assessments)⁵⁸ has been made of the impacts of the proposed action on EFH;⁵⁹ and (3) NMFS has issued a finding that the existing consultation or environmental review process meets the EFH requirements.⁶⁰ NMFS’ regulations identify some federal laws containing consultation, coordination, or review provisions that potentially could be consolidated with an EFH consultation,⁶¹ including the National Environmental Policy Act (NEPA),⁶² the Fish and Wildlife Coordination Act,⁶³ the ESA,⁶⁴ and the Federal Power Act.⁶⁵ Use of existing procedures has been approved in many cases including NEPA procedures undertaken by the United States Army Corps of Engineers (Corps).⁶⁶

B. Programmatic Consultations

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.” 50 C.F.R. § 600.925(c)(2).

⁵⁶ *Id.* at § 600.920(e). See also Consultation Guidance, *supra* n. 54, 2.0.

⁵⁷ 50 C.F.R. § 600.920(e)(1)(i).

⁵⁸ See nn. 82 - 83 and accompanying text.

⁵⁹ *Id.* at § 600.920(e)(1)(ii).

⁶⁰ *Id.* at § 600.920(e)(1)(iii). The burden for initiating contact to determine whether an existing process meets the requirements for consultation on EFH is put on the federal agency with the existing process. *Id.* at § 600.920(e)(3).

⁶¹ *Id.* § 600.920(e)(1).

⁶² 42 U.S.C. §§ 4321 - 4370(f).

⁶³ 16 U.S.C. §§ 661 - 667(e).

⁶⁴ 16 U.S.C. §§ 1531 - 1544.

⁶⁵ 16 U.S.C. §§ 792 - 825(r).

⁶⁶ Consultation Guidance, *supra* n. 54, app. 2.

Programmatic consultations allow NMFS and other federal agencies to take a broad, comprehensive look at federal programs, their potential or actual adverse effects on EFH, and appropriate conservation recommendations.⁶⁷ EFH requirements can be satisfied for an entire program but only to the extent that “all concerns about adverse effects on EFH can be addressed at a programmatic level.”⁶⁸ Programmatic consultations have been used in a few situations, such as for United States Forest Service Forest Plans.⁶⁹

C. General Concurrences

The third type of consultation that can satisfy EFH requirements is a streamlined “General Concurrence,” which requires proof that specific types of agency actions will have only minimal adverse effects.⁷⁰ A General Concurrence may be national or regional in scope.⁷¹ The criteria for development of a General Concurrence are very similar to the criteria for nationwide permits under the Clean Water Act section 404(e)⁷² which are as follows: the actions must be similar in nature and similar in their impact on EFH;⁷³ the actions must not cause greater than minimal adverse effects on EFH when implemented individually;⁷⁴ and the actions must not cause greater than minimal cumulative adverse effects on EFH.⁷⁵ Although activities that qualify for a General Concurrence do not require EFH Assessments,⁷⁶ if a General Concurrence is issued, qualifying activities must be tracked to ensure that impacts are no more than minimal.⁷⁷ General Concurrences have been approved for activities such as the Corps’ routine maintenance dredging.⁷⁸

⁶⁷ Consultation Guidance, *supra* n. 54, 3.0.

⁶⁸ 50 C.F.R. § 600.920(a)(2)(ii).

⁶⁹ Consultation Guidance, *supra* n. 54, app. 2.

⁷⁰ 50 C.F.R. § 600.920(f). *See also* Consultation Guidance, *supra* n. 54, 4.0.

⁷¹ *Id.* at § 600.920(f)(1).

⁷² 33 U.S.C. § 1344(e).

⁷³ *Id.* at § 600.920(f)(2)(i)(B).

⁷⁴ *Id.* at § 600.920(f)(2)(i)(C).

⁷⁵ 50 C.F.R. § 600.920(f)(2)(i)(A). Categories of federal actions can qualify through appropriate conditions (e.g., project size limitations, seasonal restrictions, etc.) to meet these criteria. *Id.* at § 600.920(f)(2)(iii).

⁷⁶ *Id.* at § 600.920(f)(3).

⁷⁷ *Id.* at § 600.920(f)(2)(ii).

⁷⁸ Consultation Guidance, *supra* n. 54, app. 2.

D. & E. Abbreviated and Expanded Consultations

The fourth and fifth types of consultation are an abbreviated consultation⁷⁹ (required for a proposed action that may adversely affect EFH)⁸⁰ and an expanded consultation (required for a proposed action that may result in substantial adverse effects to EFH).⁸¹ Both of these consultation procedures begin with an EFH assessment submission to NMFS by a federal agency⁸² with the following mandatory contents: (i) a description of the proposed action; (ii) an analysis of the effects, including cumulative effects, of the proposed action on EFH, the managed species, and associated species, such as major prey species, including affected life history stages; (iii) the federal agency's views regarding the effects of the action on EFH; and (iv) proposed mitigation, if applicable.⁸³ 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; and (iv) an analysis of alternatives to the proposed action. Such analysis should include alternatives that could avoid or minimize adverse effects on EFH, particularly when an action is non-water dependent.⁸⁴

The abbreviated procedures are for projects that do not quite meet the criteria for a General Concurrence, but do not have the potential to cause substantial adverse effects on EFH.⁸⁵ EFH Assessments under the abbreviated procedures must be submitted at least sixty days prior to a final decision on the action. NMFS then has thirty days to respond in writing.⁸⁶

The expanded procedures are for projects that may result in substantial adverse effects.⁸⁷ Designed to allow the "maximum opportunity for NMFS and the Federal agency to work together in the review" of potential

⁷⁹ *Id.* at Introduction.

⁸⁰ *Id.* at § 600.920(h).

⁸¹ *Id.* at § 600.920(i).

⁸² *Id.* at § 600.920(g)(1).

⁸³ *Id.* at § 600.920(g)(2).

⁸⁴ *Id.* at § 600.920(g)(3).

⁸⁵ *Id.* at § 600.920(h). For example, the abbreviated consultation procedures are appropriate when the adverse effect(s) of an action or proposed action could be alleviated through minor modifications. *Id.*

⁸⁶ *Id.* at § 600.920(h)(5).

⁸⁷ *Id.* at § 600.920(i).

effects on EFH,⁸⁸ the expanded procedures allow for site visits and coordination with the appropriate Regional Fishery Management Council.⁸⁹ Action agencies must submit assessments under the expanded procedures at least ninety days prior to a final decision on the action. NMFS then has sixty days to respond in writing, unless the action agency agrees to an extension.⁹⁰

In any situation involving consultation, once NMFS has submitted an EFH conservation recommendation to the federal action agency, that agency must provide a written response at least ten days prior to final approval of the action, if a decision by the federal agency is required in fewer than thirty days.⁹¹ The federal action agency's response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH, and, in the case of a response that is inconsistent with NMFS conservation recommendations, must explain the agency's reasons for not following the recommendations.⁹²

IV. WHAT ARE THE FISHERIES AND AREAS FOR WHICH EFH CONSULTATION IS REQUIRED IN THE SOUTH ATLANTIC REGION?

Consultation is required only where there is identified EFH. As discussed above, the Magnuson-Stevens Act places responsibility for identifying EFH on Councils.⁹³ In the four-state region of South Carolina, North Carolina, Georgia, and eastern Florida, the SAFMC is responsible for identifying EFH through management plans.⁹⁴ SAFMC has management plans for many managed fisheries⁹⁵ including seventy-three species in the snapper-grouper complex, coastal pelagics (including king

⁸⁸ *Id.*

⁸⁹ *Id.* at § 600.920(i)(3)(ii).

⁹⁰ *Id.* at § 600.920(i)(4).

⁹¹ *Id.* at § 600.920(j).

⁹² *Id.* This response 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.

⁹³ See *supra* nn. 27 - 36 and accompanying text.

⁹⁴ For a summary of SAFMC EFH designations, see NOAA Fisheries Essential Fish Habitat, *Designations and Descriptions for EFH*, http://www.nmfs.noaa.gov/habitat/habitatprotection/efh_designations.htm (accessed Feb. 9, 2003).

⁹⁵ South Atlantic Fisheries Management Council, *Fish ID and Regulations*, <http://www.safmc.net/fishid/FMPro?-DB=content&-Lay=main&pageid=about&-Format=default.html&-find> (accessed Feb. 10, 2003).

and Spanish mackerel), six species of shrimp, coral reefs, and live hard-bottom habitat, pelagic Sargassum habitat,⁹⁶ and red drum.⁹⁷ In accordance with the SFA,⁹⁸ the SAFMC completed its final habitat plan governing the management of EFH for all managed species in 1998.⁹⁹

SAFMC has broken down EFH into estuarine/inshore and offshore marine habitats.¹⁰⁰ SAFMC further divided the estuarine/inshore habitat into “estuarine emergent vegetation (salt marsh and brackish marsh), estuarine shrub/scrub (mangroves), seagrass, oyster reefs and shell banks, intertidal flats, palustrine emergent and forested (freshwater wetlands), and the estuarine water column.”¹⁰¹ Estuarine/inshore habitats serve a fundamental role as nurseries for many commercially important species.¹⁰² Thus, conservation of these habitats is vital to commercial and recreational fisheries in the South Atlantic area and requires concerted efforts among state and federal managers.

Because so many fish species utilize estuarine/inshore habitats at some point of their lives, SAFMC made an effort to coordinate state and federal endeavors where jurisdictions may overlap.¹⁰³ For example, diadromous fish such as striped bass, which migrate between fresh and saltwater to

⁹⁶ The Sargassum habitat designation is currently under review. E-mail from Roger Pugliese, Senior Fishery Biologist, SAFMC, to Kim Diana Connolly, Prof., U.S.C. Sch. L. (Feb. 21, 2003, 9:26 p.m. EST) (copy on file with Prof. Connolly).

⁹⁷ South Atlantic Fishery Management Council, *Habitat*, <http://www.safmc.net/habitat/fmpro?-db=content&-format=default.html&-view> (accessed Feb. 2, 2003).

⁹⁸ See *supra* n. 28 - 30 and accompanying text.

⁹⁹ South Atlantic Fishery Management Council, *Final Habitat Plan For The South Atlantic Region: Essential Fish Habitat Requirements For Fishery Management Plans Of The South Atlantic Fishery Management Council*. Plans include: The Shrimp Fishery Management Plan; The Red Drum Fishery Management Plan; The Snapper Grouper Fishery Management Plan; The Coastal Migratory Pelagics Fishery Management Plan; The Golden Crab Fishery Management Plan; The Spiny Lobster Fishery Management Plan; The Coral, Coral Reefs, And Live/Hard Bottom Habitat Fishery Management Plan; The Sargassum Habitat Fishery Management Plan; and The Calico Scallop Fishery Management Plan <http://www.safmc.net/habitat/FMPro?-DB=content&-Lay=main&pageid=about&-Format=default.html&-find> (Oct. 1998) (accessed Feb. 2, 2003) (“1998 SAFMC EFH Final Plan”). This final plan is 457 pages long, with nineteen appendices. In conceiving the plan, the Council took a risk-averse approach, considering all habitat used by overfished species as essential. The Council chose to emphasize the relationship of species to habitat and species to species by adopting an approach centered on management of the ecosystem, rather than a particular species. *Id.* at 4.

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.*

¹⁰² *Id.* at 16 (“Greater than 90% of the commercial and recreational landings in the South Atlantic are composed of estuarine dependent species.”).

¹⁰³ *Id.* at 7.

spawn,¹⁰⁴ depend on habitat corridors from well inland to offshore.¹⁰⁵ Threats to these habitats come from human-made barriers (e.g. dams), habitat conversion (e.g. development and wetlands filling), flow alteration, water quality,¹⁰⁶ and overharvest.¹⁰⁷ Local, state, and federal agencies have various regulatory and management roles for such activities,¹⁰⁸ making coordinated conservation efforts imperative to effectively manage these species and their wide variety of habitats. The EFH consultation process formalizes the conservation efforts of the federal government.

Restoration efforts have been ongoing to offset losses in estuarine/inland habitats for over twenty years.¹⁰⁹ Projects have had mixed results. Further, studies show that it may take up to twenty years for a synthetic habitat to become equivalent to a natural one.¹¹⁰ More research is needed to understand how to effectively replace damaged areas.¹¹¹ The difficulty in replacing such habitat makes the EFH consultation process, and implementation of resulting recommendations, even more important.

Marine/offshore habitats in the South Atlantic region consist of five general categories based on the type of bottom and water temperature: coastal, open shelf, live/hard bottom, shelf edge, and lower shelf.¹¹² "Each of these habitats harbors a distinct association of demersal (bottom dwelling) fishes and invertebrates."¹¹³ These offshore habitats contain EFH for many diverse fish species, including snappers, groupers, and over 100 species of reef fishes associated with the live/hard bottom off of the coasts of North and South Carolina, as well as at least 145 species of

¹⁰⁴ National Oceanographic and Atmospheric Administration Fisheries, *What are Diadromous Fish*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/anadromousfish.htm> (accessed Feb. 2, 2003).

¹⁰⁵ National Oceanographic and Atmospheric Administration Fisheries, *What Habitat is Important to Diadromous Fish*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/anadromousfish4.htm> (accessed Feb. 2, 2003).

¹⁰⁶ Water quality is most directly impacted by discharge of pollutants, as defined by the Clean Water Act. 33 U.S.C. § 1362(6).

¹⁰⁷ National Oceanographic and Atmospheric Administration Fisheries, *What is the Status of Diadromous Fish Habitat?*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/anadromousfish5.htm> (accessed Feb. 2, 2003).

¹⁰⁸ See generally Joseph J. Kalo, Richard G. Hildreth, Alison Rieser, Donna R. Christie & Jon L. Jacobsen, *Coastal and Ocean Law* (2d ed., West 2002).

¹⁰⁹ 1998 SAFMC EFH Final Plan at 20.

¹¹⁰ *Id.* at 22.

¹¹¹ *Id.*

¹¹² *Id.* at 11.

¹¹³ *Id.*

invertebrates, over 100 other fish species, 4 species of sea turtles, and numerous marine birds in the floating Sargassum communities.¹¹⁴

One major threat to EFH in the South Atlantic region is fishing gear.¹¹⁵ The effects of fishing gear vary widely with the bottom type present in the area as well as the type of fishing gear.¹¹⁶ The diversity among fisheries leads to the use of different gear and methods making it difficult to minimize the adverse impacts where, for instance, gear used in state waters may affect adversely the prey of a federally managed species.¹¹⁷

SAFMC and others have undertaken extensive efforts on local and regional scales to enhance existing habitats and to create new artificial reefs.¹¹⁸ This is important due to various threats to the habitats. For example, in the case of the Florida Keys and other reefs, recreational use on and around the reefs poses a substantial threat.¹¹⁹ Likewise, a number of non-fishing activities may adversely affect EFH including “dredging, fill, excavation, mining, impoundment, discharge, water diversions, thermal additions, actions that contribute to non-source point pollution and sedimentation, introduction of potentially hazardous materials, introduction of exotic species, and the conversion of aquatic habitat.”¹²⁰ Such activities may eliminate, diminish or disrupt the functions of EFH¹²¹ and thus trigger consultation requirements.

In order to identify EFH, the SAFMC began the planning process by holding workshops to identify experts and issues in the habitat field.¹²² These workshops and cooperation among state, federal, and technical experts yielded a “scientifically defensible”¹²³ EFH identification that describes the structural characteristics and functions by habitat type, employing available information on distribution and use by managed

¹¹⁴ *Id.*; *id.* at 13.

¹¹⁵ See generally, Michael C. Barnette, *A review of the fishing gear utilized within the Southeast Region and their potential impacts on essential fish habitat*, NOAA Technical Memorandum NMFS-SEF SC-44 9 (NOAA 2001) (available at http://www.nmfs.noaa.gov/habitat/habitatprotection/pdf/Barnette_gear.pdf) (accessed Feb. 2, 2003) (examining the effects of fishing gears utilized in the Southeastern Atlantic on EFH).

¹¹⁶ *Id.* at 5. These effects may not always be considered “negative” by scientists. *Id.*

¹¹⁷ *Id.* at 6 (mentioning the jurisdictional obstacles in managing fishing gear impacts on EFH.)

¹¹⁸ 1998 SAFMC EFH Final Plan at 24.

¹¹⁹ *Id.* at 80.

¹²⁰ *Id.* at 5.

¹²¹ *Id.*

¹²² *Id.* at 6.

¹²³ *Id.*

species and their significant prey “to serve as a source document for all species managed by the Council.”¹²⁴ The SAFMC chose to take a risk-averse approach to protecting EFH with the emphasis on “the interrelationships between habitat and State and Federally managed species and their prey and endangered and threatened species.”¹²⁵ Accordingly, unlike many other Councils elsewhere in the country that identified EFH for individual species or species groups,¹²⁶ the SAFMC created a single, comprehensive plan in 1998 for all EFH within the SAFMC’s jurisdiction.

The SAFMC updated its plan in April 2002.¹²⁷ However, a more detailed 2003 update is currently underway. The January 2002 Final EFH Rule,¹²⁸ which replaced the 1997 interim Final Rule under which the original EFH designations were made,¹²⁹ directed Councils to update EFH information and designations.¹³⁰ Furthermore, revisions to NOAA General Counsel interpretation of NEPA mandates required the Councils to update Environmental Impact Statements for all Federal Fishery Management Plans under their jurisdiction.¹³¹ Information compiled

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See e.g., Pacific Fisheries Management Council, *Amendment 8 (To the Northern Anchovy Fishery Management Plan) incorporating a name change to: The Coastal Pelagic Species Fishery Management Plan*, app. D, *Description and Identification of Essential Fish Habitat for the Coastal Pelagic Species Fishery Management Plan* (Dec. 1998) (available at <http://www.pcouncil.org/cps/cpsfmp/a8apdx.pdf>) (accessed Feb. 2, 2003) (establishing the EFH plan for coastal pelagic species in the PFMC’s jurisdiction).

¹²⁷ South Atlantic Fisheries Management Council, *Final Comprehensive Amendment Addressing Essential Fish Habitat In Fishery Management Plans Of The South Atlantic Region*. Amendments include: Amendment 3 To The Shrimp Fishery Management Plan; Amendment 1 To The Red Drum Fishery Management Plan; Amendment 10 To The Snapper Grouper Fishery Management Plan; Amendment 10 To The Coastal Migratory Pelagics Fishery Management Plan; Amendment 1 To The Golden Crab Fishery Management Plan; Amendment 5 To The Spiny Lobster Fishery Management Plan; and Amendment 4 To The Coral, Coral Reefs, And Live/Hard Bottom Habitat Fishery Management Plan (Including A Final EA/SEIS, RIR & SIA/FIS) <http://www.safmc.net/habitat/FMPro?-DB=content&-Lay=main&pageid=about&-Format=default.html&-find> (Apr. 22, 2002) (accessed Feb. 8, 2003). This document is 142 pages long, plus appendices and National Environmental Policy Act-required assessments.

¹²⁸ *Supra* n. 24.

¹²⁹ *Supra* n. 22.

¹³⁰ 67 Fed. Reg. at 2376 - 2379.

¹³¹ NOAA Fisheries, *Environmental Impact Statements for EFH*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/newenvironmentalimpactstatements.htm> (accessed Feb. 23, 2003).

during these processes will further facilitate meeting both the EFH and the NEPA mandates.¹³²

The South Atlantic Council is undertaking a new workshop process during 2003 to facilitate an update to all EFH designations and initiate development of the South Atlantic Fishery Ecosystem Plan.¹³³ Since the development of the existing Habitat Plan¹³⁴ (viewed by SAFMC as a source document that described EFH and amended the existing FMPs), SAFMC has monitored each FMP and plans to address any new impacts in an effort to minimize, to the extent practicable, the adverse impacts on EFH.¹³⁵ Like the process SAFMC used to develop its original Habitat Plan, a series of technical workshops will be conducted by Council habitat staff, in cooperation with NMFS/NOS Beaufort Laboratory, NMFS SEFSC Miami Laboratory, NMFS SERO personnel, and invited participants.¹³⁶ The updated SAFMC EFH identification will integrate comprehensive details of habitat distribution and characterization, the biology of managed species, and the characteristics of the food web in which they exist.¹³⁷

V. CONCLUSION AND SOURCES FOR MORE INFORMATION ON EFH CONSULTATION IN THE SOUTH ATLANTIC REGION

¹³² This requirement stems from a court order in a lawsuit filed by seven environmental groups and two fishing associations. *American Oceans Campaign v Daley*, 183 F. Supp. 2d 1, (D.D.C. 2000). The suit covered fishery management plan amendments developed by the New England Fishery Management Council, Gulf of Mexico Fishery Management Council, Caribbean Fishery Management Council, Pacific Fishery Management Council, and North Pacific Fishery Management Council. All of the involved Councils reinitiated the NEPA process for FMPs. See, e.g., *Groundfish Fisheries of the Bering Sea and Aleutian Islands Area and the Gulf of Alaska, King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands, Scallop and Salmon Fisheries Off the Coast of Alaska*, 67 Fed. Reg. 1325 (Jan. 10, 2002). The SAFMC was not a party to that suit.

¹³³ *Id.* The original 1998 Habitat Plan anticipated a comprehensive update in 2003. *Id.*

¹³⁴ *Supra* n. 99.

¹³⁵ E-mail from Roger Pugliese, Senior Fishery Biologist, SAFMC, to Kim Diana Connolly, Prof., U.S.C. Sch. L. (Feb. 21, 2003, 9:26 p.m. EST) (copy on file with Prof. Connolly).

¹³⁶ "Workshops are intended to build on a review of existing information presented in the Habitat Plan, and focus on updating information pursuant to the new EFH Rule." *Id.*

¹³⁷ *Id.*

As of 2003, the consultation process for identified EFH has been in place for over four years.¹³⁸ It protects EFH by examining the impact of all proposed activities that receive either federal funding and/or approval, or are carried out directly by the federal government.¹³⁹ EFH consultations do not provide NMFS with veto authority over federal projects adversely affecting EFH, but instead carry out a mandate that “enables NMFS to provide guidance to Federal action agencies on ways to tailor their projects to minimize harm to EFH.”¹⁴⁰ Despite some limited efforts to eliminate the process,¹⁴¹ EFH consultations appear to be here to stay.

A number of useful sources can assist private parties or federal agencies considering activities that might trigger an EFH consultation requirement. For a general overview of the process and basic requirements, the federal National Marine Fisheries Service headquarters web page can be very helpful.¹⁴² The Habitat Conservation Division Regional Services for the NMFS Southeast Regional Office might be able to provide more direct assistance to Southeast area residents.¹⁴³ The South Atlantic Fishery Management Council, though typically not involved in the consultation process itself, can provide assistance as to the location and extent of the identified habitat in the South Atlantic area.¹⁴⁴

By requiring that impacts on EFH from both fishing and non-fishing activities be considered, the Magnuson-Stevens Act ensures that the

¹³⁸ 62 Fed. Reg. 66,551 (1997), codified in 50 C.F.R. pt. 600.

¹³⁹ See *supra* section III.

¹⁴⁰ NOAA Fisheries Essential Fish Habitat, *The EFH Mandate*, <http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat3.htm> (accessed Feb. 17, 2003).

¹⁴¹ See, e.g., H.R. 2570, 107th Cong. (July 19, 2001)(as introduced); H.R. 4749, 107th Cong. (May 16, 2002) (as introduced).

¹⁴² NOAA Fisheries, National Marine Fisheries Service, *Essential Fish Habitat*, http://www.nmfs.noaa.gov/ess_fish_habitat.htm (accessed Feb. 8, 2003). NMFS Headquarters can also be contacted at NOAA Public & Constituent Affairs, Room 6217, 14th Street & Constitution Avenue, NW, Washington DC, 20230, Telephone: (202) 482-6090, Fax: (202) 482-3154.

¹⁴³ National Marine Fisheries Service, Southeast Regional Office, Habitat Conservation Division, Habitat Conservation Division Regional Operations, <http://caldera.sero.nmfs.gov/habitat/sp.htm> (accessed Feb. 6, 2003). The NMFS Regional Office can also be contacted through Southeast Regional Office, 9721 Executive Center Drive N., St. Petersburg, FL, 33702, Telephone: (727) 570-5317, Fax: (727) 570-5300.

¹⁴⁴ South Atlantic Fishery Management Council, <http://www.safmc.net> (accessed Feb. 9, 2003). The South Atlantic Fisheries Management Council can also be contacted at One Southpark Circle, Suite 306, Charleston, SC 29407-4699, Telephone: (843) 571-4366, Fax: (843) 769-4520.

NMFS takes a more holistic approach to fish habitat protection.¹⁴⁵ Such an approach saves taxpayers in the South Atlantic area and elsewhere in the United States from having later to support habitat restoration funds and potentially saves industries from having later to remedy environmental problems caused by federally approved or funded activities.¹⁴⁶ Furthermore, EFH conservation assists in efforts leading toward more sustainable fisheries, providing benefits not only to commercial and recreational fishers but also to coastal communities and states depending on coastal health for their economies.¹⁴⁷

¹⁴⁵ The SAFMC plans to produce a Fishery Ecosystem Plan for the South Atlantic Region in 2003, using a process that will build on past efforts and update EFH information in a manner that will further support consideration of ecosystem-based management. E-mail from Roger Pugliese, Senior Fishery Biologist, SAFMC, to Kim Diana Connolly, Prof., U.S.C. School of Law (Feb. 11, 2003, 11:55 a.m. EST) (copy on file with Prof. Connolly).

¹⁴⁶ See NOAA, <http://www.nmfs.noaa.gov/habitat/habitatprotection/essentialfishhabitat3.htm> (accessed Feb. 9, 2003).

¹⁴⁷ For more generally on sustainable fisheries, see Sustainable Fisheries Foundation, *Building Partnerships for the Future*, <http://www.sff.bc.ca/> (accessed Feb. 9, 2003) and Sustainable Fisheries Society, <http://www.sfsfishfirst.org/> (accessed Feb. 9, 2003).