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ARTICLE

ESSENTIAL FISH HABITAT AND COASTAL ZONE MANAGEMENT: BUSINESS AS USUAL UNDER THE MAGNUSON-STEVENS ACT?

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INTRODUCTION

The world of fisheries science has long understood the relationship between fish habitat and fisheries production. However, long-standing environmental laws, such as the Coastal Zone Management Act (CZMA)[1] and the Magnuson Fishery Conservation and Management Act (MFCMA),[2] have prevented effective management solutions to the problem of fish habitat loss due to coastal activities, and the resultant effects

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[1] *See* 16 U.S.C. §§ 1451-1465 (2000).

[2] *See id.* §§ 1801-1882 (2000).

on our nation's fisheries production.[3] Physical habitat loss has significantly affected fisheries because estuarine dependent fish make up seventy-seven percent of the nation's commercial harvest.[4] According to the U.S. Department of Commerce's National Marine Fisheries Service (NMFS), 20,000 acres of coastal wetlands are lost per year, and from 1953 to 1977, over 372,000 acres of estuarine wetlands disappeared.[5] Of these 372,000 acres, forty-five percent disappeared due to urban development.[6] Coupled with the high levels of pollution typically found in coastal waters, the impact of wetland losses on fisheries production has been significant.

The Essential Fish Habitat (EFH) language introduced into the 1996 reauthorization of the MFCMA[7] has potential implications for coastal zone activities similar to those resulting from the 1972 amendments to the federal Water Pollution Control Act, more popularly known as the Clean Water Act (CWA).[8] A wide range of opinions concerning the EFH policy has been expressed. The policy has been called both a "quantum leap in legislative approaches to marine environments" [9] and the "next great 'train wreck' for federally permitted or

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[3] Although the CZMA defined the coastal zone narrowly, as initially drafted, successive re-authorizations gradually expanded the scope of the law's impact to include estuaries, non-point source pollution, and watershed management issues. The scope of the MFCMA first went beyond the narrow issues of fish populations, management plans, and enforcement in 1996 when Congress recognized the fundamental relationship between habitat and productivity in its re-authorization of the MFCMA. *See id.*

[4] *See* OFFICE OF HABITAT PROTECTION, NATIONAL MARINE FISHERIES SERVICE, HABITAT PROTECTION ACTIVITY REPORT 9 (1994). Percentage is based on weight.

[5] *See id.*

[6] *See id.*

[7] *See* 16 U.S.C. §§ 1801-1883 (2000).

[8] *See* 33 U.S.C. § 1342 (1972) (these WPCA amendments added the National Pollution Discharge Elimination System, which required permits for any discharge of pollutants from point sources to navigable waters).

[9] Ronald C. Baird, *Foreword*, *in* FISH HABITAT: ESSENTIAL FISH HABITAT AND REHABILITATION xv (Lee R. Benaka ed., American Fisheries Society 1999) [hereinafter Benaka, *Fish Habitat*].

funded development activities."[10] Specifically, the EFH language required the eight regional fishery management councils (Councils) that manage U.S. marine fisheries in the United States Exclusive Economic Zone[11] to describe and identify EFH for each managed fishery[12] through amendments to federal fishery management plans. The re-authorized law, which was re-titled the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), defined EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity."[13]

As of this writing, thirty-nine EFH fishery management plan amendments have been approved, or partially approved, by the Secretary of Commerce (Secretary), who implements the Magnuson-Stevens Act through the NMFS, and the EFH plan amendment for Pacific salmon is still pending.[14] The delay over final approval of the EFH plan amendment for Pacific salmon is due at least in part to the March 16, 1999 addition of nine populations of salmon and steelhead in Washington

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[10] Eldon V.C. Greenberg, *Essential Fish Habitat: A New Regulatory Hurdle for Development*, 29 ENVIRONMENTAL L. REP. 10463 (1999) [hereinafter Greenberg, *Essential Fish Habitat*].

[11] The Exclusive Economic Zone (EEZ) is the area of federal waters adjacent to state waters, extending from three to 200 nautical miles offshore. State waters extend from the shore to three nautical miles offshore, except for Texas, Puerto Rico and the West Coast of Florida, whose state waters extend nine miles offshore. States administer fisheries in state waters, and the U.S. Department of Commerce administers fisheries in the EEZ, through the National Marine Fisheries Service. *See* U.S. DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE, OUR LIVING OCEANS 3-5 (1999).

[12] As of December 31, 1998, there were 39 federal fishery management plans in place, covering over 700 species of fish, shellfish, and corals. *See* U.S. DEP'T OF JUSTICE, NATIONAL MARINE FISHERIES SERVICE, FISHERIES OF THE UNITED STATES, 1998 (1999).

[13] *See* 16 U.S.C. § 1802(10) (2000).

[14] Telephone Interview with Jon Kurland, Office of Habitat Conservation, National Marine Fisheries Service (Nov. 2, 1999).

and Oregon to the endangered species list by the National Marine Fishery Service (NMFS).[15]

Once EFH is described and identified by the Councils and designations approved by the Secretary, the EFH consultation process described by the Magnuson-Stevens Act begins. This consultation process, which is one of the central products of the EFH provisions, requires federal agencies to consult with the Secretary regarding any activity, or proposed activity, authorized, funded, or undertaken by the agency that may adversely affect EFH.[16] As of December 31, 1999, 5,000 such consultations have taken place.[17] This consultation process will affect the permitting process for coastal zone activities either directly (in the case of federal agencies) or indirectly (in the case of state agencies) because EFH, as identified in the EFH amendments, include entire watersheds and coastal waters.[18] NMFS has always had the opportunity to comment on the possible effects of proposed coastal activities on fisheries through the provisions of the National Environment Policy Act (NEPA) and other laws.[19] However, the EFH provisions formalize this procedure in law and require a response when the comments are directed at federal agencies.[20]

Part I of this article provides a brief overview of how fish habitat conservation became a significant priority for NMFS and how and why provisions to ensure habitat conservation were introduced into the Magnuson-Stevens Act. We describe

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[15] *See* U.S. DEP'T OF COMMERCE, FEDERAL FISHERIES AGENCY ADDS NINE WEST COAST SALMON TO ENDANGERED SPECIES LIST (last modified Mar. 16, 1999) <http://www.publicaffairs. noaa.gov/releases99/mar99/ noaa99r115.html>.

[16] *See* discussion *infra* Section III.E.

[17] *See Hearing Before the Subcomm. On Fisheries Conservation, Wildlife and Oceans of the House Comm. On Resources* (Mar. 9, 2000) (statement of Penelope D. Dalton, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA)).

[18] *See* Philip Roni, et al., *Identification of Essential Fish Habitat for Salmon in the Pacific Northwest: Initial Efforts, Information Needs, and Future Direction, in* Benaka, Fish Habitat *supra* note 9, 93 at 101.

[19] *See, e.g.,* 42 U.S.C. §§ 4321-4347 (1970).

[20] *See* 16 U.S.C. § 1855(b)(4) (2000).

how the brief language in the Magnuson-Stevens Act was interpreted by the NMFS through its Interim Final Rule and controversies related to that interpretation. Part II examines the response of management agencies in the Gulf of Mexico to the EFH policy. Specifically, this case study reviews an amendment created by the Gulf of Mexico Fishery Management Council to address EFH requirements and describes some interagency communications in the region regarding fish habitat conservation and coastal zone activities.

Finally, in Part III, we suggest that although the EFH policy is somewhat limited in its ability to affect coastal zone management activities carried out by state agencies, it is a powerful tool to explicitly introduce habitat considerations into coastal zone management activities carried out by federal agencies. Further, EFH policy represents a significant step forward in the conservation of fish habitat through the legal recognition of fish habitat as a valid basis for fishery management efforts and as an important factor to consider when weighing the costs and benefits of coastal zone management projects.

I. HOW EFH WAS INTRODUCED INTO THE MAGNUSON-STEVENS ACT

The EFH language introduced into the 1996 revision of the Magnuson-Stevens Act was inspired by a growing concern for fish habitat and its effects on fisheries production that was repeatedly evidenced by representatives of the federal government, environmental organizations, and fishermen's associations beginning in the late 1980s and early 1990s.[21] This section discusses the form that some of these concerns took during this time period and then provides an overview of the final result, i.e., the EFH language itself.

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[21] *See* Cynthia M. Sarthou, *An Environmentalist's Perspective on Essential Fish Habitat, in* Benaka, Fish Habitat supra note 9, 11 at 16-17.

A. A GROWING CHORUS

In 1989, a report of the U.S. House of Representatives' Merchant Marine and Fisheries Committee cited the degradation of habitat as a reason for decreasing coastal fisheries productivity.[22] Participants in a 1991 national symposium on coastal fish habitat conservation made several recommendations for changes in policy and organizational frameworks, including amending the MFCMA to include habitat conservation as a national standard[23] and to give NMFS regulatory authority over projects that could severely damage fish habitat.[24] In 1992, the National Fish and Wildlife Foundation (NFWF) suggested that the MFCMA should be amended to empower NMFS to force other federal agencies to change actions that affect federally managed fisheries before the actions can proceed.[25] Also in 1992, the Marine Fish Conservation Network (MFCN) was created to "seek reform of America's fishery management laws." The MFCN, a coalition of conservation, fishing, environmental, and other organizations, lobbied for stronger habitat protection measures in the re-authorized MFCMA.[26]

Organizations representing commercial fishermen in 1994 issued a report that called on Congress to give NMFS the au-

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[22] *See* MERCHANT MARINE AND FISHERIES COMM., U.S.H.R., COASTAL WATERS IN JEOPARDY: REVERSING THE DECLINE AND PROTECTING AMERICA'S COASTAL RESOURCES 13 (1989).

[23] Any fishery management plan or regulation promulgated to implement such a plan pursuant to the Magnuson-Stevens Act shall be consistent with ten national standards for fishery conservation and management. These standards include basing conservation and management measures on the best scientific information available, minimizing cost and avoiding unnecessary duplication in creating and implementing conservation and management measures, and promoting safety of human life at sea through conservation and management measures. Fish habitat is not cited in any of the ten national standards in the 1996 Magnuson-Stevens Act. *See, e.g.,* 16 U.S.C. § 1851 (2000).

[24] *See* Sarthou *supra* note 21, at 17 (for an overview of additional recommendations made at this symposium).

[25] *See id.*

[26] *See* MARINE FISH CONSERVATION NETWORK AND CENTER FOR MARINE CONSERVATION, MISSING THE BOAT: AN EVALUATION OF FISHERY MANAGEMENT COUNCIL RESPONSE TO THE SUSTAINABLE FISHERIES ACT ii (1999).

thority to modify actions that would damage important fishery habitat and to direct the agency to treat the protection of habitats as one of its primary missions.[27] Also in 1994, the National Academy of Sciences published recommendations for improving fisheries management, including a recommendation that NMFS and the Councils be empowered to protect habitat needed to sustain fisheries resources.[28]

These cries for Congress to give more authority to NMFS to influence projects that would degrade fish habitat were inspired by a growing body of evidence that fish habitat destruction and degradation were contributing to decreasing fish stocks, resulting in decreasing economic benefit to the nation. The 1991-1993 Habitat Protection Activity Report, published in 1994 by NMFS, provided several examples of declining fisheries and habitat degradation:

> Since 1982, commercial landings of fish and shellfish in the Southeast Atlantic states and Gulf of Mexico have decreased forty-two percent.
>
> Oyster landings are ninety percent below historic levels in the Chesapeake Bay and Long Island Sound.
>
> Columbia River Basin salmon and steelhead runs have declined seventy-five to eighty-four percent from historic levels, due mainly to dams that impede the migration of sea-bound smolts and returning adults.
>
> California's natural salmon runs have been reduced by sixty-five percent in twenty years.
>
> In 1974, about twenty-five percent of shellfish beds in the United States were closed to harvesting due to sewage contamination.

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[27] *See* Sarthou *supra* note 21, at 17.

[28] *See* NATIONAL ACADEMY OF SCIENCES, IMPROVING THE MANAGEMENT OF U.S. MARINE FISHERIES 30 (1994).

> In Texas, over thirty-three percent of its approximately one million acres of coastal marshes may have been lost between the mid-1950s and mid-1970s.
>
> In Louisiana marshes, land loss rates approaching sixty miles per year have been observed due to canal dredging and upland flood control levees on the Mississippi River, among other factors.[29]

An October 1994 NMFS Habitat Protection Task Force workshop discussed the legal and structural challenges faced by the agency in effectively conserving fish habitat in order to ensure sustainable fisheries. The workshop participants identified the absence of a clear legal mandate for the conservation of fish habitat as contributing to the "general failure of to act as a strong advocate for the conservation of important fish habitat [.]"[30] Further, according to workshop participants, this lack of statutory authority has historically compromised NMFS' ability to work effectively with other federal agencies in influencing projects that could harm fish habitat.[31] The workshop participants also reviewed existing statutes to determine whether they provided NMFS with sufficient authority to carry out fish habitat conservation. The participants found that only the Federal Power Act gives NMFS such authority.[32] Finally, some workshop participants suggested that the MFCMA should include a new process for interagency consultations where federal actions might affect fish habitat.[33]

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[29] *See supra* note 3.

[30] AMERICAN FISHERIES SOCIETY, NMFS HABITAT PROTECTION TASK FORCE WORKSHOP DRAFT MEETING SUMMARY 4 (1994).

[31] *See id.*

[32] The Federal Power Act provides, among other things, NMFS authority to prescribe fishways, that is, passageways through and around hydropower structures and other such structures. *See* 16 U.S.C. § 791a (1988). *See also id.*

[33] *See supra* note 30.

B. CONGRESSIONAL RESPONSE TO FISH HABITAT LOSS AND DEGRADATION

Congress responded to the numerous calls for increased conservation of fish habitat when it amended the MFCMA on October 11, 1996.[34] The re-authorized law, also called the Sustainable Fisheries Act, cited the importance of long-term protection of EFH in its opening "findings" section.[35] One of the purposes of the Magnuson-Stevens Act was to "promote the protection of essential fish habitat in the review of projects conducted under federal permits, licenses, or other authorities that have or have the potential to affect such habitat."[36] Although critics of NMFS feel that the agency has applied the EFH policy to "broad categories" that in the end will "inevitably impose land use restrictions with economic impacts,"[37] Congress clearly intended to give the implementing agency latitude to review a wide variety of projects in virtually all coastal areas where EFH has been designated.

The Magnuson-Stevens Act states that fishery management plans should describe and identify essential fish habitat for each fishery managed under a plan.[38] Plans should also take steps to minimize "to the extent practicable" adverse effects on EFH from fishing activities[39] and identify actions to encourage the conservation and enhancement of EFH.[40]

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[34] *See* 16 U.S.C. §1801(a)(6) (2000).

[35] *See id.*

[36] *See id.* § 1801(b)(7).

[37] Handout from Michelle Desiderio, *National Association of HomeBuilders* (Aug. 10, 1999) (on file with author).

[38] *See* 16 U.S.C. §1853(a)(7) (2000).

[39] The phrase "to the extent practicable" and similar types of phrases are often included in legislation to allow regulators the option of taking little or no action in certain situations. For example, regulation of fishing activities to protect fish habitat. Despite this regulatory safeguard, the sole lawsuit that has been filed based on the EFH language has focused on fishing activities, not coastal zone activities. *See* Plaintiff's Motion for Leave to File Second Amended Complaint at 1, American Oceans v. Daley (District Court for the District of Columbia) (No. 99CV00982GK) [hereinafter Daley Motion]. This complaint is directed toward five of the eight regional fishery

The Magnuson-Stevens Act lays out the concrete measures to be taken by the Secretary and the Councils to describe and identify EFH and to consult with federal agencies regarding activities that may adversely affect EFH.[41] The Secretary is charged with establishing guidelines to assist the Councils in the description and identification of EFH in fishery management plans and to consider actions to conserve and enhance EFH within six months of the date of enactment of the Act.[42] The Secretary is also directed to create a schedule for the amendment of fishery management plans to include the identification of EFH, and to provide each Council with recommendations and information to assist Councils in the identification of EFH, adverse impacts on EFH, and actions that should be considered to conserve and enhance EFH.[43] In addition, the Secretary is directed to review programs administered by the Department of Commerce and ensure that any relevant programs further the conservation and enhancement of EF, and is required to coordinate with and provide information to other federal agencies for the same purpose.[44]

Under the Act, federal agencies and the Councils have discrete obligations.[45] Each federal agency must consult with the Secretary regarding any action "authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken" that may adversely affect EFH identified by the Councils.[46]

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management councils and charges that they did not "adequately assess the impacts of fishing on EFH or include practicable measures to protect EFH." *Id.*

[40] *See* 16 U.S.C. § 1853(a)(7) (2000).

[41] *See id.* § 1855(b).

[42] *See id.* §1855(b)(1)(A).

[43] *See id. See also* § 1855(b)(1)(B).

[44] *See id.* § 1855(b)(1)(C)-(D).

[45] *See id.* § 1855(b).

[46] *See* 16 U.S.C. § 1855(b)(2) (2000).

Federal agencies must consult with the Secretary even if their action is not located in EFH, but may adversely affect EFH.[47]

Each Council "may comment on and make recommendations to the Secretary and any federal or state agency concerning any activity authorized, funded, undertaken, or proposed to be authorized, funded, or undertaken, by any Federal or State Agency" that may affect the habitat, including the EFH, of a fishery under the Council's authority.[48] In addition, each Council must comment on and make recommendations to the Secretary and any federal or state agency regarding activities that, in the view of the Council, are likely to substantially affect the habitat or EFH of an anadromous fishery under the Council's authority.[49] If the Secretary determines, based on information received from a Council or federal or state agency or other sources, that an activity would adversely affect EFH, the Secretary shall recommend to the federal or state agency in question measures that can be undertaken to conserve such habitat.[50]

Within thirty days of receiving a recommendation from the Secretary, a federal agency must provide a detailed response in writing to the Secretary and relevant Council, including "a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat."[51] If this response "is inconsistent with the recommendations of the Secretary," the federal agency must explain why it does not intend to follow the recommendations.[52] Although Councils and NMFS can comment on activities or proposed activities of state and federal agencies, only federal agencies (as opposed to state agencies) need to respond to

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[47] *See id.* § 1855(b)(4)(A). For example, a federal land management agency like the Forest Service or the Bureau of Land Management would have to consult with NMFS on any upstream or upland actions that may adversely affect EFH.

[48] *See* 16 U.S.C. §1855(b)(3)(A).

[49] *See* 16 U.S.C. § 1855(b)(3)(B).

[50] *See id.* § 1855(b)(4)(A).

[51] *See id.* § 1855(b)(4)(B).

[52] *See id.*

NMFS or Council comments.[53] Although the omission of a requirement in the Magnuson-Stevens Act for state agencies to respond exempts a large category of coastal zone activities from the EFH consultation process, many other coastal activities that occur in state waters require federal permits or approvals, and these activities create the opportunity for an EFH consultation.[54] Although state agencies do not ever have to consult with NMFS, even on actions in bays or estuaries, NMFS must provide EFH conservation recommendations on those state actions that would adversely affect EFH.[55]

Some federal environmental laws, such as the Clean Water Act, provide state environmental agencies with the authority to issue permits for pollution discharges.[56] This delegation of authority raises the question of whether state agencies that issue permits pursuant to federal laws for activities that may adversely affect EFH are instigating federal actions (requiring EFH consultation) or state actions (not requiring EFH consultation). According to the Magnuson-Stevens Act, only federal agencies have to consult with the NMFS regarding activities that may adversely affect EFH.[57] If a state environmental agency had been given authority to grant permits pursuant to a federal law like the CWA prior to the 1996 amendments to the Magnuson-Stevens Act, then that state agency would not be subject to consultation. However, if NMFS identifies state actions that may damage fish habitat, then NMFS must provide conservation recommendations to the state. In addition, agreements between federal and state agencies that provide state agencies the authority to issue permits pursuant to federal laws are reviewed periodically and are sometimes up-

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[53] *See* 16 U.S.C. § 1855(b)(4)(B) (2000).

[54] For example, permits are required for activities affecting wetlands under the Clean Water Act. *See* 33 U.S.C. § 1344(a) (1994). Permits are also required for, among other things, the incidental taking of species under the Endangered Species Act. *See* 16 U.S.C. §§ 1531-1544 (1973). In addition, permits are required for the filling of navigable waters under the 1899 Rivers and Harbors Act. *See* 33 U.S.C. § 403 (1994).

[55] *See* 16 U.S.C. § 1855(b)(4)(A) (2000).

[56] *See* 33 U.S.C. §§ 1344(e)-1344(f) (1972).

[57] *See* 16 U.S.C. § 1855(b)(2) (2000).

graded to meet new legislative and regulatory goals. When a federal agency undertakes a periodic review of a federally delegated program, it must consult with NMFS if its action may serve to adversely affect EFH. This consultation gives NMFS the opportunity to request more stringent standards and reporting.

II. NMFS' INTERIM FINAL RULE ON ESSENTIAL FISH HABITAT

On April 23, 1997, NMFS, which is the agency authorized to implement the Magnuson-Stevens Act, published proposed rules to implement the EFH language.[58] On December 19, 1997, NMFS published interim final rules to implement EFH.[59] In addition, NMFS published a document providing technical guidance to be used in implementing the EFH requirements.[60] This section reviews aspects of the interim final rule (IFR) that are relevant to activities in the coastal zone.[61]

A. DEFINITIONS

The IFR contains several definitions that elaborate upon concepts that appear (and in some cases do not appear) in the Magnuson-Stevens Act. First, the definition of EFH that appears in the Magnuson-Stevens Act is clarified. The word "waters" is defined to include "aquatic areas and their associated physical, chemical, and biological properties" that are

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[58] *See* Magnuson Act Provisions, 62 Fed. Reg. 19,723 (Apr. 23, 1997) (to be codified at 50 C.F.R. pt. 600) [hereinafter *Magnuson Act Provisions*].

[59] *See id.* at 66,531.

[60] *See* OFFICE OF HABITAT CONSERVATION, NATIONAL MARINE FISHERIES SERVICE, TECHNICAL GUIDANCE TO NMFS FOR IMPLEMENTING THE ESSENTIAL FISH HABITAT REQUIREMENTS FOR THE MAGNUSON-STEVENS ACT (Draft 1998) [hereinafter NMFS Technical Guidance].

[61] The National Marine Fisheries Service as of this writing has yet to issue any final rules to supersede the interim final rule (IFR) published in December 1997. The Councils used the IFR and NMFS technical guidance in amending their fishery management plans. An IFR can legally be viewed as a final rule up to the point that a final rule is issued. The NMFS will publish a final rule on EFH by the end of 2000. Telephone interview with Jon Kurland, Office of Habitat Conservation, NMFS (Apr. 18, 2000).

currently used by fish or that historically have been used by fish.[62] Such a definition of waters is in sharp contrast to that found in Section 404 of the Clean Water Act, which focuses on "navigable waters" as "waters of the United States" and through court interpretation has come to include wetlands adjacent to interstate rivers and streams and coastal waters as waters of the United States.[63]

The technical guidance published by NMFS elaborates that aquatic areas formerly occupied by a species managed under the Magnuson-Stevens Act should only be identified as EFH if those areas are presently waters rather than drained or filled areas that constitute dry land.[64] Although the exclusion of dry land offers consolation to coastal stakeholders who might fear that programs that had altered aquatic areas could be subject to modification, the Councils' ability to identify areas formerly occupied by species as EFH does allow aquatic areas degraded by coastal activities to be regulated under the EFH rules. The term "substrate," which also is part of the definition of EFH in the Magnuson-Stevens Act, is defined to include structures lying underwater and associated biological communities.[65] According to the technical guidance provided by NMFS, such structures could include objects entirely or partially underwater, such as jetties.[66]

The term "adverse effect" is defined to mean "any impact which reduces the quality and/or quantity of EFH."[67] These adverse impacts can include direct contamination or physical disruption of habitat, indirect impacts such as loss of prey, and individual, cumulative, or synergistic consequences of ac-

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[62] *See Magnuson Act Provisions supra* note 58, at 66,551.

[63] *See* NATIONAL SAFETY COUNCIL, ENVIRONMENTAL HEALTH CENTER, COASTAL CHALLENGES: A GUIDE TO COASTAL AND MARINE ISSUES 88 (1998). *See also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

[64] *See* NMFS Technical Guidance *supra* note 59, at 2.

[65] *See Magnuson Act Provisions supra* note 58, at 66,551.

[66] *See* NMFS Technical Guidance *supra* note 59, at 2.

[67] *See Magnuson Act Provisions supra* note 63.

tions.[68] This broad definition allows the identification of a wide variety of coastal activities as possibly causing adverse effects to EFH.

In addition, the definition section of the IFR introduces the concept of "habitat areas of particular concern,"[69] which are described in a later section of the rule. The IFR directs that fishery management plans should identify such habitat areas within EFH.[70] Before a Council identifies a habitat area of particular concern, the Council must ensure that one or more of the following criteria are met: (1) the habitat must provide an important ecological function; (2) the habitat must be sensitive to human-induced environmental degradation; (3) development activities must represent a current or potential stress for the habitat type; and (4) the habitat type must be rare.[71] It is likely that during the consultation process, NMFS will try most strenuously to ensure that its habitat conservation recommendations are acted upon when habitat areas of particular concern might be affected by an activity conducted by a federal agency.

B. DESCRIPTION AND IDENTIFICATION

The IFR presents a four-level classification scheme for describing and identifying EFH.[72] These classifications, ranging from the lowest level of detail to the highest level of detail, are as follows:

> Level 1--Presence/absence data is available for some or all portions of the geographic range of the species.
>
> Level 2--Habitat-related densities of the species are available.

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[68] *See id.*

[69] *See id.*

[70] *See Magnuson Act Provisions supra* note 58, at 66,554.

[71] *See id.*

[72] *See Magnuson Act Provisions supra* note 58, at 66,552.

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

Level 4--Production rates by habitat are available.[73]

The scope of this paper does not permit an in-depth description of the four levels, although application of this classification scheme to a long-studied New Jersey estuary reveals the difficulty of using information beyond Level 2 to identify EFH.[74] In general, EFH identification efforts conducted by the Councils resulted in broad areas of the EEZ and state waters being identified as EFH for at least one species. More research on fish population dynamics and habitat requirements of managed species is needed to refine preliminary EFH identification through Level 3 and 4 information. This initial broad EFH identification has been criticized by the seafood industry and developers as too sweeping and thus creating a burdensome regulatory environment where any activity anywhere will affect EFH for some species.[75, 76]

If degraded or inaccessible habitat that has contributed to reduced yields of a species or assemblage can be reversed through restoration activities, such as improving fish passage, removing contaminants, or increasing water flows, then EFH should include such habitats.[77] The IFR does not specify how far upstream such EFH identification could occur. This language serves to encourage habitat restoration activities in the coastal zone.

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[73] *See id.*

[74] *See* Kenneth W. Able, *Measures of Juvenile Fish Habitat Quality: Examples from a National Estuarine Research Reserve, in* Benaka, *Fish Habitat supra* note 9, 134 at 137-143.

[75] *See* Greenberg, *Essential Fish Habitat supra* note 10, at 10465.

[76] *See* Richard E. Gutting, Jr., *Conserving Fish Habitat from the Seafood Perspective, in* Benaka, *Fish Habitat supra* note 9, 23 at 26-28.

[77] *See Magnuson Act Provisions supra* note 58, at 66,552.

C. NON-FISHING ACTIVITIES

The IFR directly identifies non-fishing activities (which often take place in the coastal zone) that may adversely affect EFH.[78] Broad categories identified by the IFR include "dredging, fill, 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."[79] The IFR requires that fishery management plans should describe how such activities may cause adverse effects to EFH for managed species by using maps and other analyses.[80] In addition, fishery management plans should analyze, to the extent practicable, how non-fishing activities, as well as fishing activities, affect habitat function on an ecosystem or watershed scale.[81] The technical guidance document published by NMFS further elaborates on the importance of identifying non-fishing impacts that do not result in immediate habitat damage, but rather increase the likelihood of potential damage.[82] For example, impairment of floodplain function over a period of decades may not damage stream habitat until a flood occurs.[83] Likewise, interruption of longshore transport of sand with structures such as jetties may not impact nearshore habitat until a storm occurs.[84]

D. CONSERVATION AND ENHANCEMENT

The IFR makes several recommendations regarding general conservation and enhancement provisions that should appear in fishery management plans. For example, the IFR

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[78] *See id.* at 66,553.

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See* NMFS Technical Guidance *supra* note 57, at 40.

[83] *See id.*

[84] *See id.*

states generally that non-water dependent actions "should not be located in EFH if such actions may have adverse impacts on EFH."[85] In addition, impacts of activities that may significantly affect EFH should be minimized or replaced by less environmentally harmful alternatives when available.[86] Disposal of materials such as sludge or industrial waste that would destroy or degrade EFH should be avoided.[87] Finally, the IFR directs that Councils, through their fishery management plans, may provide options to conserve or enhance EFH, including enhancement of rivers, streams, and coastal areas; enhancement of water quality and quantity; use of watershed analysis and planning; and habitat creation.[88]

The technical guidance published by NMFS goes into a great deal of detail to describe two coastal activities that may adversely affect EFH: construction and sand and gravel mining.[89] According to the NMFS technical guidance, construction in coastal areas can cause turbidity plumes[90] in waters, which impair natural processes important to aquatic species.[91] Dredging activities associated with construction can resuspend buried pollutants such as heavy metals, pesticides, herbicides, and other toxins.[92] Filling activities associated with construction projects can directly reduce biotic diversity.[93] Sand and gravel mining causes similar turbidity and resuspension impacts and can also result in the direct loss of

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[85] *See Magnuson Act Provisions supra* note 58, at 66,554.

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See* NMFS Technical Guidance *supra* note 57, at 48-51.

[90] Turbidity occurs when underwater bottom sediments (i.e., sand, mud, silt) are disturbed by dredges, drills, shovels, or other mechanical devices. The disturbed sediments float in the water column (a phenomena sometimes called re-suspension) and can decrease the amount of light reaching bottom organisms and also can release buried contaminants into the aquatic environment.

[91] *See id.* at 48.

[92] *See id.*

[93] *See id.*

infaunal benthic organisms important to fisheries species.[94] The technical guidance document goes on to provide a variety of suggested conservation and enhancement measures that could counter some of these impacts.[95]

E. CONSULTATION

The IFR elaborates on the consultation process described in the Magnuson-Stevens Act by distinguishing between project-specific and programmatic consultations.[96] Project-specific consultations are appropriate, according to the IFR, when critical decisions are made at a project-implementation stage or when sufficiently detailed EFH information does not exist to allow for a programmatic consultation.[97] A project-specific consultation could take the form of an exchange of correspondence regarding the excavation of 0.5 acre of emergent wetland as part of a unique, stand-alone drainage-improvement project. Programmatic consultations can be requested by federal agencies, and if NMFS determines that all concerns about adverse effects to EFH can be addressed at such a programmatic level, NMFS will develop EFH conservation recommendations that cover all projects implemented under that program.[98]

The NMFS technical guidance document provides an example of a programmatic consultation where a grant is given to municipalities to construct boat ramps.[99] If the grant program requires certain criteria for each boat ramp application, such as habitat avoidance measures and design standards, then NMFS could address EFH requirements through a programmatic consultation by reviewing the standard criteria described in the evaluation, along with possible additional in-

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[94] *See id.* at 49.

[95] *See id.* at 49-51.

[96] *See Magnuson Act Provisions supra* note 58, at 66,556.

[97] *See id.*

[98] *See id.*

[99] *See* NMFS Technical Guidance *supra* note 59, at 80.

formation such as the location of the ramps and the history of the program.[100] The agency could review this information, make EFH conservation recommendations, and wait for a response from the granting program.[101] Upon notification that the program will implement these recommendations, the programmatic consultation would be complete, with the understanding that any proposal to fund a ramp that does not conform to the granting program's criteria and EFH recommendations will require project-specific consultation.[102]

The IFR also specifies that NMFS encourages the use of existing consultation and environmental review procedures where appropriate to meet EFH consultation requirements.[103] Consultation, coordination, and review procedures found in statutes such as the National Environmental Policy Act, Fish and Wildlife Coordination Act, Clean Water Act, Endangered Species Act, and Federal Power Act can be used as long as the existing process meets the following three criteria:

> 1. The existing process must provide NMFS with timely notification of actions that may adversely affect EFH. The federal action agency should notify NMFS according to the same time frames for notification as in the existing process. However, NMFS should have at least sixty days notice prior to a final decision on an action, or at least ninety days if the action would result in substantial adverse impacts.
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> 2. Notification must include an assessment of the impacts of the proposed action on EFH that meets established requirements for EFH assessments. If the EFH Assessment is contained in another document, that section of the document must be clearly identified as the EFH Assessment.

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[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See Magnuson Act Provisions supra* note 58, at 66,556.

3. NMFS must have made a finding that the existing process satisfies the requirements of Section 305(b)(2) of the Magnuson-Stevens Act.[104]

The IFR also describes the General Concurrence (GC) process, wherein NMFS, in collaboration with the relevant Council(s), identifies several types of federal actions that may adversely affect EFH but where no further consultation is generally required because NMFS has determined that such actions will only result in minimal adverse individual and cumulative effects.[105] For example, according to the NMFS technical guidance, if the U.S. Army Corps of Engineers proposes to issue a General Permit for the placement of replacement docks in coastal waters, NMFS may review the proposal for adverse effects to EFH and find that it would be appropriate for a GC if certain criteria such as location and size standards were met.[106] A proposed GC would be subject to a public review process.

Finally, the IFR describes requirements for an EFH Assessment of a federal action that may adversely affect EFH and is not covered by a GC.[107] An assessment could also include the results of an on-site inspection to evaluate the habitat and possible effects of the project and an analysis of alternatives to the proposed action.[108] If a federal agency's written response to NMFS EFH conservation recommendations is inconsistent with those recommendations, the Assistant Administrator for Fisheries (the "Head" of NMFS) may request a meeting with the Head of the federal action agency and may

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[104] *See id.* at 66,556-66,557.

[105] *See id.*

[106] *See* NMFS Technical Guidance *supra* note 57, at 86.

[107] *See Magnuson Act Provisions supra* note 58, at 66,557. These requirements include a description of the proposed action; an analysis of the individual and cumulative effects of the proposed action on EFH, managed species, and associated species, including prey species, including affected life history stages, the federal agency's views regarding the effects of the action on EFH, and proposed mitigation activities, if applicable.

[108] *See id.*

involve the relevant Council in these discussions.[109] This is the extent of NMFS' ability to enforce its conservation recommendations.

III. COMPARING THE MAGNUSON-STEVENS ACT'S EFA SCHEME AND THE ENDANGERED SPECIES ACT'S CRITICAL HABITAT SCHEME

The NMFS technical guidance document includes an appendix describing the relationships between the Magnuson-Stevens Act and the Endangered Species Act (ESA).[110] Both statutes have similar qualities. For example, they both mandate the identification of important habitat, specify effects to habitat, and create consultation processes.[111] The equivalent of EFH in the ESA is "critical habitat," which includes areas occupied by a species at the time of an ESA listing as well as unoccupied areas that are deemed essential for the conservation of that species.[112]

The concept of "effect" in the ESA is encompassed by four regulatory categories: (1) no effect; (2) may affect, not likely to adversely affect; (3) may affect, likely to adversely affect; and (4) jeopardy.[113] There are also four regulatory categories of "affect" in the Magnuson-Stevens Act.[114] The Act uses the term "may adversely affect" as the trigger for consultation under section 305(b)(2) and uses the term "may affect" as the trigger for Council comments under section 305(b)(3), "adversely affect" triggers NMFS recommendations under Section 305(b)(4)(A).[115] In addition, the Interim Final Rule uses the wording "no more than minimal adverse effects" to support the use of the General Concurrence process and the wording "sub-

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[109] *See Magnuson Act Provisions supra* note 58, at 66,558.

[110] *See* NMFS Technical Guidance *supra* note 57, at 99-104. *See also* 16 U.S.C. §§ 1801-1882 (2000) (the MFCMA) *and* 16 U.S.C. §§ 1531-1544 (1973) (the ESA).

[111] *See id.*

[112] *See id.* at 99.

[113] *See e.g.,* 16 U.S.C. §§ 1531-1544.

[114] *See Magnuson Act Provisions supra* note 58, at 66,556.

[115] *See id.*

stantial adverse effects" to support the use of expanded consultation.[116] In the consultation continuum, abbreviated consultation encompasses effects falling between the previous two extremes.[117]

As far as consultation recommendations are concerned, under section 7(a)(2) of the ESA, federal agencies must, in consultation with the Secretary of Commerce, ensure that their actions will not jeopardize the existence of endangered or threatened species managed by the Secretary (through NMFS or U.S. Fish and Wildlife Service), or adversely modify critical habitat.[118] The action agency must make an initial determination of whether a proposed activity will affect a listed species, and if the activity may affect such a species, consultation is required.[119] If an action agency does not comply with NMFS conservation recommendations from an ESA consultation process, they are in violation of section 7(a)(2).[120] Under the Magnuson-Stevens Act, action agencies that do not comply with EFH recommendations are not in violation, but they do have to explain their reasons for not following the recommendations.[121]

In addition, only federal agencies are required to respond to EFH consultations by the NMFS.[122] The critical habitat provisions of the ESA apply at least in part to state and private actions, as well as federal actions.[123] That is, the ESA can restrict development on private or state land and affect per-

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[116] *See Magnuson Act Provisions supra* note 58, at 66,558.

[117] *See id.* at 66,557.

[118] *See* NMFS Technical Guidance *supra* note 57, at 102. *See also* 16 U.S.C. §§ 1531-1544 (1973). Under ESA, consultations are required by either NMFS or U.S. Fish & Wildlife Service depending on the species in question. The following discussion deals only with fish species subject to NMFS jurisdiction under ESA.

[119] *See id.*

[120] *See id.*

[121] *See* 16 U.S.C. § 1855(b)(4) (2000).

[122] *See id.*

[123] *See, e.g.,* 16 U.S.C. §§ 1531-1544 (2000).

mitting decisions by state agencies through its Section 9 prohibition on the take of ESA listed species.[124]

IV. CASE STUDY: EFH ACTIVITIES IN THE GULF OF MEXICO

All regional fishery management councils were required to amend their fishery management plans to include EFH provisions two years after the enactment of the Magnuson-Stevens Act.[125] The Gulf of Mexico Fishery Management Council completed its "generic amendment" (Amendment) for addressing EFH requirements in its seven fishery management plans in October 1998.[126] The following describes the amendment and the EFH related activities that have been spawned by the Amendment. Specifically, we examine EFH correspondence between NMFS, the U.S. Army Corps of Engineers and the Gulf of Mexico Minerals Management Service's EFH Programmatic Consultation. These activities help indicate what kind of effect the EFH policy is having on coastal activities in the Gulf region.

A. THE GULF OF MEXICO COUNCIL'S EFH AMENDMENT

The twenty-six representative managed species for which EFH is identified and described in the Amendment account for about thirty-three percent of the species managed by the Council and range from shrimp and spiny lobsters to snappers, groupers and mackerel.[127] These species are the most important species in terms of commercial and recreational harvest and are the species for which the Council has the most

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[124] *See id.*

[125] *See generally Magnuson Act Provisions supra* note 58.

[126] *See* GULF OF MEXICO FISHERY MANAGEMENT COUNCIL, GENERIC AMENDMENT FOR ADDRESSING ESSENTIAL FISH HABITAT REQUIREMENTS IN THE FOLLOWING FISHERY MANAGEMENT PLANS OF THE GULF OF MEXICO (1998) [hereinafter GM Generic Amendment]. The plan covers 26 representative managed species and the coral complex in the Gulf of Mexico.

[127] *See id.* at 22.

information regarding habitat associations and use.[128] The limited selection of species managed by the Council highlights the problem of insufficient scientific data to support the identification of EFH for many managed species. The Amendment created no new regulations regarding fishing activities (over which the Council has authority) and non-fishing activities (over which the Council has no direct authority).[129] The Marine Fish Conservation Network criticized the Amendment for its failure to further regulate fishing gear and to outline an aggressive strategy for addressing non-fishing activities that affect EFH.[130] In addition, the Council's EFH Amendment was only partially approved by the Secretary because it did not describe and identify EFH for all species and life stages and it did not adequately assess the effects of fishing on EFH.[131]

The Amendment identified EFH as "all of the estuarine systems of the Gulf of Mexico," that, due to the extensive distribution of life stages of managed species and to NMFS guidance, have been deemed risk adverse in the face of scientific uncertainty.[132] The Amendment also described habitat characteristics by state, as well as "EFH Alterations of Particular Concern" by state.[133] Almost forty pages of the Amendment were devoted to a description of the variety of possible non-fishing related activities that may adversely affect EFH, com-

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[128] *See id.* at 25.

[129] *See generally* GM Generic Amendment *supra* note 126.

[130] *See* MARINE FISH CONSERVATION NETWORK & CENTER FOR MARINE CONSERVATION, MISSING THE BOAT: AN EVALUATION OF FISHERY MANAGEMENT COUNCIL RESPONSE TO THE SUSTAINABLE FISHERIES ACT 11-12 (1999).

[131] Email to Lee Benaka from Jon Kurland, Office of Habitat Conservation, NMFS (Nov. 2, 1999).

[132] *See* GM Generic Amendment *supra* note 126, at 29. Estuarine systems include their mud, sand, shell, rock, and associated biological communities, sea grasses and algae, and marshes and mangroves.

[133] *See id.* at 37-43.

pared to less than ten pages devoted to fishing activities that may adversely affect EFH.[134]

In response to the various non-fishing related activities, the Amendment included an extensive list of specific conservation recommendations by project type (docks and piers, navigation channels, housing developments, etc.).[135] Prior to the lists of specific recommendations, the Amendment highlighted some general factors that should be considered in permitting situations.[136] The Amendment also included a list of general types of habitat areas of particular concern (fish migration routes, estuarine habitats with submerged vegetation, areas with substrates of high diversity or vertical relief, etc.), as well as specific geographic areas, many of which already have been designated as reserves (for example, the Florida Keys National Marine Sanctuary and the Dry Tortugas).[137]

The Council's documentation of non-fishing related activities that may adversely affect EFH is extensive and represents a severe management challenge for those striving to protect fish habitat from the cumulative impacts of human activity in the coastal zone. The enormity of the challenge at hand for habitat advocates is exemplified by a statistic from the Amendment that suggests that between 1981 and 1996, NMFS received for review more than 50,485 development proposals for the five states bordering the Gulf of Mexico.[138] A sub-sample of 7,848 of these development proposals involved

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[134] *See id.* at 115-160. Non-fishing related categories include physical alteration, water quality issues and biological alterations that may adversely affect EFH. *See id.* at 123-160.

[135] *See id.* at 174-198.

[136] *See id.* at 174-175. These factors include the extent to which the activity would directly and indirectly affect the occurrence, abundance, health, and continued existence of fishery resources, the extent to which adverse impacts can be avoided through project modification or other safeguards, the availability of alternative sites and actions that would reduce project impacts, and the extent to which mitigation may be used to offset unavoidable loss of wetland habitat functions and values.

[137] *See id.* at 199-201.

[138] *See id.* at 162.

more than 925,181 acres of various fish habitats.[139] The lack of direct regulatory authority for NMFS or the Councils over fish habitat in the Magnuson-Stevens Act sets the stage for uncertainty regarding the ability of habitat advocates to protect the hundreds of thousands of acres of habitats that are certain to be affected by a wide variety of non-fishing related activities in the future.

B. INITIAL EFH CORRESPONDENCE BETWEEN THE ARMY CORPS AND NMFS

Many correspondences have been exchanged between the offices of the U.S. Army Corps of Engineers in the Gulf of Mexico region and NMFS' Southeast Regional Office since the Gulf of Mexico Fishery Management Council passed its EFH Amendment. This section highlights some of the content and language found in these documents and indicates how the EFH policy may be affecting Army Corps activities in the coastal zone.

An August 1999 draft environmental assessment (EA) issued by the Army Corps for a project to widen and restore bay depth in two areas in Matagorda Bay, Texas, included EFH consultation language.[140] The project, scheduled to begin in October 1999, included two components designed to provide an "interim solution" to safety concerns: (1) widening the south side of the existing Gulf Intracoastal Waterway for approximately 10,575 feet, which includes dredging to allow additional space for shoal material to accumulate before it impacts navigation; and (2) restoring bay bottom contours to remove obstructions to navigation created by the Army Corps during previous channel dredging projects.[141]

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[139] *See id.*

[140] *See* U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT, DRAFT ENVIRONMENTAL ASSESSMENT FOR GULF INTRACOASTAL WATERWAY WIDENING AND RESTORATION OF BAY DEPTH AT TWO PLACEMENT AREAS, MATAGORDA BAY, TEXAS 29-52 (1999).

[141] *See id.* at 1-2.

These actions were estimated by the Army Corps in its EA to affect EFH "minimally and temporarily" because of the localized and short-term turbidity caused by the project and the project's relatively small scale when compared to the overall bay.[142] The EA did not propose mitigation for the project's impacts, and the EA stated that the project's safety improvements and habitat enhancement through disposal of dredged materials "far outweigh any potential impacts to habitat for managed species."[143] The draft EA also identified species (including various shrimp species and red drum) managed by the Gulf of Mexico Fishery Management Council that may occur in the project area and went on to state that EFH for these species may occur in the project area and may be affected by the dredging associated with the project.[144] The National Marine Fisheries Service concurred with the EA's assessment that this dredging project would have minimal effect on EFH.[145]

Another example of EFH consultation correspondence between NMFS and the Army Corps regarded a request by the Louisiana Land and Exploration Company to dredge more than 80,000 cubic yards of material to access a well site in Louisiana. According to a May 25, 1999 letter from the NMFS Southeast Regional Office to the New Orleans District office of the Army Corps, this proposed project, which was located in an area identified as EFH by the previously described EFH Amendment, would adversely impact EFH and federally managed fishery resources for several reasons.[146] Based on a May 17, 1999 field investigation by a NMFS biologist of the proposed location, the project area's wetlands were found to pro-

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[142] *See id.* at 3-4.

[143] *See id.*

[144] *See id.*

[145] Telephone Interview with Ric Ruebsamen, Southeast Regional Office, NMFS (Dec. 15, 1999).

[146] Letter from Assistant Regional Administrator, Habitat Conservation Division, NMFS, Andreas Mager, Jr. to Chief, Regulatory Functions Branch, New Orleans District, Department of the Army, Corps of Engineers, Ronald J. Ventola (May 25, 1999) (letter on file with authors).

vide nursery and foraging habitat for a variety of economically important fish including flounder, menhaden, shrimps, and blue crab.[147] The project, which would impact more than twenty acres of marsh, did not meet the criteria for authorization under the Army Corps' Programmatic General Permit regulations, which limit impacts for oil and gas activities to 3.5 acres.[148] Finally, a Geological Review Meeting (GRM) had not been conducted to determine whether well site locations that would have less environmental impact were available.[149] The letter recommended that a permit for the project should not be issued and that the several conservation issues should be considered prior to final authorization for the dredging project.[150]

In response, the Army Corps sent a letter to NMFS stating that it intended to approve the applicant's request under the programmatic general permit and that the Army Corps would require no mitigation.[151] In support of this conclusion, the Army Corps letter stated that a GRM was convened after the letter from NMFS was written, and that the GRM was followed by a field trip to explore alternative access routes from the project location.[152] The field trip indicated "no other less damaging feasible alternatives, therefore the original location was recommended."[153] The letter indicated that an alternative form of dredging would be used and that the project, as modi-

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[147] *See id.*

[148] *See id.*

[149] *See id.*

[150] *See id.* The recommendations were that a GRM be convened, a soil placement plan should be developed in conjunction with NMFS and other interested agencies to minimize impacts to area wetlands and maximize marsh creation opportunities, and that the applicant should be the required to develop a "compensatory mitigation plan that fully offsets the remaining, unavoidable wetland impacts associated with this well" within ninety days of initiating dredging activities.

[151] Letter from Chief, Regulatory Branch, New Orleans District, Department of the Army, Corps of Engineers, Ronald J. Ventola, to the Habitat Conservation Division, National Marine Fisheries Service, c/o Louisiana State University (received by NMFS June 21, 1999) (letter on file with authors).

[152] *See id.*

[153] *See id.*

fied, "would not impact emergent marsh habitat."[154] The Army Corps provided this response in less than thirty days, and NMFS determined that the response addressed its recommendations because the proposed project was revised and impacts from the project were reduced to where they were considered minimal.[155] With the revision, NMFS authorized the project through a programmatic general permit.[156]

It seems, based on the preceding exchanges of correspondence, that NMFS has been satisfied with Army Corps responses and that the Army Corps has been willing to revise projects in response to EFH concerns. However, the responsiveness of the Army Corps and other agencies to NMFS habitat recommendations should be closely monitored, and NMFS will probably have to pick its fights carefully due to the limiting language of the Magnuson-Stevens Act, which does not give the NMFS veto power over projects. Habitat advocates can only hope that the mandatory exchange of habitat-related correspondence will help managers within the Army Corps and other agencies to be more sensitive to habitat issues, even if the correspondence does not always result in substantive changes to proposed projects that may adversely affect EFH.

C. THE GULF OF MEXICO MINERALS MANAGEMENT SERVICE'S PROGRAMMATIC CONSULTATION

A July 4, 1999 letter from the Minerals Management Service (MMS) to the National Marine Fisheries Service sought to initiate EFH Programmatic Consultation for petroleum development activities in the Central and Western Gulf of Mexico.[157] This Programmatic Consultation represents one of the first comprehensive attempts by NMFS to proactively negotiate an agreement with a federal agency that broadly considers as

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[154] *See id.*

[155] Telephone Interview with Ric Ruebsamen, Southeast Regional Office, NMFS (Dec. 14, 1999).

[156] *See id.*

[157] *See generally Magunson-Stevens Act Provisions supra* note 58.

many possible adverse effects as possible to EFH due to that agency's activities. This section discusses the Programmatic Consultation and evaluates its potential effectiveness in protecting fish habitat in the Gulf of Mexico from adverse effects of mining activities in the coastal zone, specifically on the Outer Continental Shelf (OCS).

According to the acknowledgment letter sent by the NMFS Southeast Regional Office, the Programmatic Consultation request addresses "pipeline rights-of-way, plans for exploration and production, and platform removal on the. . .[OCS]."[158] The letter from NMFS found that the MMS-prepared EFH Assessment was "an acceptable evaluation of potential adverse impacts" and further found that the Assessment and supporting documents, along with "NMFS review of OCS exploration and production activities and impacts," supported the determination that a Programmatic Consultation "provides an appropriate mechanism to evaluate EFH impacts of program activities."[159] However, the letter did indicate that NMFS had concerns because EFH consultation associated with NMFS review of National Environmental Policy documents had not been addressed and because a portion of the Assessment's discussion of oil spill impacts was insufficient.[160]

Implementation of the Programmatic Consultation, according to the letter, revolves around several conservation recommendations by MMS.[161] Six additional conservation recom-

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[158] Letter from Andreas Mager, Jr., Assistant Regional Administrator, Habitat Conservation Division, NMFS, to Chris C. Oynes, Regional Director, Minerals Management Service, Gulf of Mexico OCS Region (July 1, 1999) (on file with authors) [hereinafter Mager Letter].

[159] *See id.*

[160] *See id.*

[161] *See id.* Four recommendations in the letter were proposed, including deleting the Flower Garden Banks from area-wide lease sales, requiring all owners and operators of oil facilities located seaward of the coastline to develop oil spill response plans, and holding lessees responsible for the control and removal of pollution to avoid risks to EFH and associated fisheries). The Flower Garden Banks are a pair of underwater features that rise from the floor of the Gulf of Mexico, 100 miles off the coasts of Texas and Louisiana. These features are created by salt domes beneath the sea floor and are popular diving destinations due to Caribbean reef fishes and invertebrates that

mendations were proposed by NMFS, which mostly detailed additional protections for bottom habitats when certain already-existing environmental stipulations are made part of permits.[162] The letter concludes that if the MMS adopts NMFS' conservation recommendations, no further EFH consultation would be required for actions covered by the Programmatic Consultation, except for cases involving proposals for some pipelines carrying liquid hydrocarbons, which would require program-specific EFH consultations.[163]

This Programmatic Consultation is a good example of a proactive attempt by NMFS and a federal agency to plan for the conservation of fish habitat when agency activities present adverse impacts to the habitat. The Programmatic Consultation, which is a thirteen page document attached to the letter, goes into great detail describing the impacts of Gulf of Mexico oil and gas operations on bottom habitat.[164] For example, heavy anchors, chains and pipelines have direct impacts on the bottom, and explosives are used to sever pilings during the removal of conventional platforms.[165] This collaborative effort is likely to produce better safeguards for EFH than the exchange of letters typified in the above Army Corps examples, which seem likely to result in little or no project alterations to conserve EFH. However, it must be acknowledged that in some cases it is likely that NMFS will be very influential in individual consultations and that in some cases an action agency may not follow NMFS conservation recommendations made through programmatic consultations.

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congregate there. *See* GM Generic Amendment *supra* note 126, at 69-70. *See also* NATIONAL SAFETY COUNCIL, ENVIRONMENTAL HEALTH CENTER, COASTAL CHALLENGES: A GUIDE TO COASTAL AND MARINE ISSUES 91 (1998) (stating that the Flower Garden Banks National Marine Sanctuary was designated by the Secretary of Commerce in January 1992).

[162] *See* Mager Letter, *supra* note 158, at 2-3. The NMFS recommended that the MMS be required to provide NMFS with yearly summaries describing the number and types of permits issued in certain areas, along with mitigation actions taken by MMS for that year in response to damage to EFH.

[163] *See id.* at 4.

[164] *See id.* at 1-2.

[165] *See id.*

CONCLUSION

The EFH policy introduced through the Magnuson-Stevens Act is somewhat limited in its ability to directly alter coastal zone activities carried out by state agencies, but the policy can be a powerful tool to introduce habitat conservation measures into federal coastal zone activities when the federal agency in question is willing to listen to and work with NMFS. In addition, third parties, citizens, and private entities can play a crucial role in the review process by expressing their concerns for EFH conservation because the EFH process requires that the action agencies and the public are aware of the consequences of actions on federally managed fishery species. This awareness may inspire private parties to express their desire that agency activities should serve to conserve rather than degrade EFH.

Overall, the EFH policy represents a significant step forward in the conservation of fish habitat through its legal recognition of fish habitat as not only a valid basis for fishery management efforts but also an important factor to consider when weighing the costs and benefits of coastal zone management projects. In addition, the information generated through the EFH identification and management process (for example, the creation of the Gulf of Mexico Council's Amendment, which provides an exhaustive list of possible non-fishing impacts to fish habitat) will be extremely useful to future habitat conservation initiatives. Although the EFH policy only mandates consultations for federal actions and does not give NMFS "veto power" over projects, this policy is an example of incremental growth in the regulatory process. Consultations can lead to regulations, but only if the overall management program works.

Whether EFH consultations are taking place as needed is uncertain. Even though well over 2,000 consultations will have been initiated through NMFS by the end of 1999, it is likely that federal action agencies are not consulting with NMFS on every action that may adversely affect EFH, especially those actions on which NMFS has not commented in the past. Although NMFS has taken the lead in consultations

with federal agencies, the Councils may not have the staff or expertise to comment on the full spectrum of non-fishing activities authorized by state agencies, despite the fact that Council membership includes representatives from each coastal state.[166] Some Councils rely heavily on NMFS to alert them to actions of concern. However, the Gulf of Mexico Council has devised detailed guidelines for assessing proposed activities and determining whether Council comments would be appropriate.[167] If a private party in the Gulf of Mexico region felt that the Council should comment on a proposed activity, that party could compare the activity to the criteria described in the guidelines for assessing activities when bringing the proposed activity to the Council's attention. Federal agencies have a legal obligation to initiate consultation with NMFS, although if agencies fail to initiate consultation when their activities might adversely affect EFH, NMFS must still provide conservation recommendations. However, it is important to remember that there is no legal or administrative means for NMFS or the Councils to force action agencies to adopt conservation recommendations.

As of this writing, no lawsuits have been filed under the EFH provisions of the Magnuson-Stevens Act to address coastal zone management issues. The Magnuson-Stevens Act does not contain a citizens suit provision, although the Act does allow judicial review of regulations implementing fishery management plans within thirty days of promulgation.[168] The only open case as of this writing alleges that the Secretary of Commerce and five fishery management councils (including the Gulf of Mexico Council) failed to adequately address the impacts of fishing practices on EFH.[169] It is unclear whether coastal interests who either desire more restrictions on coastal activities to protect EFH or seek fewer regulatory burdens will pursue legal action. However, a party that could show that it

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[166] *See supra* note 131. *See also* NMFS Technical Guidance *supra* note 57, at 44.

[167] *See* GM Generic Amendment *supra* note 126, at App. D.

[168] *See* 16 U.S.C. §1855(f) (Supp. II 1994).

[169] *See* Daley Motion *supra* note 37, at 1.

was harmed could probably sue NMFS for failing to provide conservation recommendations regarding an action that could adversely affect EFH as directed by section 305(b)(4)(A) of the Magnuson-Stevens Act. In addition, federal agencies could be challenged in court for failing to consult appropriately with NMFS as directed by section 305(b)(2) of the Magnuson-Stevens Act. Such suits against federal agencies could invoke the National Environmental Procedure Act, alleging that environmental impacts were not fully considered, or the Administrative Procedures Act, alleging that the action agency's decision was arbitrary and capricious and not in accordance with applicable laws.[170]

A potentially strong tool for protecting EFH from adverse impacts from non-fishing activities might be the programmatic consultation, which brings agencies together in a collaborative manner to identify the spectrum of impacts to EFH from a particular type of coastal activity and to agree upon conservation measures. Although project-specific consultations have a great deal of potential to conserve EFH, the potential of programmatic consultations such as the MMS Programmatic Consultation is relatively untested. Further efforts to devise other programmatic consultations should be encouraged by NMFS.

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[170] *See* National Environmental Procedures Act, 42 U.S.C. § 321 (1988). *See also* Administrative Procedures Act, 5 U.S.C. § 551 (1988).