

TESTIMONY

Before the

UNITED STATES SENATE

SUBCOMMITTEE
ON OCEANS AND FISHERIES

COMMITTEE ON COMMERCE, SCIENCE AND
TRANSPORTATION

THE HONORABLE OLYMPIA SNOWE
SUBCOMMITTEE CHAIR

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The Essential Fish Habitat Issue
Magnuson-Stevens Fishery Conservation & Management Act
Testimony of Jack E. Phelps
January 18, 2000

Madame Chairwoman, members of the Committee:

My name is Jack Phelps, and I am the Executive Director of the Alaska Forest Association. The Alaska Forest Association is the statewide trade association for the forest products industry in Alaska, and it is a member of the Essential Fish Habitat Coalition. The Essential Fish Habitat Coalition consists of diverse non-fishing resource and business interests, including the American Forest and Paper Association, the Bay-Delta Urban Coalition, the Edison Electric Institute, the National Association of Homebuilders and the Association of California Water Agencies. As a coalition, we are concerned about a new and expanding federal program that we fear will lead to unnecessary, burdensome and costly federal controls over land use, and an inappropriate intrusion into the rights of private property owners across the country. That federal program is the "Essential Fish Habitat" program, or EFH.

In August of 1998, Ronald Baird, director of NOAA's National Sea Grant Program, made NMFS's plans for EFH clear when he said that EFH was, ". . . the most significant piece of environmental legislation since the Clean Water Act of 1972. The full implications of essential fish habitat are not widely appreciated by the public. They will be shortly." It is the position of the EFH Coalition that there is no justification for such a sweeping new program. It is also our position that the EFH program, as described by Mr. Baird and implemented to date by NMFS, is fundamentally at odds with the intent of Congress as reflected in the 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act (hereafter, Magnuson-Stevens Act).

We are concerned that the EFH program, as described in the interim final regulations released by NMFS, already has grown into yet another regulatory impediment imposed on businesses by the federal government as a condition to receiving a federal permit. A large variety of permits could be affected. The EFH regulations could delay or stop a timber harvest project on the Chugach or a water diversion in California to irrigate a field.

Getting a permit approved by a federal agency is not a pleasant experience. But, if a property owner has property that is in, near or might affect EFH, as it is very broadly defined by the NMFS, it will enter a regulatory morass that could be the equal of Section 7 of the Endangered Species Act.

How did NMFS get this authority? They were not given it by Congress – they assumed it on their own.

Improper and Unfair Inclusion of Non-fishing Interests in the Fishery Management Council Process

The term essential fish habitat or "EFH" comes from the 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act. This was a law designed primarily to address offshore commercial fisheries. The Magnuson-Stevens Act is administered by NMFS, an agency within the Department of Commerce. NMFS also regulates endangered species in the marine environment, and

marine mammals like whales and dolphins. All of these share something in common: oceans and marine resources. NMFS enforces the Fisheries Act, but eight regional Fishery Management Councils guide it.

As you know, the Councils are composed of appointed members from the fishing industry, state agencies dealing with fish, Indian tribes and, in some cases, representatives of environmental organizations. The Council memberships do not reflect representation of any land use or development interests. There is virtually no representation of interests not directly involved in fishing.

The Council system is very procedural and very administrative. Councils meet frequently. They set up technical committees on issues like fishing gear, quotas, and habitat. These committees often meet for days and make recommendations regarding those issues to the Councils, which themselves meet for days. The Councils then make recommendations to NMFS, which conducts rulemaking on the proposals. Those rules, when final, become part of Fishery Management Plans. These Plans govern the behavior of participants in the fishery; the very interests whose representatives made the recommendations.

Plans cover many marine fish species – including anadromous species like salmon – that are fished for commercial or sport purposes. A species does not have to be rare, endangered, threatened, or even subject to any particular risk. There are over 400 species of fish subject to these Plans, ranging from salmon, halibut and swordfish to spiny dogfish, shellfish and corals, etc.

Before the 1996 Magnuson-Stevens Act amendments, this process was relatively self-contained. The interest groups involved in fishing activities interacted with each other, fought and compromised with each other, sued each other, and generally went on about their business. Now, thanks to the EFH program being developed by NMFS, a wide range of non-fishing activities, including real estate development, forest practices, mining, hydro-power, water supply, and agriculture are going to be affected by this process. All of these businesses and industries are being confronted with the prospect of getting pulled into a Fisheries Management Council system that does not represent, reflect, or generally consider their interests.

The Magnuson-Stevens Act administrative regime should have no say over how the non-fishing sector conducts its business. That has never been the intent of this law. Indeed, it is notable that when the EFH concept was being developed during the 1996 Magnuson-Stevens Act re-authorization process, the views of the non-fishing sector were never solicited. This is because, quite obviously, Congress did not intend that our sectors be pulled into the Magnuson-Stevens Act program. But NMFS has now expanded the EFH program so extensively that non-fishing interests are forced to become involved.

It is necessary for Congress to fix this situation now. The Councils should be expressly denied any jurisdiction over non-fishing activities. All Council recommendations for, and NMFS actions on, EFH designations involving habitat subject to non-fishing activities should be rescinded. And it should be made clear that any recommendations or comments issued by the Councils concerning impacts of non-fishing activities on EFH will not be accorded special deference. Failure to take these steps will subject non-fishing entities to a fundamentally and irreparably unfair position in an administrative process that by design, intent, and practice concerns only the fishing industry.

The NMFS Definition of EFH is Too Broad and All-Inclusive

The interim final regulations, as written by NMFS, lead every commentator who has reviewed them to conclude that the agency has created an extremely broad and complicated program. Why have the regulations creating this program been written in this way?

EFH was intended to be an information gathering process. It was designed to identify how the highest priority fish habitat was being harmed. It was, as its name implies, designed to cover habitat that is “essential,” or especially important, to the subject fish species. Congress defined EFH as, “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.”

I agree with Joseph M. Brancalone, Chairman of the New England Fishery Management Council who alerted this Committee to the dangers of an overly broad EFH definition. “If everything is designated as essential then nothing is essential, was a common theme throughout the EFH designation process, on a national and regional scale. Either the EFH definition should be modified, or the guidance on how to use different types of data should be more specific,” he said.

NMFS and the Councils, however, have taken this concept and greatly extended it by regulation. There are four issues that are especially noteworthy in the way that NMFS has defined, and the Councils have designated, EFH:

First, NMFS interpreted EFH in its regulations to cover not only the critically important habitat one would expect to be considered “essential,” but instead concluded the designation should cover all habitat necessary to a “healthy ecosystem.”

Second, NMFS concluded that the term should not be limited to the marine environment – the traditional realm of the Magnuson-Stevens Act – but should be extended to cover inland waters as well.

Third, having taken the step of pushing inland, NMFS announced the need for “watershed” planning. Not only would rivers, estuaries, and wetlands be covered, but also all areas that could affect those waters, including terrestrial habitat, would be included.

Finally, NMFS determined that it was not enough to cover waters where fish currently are found, but also that EFH should cover areas where fish historically were found.

The Fishery Management Councils used this NMFS approach in developing EFH. In many cases, the results are indicative of a program that seems destined to grow beyond the claims of NMFS. Here are some examples:

The Pacific Fishery Management Council, governing fish species off the coasts of California, Oregon, Washington and Idaho, has proposed extensive inland habitat as EFH for salmon.

The North Pacific Fishery Management Council is proposing to designate virtually every

river that eventually touches the ocean as EFH for salmon in Alaska.

The Mid-Atlantic Council, with the New England and South Atlantic Councils, is proposing to designate the entire inland coast from North Carolina to Florida for bluefish. This is just the southern bluefish range.

The New England, Mid-Atlantic and South Atlantic Councils have actually listed all of the estuaries and most of the major bays and river basins on the east coast, areas like the Connecticut River and Chesapeake Bay, for bluefish.

The Gulf Coast Council has effectively listed every bit of the Gulf Coast, its wetlands, estuaries and rivers from the tip of Florida to the border with Texas as habitat for brown shrimp.

These designations are extraordinarily broad. Essential fish habitat has become all fish habitat. Remember that there are over 400 fish species for which such designations must be made. The end result can only be that EFH will be all waters everywhere a Magnuson-Stevens Act managed species is now, or previously has been, found.

When asked why the EFH definition is so broad that it now includes almost the entire coastline of the United States, and substantial upland riverine habitats, NMFS points to the lack of definition it received from Congress. The 1996 Amendments, NMFS asserts, established a broad and vague definition of the term. NMFS claims that with more funding from Congress would come better scientific information. Without that scientific information they “over include” habitat that may not necessarily be essential. This “over inclusion” of habitat expands the jurisdiction of the agency and obligates it to consult on an ever-increasing number of federal actions that “may adversely affect” habitat. How much money is enough money for NMFS to exercise restraint? Who will judge when sufficient funds are made available? Apparently, in NMFS view, not the Congress. NMFS has created a program that can have an influence over even non-existent effects on terrestrial, riverine, estuarial and coastal habitats on a nationwide basis. Will any federal agency ever receive enough money from Congress or gather enough scientific information to convince it to elect to reduce its own power and influence over other Federal agencies?

This is another aspect of the EFH program that should be placed on hold until a more reasonable approach to designation is developed. In addition, it is clear that Congress will need to be very specific in defining the term. The existing definition must be replaced with one that spells out in detail precisely the kind of habitat that should be subject to this information sharing process.

The NMFS Consultation Process Is Far Too Complex and Burdensome

The 1996 amendment requires federal action agencies – those that decide whether to issue a permit or carry out a program – to “consult” with NMFS to determine what the impacts on EFH will be. NMFS, in turn, takes into account the views of the Councils. NMFS and the Councils submit recommendations to the action agencies. If the action agencies don’t follow those recommendations, they must explain why, in writing. In short, a straightforward information process was envisioned. The term “consultation,” however, is a term of art. As will be described, NMFS has turned it into a complex, time-consuming, expensive process.

As described in, and envisioned by, the 1996 Magnuson-Stevens Act amendments, this consultation process would be accomplished by a simple exchange of information. It could readily be undertaken through administrative agreements between NMFS and the principal action agencies. Instead, the process described in the EFH consultation regulations will be very similar to the cumbersome, detailed consultation procedure of the Endangered Species Act. NMFS and other supporters of the EFH program often proclaim that the 1996 amendments did not create a new consultation duty. Instead, they argue, this duty already existed and was simply never followed through on. They further argue that the intent is to develop an information sharing program, similar to what exists under the Fish and Wildlife Coordination Act.

These statements could be accepted as the basis for a reasonable EFH program if NMFS was acting in a manner consistent with that intent. To the contrary, the program that has emerged from the NMFS rulemaking process bears little resemblance to the Fish and Wildlife Coordination Act or other procedures through which agencies share information. As noted above, it is modeled after the very burdensome and complex Endangered Species Act program.

One need only make quick reference to the EFH regulations to understand this concern. The regulations consist of eight pages of Federal Register text. Of these, five pages are devoted to defining the consultation process. How can any program that is intended to be streamlined, efficient, and coordinated with existing consultation procedures require five pages of Federal Register text to describe?

The severity of these problems becomes even more apparent when the content of the regulations is considered. NMFS has taken a simple statutory consultation process that could be satisfied through an exchange of letters and turned it into a cumbersome, expensive, time consuming process consisting of all of the following elements: Memoranda of Agreement between NMFS and every Fishery Management Council; Memorandum of Agreement between NMFS and every action agency; programmatic consultations; project-specific consultations; abbreviated consultations; expanded consultations; general concurrence for no further consultation; notification of further consultation; periodic review of general concurrence findings; mandatory preparation of written assessments; consulting agency recommendations; action agency responses; requests to elevate action agency decisions; reinitiation of consultation at Fishery Management Council requests; Memoranda of Agreement with agencies on dispute resolution; and supplemental consultation. Needless to say, any program which contains so many elements is extremely complex and is not likely to be efficient.

In this testimony, we do not intend to delve into the intricacies of the EFH consultation regulations. Let it suffice to say, there is so much room for confusion, delay, inefficiency and needless expense that we are skeptical there is any way to work with the existing framework. What is needed is a far-reaching revision of the regulations to develop a more effective procedure. Our coalition of non-fishing interests has offered on numerous occasions to work with NMFS to achieve these results. We are pleased to report that NMFS has agreed to undertake such discussions. We are hopeful that they will be beneficial. However, even this prospect does not eliminate the need for additional guidance from Congress. Unfortunately, the EFH program is so far down the road at this point that we believe it is necessary for Congress to interject itself in the process and get the program back on track.

The EFH Program Needlessly Duplicates Other Information Gathering Programs

This process will be a new regulatory layer on top of those that already exist, such as NEPA's environmental impact review, Coastal Zone Management Act compliance, Endangered Species Act reviews, Federal Power Act licensing, Fish and Wildlife Coordination Act consultation, etc. Highlights include:

- The duty of the action agency to prepare a detailed "EFH Impact Assessment." When a private applicant is involved, as when a federal Clean Water Act Section 404 wetlands permit is required, this duty will probably be passed to the private party who will be required to pay for this analysis and ensure it is complete. In creating this requirement, NMFS is seeking to transfer its EFH assessment duties to other agencies and private parties.
- Time deadlines exist, but, as with the timelines associated with the ESA, the agencies can easily get around them. As a result, the process can greatly extend the time needed to complete federal permitting.
- The recommendations of NMFS and the Councils will become litigation fodder. Opponents of project development will be able to sue based on these recommendations. This will discourage action agencies from following any course other than what is recommended by NMFS or the Councils, thus effectively giving NMFS veto authority over the decisions of the action agencies. Furthermore, we fear that NMFS and the Councils will most likely recommend restrictions to protect habitat without weighing the benefits against the economic consequences.
- NMFS often states that the EFH program is a voluntary information gathering tool, yet it has promulgated a regulation that requires action agencies to prepare EFH assessments and undertake other mandatory measures and meet mandatory deadlines. Congress did not vest NMFS with the power to impose these duties on other agencies and, if the program is to be cooperative and voluntary as NMFS asserts, these requirements must be deleted and replaced with cooperative mechanisms. For example, NMFS should recast the program so NMFS will provide helpful information about truly essential habitat for fish species of concern, allowing other agencies to consider that information in their own reviews of projects without formal requirements for EFH assessments and consultations.
- Almost certainly, this procedure will result in delays in getting permits. The cost of getting permits will increase – due to delays, due to the need to undertake consultation and prepare EFH assessments, due to the inevitable slippage in deadlines that cover the federal agencies, and due to the cost of complying with EFH restrictions. Permits are likely to be subject to new restrictions. In some cases, permits for activities are likely to be denied. And, it is important to remember, these are not restrictions to protect species in danger of extinction, they are restrictions to protect the habitat of all managed fish species, no matter how plentiful.

The bottom line is that NMFS has not taken the steps necessary to coordinate its EFH review efficiently and effectively with the many environmental reviews non-fishing activities must already undertake. Although lip service is paid to this principle, we need to see evidence that it is being carried out.

Accordingly, we believe Congress should step in and make clear that NMFS cannot impose mandatory duties and time frames on action agencies. It also should prescribe that EFH consultation will be satisfied by any other preexisting environmental review applicable to the agency action. EFH should be required to operate within, rather than reside on top of, such other procedures.

Non-fishing Interests and the General Public Need More Information about the EFH Program

The EFH program is growing into an enormously expensive and, to a large extent, redundant program. The NMFS FY2000 budget request was for \$13.85 million dollars for EFH consultations. This amount does not include the expense borne by other federal agencies to submit projects to NMFS, to respond to NMFS's recommendations, and to implement those recommendations. This amount also does not include the increased project costs resulting from either the delays inherent in the NMFS recommendation process or the cost of implementing the recommendations. This Committee has already received testimony about project delays and costs as a result of the EFH definition and there will be more to come as we learn about the 1999 consultations. When all these costs are taken together and combined with problems and costs associated with the expansive and overbroad definition of EFH detailed above, it become evident that the EFH program is entirely too expensive, cumbersome and burdensome.

EFH could also be a new litigation tool for parties opposed to development in all coastal regions of the country. For reference, take a look at what has happened with the ESA and NEPA. Even if a party gets a permit it can live with, there is no guarantee a lawsuit will not be brought to protect EFH, especially if a NMFS/Council recommendation was not adopted.

The announcement of the reopening of the comment period in development of the final rule for EFH, published by NMFS on November 8, 1999, stated that: “[s]ince the promulgation of the interim final rule, EFH provisions for 39 fishery management plans have been developed by the Councils and approved or partially approved by the Secretary. Additionally, NMFS and Federal Agencies have begun consulting on actions that may adversely affect EFH. Approximately 2000 EFH consultations have been completed to date.”

When we saw that claim, we were astounded. This claim provided graphic validation of our fears about the program. We had claimed that the overly broad “ecosystem” based definition of EFH would lead to a massive influx of EFH consultations. This may explain why 2000 consultations have been required in the first 10 months of the new program.

To get a sense of how disproportionate this program is compared to the issues subject to review, one need only compare this level of consultation with that under the ESA. In response to Congressional questioning in March of 1999, the National Oceanic and Atmospheric Administration responded in writing that: “[a]pproximately 229 formal and 981 informal [ESA] consultations are completed each year”. The number of EFH consultations exceeds by a substantial number the formal and informal consultations completed annually under the ESA, and yet the EFH program is only in its earliest stages of implementation. NMFS has 55 full time employees dedicated to section 7 consultations under the ESA. What will it cost to staff a program that in less than a year has grown to nearly twice the size of section 7 consultations under ESA? Penelope Dalton, Assistant Administrator for the National Marine

Fisheries Service, has stated on numerous occasions before this Committee that she only expects the number of EFH consultations to grow as NMFS's reach over other Federal agencies continues. Clearly, Congress did not intend to create a consultation program under the Magnuson-Stevens Act that so far exceeded the ESA in complexity and size.

When we saw the claim that NMFS had completed 2000 consultations, we were astounded because NMFS had not made any of the information from those consultations public. How could they expect informed comment from the public when they had not released information about those consultations? NMFS claims to want to know about problems with the consultation process, but, they seem unwilling or unable to disclose information about the process. Most of the consultations are with federal agencies on federal projects and therefore the ability of the public to have first hand knowledge about the consultation process and its results are certainly limited.

When we read the claim in the Federal Register that NMFS had completed 2000 consultations, we filed a FOIA request (dated November 18, 1999) asking for all documents related to EFH consultations. We are still awaiting a substantive response.

This Committee and the public must be given sufficient information about these consultations to evaluate the implementation of the EFH program to date. The following is the kind of information that NMFS should provide the people and the Congress to enable some level of meaningful review of the EFH consultations it has been conducting:

1. The number of consultations completed, by NMFS Region;
2. The average time taken to complete a consultation, and the range and distribution of time taken for each consultation around that average;
3. The average cost of each consultation, in dollars and man-hours or full time equivalents (FTEs), and the range and distribution of the costs of each consultation around that average;
4. The distribution and amount of that cost among NMFS, action agencies, third party applicants for federal authorizations, and others;
5. The number of consultations in each category described under the IFR: national general concurrences, regional general concurrences, abbreviated, expanded, extended, and supplemental consultations, and, separately, the number of programmatic versus project-specific consultations;
6. The number of documented "no effect" determinations by action agencies, the number of these with which NMFS concurred/did not concur, and the number of these for which an EFH consultation was nevertheless completed;
7. The number of consultations involving federal actions for which ESA consultation was also completed, and the number of these which involved ESA consultation with NMFS;
8. The number of consultations involving federal actions for which NEPA documentation was also

completed, and the category of NEPA documentation completed (e.g., EA or EIS);

9. The number of consultations involving other environmental analysis documentation besides an EFH assessment, and the number of these for which the environmental documentation prepared for other purposes also served as the EFH assessment, without modification to meet EFH consultation requirements;
10. Other information about how EFH consultation was consolidated or integrated with procedures such as NEPA, ESA, Federal Power Act licensing procedures, and Coastal Zone Management Act regulations for individual or collective actions;
11. Categories of activities for which EFH consultations were completed, including the basic categories of fishing and non-fishing, more specific federal action categories such as Clean Water Act Section 404 permits and FERC power facility licensing or relicensing, and more specific types of activities, such as timber sales, road projects, marina developments, oil and gas drilling, hardrock mineral extraction, housing subdivisions, agricultural water diversions, and so on;
12. The number of EFH consultations which were initiated but are not yet completed, and how long they have been pending; and
13. The categories and representative examples of recommendations made by NMFS in consultations, action agency disagreements with such recommendations, and how these differences were resolved.

We ask for this Committee to request that NMFS compile this kind of information into a format that promotes understanding of the EFH consultations that have occurred so far, and that facilitates constructive comment. We also ask this Committee to assist the American people by halting implementation of the EFH program until more guidance can be provided in the Act itself.

Conclusion

The non-fishing sector does not oppose the EFH concept. Indeed, we address these concerns regularly. We are willing to engage with NMFS in a discussion on how this program should work and where we might help. We are pleased to report that we will be meeting with NMFS in the near future to discuss these concerns. We hope to learn more about their goals and plans, but we also will convey the need for fundamental changes in the program. Congress can greatly facilitate this process by letting NMFS know it is on the wrong track, and by developing more specific guidance to address the concerns discussed in this testimony. Moreover, we ask that Congress amend the Magnuson–Stevens Act to address the problems highlighted in this testimony if NMFS does not respond. Thank you.

Attachment: AFA's 12/23/99 letter to NMFS re: EFH Interim Final Rule