

Testimony of Sam Anderson

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On behalf of the National Association of Home Builders and

The Essential Fish Habitat Coalition

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Subcommittee on Oceans and Fisheries

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Madame Chair, members of the Committee, my name is Sam Anderson and I am the Executive Officer of the Master Builders Association of King and Snohomish County. I am also a member of the National Association of Home Builders. Today, I represent not only the building industry but also other industries that belong to the Essential Fish Habitat Coalition. This Coalition is comprised of diverse non-fishing resource and business interests including the National Association of Home Builders, the American Forest and Paper Association, the Bay Delta Urban Coalition, the Edison Electric Institute and the Association of California Water Agencies. We are all extremely concerned about the National Marine Fisheries Service's (NMFS) implementation of the Essential Fish Habitat (EFH) Provisions of the Magnuson-Stevens Fisheries Act.

For convenience sake, I will use the acronym "MSA" from now on.

First and foremost, the coalition is very concerned with the scope of the Essential Fish Habitat provisions as proposed by NMFS. The coalition believes that NMFS has far exceeded Congressional intent in its implementation. Because we work in heavily regulated industries, we worry that the proposed Essential Fish Habitat regulations will slow down permits and foster law suits—which will only raise the cost of conducting business for our industries. Worse, the requirements under the proposed regulation are redundant and duplicative.

As a representative of the home building industry, I find it curious to be speaking before a Senate Subcommittee on Oceans and Fisheries commenting on a statute intended to ensure sustainable populations of fish, so they can be commercially harvested. Yet, those familiar with the recently developed Essential Fish Habitat program will understand why I am here and why builders, developers, miners, hydropower electricity providers, farmers, and timber managers, nationwide are so concerned. We all know that the Essential Fish Habitat designation acts as a federal zoning overlay. The designation will ultimately result in land use restrictions and economic impacts on both coastal and upland land areas.

As a result of this, we ask you to consider three requests while passing the reauthorization of MSA. First, we ask Congress to clarify in legislation its original intent for this program by narrowing or clarifying the MSA's definition of Essential Fish Habitat. The coalition believes Congress never intended for NMFS to interpret the program as broadly as it has. Second, we ask Congress to prohibit NMFS from imposing mandatory duties or timeframes on other

federal agency actions. Third, we ask that Congress direct NMFS to immediately develop a “general concurrence” for those activities that are already regulated and cause minimal impacts to areas identified as EFH.

We do not dispute the importance of efforts to identify and conserve the vital habitat areas of the United States' domestic fisheries. Our central opposition to the EFH regulatory program is that it superimposes the MSA decision process onto the land development process—a process that is already subject to state and federal comprehensive regulatory programs that address the full range of environmental concerns, including fish habitat.

1. NMFS is Acting Beyond the Scope of Congress' Intent in Developing Consultation Program

The home building industry, as well as the other members of our coalition, are very heavily regulated and sensitive to any additional pending restrictions on our activities. We believe Congress' intent under the MSA was to create a consultation program, not a new regulatory scheme. In fact, Congress spoke only of establishing guidelines and providing information on essential habitat.

Unfortunately, we believe very strongly that, based on NMFS's overzealous interpretation of the MSA, we will indeed face new mandated regulatory requirements. Let me explain. Under the proposed program, federal action agencies are required to consult with NMFS and to

provide a written assessment as to how an agency action will effect EFH. Once NMFS has responded by providing the agency their determination and recommendation, the agency is required to reply (again in writing) as to whether or not they will follow NMFS's recommendation. This requirement will divert key federal agency staff from normal permitting and operational duties. Further, it is highly unlikely that these written responses by the agencies will be within the time limits established by the program. We do not know what effect this three part process will have on permits, but suspect that it will cause significant delays as the same staff which provided the assessment must justify their failure to meet the deadlines of the program. Meantime, permits and agency tasks languish. Further, if time lines are not met and recommendations are not followed, we are concerned that private parties will pursue litigation and even more permits and projects will be delayed.

We are also concerned that conflicts and disagreements between NMFS and federal agencies over consultation issues will undoubtedly arise. How will these be resolved? We do not know. But, we strongly believe that disagreement between NMFS and another agency will take time to settle, leading to additional permit delays and costs.

We also suspect that very soon NMFS, working with other agencies, will require that industry pay for the EFH impact assessments. NMFS has argued in its final interim rule that it will not impose new or additional enforceable duties on State, local, tribal or private sector entities that would constitute a federal mandate. This has been misleading. Let me explain why. The rule

requires federal agencies to complete detailed EFH assessments for many private sector activities requiring federal permits or other authorization. The rule authorizes these agencies to designate a non-federal representative to prepare the assessment. This creates a problem in that federal-permitting agencies, not funded themselves to complete EFH assessments, will require nonfederal private applicants to pay for them in order to obtain needed permits. As we have learned under the Endangered Species Act, part of the cost of getting a permit is usually gathering information and research for the agency.

2. **The Definition of EFH is Overly Broad**

NMFS's final interim rule retains an extremely broad definition of "essential" fish habitat. The regional Fishery Management Councils are mapping all existing and potentially historical habitat. When all habitat is covered under the program, the term "essential" becomes meaningless. The EFH designations should carry some measure of unique value, if they are to have any added benefit for protecting and restoring salmon populations and their essential habitats.

In contrast, NMFS has interpreted EFH in its regulations to cover not only the critically important essential habitat, but instead concluded the designation should cover all habitat necessary to a "healthy ecosystem." In other words, rather than isolating "essential" habitat as a subset of all habitat, NMFS designated "essential" the ecosystem within which the fish habitat is located. An overreaching interpretation indeed.

This interpretation means that NMFS will regulate activities occurring on inland waters. Once inland, NMFS unsurprisingly announced the need for "watershed" planning—not only would rivers, estuaries, and wetlands be covered, but also all areas that could impact those waters. 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.

Rather than debate the definition in an academic manner, it is illustrative to review how the definition is being implemented by NMFS. The proposed EFH designations for salmon within the Pacific Fishery Council include the existing geographic range of all salmon species and much of their historical range. These maps illustrate the broad brush used by the Fish Councils and NMFS in identifying EFH. Virtually every watershed within Washington State is included within the EFH designation. And, it is important to remember that the regulatory reach of the EFH program, as devised by NMFS, includes a review of not only the actions within designated EFH, but those activities outside EFH that “may adversely affect” EFH. A vast landscape of NMFS influence and control.

In addition to its definition of the word “essential” NMFS uses a very broad definition for the term “adverse effect”. It is defined as “any impact that reduces quality and/or quantity of EFH.” This includes any loss of prey or reduction in species fecundity. All activities anywhere are likely to have some "adverse effect" somewhere on EFH as that term is now defined. As best

See attached maps.

we can see, there is no limiting principle that would leave any activity outside of NMFS purview.

We find especially troubling the question of lost “prey.” NMFS states that actions that reduce the availability of prey species or prey species habitat may be considered adverse effects on managed species and EFH. Since NMFS offers no corresponding requirement that the loss have some meaningful impact on the managed fishery, the loss of a few prey or a whole population may qualify as an adverse effect. Thus, actions, which have little or no impact on truly essential habitat, may nonetheless be regulated under these provisions.

3. Information Used to Identify EFH

NMFS’s interim final rule provides that data for identifying EFH should be obtained from the “best available information.” The regional Fish Councils are to use logbooks and local knowledge in this identification. The information gathering procedures of both NMFS and the Councils ignore non-fishing entities that are not given a comparable role in providing information and shaping habitat identification and recommendations. Nonetheless, we will be significantly impacted by these regulations. The Council system is complex, cumbersome, and unresponsive to non-fishing interests and designed to promote the interests of the fishing community, not strike a balance between fishing and non-fishing sectors.

The possibility that historic habitat may be designated as EFH points out further problems with

the EFH identification approach. Presence of a species, either historic or current, in an area does not mean that the species can survive or reproduce in that area. There should be some assurances that information will be developed to identify habitats that are truly essential—and not just potential or historic.

4. **Consultation Provisions**

NMFS has stated to the regulated community that it will strongly encourage the use of existing consultation and environmental review processes to satisfy the EFH requirement. By contrast, the interim final rule sets forth extremely stringent criteria for the consultation that does not take advantage of existing processes.

For example, as part of the stringent consultation rules, the regional Fish Councils have been given a role in determining whether general concurrences may be used when allowing public review of the concurrence. NMFS also hopes to develop agreements with the councils to coordinate comments and recommendations on actions affecting EFH. Thus, through formal agreements with NMFS, the councils will have a role in determining the end product of an EFH consultation. All of these changes make the consultation process even more difficult to deal with for non-fishing, regulated entities—and they vest improper power in the councils.

As noted above, the homebuilders and other members of our coalition have little input into the

way the councils act. Indeed, they are heavily weighted to consider fishing interests. But, we will be subjected to the regulatory power of the Councils through NMFS's regulatory scheme. We do not believe this result was ever intended. Indeed, it is notable that when the EFH concept was being developed during the 1996 MSA reauthorization process, the views of the non-fishing sector were never solicited. Why? Because, quite obviously, Congress did not intend that inland interest groups be pulled into the program. But, NMFS has now expanded the EFH program so extensively that non-fishing interests are forced to become involved.

5. **The EFH Assessment**

NMFS has written that the EFH assessment must include an analysis of alternatives "particularly when an action is non-water dependent." Nothing in the terminology of the MSA, its legislative history, or case law to suggest that the Act covers non-fishing, non-water dependent activities such as land development or construction activities, mining, timber harvesting, etc. This particularized burden on federal agencies to assess alternatives to non-water dependent actions is not only unauthorized, it is also without any basis in reason. Why is it more appropriate, in order to protect fish habitat, to consider alternatives to non-water dependent activities when certain fishing (i.e., water dependent) activities are acknowledged to contribute equally to EFH degradation?

There are numerous other problems with the consultation process. For example, the rule states that the purpose of the procedures is to "promote the protection of EFH." This standard of

providing "protection" is found nowhere in the MSA. NMFS may request further review of any federal agency decision that is inconsistent with a NMFS EFH recommendation. There is no authority for this requirement. The acting agency need only respond in writing; NMFS cannot perpetuate the consultation process or mandate a result in this manner.

6. **Duplicative and Redundant Provisions**

Without a doubt, there are activities that threaten fish habitat that are causing fish populations to decline and affect commercial fisheries. These activities should be regulated to ensure that their impacts are minimized and mitigated. We, however, do not believe that land-based activities are causing a significant enough adverse impact to warrant the burdensome consultation process set forth in the EFH interim final rule. This is not to say that many land-based activities do not cause deleterious environmental impacts. However, for the most part these impacts have been eradicated through the numerous federal, state, and local laws and regulations already in place. The environmental regulations established since 1970 have precluded significant direct, indirect, and cumulative impacts on all land, whether it is essential fish habitat or not. Most coastal states including Washington, California, Oregon have particularly stringent environmental protection laws at the state and local levels. And, all three states have comprehensive land planning and regulations protecting environmentally significant areas and lands.

Over the past two years, NAHB, as well as other Coalition members, have repeatedly asked

the NMFS and the Fish Councils to identify the adverse impacts to those areas considered Essential Fish Habitat that are not already addressed by other regulations. Sediment and runoff, for example, which can be problematic for many fish species is largely eliminated by the federal storm water program administered by the Environmental Protection Agency and local storm water management requirements. Consequently, NMFS's role in this heavily regulated area adds little because runoff and pollutant discharge issues are well defined, well regulated, and appropriately mitigated to the extent possible by existing federal, state and local agencies.

We are concerned that the EFH program, as described in the NMFS interim final regulations, already has grown into yet another regulatory impediment imposed by Congress on businesses as a condition to receiving a federal permit. A large variety of permits could be affected. The EFH regulations could delay or halt altogether building permits, timber permits, and other land-based activities in the Puget Sound region.

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, Congress should direct NMFS to recast the program so that 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.

Without this Congressional direction, there will undoubtedly be permitting delays. 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 keep in mind, these are not restrictions for species in danger of extinction, they are restrictions to protect the habitat of all fished species, no matter how plentiful or widely dispersed.

7. Lack of Information

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 information should be provided by NMFS so that the American public and Congress are enabled some level of meaningful review of EFH consultations to date:

- a. The number of consultations completed, by NMFS Region;
- b. The average time taken to complete a consultation, and the range and distribution of time taken for each consultation around that average;
- c. The average cost of each consultation, in dollars and person-hours or full time equivalents

("FTEs"), and the range and distribution of the costs of each consultation around that average;

- d. The distribution and amount of that cost among NMFS, action agencies, third party applicants for federal authorizations, and others;
- e. The number of consultations in each category described under the interim final rule: national general concurrences, regional general concurrences, abbreviated, expanded, extended, and supplemental consultations, and separately the number of programmatic versus project-specific consultations;
- f. 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;
- g. 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;
- h. The number of consultations involving federal actions for which the National Environmental Protection Act (NEPA) documentation was also completed, and the category of NEPA documentation completed (e.g., Environment Assessment or Environment Impact Statement);
- i. 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;

- j. 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;
- k. Categories of activities for which EFH consultations were completed, including the basic categories of fishing and nonfishing, more specific federal action categories such as Clean Water Act Section 404 permits and Federal Energy Regulatory Commission 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;
- l. How many EFH consultations have been initiated, but not yet completed, and how long they have been pending; and
- m. 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 that this committee request NMFS to compile this kind of information in a format that facilitates understanding of the EFH consultations which have occurred so far and that enables constructive further comment.

Conclusion

The non-fishing sector does not oppose the EFH concept. Indeed, we address these concerns

regularly. However, we believe the actions set forth in the EFH provisions are duplicative and redundant and we seriously question the cost/benefit of this program. Even NMFS has said that of the 2000 consultation to date, most were already covered by some other environmental review. NMFS has also said that they strongly encourage the use of existing consultation and environmental review processes to satisfy the EFH requirements, yet the rule sets forth extremely stringent criteria for the use of any such process.

When asked why the EFH definition is so broad that it now includes almost the entire coastline of the United States, and substantial upland habitats, NMFS points to the lack of guidance it received from Congress. The 1996 Amendments, NMFS asserts, established a broad and vague definition of the term. So, NMFS, moved in filling what they perceived as the void. It is important that Congress clearly define the EFH provisions when it reauthorizes the Magnuson-Stevens Act this year. Congress should also assist the American people by halting implementation of the EFH program until more guidance can be provided in the Act itself. Our coalition is, has been, and continues to be engaged with NMFS and Congress in a discussion on how this program should work and where we might help.

Thank you for your time today and consideration of our concerns.