

HABITAT STEERING GROUP REPORT TO THE COUNCIL

Upon consultation with the Executive Director, the Habitat Steering Group felt it was appropriate to change its name to the Habitat Advisory Board (HAB).

The HSG discussed new members and hope the Council has selected a new sportfishing representative.

Mr. Paul Heikkila was elected Chair for 2002. Mr. Stuart Ellis was elected Vice Chair.

We will provide comments on groundfish rebuilding plans, marine reserves, and highly migratory species management during those agenda items (F.3.b, D.1.c, and G.2.c, respectively).

Habitat Issues

Federal Energy Regulatory Commission (FERC) Letter. The Council received a draft letter to the FERC, which is included in their briefing books. The HSG heard the states' staff, as well as staff from NOAA General Counsel, would like additional time to review the letter. Therefore, the HSG requests that the Council not finalize the letter until the April meeting. We do not think the letter will change dramatically in substance, but HSG members felt the letter could be strengthened and clarified in some areas.

Draft Habitat Areas of Particular Concern (HAPC) Process Document. The HSG has a subgroup participating in this process. If the Council's direction is otherwise, they should inform us. Our April meeting, in large part, will be dedicated to the HAPC process.

We would like to encourage the Council to use the description of fishing gear impacts developed by the Southeast Council as a model for a version to be included in the groundfish fishery management plan (FMP). The Southeast Council contracted with the Gulf States Marine Fisheries Commission to develop the document.

NMFS Sued on Essential Fish Habitat (EFH) Rule. Several clients of Perkins Coie, LLP have filed suit against NMFS in the U.S. District Court for the District of Idaho to challenge the EFH final rule. The plaintiffs are Idaho County (Idaho), Valley County (Idaho), Okanogan County (Washington), Alaska Forest Association, Intermountain Forest Association, and National Association of Home Builders. They make claims under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Administrative Procedures Act, National Environmental Policy Act (NEPA), and Regulatory Flexibility Act, the gist of which is an allegation that NMFS exceeded its authority and did not adequately consider effects on non-fishing entities. They ask the court to enjoin NMFS from implementing the EFH designations and consultation requirements until the agency has issued revised final regulations complying with the Magnuson-Stevens Act, Administrative Procedures Act, NEPA, and Regulatory Flexibility Act; and has approved amendments to FMPs in conformance with those revised final regulations. Under the Magnuson-Stevens Act, NMFS has 45 days to file its response.

EFH Final Rule. The final regulations for implementing the EFH provisions of the Magnuson-Stevens Act were published in the *Federal Register* on January 17. The final rule replaces an interim final rule that has been in effect since January 1998. The rule makes some changes to the regulations based on thousands of written public comments and almost four years of experience implementing EFH through the interim rule. The revised regulations provide clearer standards for the councils to use in identifying EFH, additional guidance to help councils evaluate whether fishing activities may adversely affect EFH, and clearer procedures for federal agency consultations with NMFS on actions that may impact EFH. The final rule became effective February 19, 2002 and can be assessed at the Southwest Region's website: <http://swr.nmfs.noaa.gov/efh.htm>.

San Francisco International Airport (SFO) Runway. The airport's Environmental Impact Review/Environmental Impact Statement (EIR/EIS) work on the proposed new runway configuration alternatives has slowed since September 2001, but they are clearly moving forward with their studies. SFO is scheduled to send its first comprehensive draft report to a panel on April 16 organized by NOAA's National Ocean Service. This panel will consist of hydrologists, fish and wildlife experts, and water quality experts. NMFS will have input through a fish ecologist sitting on the Panel. This first report would deal only with the new BX-6 runway option (proposed 659 acre fill) and will include all the hydrology, water quality, and biology studies. The Science Panel will probably convene in late May to discuss this report. In early July, SFO is scheduled to send a combined comprehensive report to the Science Panel covering all the proposed alternatives. The Science Panel will reconvene in September to hold its final set of meetings and conduct a Public Forum announcing the panel's results. The EIR/California Environmental Quality Act process and the EIS/NEPA process are moving along parallel tracks, but on a slightly different time schedule with the EIR moving slightly ahead of the EIS. The Southwest Region actively participates in monthly meetings hosted by SFO and is closely monitoring what preferred alternative SFO will select and the types and amounts of habitat mitigation proposed.

Klamath Flow Issues. Mr. Michael Rode gave a fairly extensive overview of current Klamath flow issues, including the final Biological Assessment recently submitted by the Bureau of Reclamation and the National Academy of Sciences Interim Report, and a recent public meeting held in Medford, Oregon. The Biological Assessment is proposing a ten-year Klamath Project operations plan that will result in Klamath River flows no greater than the minimum flows that occurred during the 1990-1999 period. Given our greatly increased understanding of anadromous salmonid habitat/flow relationships on the Klamath, this is a great step backwards. The HSG decided to develop a draft letter as soon as possible for the Council to review in April or possibly June.

PFMC
03/12/02

Pietro Parravano
President
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In Memoriam:

Nathaniel S. Bingham
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RECEIVED PACIFIC COAST FEDERATION
of FISHERMEN'S ASSOCIATIONS

JAN 14 2002

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W.F. "Zeke" Grader, Jr.
Executive Director
Glen H. Spain
Northwest Regional Director
Mitch Farro
Fishery Enhancement Director
Vivian Bolin
Watershed Conservation Director
Duncan MacLean
Salmon Advisor

Please Respond to:

California Office
P.O. Box 29370
San Francisco, CA 94129-0370
Tel: (415) 561-5080
Fax: (415) 561-5464

www.pcffa.org

Office of the President
215 Spruce Street
Half Moon Bay, CA 94019
Tel: (650) 726-1607
Fax: (650) 726-1607

Northwest Office
P.O. Box 11170
Eugene, OR 97440-3370
Tel: (541) 689-2000
Fax: (541) 689-2500

4 January 2002

Mr. Rodney R. McInnis
Acting Regional Director – Southwest Region
National Marine Fisheries Service
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802-4213

RE: Threats to Essential Fish Habitat in San Francisco Bay Estuary
Threats to San Francisco Bay Estuary-Dependent ESA-Listed Species

Dear Mr. McInnis:

The Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources write you out of our deep sense of urgency regarding the fate of the San Francisco Bay estuary. San Francisco Bay is considered the most important estuary on the west coast of North and South America. For the commercial fisheries (as well as recreational fishing) along the central and northern California coast this estuary is essential to the economic well being of our industry. The Bay is the gateway from the Sierra streams to the Pacific for one of the west coast's largest Chinook salmon populations. It is home to the largest herring fishery south of British Columbia and our nation's last remaining urban commercial fishery. The Bay, it is believed, had been the largest nursery area for Dungeness crab along the entire Pacific Coast, and, before World War II, the site of a major oyster and shrimp fishery. It also provides spawning and/or nursery habitat for several species of sole.

But serious indicators of stress are evident, and action needs to be taken before our valuable heritage meets the critical magic numbers. Salmon migrating from the Delta to the Bay estuary are actually losing weight (and strength) in the estuary (instead of gaining weight as they should) before going to sea – a clear indicator of stress on the Bay ecosystem. Dungeness crab populations are at one-tenth the levels they were in the 1950's, as much of their nursery in the Bay has been destroyed. Only remnant populations of native oysters are still found in the Bay and the remaining oyster reefs may soon disappear. And, much of the herring spawn is lost on creosote pilings due to the lack of adequate amounts of eelgrass habitat.

The Bay is threatened on many fronts. Unless the major problems are confronted, this estuary, its fish and shellfish populations, and the livelihoods and communities of those dependent on its resources will be destroyed. NMFS has clear legal authority under the Magnuson-Stevens Act to protect essential fish habitat (EFH), which includes that utilized by salmon and groundfish in San Francisco Bay, and under the Endangered Species Act (ESA) to protect and recover listed fish stocks, including winter and spring-run Chinook salmon utilizing the San Francisco Bay estuary. The most significant and imminent threats to this estuary and its resources include:

1. An Increase in the Amount of Freshwater Diversions. Over half of the fresh water that historically flowed into San Francisco Bay is now diverted from upstream Sacramento/San Joaquin Rivers and tributaries. Despite unacceptable water quality/quantity levels (1987 staff report, State Water Resources Control Board, of 1.6 million acre feet deficit of freshwater inflow to the estuary), various proposals from CALFED still substantially increase diversions to new reservoirs and storage facilities without serious consideration of other sources of water, such as desalinization of ocean water, that would mitigate impacts to the Bay ecosystem. Pacific herring, which use the Bay for spawning, are saline sensitive. Increased diversions will negatively impact their spawning, and the overall health and biological productivity of the estuary dependent on adequate mixing of freshwater with seawater. The so-called "environmental water" CALFED currently proposes for fish, wildlife and ecosystem fixes is more likely never to reach the Bay at all.

2. Proposed Expansion of San Francisco International Airport. Present plans at San Francisco International Airport will expand 1,000 to 1,400 acres of new fill in the Bay, the largest fill proposed since passage of the Petris-McAteer Act in 1965. The massive reconfiguration of the proposed fill would directly change flow patterns in the Bay, and impact wetland and Bay habitats, particularly eelgrass beds used by fish.

3. Port Dredging and Dredge Spoil Disposal. Current plans call for increased dredging at ports within San Francisco Bay (e.g., Port of Oakland), to accommodate the newest classes of container ships, tankers, cruise ships and military vessels. Proposed dredging includes areas of known contaminated sediments. Resuspension of contaminants into the water column, near fish habitat (e.g., eelgrass beds, oyster reefs), threatens degradation of critical or remnant habitats. And, despite the designation of a deepwater dredge disposal site under the Long Term Management Strategy (LTMS), the LTMS currently allows high levels of dredge spoil disposal in the Bay, also degrading fish habitats and water quality.

4. Increased Marine Traffic. Our concern regarding dredging and dredge spoil disposal rises with implementation of the national Marine Transportation System initiative (MTS), which pledges to double infrastructure for marine transportation at coastal and river ports. MTS will likely increase new dredging and select inexpensive locations for dredge spoil disposal, channel deepening, and pier construction within San Francisco Bay. Increased marine shipping traffic in itself raises the pressure of marine bioinvasions from ships and their ballast water, pollution from bilge water and spills, anchor and prop scour, noise and wave generation, and water circulation alterations. Additionally, wakes from increased vessel traffic wear on nearshore and shoreline habitats, affecting habitats of concern -- shallow subtidal, deep subtidal, eelgrass, mudflat, sand shoals, rock reefs and salt

marshes. Moreover, additional traffic and larger vessels will likely require removal of the Bay Rock Reefs near the entrance of San Francisco Bay, that have served as important habitat to various fish species.

5. Sand Mining. Sand mining operations are currently permitted for 1.5-2 million cubic yards of sand removal per year in San Francisco Bay. Sand mining businesses are currently applying for new permits for up to double the current volume. Much mining already occurs in essential fish habitat (EFH).

6. Bay Bridge Retrofit/Reconstruction. The East Span Bay Bridge Seismic Retrofit will damage or destroy five acres of eelgrass without plans for mitigation to replace valuable fishery habitat in-kind or on-site.

7. San Luis Drain. The San Luis Drain, designed to convey agricultural waste water with high levels of selenium and pesticide runoff from the west side of the San Joaquin Valley to a proposed discharge site in the Delta, is another threat. Under certain proposed scenarios, significant increases in contaminant levels may result. Selenium in high levels, in addition to being toxic to birds, can also be poisonous to fish.

8. New or Expanded Power Plant Construction/Operation Around Bay. The recent electricity shortage in the state has created a push for new or accelerated power plant construction and expansion in the Bay Area. San Francisco's Portrero Power Plant is currently seeking approval for a new unit requiring over 450 million gallons per day to be drawn from the Central Bay, heated to at least 20 degrees above ambient, and then returned to the Bay. The impingement, entrainment and thermal changes would adversely impact many species of fish and invertebrates, especially juvenile Dungeness crab. Four more power plants have been proposed for the Bay Area, possibly with different cooling systems, but still with potential to cause significant adverse impacts. In the Delta, several power plants are currently seeking expansion, with permits to discharge water at temperatures as high as 86 degrees F.

9. Ongoing Pollution. While the Clean Water Act has measurably improved our nation's waters, including San Francisco Bay, still our expanding population has caused municipal discharges and storm water runoff to grow. Now, there is a great need to focus on effective control of non-point source pollution. Cumulative sediment and chemical buildup from mining and the agricultural industries has seriously impaired water quality in the Delta, Central Valley tributaries and the Bay for several decades. The growth of organic farming and Integrated Pest Management (IPM) systems have not yet brought about the desired chemical reductions to the Delta and Bay.

10. Bioinvasions San Francisco Bay is one of the single most "invaded" waterways in the world, due to high foreign vessel traffic and introductions of non-native aquatic plants and animals from ship's ballast water. Increased survivorship of many invaders is likely due in part to the declining health of the estuary. A great deal of effort has been put into research on the invaders, and some measures have been enacted to prevent introduction through discharges of ship's ballast water. However, exclusion is really only the first step to an

effective pest management program. A strategic plan needs to be developed for early detection and control or eradication of unwanted invasive organisms.

We believe several different habitats in the Bay are at high risk: tidal wetlands, remnant oyster reefs and eelgrass beds. Eelgrass beds face the greatest threat. The last survey of eelgrass in the Bay, in 1989, delimited only 316 acres. Now we believe the total acreage is much less. The beds in San Francisco Bay are patchy compared to those found in other estuaries of Northern California, and appear stressed. Eelgrass in San Francisco Bay reproduces sexually (seeds) and cannot be effectively mitigated in the Bay through vegetative propagation. Eelgrass habitat can be regenerated only with careful habitat modification (either by dredging or fill to achieve an appropriate depth for eelgrass).

Like many marine plants, its narrow light requirement range limits its depth range (intertidal and shallow subtidal), and fluctuations in sediment turbidity can, within a short period of time seriously impair light penetration. Fine-grained sediments affect turbidity more than coarse-grained sediments. Dredging and disposal activities generate turbidity and redistribute fine-grained sediments to other areas of the Bay, thereby reducing light penetration and eelgrass growth. Contamination, which may result from disturbance of sediments by dredging or from source or non-point source pollution, is not well understood as a limiting factor for eelgrass in the Bay, but herbicides, copper and nickel present in the waters of the Bay adversely affect growth and production of eelgrass plants.

Because of the importance of San Francisco Bay and the magnitude and myriad of threats facing the estuary, PCFFA and IFR, on behalf of the working fishing men and women they represent, respectfully request a meeting with you and other National Marine Fisheries Service staff at the earliest possible date, preferably before the end of this month. We cannot wait.

NMFS clearly has the mandate and legal authority to act. The Magnuson-Stevens Act charges your agency with identifying and protecting essential fish habitat (EFH). NMFS (through the Pacific Fishery Management Council) has authority (Fishery Management Plans) over salmon and groundfish species that use habitat within San Francisco Bay. NMFS also is responsible for the protection and recovery of ESA-listed salmon stocks, including winter and spring-run Chinook salmon and steelhead trout, all which migrate through and use habitat within San Francisco Bay.

We would like to meet with you, your legal team and members of your staff working on San Francisco Bay issues, review NMFS documents pertaining to protections for the Bay and its fishery resources, and review NMFS plans and proposals for protecting the Bay. We also would like to obtain a list of all agencies, regional, state or federal, that NMFS partners with in efforts to protect the Bay or that share legal responsibility for certain aspects of Bay protection. It is not our intent to point fingers or assign blame. Looking forward, we want to know specifically what is being done, and understand what still needs to be done. Moreover, we want to contribute to the solutions. We, a non-governmental organization representing people dependent on Bay fishery resources, can and will assist NMFS and any of other agency in fulfilling the mission of protecting this great estuary.

Mr. Rodney R. McInnis

4 January 2002

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We look forward to hearing from you soon. We'd be pleased to host the meeting here in our San Francisco offices, for convenience to your staff from across the state, as well as accommodate staff from agencies nearby in Sacramento or the Bay Area.

Sincerely,

P. Parravano

Pietro Parravano
President

cc: Mr. Robert Hight, Director, California Department of Fish & Game
Mr. Tom Hannigan, Director, California Department of Water Resources
Mr. Jeff Morales, Director, California Department of Transportation
Mr. Paul Thayer, Executive Director, California State Lands Commission
Mr. Wayne White, Acting Director, California Region, U.S. Fish & Wildlife Service
Mr. Kirk Rogers, Acting Director, Pacific Region, U.S. Bureau of Reclamation
Mr. Wayne Natri, Region 9 Administrator, U.S. Environmental Protection Agency
Lt. Col. Timothy O'Rourke, San Francisco District, U.S. Army Corps of Engineers
Ms. Loretta Barsamian, San Francisco Bay Regional Water Quality Control Board
Mr. Will Travis, Executive Director, Bay Conservation & Development Commission
Dr. Donald McIsaac, Executive Director, Pacific Fishery Management Council
Mr. Robert Treanor, Executive Director, California Fish & Game Commission
Mr. Patrick Wright, Executive Director, CALFED

Mr. Linwood A. Watson, Jr., Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20246

Dear Secretary Watson:

This letter concerns the Federal Energy Regulatory Commission's (FERC) responsibilities under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).¹ Specifically, the Pacific Fishery Management Council (Council) is concerned FERC's administration of licensing actions under the Federal Power Act be consistent with the conservation of essential fish habitat .

ESSENTIAL FISH HABITAT

The Sustainable Fisheries Act of 1996 amended the Magnuson-Stevens Act to establish new requirements for "Essential Fish Habitat" (EFH) descriptions in federal fishery management plans (FMPs) and to require federal agencies to consult with National Marine Fisheries Service (NMFS) on activities that may adversely effect EFH. The Magnuson-Stevens Act, includes the following definition for managed salmonid species:

"EFH for Pacific Coast salmon fishery means those waters and substrate necessary for salmon spawning, rearing, breeding, feeding, or growth to maturity, needed to support a long-term sustainable salmon fishery and salmon contributions to a healthy ecosystem."

We have enclosed Section 3.2.5 Potential Impacts and Conservation Measures for Nonfishing Activities that may affect Salmon Essential Fish Habitat of Appendix A Identification and Description of EFH, Adverse Impacts, and Recommended Conservation Measures For Salmon - Amendment 14 to the Pacific Coast Salmon Plan (August 1999), in order to clarify the range of issues and concerns related to habitat critical to coho and chinook salmon and Puget Sound pink salmon.

IMPACT OF FERC LICENSED HYDROELECTRIC PROJECTS ON EFH

Throughout the range of Pacific salmon, numerous hydropower dams are currently undergoing, or are soon scheduled for relicensing, by FERC. With the term for FERC hydropower licenses generally running from 30 to 50 years, hydropower dams in California, Oregon, Washington, and Idaho present unique challenges to anadromous fish. According to a 1994 study by the U.S. Department of Energy, upstream passage/protection facilities are present at 6.7% (out of a total of 450 plants) of FERC licensed hydroelectric projects and downstream passage/protection/mitigation facilities are present at 9.3% (42 plants) in California. While in Oregon and Washington upstream and downstream passage/protection facilities are present at 22.5% (out of a total of 306 plants). Many of these existing passage facilities perform poorly. Additionally, many hydropower facilities significantly decrease streamflow, impair water quality and destroy important fish habitat causing serious harm to anadromous fish.

1 (Magnuson-Stevens Act) (16 U.S.C. 1801 et seq.), and Reorganization Plan Number 4 of 1970.

For instance, in California's Central Valley (Sacramento and San Joaquin Watersheds) dams block as much as 95% of historic salmonid spawning habitat. As a result, anadromous salmon are extirpated from approximately 5,700 miles of their historic habitat in the Central Valley. In most cases the habitat remaining is of much lower quality than the habitat lost and is subject to further degradation by direct and indirect impacts of hydroelectric operations. According to a FERC review, a total of 149 FERC licensed and exempted projects are located in the Central Valley. Although most of the 149 projects are small (114 have capacities less than 5 megawatts), total reservoir storage is about 40% of all surface water storage in the Central Valley. Most storage is located at relatively few projects. Twenty nine projects account for 95% of the FERC-licensed storage in the valley.

In 1985 the Oak Ridge National Laboratory analyzed the direct and indirect adverse impacts to sensitive fish populations from hydroelectric project operations in the Central Valley. The results of this analysis are contained in a FERC report concluding that 27 FERC licensed hydroelectric projects adversely alter stream flows in areas where sensitive fish species (including chinook salmon) are located. In its report, FERC further concludes the continuing operations of 9 FERC licensed hydro projects (involving 22 storage reservoirs) appear to have significant direct and cumulative impacts.

Similarly, dams, including FERC facilities in the Columbia River basin, block 55% of the total area and 33% of the total stream miles (over 3,000 stream miles) that were once accessible to salmon. Even dams with juvenile passage facilities can have significant cumulative effects, with cumulative juvenile mortalities routinely exceeding 75%.

The 1986 amendment to the Federal Power Act, the Electric Power Consumers' Act (ECPA) requires FERC to take a balanced approach to dam licensing. The amendment requires FERC, when deciding whether to issue a license, to consider not only the power generation potential of a river, but also give equal consideration to energy conservation, protection of fish and wildlife, and general environmental quality. This "equal consideration" mandate requires FERC to consult with federal, state, and local resource agencies, including fish, wildlife, recreation and land management agencies, in order to assess more accurately the impact of a hydroelectric project on the surrounding environment.

CUMULATIVE IMPACT ASSESSMENT

It is critical FERC utilize analytical tools to accurately determine potential adverse effects (e.g., the 1996 NMFS "Matrix of Pathways and Indicators" for evaluating the effects of human activities on anadromous salmonid habitat), watershed assessment protocols, research programs, predictive watershed models for testing policies and assessing adverse impacts, etc. These can be particularly useful for assessing cumulative impacts. Cumulative impact analysis is intended to monitor the effect on EFH of the incremental impacts occurring within a watershed or marine ecosystem context that may result from the minor but collectively significant actions.

A valid cumulative impact assessment can not be conducted on a project by project basis, as is FERC's practice. A relicensing occurs at the expiration of current FERC license terms for a hydroelectric project. Expiration dates are based upon the date and duration of the current license. Accordingly, relicensings are not coordinated by watershed or impact area. Because relicensing schedules are not coordinated, the development of comprehensive cumulative impact assessments and system or basin wide alternative operating scenarios necessary to improve efficiency, facilitate relicensing, and minimize impacts on listed salmonids are precluded. The lack of coordinated relicensing also limits the efficacy and thus the opportunity for improving fish passage on rivers where longitudinally consecutive hydroelectric projects create multiple migration barriers. Accordingly, FERC should require licensees to amend their project licenses prior to relicensing such that license expiration dates are coordinated (bundled) by watershed or system depending upon the area of impact to aquatic habitat.

Cumulative impact analysis is a corollary of tiering from the programmatic since iterative actions of increasing focus can have various kinds of adverse effects (additive, synergistic, catalytic, threshold) over the life of the project and beyond. Utilization of such programmatic tools will enhance predictive capability of cumulative impact analyses and help inform the selection of appropriate mitigation.

CRITICAL ISSUES

The Council urges FERC to fully address the following issue areas as it moves forward with the deliberations concerning relicensing actions in California, Washington, Oregon, and Idaho:

- (i) **Fish passage conditions at the project:** Hydropower projects affect both upstream migration of adult salmonids, and downstream migration of juveniles. Some projects may possess passage facilities that are improperly designed or operated resulting in substantial impacts to fish. Some projects may totally block salmonid migration, eliminating access and connectivity between populations and habitats. Applicants should analyze existing fish passage conditions and devise strategies to improve passage conditions where necessary to meet established quantitative and qualitative fisheries goals.
- (ii) **Impacts to stream flow and fish habitat in and below the project area:** Hydropower projects that are truly "run of river" may impact stream flow conditions minimally, because they pass all flows through turbines (with powerhouse integral with the dam) or over spillways, thereby maintaining consistent flow conditions below the project (i.e., run-of-river operations). Nonetheless, in reality few if any projects are "run of river" where inflow matches outflow on a 24 hour basis. Such operations can degrade habitat above and below projects. In addition, projects may store stream flows behind the project and release the flows later for generation (i.e., peaking projects). Peaking operations can result in stranding of fish due to rapid flow fluctuations, can scour spawning and rearing areas below projects, and reduce the abundance and diversity of aquatic insect populations critical to fish productivity. Still other projects may divert stream flows from the river channel, thus dewatering aquatic habitat. Applicants should describe existing stream flow conditions in the affected area, and describe how project operations will be modified to improve access to and impacts on aquatic habitat.
- (iii) **Impacts to water quality in the project area:** Project operations that affect stream flow may likewise affect water quality. For example, storing water behind diversionary structures may result in increased water temperatures, disruption of normal sediment transport regimes, and reduction of available dissolved oxygen in downstream areas. Reduction in stream flows may also reduce water available for diluting other man-made wastes emanating from point and non-point sources. Rapid release of water below projects can increase total dissolved gas levels causing gas bubble trauma. Each applicant should analyze existing water quality parameters in the affected area, including parameters monitored under state and federal Clean Water Act regulations. Studies should analyze how project operations need to be modified to prevent degradation of existing water quality, or improvement of water quality in water quality limited streams. The project area must extend downstream far enough to cumulatively account for impacts. For example, flow damping effects on sediment delivery to downstream estuaries must be considered.
- (iv) **Assessments should:** 1) Provide a biologically based rationale demonstrating the proposed actions do not appreciably reduce the likelihood of survival and recovery of the species in the wild; and 2) provide that full mitigation and compensation for unavoidable loss is required.
- (v) **Effective monitoring and evaluation programs:** The design and funding of monitoring programs must provide for collection of sufficient data to assess compliance, effectiveness, and parameter validation. Much of the already cumbersome licensing process will concern the specific details of impact mitigation and monitoring. Therefore, in order to provide meaningful mitigation of impacts, any proposal to protect, mitigate, or enhance aquatic resources should be programmatic and include basin-wide proposals for mitigation and monitoring. A series of independent and site specific proceedings (without regional or basin-wide coordination) would perpetuate the current duplicative and time consuming process. Consequently, this would prohibit a timely response to regional energy and environmental needs.
- (vi) **Provides for adaptive management:** A structured process of "learning by doing" needs to be included throughout the term of the license by evaluating monitoring data to determine any needed revisions of assumptions, management strategies, or objectives. Project proposals must describe the conditions under which revisions are to be made and the processes for accomplishing those revisions.

- (vii) **Multiple dam effects:** Within any larger watershed, multiple dam structural configurations and operations, and future relicensing must be taken into account.

ALTERNATIVE LICENSING PROCESS

The Council is concerned over the recent collaborative licensing alternative instituted by FERC. With so many licensing proceedings ongoing, it is very difficult for the Council and other parties who are important stakeholders in the relicensing process to effectively engage in the alternative process, because of the large time and resource commitment required by the process. Thus, FERC should weigh carefully each licensing proceeding with respect to the alternative process and defer to the traditional three stage consultation process if there is evidence provided by stakeholders the alternative process is not conducive to a particular licensing process.

Further, the Council is concerned FERC often does not support reopening of licenses or shorter license terms to allow for adaptive management of license conditions and modified terms, conditions, and prescriptions of the fishery agencies to protect fishery resources which are public resources. Given the importance of these multiple licensing proceedings that will establish new or renewed licenses for decades in the future, the Council recommends FERC seek flexibility with respect to license reopeners and shorter license terms. In the standard thirty to fifty years of a FERC license, entire populations of fish can be fragmented or even extirpated.

If the Council can be of any further assistance in your deliberations or negotiations concerning the mitigation agreement concerning the project, please contact the Chair of the Habitat Steering Group.

Sincerely,

DRAFT

Dr. Hans Radtke
Chair

HR:kla

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, MD 20910



THE DIRECTOR

RECEIVED

JAN 22 2002

JAN 16 2002

PFMC

Mr. Jim Lone
Chairman
Pacific Fishery Management Council
7700 NE Ambassador Place
Portland, Oregon 97220-1384

Dear Mr. Lone:

Enclosed please find a copy of the final rule implementing the essential fish habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act. The final rule becomes effective February 19, 2002, and supersedes the EFH interim final rule that was published in the *Federal Register* on December 19, 1997. The final rule is the result of an extraordinarily thorough public rulemaking process that included five separate comment periods and more than 20 public meetings and workshops. During a total of 270 days of open public comments, the National Marine Fisheries Service (NMFS) received approximately 3,600 written comments on the EFH regulations. The final rule benefitted greatly from written comments and verbal testimony. I hope you will agree that the result is much clearer guidance and more efficient procedures for Fishery Management Councils, NMFS, other agencies, and the public.

The final rule retains the same overall structure as the interim final rule. Subpart J of 50 CFR part 600 contains guidelines to assist Councils in developing the EFH components of fishery management plans (FMPs). Subpart K of 50 CFR part 600 contains procedures for coordination, consultations, and recommendations for Federal and state agency actions that may adversely affect EFH. The final rule includes numerous clarifications, simplifications, and editorial improvements intended to make the regulations easier to use.

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

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

Two procedural changes in the final rule affect the Councils directly. First, the final rule streamlines the procedure for NMFS to provide recommendations and information to Councils regarding the EFH components of FMPs, in consultation with participants in the fishery, as required by section 305(b)(1)(B) of the Magnuson-Stevens Act. Under the interim final rule, NMFS was required to provide draft recommendations to a Council in writing, make the draft recommendations available for public review, and hold at least one public meeting before providing final recommendations to the Council. This procedure proved to be confusing and duplicative with the existing Council process for FMP development and public comment. The final rule simplifies this process by allowing NMFS to obtain public input via the normal Council process and provide only one set of written EFH recommendations.

Second, the final rule eliminates the requirement for NMFS to consult with the appropriate Council(s) prior to issuing a General Concurrence. General Concurrences are the mechanism whereby NMFS examines a category of Federal actions that are similar in nature, similar in their effects on EFH, and will cause no more than minimal adverse effects to EFH individually or cumulatively. Once NMFS issues a General Concurrence, the Federal agency is not required to consult with NMFS on each individual action covered by the General Concurrence. The requirement for Council consultation was intended to ensure good coordination, but it proved to be a hindrance to issuing General Concurrences promptly for actions that are truly minor. The final rule states that after completing a General Concurrence, NMFS will provide a copy to the appropriate Council(s) and will make the General Concurrence available to the public. NMFS can always revise or revoke a General Concurrence if Council or public review suggests such action is warranted.

Staff from the NMFS Office of Habitat Conservation would be pleased to brief the full Council and/or appropriate Council committees on all of the changes to the EFH regulations. If you would like to arrange such a briefing, please contact Jon Kurland, our national EFH Coordinator, or Korie Johnson at 301-713-2325.

Sincerely,



William T. Hogarth, Ph.D.
Assistant Administrator for Fisheries

Enclosure

ESSENTIAL FISH HABITAT ISSUES

Situation: The Habitat Steering Group (HSG) will meet Monday, March 11 to develop recommendations on Council Agenda items F.3, Update on Amendment 12 - Rebuilding Plans; D.1, Status of National Marine Sanctuary Processes Pertaining to Marine Reserves; and G.2, Highly Migratory Species Fishery Management Plan.

The HSG will also review a draft letter on Federal Energy Regulatory Commission (FERC) hydropower relicensing which will be presented to the Council for review (Exhibit C.1, Attachment 1). This programmatic letter covers subjects common to numerous projects which are scheduled for relicensing in the near future. The letter will ensure the Council's policies and recommendations will be presented in a consistent manner for all of the projects.

Other issues that will be discussed at the HSG meeting include approaches to identifying and protecting habitat areas of particular concern and updates on Klamath flow issues (see Ancillary D for the complete agenda).

Council Action:

1. Consider comments and recommendations developed by the HSG at the March meeting.
2. Consider draft letter to FERC regarding hydropower relicensing.

Reference Materials:

1. Habitat Steering Group Agenda (Ancillary D).
2. Draft letter to FERC (Exhibit C.1, Attachment 1).
3. Letter to Mr. Jim Lone from Dr. Bill Hogarth, NMPS (Exhibit C.1, Attachment 2).
4. Public Comment C.1.c.

Agenda Order:

- a. Report of the HSG
- b. Reports and Comments of Advisory Bodies
- c. Public Comment
- d. **Council Action:** Consider HSG Recommendations and Take Action if Necessary

Paul Heikkila

PFMC
02/27/02