



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

February 18, 2009

Janine Jennings
Water Quality Standards Unit
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Re: EFH Consultation on Alaska's
Revised Mixing Zone Policy

Dear Ms. Jennings:

The National Marine Fisheries Service (NMFS) has reviewed the Alaska Department of Conservation's (DEC) most recent implementation guidance on the 2006, Mixing Zone Regulation Revisions, dated December 17, 2008 (Guidance). We offer two recommendations for strengthening the Guidance to better insure that DEC adequately addresses the potential adverse effects of proposed projects to Essential Fish Habitat (EFH).

First, we are concerned the following description of EFH is not sufficiently comprehensive:

"Essential Fish Habitat has been designated for all marine waters and brackish waters and fresh water habitats of anadromous Pacific salmon. NOAA Fisheries administers EFH and may recommend conservation measures for these areas."

To acknowledge the full scope of EFH designations and NMFS' responsibility to provide EFH Conservation Recommendations, we request that description be revised as follows:

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) defines the term Essential Fish Habitat (EFH) to mean, "...those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." In Alaska, EFH has been identified for Bering Sea and Aleutian Island Groundfish, Gulf of Alaska Groundfish, Bering Sea and Aleutian Island King and Tanner Crab, Alaska Scallops and Alaska Stocks of Pacific Salmon. Section 305(b)(4)(A) of the Magnuson-Stevens Act requires NMFS to provide EFH Conservation Recommendations to federal and state agencies for actions that would adversely affect EFH.

Second, we recommend the Guidance incorporate the following paragraph to provide a framework for the EFH consultation process as it relates to proposed mixing zones:

"The applicant will make an initial determination as to whether there is any potential for an adverse effect from a mixing zone proposed within EFH. This determination should be done using procedures specified in DEC's Permit Writer's Handbook or consistent with those in EFH regulations. DEC will provide the draft permit, with the applicant's EFH determination, to NMFS prior to or during the public comment period. For any mixing zone applied for in EFH, DEC will solicit EFH Conservation Recommendations from NMFS at the time that DEC provides the draft permit to NMFS."



Recently, EPA provided NMFS with a courtesy copy of EPA's determination that the authorization of the Alaska National Pollutant Discharge Elimination System (APDES) permitting program will have no adverse affect on EFH. This conclusion resulted from procedures outlined in the Memorandum of Agreement (MOA) between EPA and the DEC, which delegates permitting authority to DEC for the APDES program. In the MOA, DEC agreed the Guidance would include language committing DEC to notify NMFS of any preliminary draft permit that utilizes a mixing zone in EFH; specifically EFH in waters other than the territorial sea, waters of the contiguous zone and oceans. The paragraph we propose above would accomplish that goal.

While the Magnuson-Stevens Act does not require state agencies to consult with NMFS regarding EFH, NMFS is required to provide EFH Conservation Recommendations on any action that would adversely affect EFH. We offer this paragraph in accordance with regulations at 50 CFR 600.925(c)(1), which state NMFS should use existing coordination procedures or establish new procedures to identify state actions that may adversely affect EFH, and to determine the most appropriate method for providing EFH Conservation Recommendations to state agencies.

Thank you for the opportunity to comment on the Guidance. We recommend that EPA require DEC revise the Guidance to address these recommendations prior to EPA authorizing DEC's proposed revisions to the Alaska Water Quality Standards in 18 AAC 70.240 through 18 AAC 70.270 (mixing zones). We look forward to hearing from you on this matter. Should you have any additional questions regarding EFH, please contact Ms. Jeanne Hanson of my staff at (907) 271-3029.

Sincerely,



Robert D. Mecum
Acting Administrator, Alaska Region

cc: Aleria.Jensen@noaa.gov
Palmer.John@epamail.epa.gov
erin.strang@alaska.gov
Jim.Powell@alaska.gov
Ellen_Lance@fws.gov