Committee on Resources

Subcommittee on Fisheries Conservation, Wildlife and Oceans

Statement

TESTIMONY OF
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NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
ON
THE ESSENTIAL FISH HABITAT PROVISIONS OF THE
MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT
BEFORE THE
HOUSE SUBCOMMITTEE ON FISHERIES CONSERVATION,
WILDLIFE AND OCEANS
COMMITTEE ON RESOURCES

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Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify on the implementation of the "essential fish habitat" (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). I am Penny Dalton, Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

American Fisheries

Commercial and recreational fisheries are important national resources. In 1998, U.S. commercial fisheries produced about $3.1 billion in dockside revenues. By weight of catch, the United States is the world's fifth largest fishing nation, harvesting almost 10 billion pounds annually. The United States also is the third largest seafood exporter, with exports valued at over $2.3 billion in 1998. In addition to supporting the commercial seafood industry, U.S. fishery resources provided enjoyment for over 8

million saltwater anglers who caught an estimated 312 million
fish in 1998.

While the seafood and marine recreational fishing industries make substantial contributions to the economies of coastal communities throughout the Nation, harvest levels have declined noticeably in some key fisheries. Current harvest yields are substantially lower than the long-term potential yield. As of 1999, 11 percent of U.S. living marine resources are overfished or are approaching an overfished condition, 14 percent are not over fished, and there is another 75 percent whose status is unknown. NOAA Fisheries is working to fill these information gaps and rebuild fish stocks, which will support increased harvests and greater economic and social benefits. Key contributors to rebuilding and maintaining healthy fisheries will be the ability to identify and protect essential fish habitat.

The Sustainable Fisheries Act

The Magnuson-Stevens Act provides the national framework for conserving and managing the wealth of U.S. fishery resources. In 1996, Congress ushered in a new era in fisheries management, making significant revisions to the Magnuson-Stevens Act in the Sustainable Fisheries Act. In particular, the1996 amendment refined the focus of fisheries management by emphasizing the need to protect fish habitat. To support this goal, the Sustainable Fisheries Act required that fishery management plans identify as "essential fish habitat" those areas that are necessary to fish for their basic life functions. The new law also clarified NOAA Fisheries' authority to comment on certain actions that affect EFH.

NOAA Fisheries is working to ensure that all Sustainable Fisheries Act requirements are implemented, and that conservation and management measures fully protect the resources and provide for the needs of fishing communities and the Nation. We are laying a better foundation for future fisheries management, yet the benefits of the changes made by Congress in 1996 will take years, perhaps decades, to realize fully. In addition, the management decisions that we face are becoming ever more complex and contentious, and good solutions that are universally supported are hard to come by. We need to direct resources and effort to the scientific and technical aspects of our work. We also must build consensus with the public and among various stakeholders to help develop management programs that will move us toward the goal of healthy and sustainable marine fisheries.

Congress imposed a deadline of October 11, 1998 for amendments to each of 39 existing fishery management plans to implement the changes required by the Sustainable Fisheries Act. Amendments prepared by three of the regional Fishery Management Councils (Councils) did not fully address the requirements for EFH. NOAA Fisheries partially approved these amendments and is working with the Councils to improve them. Nearly all of the other fishery management plans have been completed and many are being implemented.

The Magnuson-Stevens Act defines EFH as: "*...those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.*" NOAA Fisheries provided additional regulatory guidance to ensure consistency in the interpretation of this definition: "*Waters" include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; "substrate" includes sediment, hard bottom, structures underlying the waters, and associated biological communities; "necessary" means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle.*

We have heard both praise and concern from our constituents over the increased emphasis we are placing on habitat conservation to implement the EFH provisions of the Magnuson-Stevens Act. NOAA Fisheries regards the EFH mandate as a significant opportunity to improve the management of sustainable fisheries. This opportunity, however, depends on building better relationships and cooperation with Federal, state, and local government agencies, fishing and non-fishing industries, conservation groups, academia, land owners, and other members of the general public.

I will focus the rest of my remarks on three major issues regarding the implementation of EFH. First, there is concern in some quarters that EFH designations are too broad and have therefore lost their intended meaning. I will explain why the EFH designations look the way they do, including the scientific basis behind the process NOAA Fisheries and the Councils used to describe and identify EFH. Second, I will explain our efforts to minimize the effects of fishing on EFH, and how we are working to improve our

ability to address this issue in the future. Third, I will explain the steps NOAA Fisheries has taken to make the EFH consultation process effective and efficient for action agencies and non-fishing industries. I will also address several common misconceptions regarding EFH.

EFH Designations

From the broadest perspective, fish habitat is the geographic area where a species occurs at any time during its life cycle. Habitats can be characterized by various attributes including biological, physical, and chemical parameters, location, and time. Ecologically, species distributions are controlled or focused by habitat characteristics that include obvious structure or substrate (e.g., coral reefs, marshes, or kelp beds) and other habitat features that are less distinct. Spatially, habitat use may shift over time due to changes in stock size, seasonal migrations, climatic change, human uses, or other factors. Habitats not currently used may be important to meet long-term goals for species productivity, particularly if a stock is over fished. Habitat restoration is a valuable tool to enhance degraded habitats and improve habitat quality and quantity, with benefits to the species and society.

Fishery management goals cannot be achieved if the managed species do not have sufficient quantities of suitable habitat. Fishery species use habitat for spawning, breeding, migration, feeding, growth, and shelter. Most habitats provide only a subset of these functions. The habitat utilized by a species changes with life history stage, abundance of the species, competition from other species, and environmental variability in time and space. The role of habitat in supporting the productivity of organisms has been thoroughly documented in the ecological literature, and the linkage between habitat availability and fishery productivity has been clearly established for a number of fishery species. By assessing the role of the managed species in the ecosystem, e.g., as predator or as prey, we can increase our understanding of the habitats necessary to support sustainable fisheries.

EFH is the habitat necessary to managed fish species to complete their life cycles. Generally, EFH for any given fish species constitutes only a portion of the total available habitat. The guidelines established by NOAA Fisheries to assist the Councils in determining what areas to identify as EFH are based on five general principles. First, the description and identification of EFH must be based on the best information available. Second, the procedures for describing and identifying EFH must be scientifically defensible. Third, the guidelines require a risk-averse or precautionary approach to describing and identifying EFH to ensure adequate habitat protection. Fourth, the guidelines are sufficiently broad to address the habitat needs of many different species in many different regions, as well as for varied physical, chemical, and biological processes that affect habitat quantity and quality. Finally, the ecological relationships among species and between the species and their habitats require, where possible, that an ecosystem approach be used in assessing and conserving EFH.

Where scientific information was available, NOAA Fisheries and the Councils identified EFH for each individual managed species and life stage. Because of the great number of managed species and the wide diversity of habitats utilized by the life stages of those species, habitats identified as EFH range from freshwater streams and estuaries to submarine canyons and fronts between water masses. However, much more scientific information is necessary to identify the exact type and quantity of habitats necessary to achieve the desired level of fish production, or even to specify which habitats contribute most to the growth, reproduction, or survival of target species. In these cases, our guidelines call for identifying EFH based on where the managed species is found in the highest concentrations, or where it occurs most commonly. These are scientifically defensible proxies for habitat value, and they represent our commitment to developing

effective management strategies using the best available information.

Over 700 species are managed under the Magnuson-Stevens Act. The ecological needs of these species run the gamut of what one might expect for such a diversity of marine life, ranging from giant tunas to small reef fish and from salmon to surf clams. Different species and life stages have different ecological requirements. In many cases, between 50 percent and 70 percent of the geographic range of a life stage of a managed species was identified as EFH. However, once individual EFH designations for all the species are overlaid, the mosaic of designations is bound to be broad. When considering the breadth of area covered by a map that encompasses all of the EFH designations, it is important to remember that the seemingly broad-brush coverage represents the aggregate of the important habitats for all species managed under Federal fishery management plans. NOAA Fisheries will continue to work with the Councils to revise and refine these designations as additional information becomes available.

One tack we have taken to help focus EFH conservation priorities has been to promote the concept of "habitat areas of particular concern" or HAPCs. HAPCs are discrete areas within EFH that provide extremely important ecological functions and/or are especially vulnerable to degradation. For instance, HAPC designation may be warranted for areas that play a vital role in the reproductive cycle of a managed species, or for areas that contain a rare habitat type that may be sensitive to disturbance from fishing or other human activities. Two examples are the northeast peak of Georges Bank, where the New England Council identified a cobble bottom habitat as an HAPC for juvenile cod, and areas in the lower Chesapeake and Delaware Bays, where NOAA Fisheries identified HAPCs for sandbar sharks because of the role of these areas as summer pupping grounds and their potential for disturbance from various development activities. In total, HAPCs comprise a fraction of 1 percent of the areas identified as EFH.

The designation of HAPCs is a valuable way to acknowledge cases where we have especially detailed information on ecological function and/or habitat vulnerability that allows us to highlight a priority area for conservation and management. To focus solely on HAPCs, however, ignores the broader ecological requirements of managed fish species. It is entirely appropriate to designate as EFH the areas that provide necessary environments for managed species to feed, reproduce, and seek shelter from predators. It should come as no surprise that these areas constitute a sizeable portion of the managed species' geographic range. NOAA Fisheries used the best available science to identify such areas, and is committed to enhancing our knowledge base so we can refine the EFH designations over time.

The Effects of Fishing on EFH

The Magnuson-Stevens Act requires NOAA Fisheries and the Councils to minimize to the extent practicable adverse effects to EFH caused by fishing. The management of fishing effects on EFH in Federal waters is the one area where the Councils and NOAA Fisheries have direct regulatory authority over actions that may adversely affect the quality and quantity of EFH available to support sustainable fisheries. However, there is very limited information linking physical habitat disturbance with observable decreases in productivity, survival, and recruitment of managed species of fish.

NOAA Fisheries is working in partnership with other agencies and institutions to conduct new research to improve our understanding of the effects of fishing on EFH. Within NOAA, we are working with the National Sea Grant Program to select priority research projects involving fish habitat, which Sea Grant will fund over the next two years. We are also working with the National Ocean Service to generate maps and other syntheses to help the Councils identify EFH and to enable us to develop internet-based compilations

of EFH information. Outside of NOAA, we are working with the U.S. Geological Survey and others on a national initiative to identify and map bottom habitats and determine the effects of fishing gear on EFH. Our Science Centers also are conducting specific targeted research to improve our understanding of fishing effects on habitat.

NOAA Fisheries is being sued by a group of plaintiffs who contend that we have not imposed sufficient measures to reduce the effects of fishing on habitat. Since this issue is the subject of ongoing litigation, I must limit my comments. However, I will note that NOAA Fisheries and the Councils have a long track record of implementing measures that protect fish habitat, such as area closures and gear restrictions. Our challenge is to use the best available and evolving science to identify potential harm to EFH, and then to work with the Councils to develop practicable management measures. This is a difficult task, but we are making progress.

EFH Consultations for Non-fishing Activities

NOAA Fisheries has reviewed non-fishing activities and commented on potential impacts to fish habitat for decades under the Magnuson-Stevens Act and other authorities. Since 1970, NOAA Fisheries has reviewed about 10,000 Federal actions per year under the Fish and Wildlife Coordination Act, Clean Water Act , National Environmental Policy Act, Federal Power Act, Endangered Species Act, and other laws to evaluate impacts to fish habitats. These reviews provide an opportunity to offer our advice on many Federal agency decisions involving actions that could affect living marine resources. However, during required environmental reviews, Federal agencies did not typically focus on how proposed actions might affect marine fishery species and their habitats. In many cases where NOAA Fisheries commented to the action agency, we were unsure whether our

recommendations were heeded or why they may have been rejected.

The Sustainable Fisheries Act changed this situation in three important ways. First, it required Federal agencies to consult with NOAA Fisheries if they determine their actions may adversely affect EFH for federally managed species of fish. Second, it required NOAA Fisheries to provide EFH conservation recommendations for any Federal or state agency action that would adversely affect EFH. Third, it required Federal action agencies to respond to those recommendations in writing, and if the action agency disagrees with our advice, it must explain why.

NOAA Fisheries' approach to the EFH consultation process is to work with Federal action agencies to build EFH considerations into the environmental reviews that are required under other laws wherever possible. Our goal is to promote efficiency and avoid duplication, while ensuring that EFH consultation provides a meaningful review of potential harm to the habitats needed by commercially and recreationally important species of fish. To make this goal a reality, we are working with Federal action agencies to develop "findings" that detail the operating procedures to be used to handle EFH consultations within existing environmental processes. We have completed 21 such agreements to date, and we are working on many more so affected agencies can ensure that when they address potential harm to EFH in an environmental impact statement or other document they are meeting their obligations to consult under the Magnuson-Stevens Act.

Between the date EFH became effective for each fishery management plan and December 31, 1999, NOAA Fisheries had completed nearly 5,000 EFH consultations, almost all of which were integrated into other environmental reviews. The result has been a consultation process that focuses needed attention on potential

impacts to EFH and provides NOAA Fisheries' recommendations on how to avoid or minimize impacts, without a lot of delays and new paperwork. We are avoiding duplication with other reviews while adding a vital new consideration. Federal agencies are now starting to assess specifically the impacts of their actions on habitats used by federally managed fishery species, and they are responding to NOAA Fisheries' recommendations in their decisions.

We understand that several non-fishing industry groups are concerned about the potential impact the EFH consultation process could have on their activities. NOAA Fisheries is working with many non-fishing industries to explain the EFH consultation process by developing informational brochures for non-fishing interests, writing articles for non-fishing industry publications, and making presentations at non-fishing industry meetings. We have emphasized that non-fishing activities require an EFH consultation only if the project is federally funded, permitted, or authorized and the activity may adversely affect EFH. We are also working closely with individual industries to identify actions that can be taken to avoid impacts to EFH and obviate the need for project-by-project EFH consultations in some cases.

EFH has provided more structure and emphasis to NOAA Fisheries' review of the effects of non-fishing activities on fish habitats, and we are committed to making this a smooth process. To date, although we have heard concern from non-fishing interests about potential project delays or disapprovals, we are not aware of any major problems resulting from the thousands of consultations we have already completed. On the contrary, I believe the EFH consultation process is going extremely well.

Misconceptions About EFH

The EFH provisions of the Magnuson-Stevens Act have received a great deal of interest from parties whose activities may potentially be affected by EFH designations, including the fishing industry, non-fishing industries, and the environmental community. Some of the concerns raised about EFH have merit, but unfortunately, several common misconceptions have led a number of people to believe that EFH is something very different than what it really is. In particular, many of the concerns about EFH raised by non-fishing industries have been exaggerated. NOAA Fisheries has been working extensively with those groups to address their concerns. However, I would like to highlight some of the issues that have been raised and describe briefly our efforts to ensure that the EFH provisions of the Magnuson-Stevens Act are implemented efficiently and effectively.

However, as I indicated earlier, we currently are required to review several thousand Federal actions each year under long-standing statutory authority. Regarding the consultation process for Federal actions that may adversely affect EFH, there have been suggestions that NOAA Fisheries will use the EFH provisions of the Magnuson-Stevens Act to consult on many actions we have not reviewed previously, including land use practices and other actions occurring far inland. Our priority has always been, and will continue to be, concentrating our efforts on those actions with the greatest potential to harm marine and anadromous fishery resources. The difference under EFH is that now we are placing more emphasis on the habitat needs of the species of fish that support federally managed recreational and commercial fisheries.

Some observers have asserted that the EFH consultation process is burdensome and duplicative. We do not agree. To avoid redundancy, NOAA Fisheries has gone to great lengths to blend EFH consultations into existing environmental reviews. These other reviews consider impacts on the aquatic environment in general or on specific resources of concern such as endangered species. However, these other environmental reviews do not often specifically address effects on commercially and recreationally important species of fish and shellfish and their habitats. Building EFH assessments into these reviews is an efficient way to identify

potential harm to fishery resources while not being duplicative or burdensome.

NOAA Fisheries has heard comments that EFH provisions could evolve into a clone of the Endangered Species Act, with similar restrictions on development and potential economic consequences. As provided in the Magnuson-Stevens Act, EFH conservation recommendations from NOAA Fisheries to an action agency are non-binding. NOAA Fisheries cannot use EFH to stop or delay development. Recommended conservation measures stemming from the EFH consultation process simply require an acknowledgment by the Federal action agency that it considered the advice. Under the Magnuson-Stevens Act, Federal agencies can, and sometimes do, decide not to accept NOAA Fisheries' recommendations. The EFH provisions simply cannot be interpreted to provide the same authority as the Endangered Species Act, which imposes a substantive prohibition against any Federal agency action that is likely to jeopardize the continued existence of a listed species or adversely modify designated critical habitat for that species.

Finally, there appears to be a perception among some parties that the EFH provisions of the Magnuson-Stevens Act have led to the development of a huge new Federal bureaucracy. Nothing could be further from the truth. NOAA Fisheries allocated $2 million in new resources toward EFH in FY 1998 and $750,000 in FY 1999. We have also reprogrammed $650,000 to EFH work from other activities in FY 2000. Of this total, approximately 60 percent has been devoted to research on the habitat needs of managed species and the effects of fishing on habitat, and the remainder has gone towards assisting the Councils and implementing EFH consultations. The President's budget request for FY 2001 includes an additional $1 million for research on the effects of fishing gear on bottom habitats, and $770,000 for basic science to refine the description and identification of EFH in fishery management plans.

Reauthorization Issues

We are still working to implement the changes to fishery management policies and procedures made by the Sustainable Fisheries Act. Consequently, we have not proposed major changes to the Magnuson-Stevens Act. However, we have identified some revisions of existing provisions that may be useful to make the management process more efficient and to resolve some relatively minor problems.

Special management areas, including those designated to protect coral reefs, hard bottoms, and precious corals, are important commercial resources and valuable habitats for many species. Currently, the Federal government has the authority to regulate anchoring and other activities of fishing vessels that affect fish habitat. However, we remain concerned with threats to those resources from non-fishing vessels. We intend to work with other Federal agencies to suggest amendments to the Act to clarify, consolidate, and strengthen the Federal government's authority to regulate the actions of any recreational or commercial vessel that is directly impacting resources being managed under the Magnuson-Stevens Act.

Conclusions

The essential fish habitat provisions of the Sustainable Fisheries Act provided important new tools for NOAA Fisheries and the Councils to build and manage sustainable fisheries. Under the amended Magnuson-Stevens Act, fishery managers must account for the effects of fishing on the habitats needed by commercially and recreationally important species of fish. We must ensure that our fishery management decisions consider potential effects on the environments these species need for their basic life functions. Likewise, we must ensure that our recommendations to Federal and state agencies regarding non-fishing activities are focused on measures needed to conserve the habitats that support managed fisheries. Building sustainable fisheries requires a holistic approach that considers threats from over fishing, bycatch, habitat

loss and degradation, and other factors that affect fish stocks. The EFH provisions of the Magnuson-Stevens Act are an important component of our efforts to maximize benefits from the Nation's marine fisheries.

Mr. Chairman, this concludes my testimony. Thank you for the opportunity to discuss the essential fish habitat provisions of the Magnuson-Stevens Act. I would be pleased to answer any questions that you and members of the subcommittee may have.

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