State of California
DEPARTMENT OF TRANSPORTATION

Business, Transportation and Housing Agency

Memorandum

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To: DEPUTY DISTRICT DIRECTORS
for Environmental
DISTRICT OFFICE/BRANCH CHIEFS
for Environmental

Date: June 7, 2004

From: GARY R. WINTERS
Chief
Division of Environmental Analysis

Subject: Essential Fish Habitat Delegation Authority

In a letter dated May 21, 2004, the Federal Highway Administration (FHWA) identified the California Department of Transportation (Department) as its *non-Federal representative* to consult with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA-Fisheries) under certain circumstances, relevant to provisions of Essential Fish Habitat (EFH) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. This letter describes those circumstances in which the Department will consult with NOAA-Fisheries on EFH and when this process can be combined with the existing Section 7, Endangered Species Act consultation process.

Detailed guidance on the EFH consultation process will be provided to the Districts and Regions by August 1, 2004. This guidance will also be incorporated into the Standard Environmental Reference (SER) and all other appropriate environmental guidance documents.

The FHWA delegation authority letter is attached for your review and use.

If you have any questions regarding this memorandum, please contact Gregg Erickson, Chief, Office of Biology and Technical Assistance, at (916) 654-6296 or Deborah McKee, Senior Environmental Planner, at (916) 653-8566.

Attachment

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA. 95814

May 21, 2004

IN REPLY REFER TO
HDA-CA
File #: Essential Fish Habitat-Delegation Authority
Document #: S44655

Mr. Tony Harris, Acting Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

Attention: Federal Resources Office, Room 3500
For Gary Winters

Dear Mr. Harris:

SUBJECT: Essential Fish Habitat; Delegation Authority

In accordance with regulations published at title 50 Code of Federal Regulations, Section 600.920(c) (50 CFR 600.920(c)), *Designation of non-Federal representative*, the Federal Highway Administration (FHWA) is identifying the California Department of Transportation (Department) as its non-Federal representative to consult on our behalf with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA-Fisheries) under certain circumstances, relevant to provisions of Essential Fish Habitat (EFH) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). This delegation of authority does not alter previous delegation authority by the FHWA to the Department, pursuant to the Endangered Species Act (ESA), as outlined in our April 24, 2002, letter to the Department and only facilitates EFH consultation by utilizing existing ESA consultation procedures.

The FHWA received a "finding" letter, dated August 19, 2003, from the NOAA-Fisheries identifying appropriate means to facilitate consultation on EFH (see 50 CFR 600.920(f)(3), *NMFS finding*). This "finding" includes a recommendation to consolidate Section 7, ESA consultation, with EFH consultation. The Department should use this opportunity, or others, as identified in the August 19, 2003, letter to conduct concurrent consultations with the NOAA-Fisheries. On the other hand, no such delegation for EFH consultation authority is provided by this letter for the following: *General Concurrence*, [50 CFR 600.920(g)]; *Abbreviated consultation procedures* [50 CFR 600.920(h)]; *Expanded consultation procedures* [50 CFR 600.920(i)]; or *Programmatic consultations* [50 CFR 600.920(j)].

It should be noted that in accordance with 50 CFR 600.920(f)(ii), EFH evaluations must be clearly identified and be distinguished from other consultation information, such as that for Section 7 ESA consultation, in environmental documents. This is necessary to clearly distinguish the independent consultation requirements under MSFCMA and ESA, despite the opportunity to conduct both consultations simultaneously. Mandatory contents of an EFH assessment are identified at 50 CFR 600.920(e)(3).

Circumstances where the Department will act upon our behalf are further detailed below.

Scenario 1: No Federally listed species subject to NOAA-Fisheries jurisdiction; EFH present.

- The Department will make "no adverse effect" determinations for EFH; no consultation with the NOAA-Fisheries is required pursuant to MSFCMA.
- The Department will make "adverse effect" determinations and consult with the NOAA-Fisheries pursuant to MSFCMA. The Department is responsible in addressing all Conservation Recommendations provided by the NOAA-Fisheries or the Pacific Fishery Management Council (PFMC). This includes a detailed response to the NOAA-Fisheries, by the Department, within 30 days of receiving the recommendations (i.e., either accepting them in full, or providing an explanation for not implementing any recommendations; the FHWA must be copied on any correspondence). Further detail is provided at 50 CFR 600.920(k)(1). Concurrence in the acceptability of the Conservation Recommendations will be made by the FHWA through approval of the National Environmental Policy Act (NEPA) documentation.
- Pursuant to 50 CFR 600.920(k)(2), if any of the Conservation Recommendations are *not* to be implemented by the Department, the FHWA must be consulted and concur on any final determination that is inconsistent with the NOAA-Fisheries or PFMC recommendations. *The requirements of this consultation with the FHWA regarding non-implementation of any NOAA-Fisheries Conservation Recommendations are applicable to all aspects of EFH consultation pursuant to MSFCMA.*

Scenario 2: Federally listed threatened/endangered species subject to the NOAA-Fisheries jurisdiction; EFH present.

- The Department will make "no effect" determinations pursuant to ESA and "no adverse effect" determinations pursuant to MSFCMA; no consultation with the NOAA-Fisheries for either determination is required. The FHWA concurrence with these determinations will be evidenced by our approval of the NEPA documentation for that particular project.
- The Department will make "not likely to adversely affect" determinations pursuant to ESA and informally consults with the NOAA-Fisheries requesting concurrence from the NOAA-Fisheries with those determinations. Concurrently,
    - The Department will make "no adverse effect" determinations pursuant to EFH precluding additional consultation on EFH; or
    - The Department will make "adverse effect" determinations pursuant to EFH and consults with the NOAA-Fisheries on both EFH and ESA.
- The FHWA will make "likely to adversely affect" determinations pursuant to ESA and will consult with the NOAA-Fisheries. Concurrently,
    - The Department will continue to make "no adverse effect" determinations pursuant to MSFCMA, noting this in its submittal of the environmental document needed for formal Section 7 consultation by the FHWA.
    - The FHWA will make "adverse effect" determinations to EFH and consults with the NOAA-Fisheries pursuant to MSFCMA, in coordination with Section 7 formal consultation.

Although the FHWA will be responsible for initiating consultation for those situations where there is an adverse effect relative to both ESA and EFH, this does not preclude the Department from coordinating and/or requesting technical assistance from the NOAA-Fisheries under these circumstances. In addition, although consultation with the NOAA-Fisheries is not required when a determination of "no adverse effect" on EFH is made, this does not preclude the Department from requesting concurrence from the NOAA-Fisheries on these determinations.

While some of these situations may only occur rarely, we believe that all potential scenarios relative to integrating MSFCMA and ESA have been addressed. We emphasize that the FHWA remains ultimately responsible for compliance with Sections 305(b)(2) and 305(b)(4)(B) of MSFCMA and the Department needs to be familiar with these responsibilities. Therefore, the FHWA expects close coordination with the Department in complying with MSFCMA.

We hope this delegation of authority will work in the interests of all involved parties and further our efforts in streamlining and clarifying the procedures and responsibilities pursuant to both ESA and MSFCMA. If you have any questions or need further information, please feel free to contact me at (916) 498-5001.

Sincerely,

Gene K. Fong
Division Administrator