

#11

ADDITIONAL CORRESPONDENCE



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930-2276

APR 16 2015

NEW ENGLAND FISHERY
MANAGEMENT COUNCIL

Ernest F. "Terry" Stockwell
Chairman
New England Fishery Management Council
50 Mill Street
Newburyport, MA 01950

APR 16 2015

Dear Terry:

I am concerned about several of the Habitat Committee's recommendations for Omnibus Habitat Amendment 2 preferred alternatives. This is not the first time I have raised such concerns. You may recall our letters from February 2014 and January 2015 regarding the Draft Environmental Impact Statement (DEIS) and the direction the Amendment is going. After a decade of development, the Council may be poised to take actions that significantly weaken, rather than improve, essential fish habitat (EFH) protection in New England.

The Magnuson-Stevens Fishery Conservation and Management Act requires¹ that we "minimize to the extent practicable adverse effects" on EFH caused by fishing, and "identify other actions to encourage the conservation and enhancement of such habitat." The Council's Goals and Objectives for this Amendment² are varied, but they include the goal of "enhancing groundfish fishery productivity" and several objectives related to "improved groundfish spawning protection, including protection of localized spawning contingents; improved protection of critical groundfish habitats; and, improved refuge for critical life history stages." We have fully supported these goals and objectives throughout the Amendment development.

Given the analyses in the DEIS and additional information submitted during public comment opportunities for the amendment, I feel strongly that the Committee's recommendations for preferred alternatives do not meet the Magnuson-Stevens Act's requirements and this Amendment's goals and objectives. This should not be surprising. Agency personnel have provided consistent guidance and feedback at the Committee level, and outlined my concerns as the Committee debated and ultimately recommended its preferred alternatives. The Committee's recommendations for two areas in particular, Cashes Ledge and Georges Bank, are severely inadequate, as outlined below.

Gulf of Maine

Collectively, the Committee's recommendations for preferred alternatives in the Gulf of Maine represent a 26-percent reduction in area size from the status quo protections and a 38-percent reduction in size from the Council's previously preferred alternatives in this region. More

¹ Magnuson-Stevens Fishery Conservation and Management Act, § 303(a)(7)

² OA2 DEIS, Vol. 1, Section 3.2



important than just area size alone, the Committee's recommended alternatives are expected to result in an increase in the adverse effects of fishing on EFH and a reduction in the protection afforded juvenile groundfish habitat. The Council must carefully consider the collective suite of alternatives and the resulting impacts to both EFH protection and spawning groundfish, as described in the goals and objectives. Within these recommendations, I am particularly concerned about the Committee's recommended approach for the Central Gulf of Maine that will undo many years of protection afforded to Cashes Ledge.

Eastern Gulf of Maine

At the February 2014 Council meeting, the preferred alternative in the Eastern Gulf of Maine sub-region included the Large Eastern Maine Habitat Management Area and the Machias Habitat Management Area, closed to mobile bottom-tending gears and gears capable of catching groundfish (Alternative 2, Options 1 and 5). The Committee recently recommended the Small Eastern Maine Habitat Management Area, closed to mobile bottom-tending gear (a portion of Alternative 3, Option 1). This represents a 76-percent reduction in habitat protection from the Council's previously preferred alternative. There is not currently much mobile bottom tending gear use in this region, so these gear restrictions would do little to minimize adverse effects in the short-term. However, there are currently no habitat management areas in place in this area, so the Committee's recommendations in this sub-region would represent a step towards protecting vulnerable habitat historically used by spawning and juvenile cod and other groundfish.

Central Gulf of Maine

I am especially concerned about the Committee's recommendation for the Cashes Ledge Closure Area in the Central Gulf of Maine. The Committee is recommending a mobile bottom-tending gear closure in the Modified Cashes Ledge, Fippennies Ledge, and Modified Jeffreys Bank Habitat Management Areas, with a prohibition on all fishing on Ammen Rock (Alternative 3, without Platts Bank, Option 1.) The Modified Cashes Ledge Habitat Management Area is 26 percent smaller than the current habitat closed area, while the modification to the Jeffreys Bank Habitat Closure Area would result in more vulnerable substrate being protected in roughly the same amount of area as the status quo area. The Fippennies Ledge Habitat Management Area is small and focuses solely on the top of the ledge. This recommendation is similar to the Council's previously preferred alternative, but adds Fippennies Ledge. In our January 8, 2015, comment letter, I noted our concerns about opening the status quo groundfish closure on Cashes Ledge in light of the recent Gulf of Maine cod stock issues and expressed strong support for the status quo.

The importance of the Cashes Ledge area is not limited to the ledge itself. Because the current Cashes Ledge Groundfish Closure (Alternative 1, No Action) is more than 3.5 times larger than the Fippennies and modified Cashes Ledge areas combined, and includes the deep basin between these two ledges and Sigsbee Ridge, it includes a greater diversity of habitats than in the areas that focus on the rocky ledges.³ This diverse mosaic of habitat types has been protected from the adverse habitat effects of trawling for 13 years and supports a variety of demersal fish species, including cod, haddock, plaice, pollock, witch flounder, redfish, monkfish, smooth and thorny

³ DEIS, Vol. 3, Section 4.2.1.2, Page 221

skate, and three species of hakes.⁴ Furthermore, gillnets, which were also used to catch cod and other species in the area before it was closed, would continue to be prohibited if the status quo gear restrictions in the groundfish closed area are left in place.

The Cashes Ledge area is known to provide excellent habitat for Atlantic cod. Structured bottom habitats provide shelter and food for juvenile cod and there is a resident cod population on the ledge.⁵ Recent research has shown that cod inside the groundfish closed area are larger than cod outside the area, indicating that it provides a refuge for spawning cod as well as excellent habitat for juveniles.⁶ Research has also shown that adult cod are found in the deeper mud and sand habitats around and between the ledges.⁷

Removal of the existing groundfish closure, and the gear restrictions on all gears capable of catching groundfish, in favor of the smaller areas recommended by the Committee with more limited prohibitions on mobile bottom-tending gear (except for the very small Ammen Rock area, where all gears would be prohibited), would compromise any recovery of bottom habitats in the larger area that has occurred over the last 13 years and potentially increase the adverse effects of fishing on a diverse array of bottom habitats used by resident and migrant populations of groundfish in the area. The Committee's recommendation for the Central Gulf of Maine, in concert with other recommendations for the region, substantially reduces the overall habitat protection benefits for the entire Gulf of Maine. We believe there is insufficient information in the record to show that the Committee's recommended preferred alternative improves juvenile groundfish habitat protections and would likely fail to meet the Council's stated goals and objectives.

As we have noted before, the status quo Cashes Ledge Closure Area is not only the most protective of a wide range of vulnerable habitats, the DEIS shows that it is the most economically practicable. The DEIS concludes that, "despite the current, direct costs to the fleet in terms of effort displacement, the status quo would be expected to result in slight positive economic impacts because of the protection of habitats supporting juvenile groundfish that are susceptible to fishing disturbance⁸."

Western Gulf of Maine

The Council previously preferred the status quo Western Gulf of Maine Closure Areas, with the existing gear restrictions, in combination with a slight expansion of the existing 12-inch roller gear requirement and an exemption for shrimp trawls in a small, defined portion of the northwestern corner. The Committee is recommending a modification to the status quo that would align the eastern boundary of the Western Gulf of Maine Groundfish Closure Area with the existing Habitat Closure Area, opening 25 percent of the current total closed area.

In combination with the reduction from the current closures in the Central Gulf of Maine and the reduction from the Council's preferred alternative in the Eastern Gulf of Maine, this additional

⁴ DEIS, Vol. 3, Table 41

⁵ Sherwood, G.D. and J.H. Grabowski 2010. Exploring the life history of colour variation in offshore Gulf of Maine cod (*Gadus morhua*). ICES J. Mar. Sci. 67:1640-1649.

⁶ See G. Sherwood comment letter, DEIS Public Comment Letter #166

⁷ See G. Sherwood comment letter, DEIS Public Comment Letter #166

⁸ DEIS, Vol. 3, Section 4.2.3.2.1, page 380

reduction further jeopardizes the Council's ability to comply with the requirements of the Magnuson-Stevens Act and meet the goals and objectives of this Amendment.

Georges Bank & Great South Channel

The Council had previously not identified a preferred alternative in the Georges Bank or Great South Channel/Southern New England sub-regions. I have been and continue to be very concerned about the Committee's approach for Georges Bank. The agency has consistently raised concerns about the Habitat Area of Particular Concern (HAPC) on the Bank as well as the overall reduction in meaningful protection areas that the Committee has discussed and now recommends as preferred. Even if HAPC designation was to be removed on the Northern Edge, we would remain very concerned about opening that area to mobile bottom-tending gears.

Georges Bank

The Committee is recommending the Georges Shoal 2 Habitat Management Area and the EFH South Habitat Management Area, closed to mobile bottom tending gear (Alternative 7, Option 1). The HAPC for juvenile cod was first designated in the Omnibus Habitat Amendment 1 in 1998 and was subsequently closed to mobile bottom-tending gear in 2003 as one of the habitat management measures intended to minimize the adverse effects from fishing on EFH on Georges Bank. As we have emphasized in earlier letters to the Council, opening the area would reverse 20 years of habitat protection and recovery in an area that is highly vulnerable to the adverse effects of mobile bottom-tending gear and would be inconsistent with the Council's decision in 2007 to maintain the HAPC designation for juvenile cod in this area. As we noted in a prior letter⁹, it seems unlikely that maintaining the gear restrictions in the Closed Area II Habitat Closed Area/HAPC alone would be sufficient to improve habitat protection for juvenile cod and other groundfish species on Georges Bank. Some additional area of vulnerable habitat along the northern edge of the bank would be needed in order to meet the goals and objectives of the Amendment.

Proponents of Alternative 7 suggest that the two Alternative 7 areas are of equivalent habitat value to the current habitat closure areas on Georges Bank. However, the areas of Alternative 7, despite the larger size¹⁰, fall far short of the current Closed Area II Habitat Closure Area in several key metrics, including a lower percent coverage of gravel-cobble¹¹, almost no juvenile groundfish hotspots,¹² and low abundance for most groundfish species (see below). The Georges Shoal 2 Habitat Management Area has little to no EFH for cod, haddock, pollock, and three skate species. EFH designations are based on the relative abundance of fish caught in trawl surveys, as well as other metrics. Therefore, the absence of EFH designations in this area demonstrates that groundfish occur in low numbers there because the habitat is largely unsuitable. One evaluation that illustrates this well is the EFH Overlap Analysis for the Georges Bank Alternatives.¹³ The EFH Overlap Analysis shows that the Georges Shoal 2 Habitat Management Area has the lowest total score of all of the areas under consideration on Georges Bank. The Georges Shoal 2 Habitat Management Area also has the lowest count of species represented and the lowest count

⁹ Letter to Chairman Stockwell, January 8, 2015.

¹⁰ HAPC = 650 km²; Georges Shoal 2 + EFH South = 1,316 km², DEIS Vol. 3, Table 48

¹¹ 65 percent in HAPC vs. 33 percent (Georges Shoal) and 46 percent (EFH south), DEIS Vol. 3, Table 48

¹² 19 in HAPC; 2 Georges Shoal + EFH South combined, DEIS Vol. 3, Table 68

¹³ DEIS, Volume 3, Section 4.2.1.4.9, Table 51, page 258

of EFH designations represented, despite being one of the larger mobile bottom tending gear closure alternatives in the region.

The area within Alternative 7 has very little current trawl or scallop dredge activity from which adverse effects are accruing, particularly in the most recent few years. This conclusion is based on the modeling results for the accrual of adverse effects over time (2000, 2005, and 2009)¹⁴, as well as the estimates of potential revenue displacement and the number of hours fished by different gear types in more recent years (2010-2012).¹⁵ Closing the area to bottom trawls and dredges would not displace much, if any, fishing, by those gear types and would not improve or minimize adverse effects of those gears in the region. On the other hand, opening the HAPC would result in an increase in adverse effects on even more vulnerable substrate.

Using nearly every metric in the DEIS, the areas in Alternative 7 do not have “equivalent habitat protection value” as the current closures on Georges Bank. It appears, particularly in concert with reductions in habitat protections elsewhere, that this measure would result in an increase in adverse effects on vulnerable habitat. Further, this alternative would fail to improve the protection of critical habitats that enhance survival, growth, and recruitment of juvenile groundfish. The Committee’s discussion and other public input, has, to date, failed to provide compelling rationale that demonstrates the information in the DEIS is incorrect or that other information about Alternative 7 meets the established goals and objectives.

At its April 9, 2015, meeting, the Committee voted to add an alternative that would modify the current Closed Area II Habitat Closed Area to open the most northern part of the area, close a portion of Closed Area II that is not currently included in the habitat closed area, and combine it with the Georges Shoal 2 Habitat Management Area from Alternative 7. The new Northern Edge area would appear to provide roughly equivalent protection as the existing area and allow some access to the heaviest concentration of scallops in the area. The Georges Shoal area does not contribute to the overall protection of the region, as described above. When compared to the existing closures, including the Closed Area I closures and the Nantucket Lightship Areas, and in conjunction with the Committee’s recommendation in the Great South Channel, this would not likely result in an “improvement” to juvenile groundfish habitat protection overall.

Great South Channel/Southern New England

The Council had not previously identified a preferred alternative in this sub-region. The Committee is recommending Alternative 5, Nantucket Shoals, closed to mobile bottom-tending gear, with an exemption for clam dredges in the majority of the area for at least three years, while a follow-on action to identify more discrete clam access areas is developed. The Habitat Plan Development Team originally identified four smaller areas of complex, stable substrate as potential habitat management areas in the Great South Channel. In early 2012, an analysis was completed to combine the area into a single habitat management area with approximately equivalent habitat protection value. Thirty-two percent, or 742 km², of Alternative 5 is vulnerable substrate¹⁶, Alternative 4 covers a greater percentage of the vulnerable substrate (40 percent, or 1,018 km²) and Alternative 3 covers an even greater percentage of vulnerable

¹⁴ DEIS, Vol. 1, Section 4.2.2, page 149-158

¹⁵ DEIS Vol. 3, Section 4.2.3.4, Table 94

¹⁶ Percentage of gravel, cobble, and boulder, DEIS Vol. 3, Section 4.2.1.5, Table 54

substrate (46 percent, or 1,533 km²) and includes juvenile cod hotspots. The Committee's preferred alternative would not provide as much protection as the other two alternatives, but may be more practicable by minimizing the economic impact on the groundfish and scallop fleets.

However, the clam exemption option being put forward by the Committee further weakens an already diluted alternative. Recent information provided by the clam industry clearly shows that they are fishing in parts of the Nantucket Shoals/Great South Channel area identified by the Swept Area Seabed Impact model as cobble and boulder-dominated substrates. These substrates are more vulnerable to the adverse effects of fishing than the sandy sediments that clam dredges were assumed to be fishing in.¹⁷ This apparent contradiction stems from the substrate classification types where cobble and boulder-dominated substrates can include patches of sand and gravel. Clearly, clam dredges are being used successfully in this type of patchy bottom, apparently because of the short tows in selected areas where clam dredge operators know they can avoid damage to the gear. Given what the DEIS concludes about the impacts of hydraulic clam dredges on the type of habitats where they are fishing¹⁸, I do not support the clam dredge exemption in the Great South Channel, or anywhere on Georges Bank, in substrates identified as more vulnerable. An exemption for clam dredges would substantially reduce or nullify any of the benefits gained from a prohibition on bottom trawls and scallop dredges and would not contribute to the overall habitat protections in the region.

Our concerns about the gear modifications options (Options 3 and 4) are well known.¹⁹ Unfortunately, the Committee is recommending Option 4, a prohibition on groundcables, as a management option for the two Cox Ledge Habitat Management Areas. The Committee and members of the public have consistently stated that these gear modifications are viable alternatives, largely based on their use as habitat conservation measures in other regions of the country. This is not a compelling argument. It is a vague and broad comparison that does not consider specific analyses that supported such use on the west coast, and ignores the information compiled by the Plan Development Team with respect to gear modification for impact mitigation within our region. The DEIS states unequivocally that these measures cannot be shown to minimize adverse effects on habitat in our region.²⁰ Because of the unknown impact to catch efficiency, the potential for the swept area reductions to be cancelled out by longer tows means that we cannot rely on this as a measure to effectively minimize adverse effects. No new information has been provided that would indicate that this measure would be likely to minimize adverse effects from fishing and should not be used in an attempt to comply with that requirement.

Combined Habitat Management Alternatives

Looking at the habitat management alternatives collectively, the combination of preferred habitat management areas being recommended by the Committee results in meaningful reductions in overall habitat protection and would fail to adequately minimize the adverse effects from fishing on EFH in the region. Our preliminary evaluation of the Committee's recommended

¹⁷ The effects of hydraulic clam dredges in cobble and boulder substrates were not evaluated because it was assumed, based on input from the clam industry, that the gear could not be operated in these habitat types.

¹⁸ DEIS, Vol. 3, p. 156 and Vol. 1, Section 4.2.2.1 and Figure 5, pp 136-138.

¹⁹ Letter to Chairman Stockwell dated February 21, 2014.

²⁰ DEIS, Vol. 3, Section 4.1.2.3, page 159

combination of measures indicates they do not appear to comply with the Magnuson-Stevens Act requirement to minimize to the extent practicable the adverse effects from fishing on EFH. As noted above, several components of these alternatives would also fail to satisfy the goals and objectives and purpose and need of the Amendment.

Spawning Alternatives

The Committee contends that the proposed Gulf of Maine Cod Protection Measures in Framework Adjustment 53 to the Northeast Multispecies Fishery Management Plan are sufficient to meet the Habitat Amendment's objective of "improving groundfish spawning protection." However, the collective set of recommendations, including those for the year-round habitat protection measures, need to be considered when determining if the goals and objectives related to spawning protection would be achieved.

Framework 53, if approved as recommended, would modify the existing set of rolling closures by removing the April closures, slightly modify the May and June closures, and would implement new closures in the winter (November–January). Framework 53 would also maintain the October and March rolling closures that are only applicable to the small fraction of the groundfish fleet within the common pool.

The Framework 53 Environmental Assessment submitted by the Council concludes that the impacts of the measures on Gulf of Maine cod and other groundfish are mixed. There are likely positive impacts on the winter spawning Gulf of Maine cod population, but likely negative impacts on the stock's spring spawners.²¹ Likewise, there would be some negative impacts on other spring spawning groundfish, including winter flounder, yellowtail flounder, American plaice, and haddock, and, to a lesser extent, witch and windowpane flounder from the removal of the April closure. The only species for which a slight positive impact would be expected is ocean pout, which spawns in the fall and winter. All of these groundfish stocks, except for haddock, are either under a rebuilding plan and/or have stock sizes trending downward. I find it impossible to rationally understand how, in light of the Framework 53 analyses, the Committee's recommended spawning alternative meets the objective of improving groundfish spawning protection.

It is also important to note that modifications to the year-round closures will have impacts on spawning fish, the potential for which is not considered in the impacts discussion in Framework 53. While fish do not spawn year-round, the year-round groundfish closures have provided some level of spawning protection by excluding disruptive gears from areas where spawning fish congregate. The potential opening of the Cashes Ledge Groundfish Closure to all gears throughout the basin and non-mobile bottom-tending gears on the ledge itself could have negative implications for cod, witch flounder, haddock, and plaice.²² Gillnets have been shown to disrupt cod spawning aggregations.²³ In addition, the DEIS concludes that both Alternatives 3 and 4, similar to the Committee's preferred alternative, would have a slightly negative impact on

²¹ FW 53, Section 7.1.2.1.3.2, page 210

²² FW 53 Appendix II (maps of spawning condition fish in block 130)

²³ Dean, M.J. et al. 2012. Disruption of an Atlantic cod spawning aggregation resulting from the opening of a directed gill-net fishery. *N. Amer. J. Fish. Mgmt.* 32:124-134.

large-mesh spawning groundfish relative to the status quo²⁴, although low sampling contributes to a high amount of uncertainty in this region. We also know that the cod population on Cashes Ledge is resident and less productive than other, more mobile cod populations.²⁵ As such, careful consideration should be given to the potential impacts from allowing even non-mobile bottom-tending mobile gear capable of catching groundfish into the area where this sub-component of the cod stock is present. Once a sub-population of spawning cod is lost, it is not likely to recover.²⁶ Protection of localized sub-populations or spawning contingents was pointed to as being particularly important under the goals and objectives. In addition to the habitat protection described above, the status quo Cashes Ledge Groundfish Closure Area would continue to provide this protection.

Additionally, the Council's currently preferred measure, the implementation of a discrete closure within portions of blocks 124 and 125 from November through January (Massachusetts Bay Spawning Protection Area), would be spatially covered by the Framework's measures. This action would implement additional gear restrictions (i.e., prohibit the use of mid-water trawls, purse seines, and recreational groundfish fishing²⁷) beyond what the Framework's Cod Protection Measures would implement. While this would be an improvement of the winter closures, it is a small proportion of the areas and is likely to have a minimal impact on protecting spawning fish beyond the closures recommended in the Framework.

In addition to these changes in the Gulf of Maine, the Habitat Amendment is considering spawning measures on Georges Bank. The currently preferred alternative would change Closed Area II and Closed Area I Habitat Closed Area North from year-round to seasonal closures from February 15–April 15 of each year. Currently exempted gears would be permitted into the areas during the seasonal spawning closures, including scallop dredges, mid-water trawls, other pelagic gear, and trap gear. There is no explanation why these gear types would be allowed in these spawning areas, but not in others. As a result, the only change is in the reduction in season from year-round to 3 months. The DEIS concludes that the Committee's recommended preferred alternative (Alternative 3, with options B and C) would result in negative impacts on the groundfish resource and productivity, relative to the status quo.²⁸

Given the Council's conclusions in Framework 53 and the DEIS on the impacts to groundfish from the Committee's preferred alternatives (both spawning and habitat management), it is difficult to see how the goal of "improving groundfish spawning protection, including protection of localized spawning contingents or sub-populations of stocks" would be met with the implementation of those recommendations alone. To address this, I feel strongly that the Council should consider restoration of some or all of the April rolling closure blocks, seasonal or year-round closures of Cashes Ledge to gear capable of catching groundfish, increased gear restrictions in the existing and proposed seasonal closures and in the Georges Bank proposed spawning modifications, or some other additional measures in order to meet the goals and objectives of the Amendment.

²⁴ DEIS, Section 4.2.2.4.2, page 290

²⁵ Sherwood, G.D. and J.H. Grabowski 2010. Exploring the life history of colour variation in offshore Gulf of Maine cod (*Gadus morhua*). ICES J. Mar. Sci. 67:1640-1649.

²⁶ Ames EP (1997) Cod and Haddock Spawning Grounds in the Gulf of Maine. Island Institute, Rockland, Maine

²⁷ DEIS, Vol. 3, Section 2.2.1.3

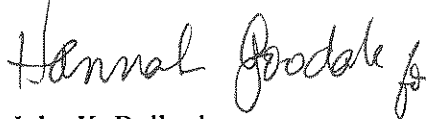
²⁸ DEIS, Section 4.3.2.2.4, Page 525

Conclusion

In developing the Omnibus Amendment, the Council concluded that habitat specific management measures were necessary to continue to comply with the Magnuson-Stevens Act requirements to minimize adverse effects.²⁹ The areas that were implemented as habitat protection areas in Northeast Multispecies Amendment 13 and Scallop Amendment 10 have been used to demonstrate compliance with this requirement since 2004 across most of the Council's fishery management plans. While there is no requirement to necessarily maintain or increase the footprint of habitat protection in size alone, the Council needs to demonstrate that the new suite of habitat protection measures would continue to minimize to the extent practicable the adverse effects from fishing on EFH and improve juvenile groundfish habitat and spawning protections. There is a compelling amount of analysis in the DEIS and many additional studies provided for the Council's consideration that strongly suggest the Committee recommendations have not made use of the best available scientific information, as it pertains to habitat protection and long-term improvements for groundfish spawning. I am very concerned about this. It is critical that the Council relies upon the best scientific information available when making its final decisions because we cannot approve measures that are contrary to that information. Moreover, there is an appearance that the collective suite of alternatives being recommended to the Council by the Committee substantially decreases habitat protection in New England, and fails to meet the Amendment's goals and objectives. For the reasons previously outlined, this is particularly evident in the Central Gulf of Maine and on Georges Bank. Based on our preliminary evaluation of the Committee recommendations, we believe we would not be able to approve substantial portions of the Amendment if the Council adopts the Committee recommendations in full.

I strongly encourage all of the Council members to consider the long-term implications of the decisions to be made at this upcoming meeting.

Sincerely,



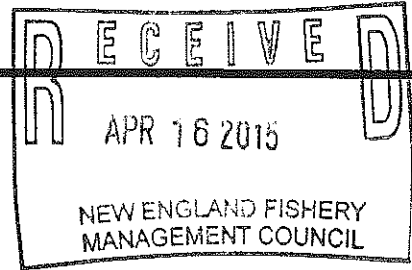
John K. Bullard
Regional Administrator

cc: Thomas Nies, NEFMC Executive Director
Richard Robins, MAFMC Chairman
David Preble, NEFMC Habitat Committee Chairman

²⁹ A13, Section 4.2.7.1.1, page I-204; DEIS Vol. 1, Section 1.2.2.1

Joan O'Leary

From: MARSHFIELD@aol.com
Sent: Wednesday, April 15, 2015 7:13 PM
Subject: **No Action Vote** requested next week



4/15/2015

Dear National Marine Council and staff members

Please vote NO ACTION next week in the requested DHRA / Gulf of Maine / Stellwagen Bank closure area being considered.

The science is faulty, you can't undo a congressional act that was started to keep the area open in the first place without congress agreeing to close it and a yes vote is a knee jerk reaction that will immediately negatively impact thousands of families and put hundreds out of business in the charter and recreational sectors.

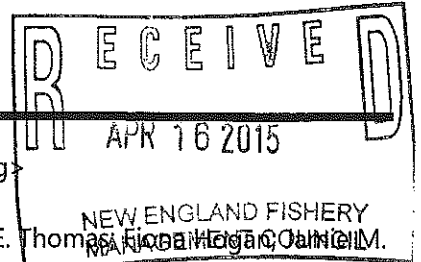
Please vote NO ACTION on the Western Gulf of Maine Stellwagen DHRA.

Thank you

Capt. Brad White
White Cap Charters LLC

PO Box 489
149 Old Main St
Marshfield Hills, MA 02051
tel: 781.834.0112
Marshfield@aol.com

Joan O'Leary



From: Michael Colleary <michael_colleary@miltonhospital.org>
Sent: Thursday, April 16, 2015 8:11 AM
To: Chris Kellogg; Deirdre Boelke; Demet Haksever; David E. Thomas; Pat Fiorelli; Joan O'Leary; Jonathon M. Peros; Lou Goodreau; Lori Steele; Maria T. Jacob; Pat Fiorelli; Rachel Feeney; Sherie Goutier; Sandy Stone; Tom Nies; Woneta M. Cloutier
Subject: DHRA

Hello,

My name is Michael Colleary. Please vote for no DHRA on Stellwagen Bank. I fish recreationally and hire charters too. Closing fishing grounds that are used by nearly every fishing boat on Massachusetts South Shore is damaging to the economy.

Stellwagen was set aside as a protected sanctuary. Mining, Fuel Exploration and Gambling were never to be done there.

I believe allowing a Closure of any type would start a snowball of closures that would outlaw fishing all together and that is just wrong.

Thank you for your time.

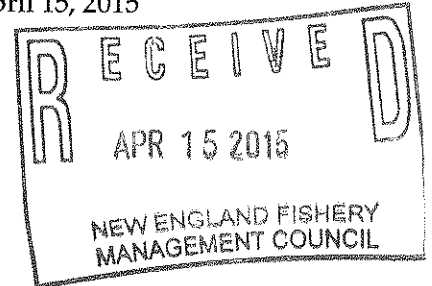
Michael Colleary
Pembroke MA.



EARTHJUSTICE
BECAUSE THE EARTH NEEDS A GOOD LAWYER

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

April 15, 2015



Tom Nies
Executive Director
New England Fishery Management Council
tnies@nefmc.org

RE: Earthjustice Letter to GARFO dated April 10, 2015 regarding OHA2

Dear Tom:

Please find the attached letter from Earthjustice to GARFO regarding the most recent Habitat Committee recommendations for the Omnibus Habitat Amendment 2. Although it is addressed to John Bullard, this letter should be included in the briefing materials for the April 2015 Council Meeting and available for the Council's consideration. Please call me if you have any questions and thanks in advance for your time.

Best,

Erica A. Fuller
Attorney
Earthjustice
508 - 400 - 9080 (C)

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mb, pmf - 4/16/15



Mr. John K. Bullard
Regional Administrator NOAA Fisheries
Greater Atlantic Regional Office
55 Great Republic Drive
Gloucester, MA 01930-2276

April 10, 2015

Dear Mr. Bullard,

We are writing regarding the Omnibus Habitat Amendment 2 (OHA2). Unfortunately, the Habitat Committee (Committee) recommendations made during its March 23-24 meeting represent significant rollbacks from existing habitat protections and would not meet legal requirements to minimize the adverse impacts of fishing to the extent practicable, and ensure the conservation and enhancement of EFH for each FMP.¹ The National Marine Fisheries Service (NMFS or NOAA Fisheries) should advise the New England Fisheries Management Council (Council) to choose additional and/or other alternatives in order comply with the Magnuson-Stevens Act, the Administrative Procedure Act (APA) and to meet the goals and objectives of this amendment.

While we appreciate that based on the most recent scientific information some boundaries for protecting EFH may change, and that if fully justified the total area protected could potentially be reduced through this action, the Committee recommendations are extreme and represent such significant rollbacks from status quo EFH protection we are confident they would not pass legal review. As part of reaching our conclusion, we highlight the following:

- **A 35-percent loss in the total EFH area protected in the Gulf of Maine would occur if the Committee recommendations are approved:²**
 - Small Eastern Gulf of Maine HMA with Option 1;
 - Central Gulf of Maine Alternative 3, Option 1, without Platts Bank (Modified Cashes Ledge, Modified Jeffreys Bank, Fippennies Ledge, Ammen Rock);
 - Western Gulf of Maine habitat closure, Western Gulf of Maine groundfish closure with the eastern boundary shifted to match the habitat closure, Alternative 7a (roller gear), and Alternative 8 (shrimp exemption).³

¹ 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a)(9), (10); (b).

² Currently 4,902 km² are protected in the Gulf of Maine; the preferred alternative proposes to protect 3,196 km². See DEIS Volume I, Table 33, p. 369/483.

- **An 88-percent loss in the total EFH area protected on Georges Bank would occur if the Committee recommendation is approved:**⁴
 - Alternative 7, option 1: CAII EFH South HMA MBTF & Georges Shoal 2 MBTG.
- **A 65-percent loss in the total EFH area protected in the Great South Channel would occur if the Committee recommendations are approved:**⁵
 - Alternative 5, option 1: Nantucket Shoals HMA;
 - Cox Ledge HMAs (1 and 2), with a prohibition on trawl ground cables with bridles capped at 30 fathoms per side, and a prohibition on hydraulic clam dredges.
- **The Committee recommendations do not improve spawning protections consistent with the Magnuson-Stevens Act and the goals and objectives of the OHA2:**
 - In the Gulf of Maine, NE Multispecies (Groundfish) Framework 53 spawning and cod protection measures and Alternative 3 (Massachusetts Bay Spawning Protection Area);
 - On Georges Bank, Alternative 3 (Closed Area I North and Closed Area II, Feb 1-April 15) with Options B and C;
 - No spawning protections for any species affected by the OHA2 other than groundfish.
- **Rather than propose new or additional protections in the identified habitat areas of particular concern (HAPCs), the Habitat Committee recommended opening up significant portions of the Cashes HAPC, the entirety of the Northern Edge HAPC, and an exemption to allow highly destructive clam dredging within the proposed Great South Channel HAPC area.**

In their totality, these alternatives represent a nearly 70-percent reduction in the total EFH area protected, fail to adequately protect spawning habitat, and fail to protect the areas identified as particularly valuable EFH. These recommendations do not meet the goals and objectives of this amendment which include *enhanced* groundfish productivity, *improved* spawning protection, *improved* protection of critical groundfish habitats, and *improved* refuge for critical life history stages for all managed species (i.e., omnibus).⁶ For comparison, the status quo groundfish/habitat management areas amount to approximately 10-percent of the total area

³ The shrimp exemption area (23-percent) was removed from the overall footprint of the WGOM habitat box for the purposes of this calculation. Alternatively, the roller gear exemption could provide a rationale for setting the whole area to zero protection.

⁴ Currently 10, 801 km² are closed on Georges Bank; the preferred alternative proposes to close 1,303 km². The inclusion of this alternative is charitable in light of the scallop and lobster access. See DEIS Volume I, Table 33, p. 369/483.

⁵ Currently 7,285 km² are closed in the Great South Channel; the preferred alternatives propose to close 2,563 km². See DEIS Volume I, Table 33, p. 369/483.

⁶ See OHA2 pp. 76-77, available at:

<http://s3.amazonaws.com/nefmc.org/14haboa2eisvol1summaryaffectedenvironment.pdf>

under the Council's jurisdiction, however, under the Habitat Committee's recommendations, this percentage drops to just 3-percent. Further, the total area slated to lose protected status (15,926 km²) is larger than the size of Connecticut and Rhode Island combined (15,220 km²).⁷ In addition to doing little, if anything, to enhance or improve EFH protection consistent with the law, these recommendations are inconsistent with the guidance of the Intergovernmental Panel on Climate Change⁸ and NOAA Fisheries own plans for habitat and adaptation which urge robust habitat protection in order to build resiliency against the consequences of rapid climate change.⁹

In the Gulf of Maine, where the Council had already identified its preferred alternatives for the DEIS (5,874 km²), the Committee recommended cropping the footprint by another 2,678 km², or a reduction of 46-percent over the Council's previously chosen preferred alternatives. Specifically, the Committee recommended eliminating the entire Machias HMA (rather than addressing or eliminating the grey zone where Canadian effort overlaps effort in a small portion of the HMA), eliminating the Large Eastern Maine HMA (which contains greater diversity of habitat than the Small Eastern Maine HMA and affords more protection for juvenile groundfish), eliminating a quarter of the Western Gulf of Maine Groundfish Closed Area (the removal of which has not been analyzed in the OHA2 and only been analyzed for groundfish in Framework 48), reducing the Cashes Ledge Groundfish Closed Area by sixty percent (any reduction in this closed area, known for its spectacular species and habitat diversity including a rare offshore kelp forest would not be acceptable based on the best available science, or precautionary in light of the lack of survey data for this area and the depleted status of Gulf of Maine cod which demands protection of Gulf of Maine cod EFH within the Cashes Ledge

⁷ Connecticut (12,542) + Rhode Island (2,678) = 15,220 (in km²). *See* http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_area.

⁸ The Intergovernmental Panel on Climate Change (IPCC) is the international body for assessing the science related to climate change, under the auspices of the United Nations (UN) and World Meteorological Organization (WMO). *See* <http://www.ipcc.ch/report/ar5/index.shtml>.

⁹ *See* National Fish, Wildlife and Plants Climate Adaptation Strategy, National Fish Wildlife and Plants Climate Adaptation Partnership. 2012. Association of Fish and Wildlife Agencies, Council on Environmental Quality, Great Lakes Indian Fish and Wildlife Commission, National Oceanic and Atmospheric Administration, and U.S. Fish and Wildlife Service. Washington, DC, <http://www.wildlifeadaptationstrategy.gov/pdf/NFWPCAS-Final.pdf>; *see also* National Fish, Wildlife and Plants Climate Adaptation Partnership (2012). Chapter 3: Climate Adaptation Goals, Strategies & Actions. <http://www.wildlifeadaptationstrategy.gov/strategy.php>.

GCA),¹⁰ reforming and shrinking the Jeffrey's Bank Habitat Closure and adding a fraction of only one of two proposed areas in Eastern Maine. All of these regressive decisions were made against a backdrop of over 150 thousand public comments supporting the new Eastern Maine preferred alternatives in the DEIS and No Action in the remainder of the Gulf, including comments providing new data and analysis that support retaining these areas as they were proposed in the DEIS.

On Georges Bank and in the Great South Channel, where the Council has not selected preferred alternatives, the Habitat Committee selected "the industry" proposed alternatives. On Georges Bank the Committee rejected alternatives proposed by NOAA Fisheries and multiple conservationist groups, and selected the alternative specifically identified in the NOAA Fisheries letter as an inadequate option.¹¹ The Committee ignored NOAA Fisheries' warnings that the northern edge of Georges Bank should remain off limits to damaging trawl fishing and advice to protect additional areas near the northern edge. Without any actual data reflecting the estimated value of accessible scallops if existing Closed Areas I and II were reopened, the Committee nonetheless justified its actions based on the need to access valuable scallops in the northern edge. The data presented in recent SAFE reports do not support this justification nor the economic valuation of Northern Edge Alternative 8, the only Georges Bank alternative that offers significant EFH protection by capturing more SASI LISA clusters than any other proposed alternative.

The primary emphasis of the Magnuson-Stevens Act's EFH provisions is to minimize the adverse effects on habitat caused by fishing; and it is simply not practicable to provide such sweeping scallop industry access in order for that industry to maximize its short-term economic gains as much as possible when the area that is identified as holding positive long-term biological benefits for overfished groundfish stocks in rebuilding plans. The alternatives that appear to be favored right now (Alternative 7 and two new alternatives added at the

¹⁰ See DEIS, Vol II, p. 392/456 (discussing unique nature of the closed area). More than the Cashes Ledge HAPC is required. The DEIS recognizes the Cashes Ledge GCA as an important spawning ground for Gulf of Maine cod. See DEIS, Vol. III, p. 101 and Table 17. This is a known cod abundance area and there continue to be remnant populations of resident and migratory cod in the Cashes Ledge GCA. Further, this area represents EFH for a wide range of other commercial species including haddock, pollock, American plaice and others. Any action to remove protections from this area that has benefitted from over a decade of limited benthic disturbance from fishing would be irresponsible and inconsistent with the substance, the goals and the objectives of the Amendment.

¹¹ See January 8, 2015 letter from John Bullard to Terry Stockwell at pp. 3-4 ("While Alternative 7 would close roughly double the amount of area as the HAPC, it is not equivalent in terms of habitat protection and thus may not compensate for the adverse effects of opening a portion of the HAPC. The DEIS5 concludes that the two habitat management areas of Alternative 7 would be expected to result in slightly negative habitat impacts relative to the status quo and neutral impacts relative to several of the other alternatives, despite its larger size.").

Committee's April 9, 2015 meeting) are inconsistent with the goals and objectives of this amendment, and are arbitrary and capricious under the APA and inconsistent with the Magnuson-Stevens Act's requirements to minimize to the extent practicable the adverse effects of fishing on EFH, and to take other actions to conserve and enhance EFH.¹²

I. PUBLIC COMMENT ON THE DEIS PROVIDES A BASIS FOR NEW ALTERNATIVES THAT MEET LEGAL MANDATES

As the vast majority of the 159,502 public comments submitted on the draft environmental impact statement (DEIS) pointed out, the OHA2 has fundamental flaws, including that it fails to protect habitat for spawning and juvenile fish, and it fails to protect prey as a component of essential fish habitat for managed species, consistent with the Magnuson Stevens Act. In addition, NOAA Fisheries provided substantive comments and EFH recommendations¹³ on numerous issues where the current proposed action is inadequate, and recommended approaches that would meet legal requirements and the Agency's policy goals.¹⁴ A significant amount of new information and analysis was presented during public comment that must be meaningfully considered as part of this action and incorporated into the analysis and final decision-making.

The National Environmental Policy Act (NEPA) requires that relevant new information be carefully considered as part of the final EIS, and specifically in this case the new information requires that existing or new alternatives analyzed in light reasonable concerns raised by public comment. Specifically, the new information provides a basis for new or reconfigured Habitat Management Areas (HMAs) where there has already been significant scientific analysis. These alternatives include the following: (1) Stellwagen Bank HMA as Atlantic Cod EFH to protect sandlance (i.e., food for grow to maturity); (2) HMA Alternative that Seasonally Protects River Herring as Atlantic Cod EFH (i.e., food for grow to maturity); (3) Revision of management for existing HMA Alternative so they will Protect Spawning Atlantic Herring in addition to other functions; and (4) a Multi-Function HMA for near-shore Gulf of Maine that protects spawning and juvenile groundfish, spawning Atlantic herring, and considers other forage concerns (i.e. river herring hotspots), discussed further below.¹⁵ Additionally, NOAA Fisheries and the Council have failed to provide any meaningful analysis of substantial new information on

¹² 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a)(9), (10); (b).

¹³ 50 C.F.R. § 600.815(b) ("NMFS will provide such recommendations for the initial incorporation of EFH information into an FMP and for any subsequent modification of the EFH components of an FMP.").

¹⁴ See January 8, 2015 and March 16, 2015 letters from NOAA Fisheries Regional Administrator John Bullard to NEFMC Chairman Terry Stockwell.

¹⁵ Comment Letters are available at: <http://s3.amazonaws.com/nefmc.org/1-OHA2-Public-comment-letters.pdf>. See Conservation Law Foundation at pp. 133-197; see also Pew Charitable Trusts Letter at pp. 665-703.

groundfish habitat use (i.e., *persistence*) offered by the Nature Conservancy,¹⁶ most of which supports choices different from those being made by the Council, including selection of Alternative 8 on Georges Bank, maintaining Closed Area 1, and choosing Alternative 3 (not 5) in the Great South Channel without allowing dredging of the bottom (see Committee decisions made April 9, 2015).

A. The OHA2 Fails to Identify and the Committee Failed To Recommend any Alternatives that Protect Prey as EFH for Managed Species Consistent With the Magnuson Stevens Act

As our March 20, 2015 letter discussed, there are legal obligations to protect prey as a component of EFH for managed species (*see also* CLF et al, February 20, 2014, Pew Charitable Trusts January 8, 2015). The Magnuson-Stevens Act defines EFH as those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity. 16 U.S.C. § 1802(10). If an area contains an important food source for a managed stock, that area should be designated as EFH if there would be adverse impact on the managed species in the absence of that prey.¹⁷ The presence of prey contributes to the quality of foraging habitat and is a component of EFH. With regard to prey, the DEIS needs to be improved in order to: (1) address prey species distributions in the text description of the alternatives; (2) provide maps for prey species not managed by the Council; and (3) adequately analyze feeding as a factor in the adverse impacts analysis or the development of the HMAs (at present, the DEIS merely summarize what managed species eat for food).¹⁸ Forage fish such as sandlance, alewives, blueback herring, and Atlantic herring have been identified as key prey species for Atlantic cod, haddock and other managed fish in the DEIS and other scientific documents in the record. The existing analysis, supported by additional information received during the public comment period, require the adoption of alternatives to protect prey as a component of EFH for managed species.¹⁹

At the Committee meeting on March 23, 2015 Earthjustice commented on the need to update the text descriptions in the DEIS. We are concerned that all of the discussion about prey, a critical component of EFH for managed species, is in Appendix B, rather than in the text

¹⁶ *See supra* at fn 15, pp.603-664.

¹⁷ FMP's "shall" minimize adverse effects on EFH to the extent practicable, 16 U.S.C. § 1853(a)(7). Feeding (prey) is an essential element of EFH. 16 U.S.C. § 1802(10). The regulatory definition of "adverse effect" includes loss of prey and its habitat if it modifies the quality or quantity of EFH. 50 C.F.R. 600.810(a).

¹⁸ The EFH designations for the managed species in Volume II also need to be updated to include the prey species information currently in Appendix B, so that the textual descriptions appropriately describe EFH consistent with the regulations. 50 C.F.R. §§ 600.815(a)(i)(1), (iv)(B).

¹⁹ The Pacific Fishery Management Council has recently identified prey as a component of foraging EFH in both their salmon FMP and groundfish FMP. *See* Pacific Coast Salmon Fishery Management Plan, Appendix A; *see also* Pacific Coast Groundfish Fishery Management Plan, Appendix B2.

descriptions found in the EIS. The relevant regulations state: "FMPs must describe and identify EFH *in text* that clearly states the habitats or habitat types determined to be EFH for each life stage of the managed species," 50 C.F.R. 600.815 (a)(1)(italics added); and "[i]f there are differences between the descriptions of EFH in text, maps, and tables, *the textual description is ultimately determinative of the limits of EFH,*" 50 C.F.R. 600.815 (a)(4)(B) (italics added). Further, the definition of adverse effect "specifically mentions the loss of or injury to prey species and their habitats as potential adverse effects to EFH because, as mentioned above, prey can be a vital component of habitat for managed species."²⁰ However, as an example of the OHA2's treatment of prey as a component of EFH, the text description for Atlantic cod fully describes the physical characteristics of EFH for all life stages of cod (eggs, larvae, juvenile and adults) and other relevant information,²¹ yet nothing directs the reader toward the updated (revised summer 2014) lists of prey species for Atlantic cod found in Appendix B or other information gleaned by the Planning Development Team on the importance of prey species and habitat.²² The EFH designations for the managed species in Volume II must be updated to include the prey species information currently in Appendix B, so that the textual descriptions appropriately describe EFH consistent with the regulations.

NOAA Fisheries and the Council are clearly well aware of the primacy that EFH text descriptions have over all other presentations or definitions for EFH. This issue was discussed extensively at the April 9, 2015 Committee meeting by NOAA Fisheries staff when making decision about how to reconcile questions about EFH for scallops, black back flounder, and juvenile cod (see meeting motions for April 9, 2015). It appears arbitrary (and shortsighted) to the public interested in the prey dimensions of EFH to neglect prey in the EFH text descriptions when such text descriptions are being addressed for other interested parties.

Scientific information presented during public comment demonstrates that prior analysis could be used to support alternatives that protect prey as EFH consistent with the law including:

- **A Stellwagen Bank HMA for the conservation of sandlance as Atlantic Cod EFH.** Stellwagen Bank has been recognized as a hotspot for cod feeding on sandlance in the recent cod stock assessment and in peer reviewed publications (Richardson *et al.*, 2014: Can. J. Fish. Aquat. Sci. Vol. 71). Thus, this portion of cod EFH (see DEIS Volume 2, Map 41) is particularly important to cod as a feeding area and should be protected as an HMA with measures suitable for protecting cod and their prey. The boundary of the areas is shown approximately in Richardson *et al.*, but could also be defined by depth contour around the bank (depth=60 meters). This alternative has been described in previous letters (CLF *et al.*, 2014 and Earthjustice Jan 8, 2015).

²⁰ See Final Rule and regulations implementing EFH, 67 Fed. Reg. 2343, 2347 (Jan. 17, 2002).

²¹ See Volume II, pp. 89-93/456 for Atlantic cod.

²² See Appendix B, p. 12/113 for Atlantic cod.

- **A New Seasonal HMA to Protect River Herring as Atlantic Cod EFH.** Published research has focused on the specific role of river herring in the spawning and feeding of groundfish.²³ Areas of groundfish EFH that coincide with river herring concentrations must be considered as particularly important areas and protected as HMAs because they contain food for seriously compromised stocks like cod. The times and locations of high rates of at-sea river herring catch were identified in a paper published by Cournane *et al.* 2013 (Fisheries Research 141:88– 94 – Figure 2), and also analyzed extensively during the development of Atlantic Herring Amendments 4 and 5. An alternative for seasonal HMAs within the OHA2 based upon Figure 2 in Cournane *et al.* should be included the OHA2. These HMAs should extend from shore to the boundary as indicated in the March 17, 2015 Letter submitted by the Pew Charitable Trust to Tom Nies.

B. The OHA2 Fails to Identify and the Committee Failed to Recommend HMAs that Protect Spawning Fish Consistent With the Magnuson Stevens Act and Improve Spawning Protections consistent the Goals and Objectives of the Amendment

The Committee’s recommendations for spawning protection – Framework 53 measures, the Massachusetts Bay Spawning Protection Area, and Alternative 3 on Georges Bank would not satisfy legal requirements under the Magnuson Stevens Act, or the goals and objectives of this amendment. Spawning, including pre-spawning behaviors and aggregation, is obviously vital to the future of fish and fisheries, and consequently is specifically identified in the Magnuson-Stevens Act where the act defines EFH.²⁴ Objective K (added in 2011) calls for: “Improved groundfish spawning protection’ including protection of localized spawning contingents or sub-populations of stocks (Goals 9 and 10).”²⁵ As discussed in prior letters, the decision to largely ignore the areas identified by the Closed Area Technical Team (CATT) as key areas for spawning groundfish is inconsistent with the best available science. The plan to address the spawning issue in a future action through the Northeast Multispecies FMP, instead of the current Omnibus Habitat Amendment is also problematic.²⁶ The measures for Cod proposed in Framework 53 are not even adequate for Cod – only one of the many species

²³ Ames EP (1997) Cod and Haddock Spawning Grounds in the Gulf of Maine. Island Institute, Rockland, Maine; Ames EP, Lichter J (2013) Gadids and Alewives: Structure within complexity in the Gulf of Maine. Fisheries Research 141: 70– 78; Zemeckis D et al (2014) Spawning site fidelity by Atlantic cod (*Gadus morhua*) in the Gulf of Maine: implications for population structure and rebuilding. ICES J. Mar. Sci. 71 (6): 1356-65; Ames EP (2010) Multispecies Coastal Shelf Recovery Plan: A Collaborative, Ecosystem-Based Approach. Marine and Coastal Fisheries: Dynamics, Management, and Ecosystem Science 2:217–231; see species summaries in Collette and Klein-MacPhee (2002) Bigelow and Schroeder’s Fishes of the Gulf of Maine, Smithsonian Press, DC.

²⁴ 16 U.S.C. § 1802(10).

²⁵ See *supra* at fn 6.

²⁶ See DEIS volume 3, p. 176.

covered by the omnibus amendment (see memorandum from the Habitat PDT to the Habitat Committee, dated April 8, 2015).

Although one of the purposes of Framework 53 was to enhance spawning protection for GOM cod given the poor status of the stock, there is little support in the record for the Gulf of Maine Cod Protection Measures approved by the Council. Framework 53 proposes to reconfigure the GOM rolling closures by adding some closures and removing others, including all closures in April and one in June. *See* 80 Fed. Reg. 12395 (Mar. 9, 2015). The Council's rationale for this reconfiguration is to provide additional fishing opportunities to target healthy stocks, however, Earthjustice shares NOAA Fisheries concerns that the additional closures in May and June are unlikely to benefit GOM cod because there has been little to no fishing activity in those times and places anyway. *Id.* at 12403 (*see also* April 8, 2015 Memorandum from the Habitat PDT to the Habitat Committee, entitled *Analyses requested at February 24, 2015 Committee Meeting*).

The removal of all of the April rolling closures in an area of historical importance to spawning cod is particularly problematic. The record shows that the removal of these closures is likely to shift effort onto areas of high GOM cod concentration while possibly targeting other stocks. *Id.* at 12406. Loss of the April closures may also have an impact on other groundfish stocks including GOM winter flounder, CC/GOM yellowtail flounder, plaice, and GOM haddock that are currently afforded secondary protection under these closures. *Id.* In addition to mortality from fishing, there is also scientific information showing that fishing on spawning fish may affect behavior even if they are not caught by disrupting signals and ultimately reducing reproductive success. Whatever small economic benefits may be afforded in the short term by additional opportunities to target other stocks, GOM cods ability to rebuild is dependent upon reproductive success every year between now and 2024. This is the wrong time to make a short-term economic trade-off to the detriment of GOM cod.

Habitat issues related to groundfish spawning should be addressed comprehensively in the Omnibus Habitat Amendment 2 (OHA2), not Framework 53. The proposed measures in Framework 53 do not meet the goals and objectives of Framework 53, and do they meet the goals and objectives of the OHA2. Thus, they would not satisfy NOAA Fisheries' legal obligations to protect spawning habitat as part of this amendment. NOAA Fisheries should disapprove the Gulf of Maine Cod Protection measures described in Framework 53 (which reconfigure the GOM rolling closures), *id.* at 12403, because they will inhibit rebuilding, and work with the Council to develop an improved suite of seasonal closures based on the Closed Area Technical Team /PDT analysis that offers protections for all groundfish, not just GOM cod.

In addition to groundfish, the OHA2 amends the Atlantic herring FMP (a managed species) which is also prey for a number of depleted groundfish stocks without proposing protections for well-known herring spawning areas. Although Objective K calls for "improved...protection of localized spawning contingents or sub-populations of stocks," nothing identified in the OHA2 or recommended by the Committee achieves this objective.

Herring are a vital food source for the region's most important groundfish stocks including Atlantic cod, haddock and other species. Scientific studies show that spawning aggregations are disrupted by fishing. Because herring egg mats are attached to the seafloor they are vulnerable to mobile gear contacting the bottom. New analysis presented during the public comment demonstrates that some of the prior analysis could be used to support new alternatives that protect spawning to comply with the law. These alternatives include the following:

- **An HMA that Protects Spawning Atlantic Herring.** The EFH maps for many groundfish overlap extensively with herring spawning grounds and other components of EFH for Atlantic herring. This was a principal conclusion of an analysis presented to NOAA Fisheries and the Council in a letter February 20, 2014 (*see CLF et al., 2014, Figure 1A, page 13*), and in public comments submitted by the Pew Charitable Trust on the DEIS (*see January 8, 2015 letter*). These letters presented maps of herring spawning areas from the most recent stock assessment for herring, and from the EFH source documents, showing their relationship to HMA options that are being considered. These relationships are further supported by updated spawning data accepted by the Committee on April 9, 2015. Those HMA alternatives in the DEIS that could provide protection for herring spawning and eggs, and which include aggregations of this prey species within groundfish EFH, must be given the highest priority when the Council finalizes OHA2. The HMA alternatives that overlap extensively with herring spawning areas and groundfish EFH include:
 - a) Eastern Gulf of Maine Alt. 2: Large Eastern Maine HMA and Machias HMA.
 - b) Western Gulf of Maine Alt. 1/No Action: Western Gulf of Maine Groundfish and Habitat Closure Areas
 - c) Georges Bank Alternative 8: The Northern Georges HMA
 - d) Georges Bank Closed Area I: Part of Alternative 1 (no action)
 - e) Great South Channel (GSC) and Southern New England: Alternative 3 - GSC East HMA

C. The OHA2 Fails to Identify and the Committee Failed to Recommend a Multi-Function HMA That Protects Prey for Managed Species and Spawning In the Inshore Gulf of Maine

Several comment letters urged the Council to take an integrated view of habitat protection (*see PCT January 8, 2015 Letter*), and seek out HMAs that could achieve multiple goals for specific stocks and the ecosystem (e.g., Pew Charitable Trust letter to Paul Howard dated July 18, 2011). The alternative for a Multi-Function HMA for the inshore Gulf of Maine described below would achieve this goal and advance recovery of the ecology of this area.

- **A Multi-Function HMA.** Based on the work of the Closed Area Technical Team (CATT) on spawning and juvenile groundfish, and also considering forage concerns (river

herring hotspots and spawning in Atlantic herring), an alternative could be developed that defines a line 20 nm seaward of shore,²⁷ and extends from a point due east of Chatham to the border with Canada that protects spawning and juvenile groundfish, spawning Atlantic herring, and safeguards those areas of groundfish EFH that contain forage as a component of their EFH (described on pages 13-15 of the Pew Charitable Trusts January 8, 2015 Letter).²⁸

II. PRACTICABILITY

A recent letter submitted by representatives of the Atlantic Scallop fishery asserts that it would not be practicable to protect the HAPCs in the Great South Channel and on Georges Bank because of lost revenue to the Scallop fishery.²⁹ These arguments lack merit. While there is not an explicit standard for practicability determinations, NOAA Fisheries must take a comprehensive and long-term view of the practicability of protecting habitat in New England.³⁰ This is especially important considering the depleted state of fisheries resources and the mounting influences of climate change. While “practicability” requires a reasonable balancing of the costs and benefits of competing interests, it is not a free pass to do as little, or nothing, as possible in order to limit the economic impacts to certain components of the fishing industry.³¹

²⁷ Under the Magnuson-Stevens Act there is authority to regulate in state waters when necessary. *See* 16 U.S.C. § 1856(b); *see also* 16 U.S.C. §§ 1852(h)(1), 1853(b)(3)(A), (b)(12).

²⁸ The new spawning analysis presented by NOAA Fisheries at the March 11, 2015 Habitat Plan Development Team (PDT) meeting adds further support for the ecological value of this HMA alternative, revealing extensive overlap between near-shore spawning areas for Atlantic herring and groundfish EFH. The HMA would also capture the areas shown in DEIS map 35, volume 3 (p 141), as recommended by the PDT and CATT in 2013. Such an HMA should include near shore waters to maximally benefit juvenile cod (see also DEIS on juvenile cod EFH). Though this area has received previous analysis and consideration, including a recommendation by the PDT, the analysis did not consider this as a joint spawning and juvenile area that has significant benefits for Atlantic and river herring as forage within groundfish EFH.

²⁹ *See* January 28, 2015 Letter from Kelly Dye & Warren LLP to NEFMC.

³⁰ *See e.g.*, Letter from Guillermo Herrera, Jan. 6, 2014 (Letter, #86 in the Council compilation). NOAA Fisheries’ January 8, 2015 Letter to the NEFMC also indicates that to date the practicability analysis in the DEIS fails to fully account for the benefits to all sectors of the fishing industry that would come from increased productivity associated with habitat protection.

³¹ One example of the potentially flawed practicability analysis is the disparity between Table 140 in Volume III, p. 645 which estimates the long term and short term yield potential from Alternative 8 as almost double any other alternative for GB, despite information in Figure 6 of the Draft SAFE Report for Framework 26 to the Scallop FMP which indicates that the highest scallop abundance is on the southern flank of Georges Bank rather than the Northern Edge.

One of the purposes of the Magnuson-Stevens Act is to develop a national program for the conservation and management of national fishery resources that “facilitate[s] long-term protection of essential fish habitats.”³² In order to this purpose, Congress directed NOAA Fisheries to minimize the adverse effects of fishing on EFH. The 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Act, which included the EFH mandate, give conservation of fisheries priority over short-term economic interests. Several courts have supported this view. See *Natural Res. Def. Council*, 2014 WL 5148407 at *2, fn3; see also *NRDC v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005) (“The purpose of the Act [as amended by the SFA] is clearly to give conservation of fisheries priority over short-term economic interests.”). The D.C Circuit has explicitly rejected the idea that the MSA’s economic and conservation goals are in conflict. See *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). There is no conflict, because the Magnuson Stevens Act places conservation before economic priorities. *Id.*

NOAA Fisheries’ January 8, 2015 Letter to the NEFMC indicates that it too is concerned that the practicability analysis in the DEIS fails to fully account for the benefits to all sectors of the fishing industry that continued habitat protection would provide to the productivity in other fisheries. As we have previously commented, the practicability determinations in the DEIS do not provide an adequate basis upon which decisions about the long-term costs and benefits of habitat protection for the New England community can be based.³³ The analysis places too much weight on near-term economic costs and benefits to commercial fisheries while inadequately valuing future benefits, and it fails to model responses of fishermen to new habitat protection measures. Relying upon the short-term practicability analysis to justify actions similar to the extreme rollbacks recommended by the Habitat Committee is not defensible, will jeopardize the health of these valuable public resources, and ignores the thousands of public comments calling for enhanced habitat protections.

In general, where scientific uncertainty is high, additional caution should be taken in fisheries management decisions. Earthjustice strongly urges NOAA Fisheries and the Council to take a much more cautious approach than the approach recommended by the Habitat

³² 16 U.S.C. § 1801(a)(6).

³³ In the case of habitat and fishery-relevant biological processes, significant uncertainties exist but are poorly characterized within the DEIS and are not well accounted for within the range of habitat areas and regulatory approaches offered. For example, the DEIS does not adequately develop alternatives that reflect discount rates that value future benefits of habitat that has been protected in a precautionary manner. The analysis also fails to explore behavioral responses to proposed regulations, neglecting possible behavioral dynamics that would mitigate presumed negative effects of area closures and regulations. Additionally, the DEIS neglects consideration of policy mechanisms that could be deployed to reduce the negative impacts of closure options (e.g., complementary regulatory actions), thus shifting the outcome of the practicability equation. Overall, little attention is given to the long-term health of ocean ecosystems and the benefits this will have for industries beyond commercial fishing.

Committee – one that reflects social and biological uncertainties, and places appropriate value on restoring and conserving marine resources for future generations. At present, the recommended actions are inappropriately based on the near-term economic considerations of some influential commercial fishermen.

Conclusion

This Amendment is an important opportunity to help restore and protect New England's fisheries and the larger ocean ecosystem. To comply with the Magnuson-Stevens Act, NEPA, and the APA, the final OHA2 must significantly improve EFH protections over the substantial rollbacks to protected areas recommended by the Habitat Committee, including by taking actions that will support juvenile and spawning groundfish as well as forage as a component of EFH. It would be inconsistent with the Magnuson-Stevens Act to take action, as the Habitat Committee has recommended, that is primarily based on the short-term economic interests of certain commercial fishermen to the detriment of the long-term ecological health of the Northwest Atlantic Ocean and the economic interests of all fishermen and the nation.

Thank you for considering these comments.

Sincerely yours,

/s/ Roger Fleming

Roger Fleming, Attorney

Erica Fuller, Attorney

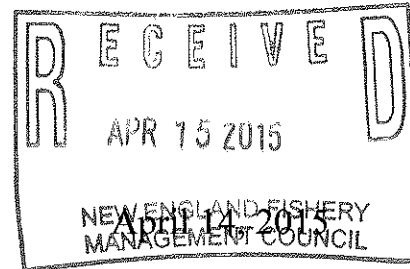
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CC: David Preble, Chairman Habitat Committee (via Email)
Moira Kelly, Sustainable Fisheries Division (via Email)
David Stevenson, Habitat Conservation Division (via Email)
Louis Chiarella, Habitat Conservation Division (via Email)
Mitch Macdonald, NOAA General Counsel (via Email)
Tom Nies, Executive Director NEFMC (via Email)
Terry Stockwell, Chairman NEFMC (via Email)

New England Fisheries Management Council
50 Water Street, Mill 2
Newburyport, MA 01950



Dear Mr. Nies:

I am the owner of the charter fishing boat RELENTLESS and fish out of Green Harbor, and Boston, MA. I am writing to you regarding the proposed habitat protection measures being voted on at the April council meeting. I strongly oppose any changes to the Western Gulf of Maine closed area and strongly support Alternative 1, No Action.

Additional closed areas for the charter/party and recreational anglers will create an adverse effect on a sector that is already operating under rules with strict bag limits, minimum size limits, a hard TAC and a six month closed season on GOM cod. If the Dedicated Habitat Research Area (DHRA) on Stellwagen Bank is adopted, the charter/party and private vessels fishing out of the South Shore of Massachusetts will be forced to transit greater distances. This could be over forty nautical miles to locate ground fish. Being forced to run these greater distances will result in a loss of customers who can fish out of other ports with less time transiting. Safety of small boats must be taken into consideration. Many boats do not have or are required to have on board, life rafts, survival suits and EPIRBs as required on commercial fishing vessels where there is strict compliance and mandatory training.

The Stellwagen Bank National Marine Sanctuary claims very little fishing takes place in the WGOM southern area based on VTR data with ZERO private vessels fishing in the area and only a hand full of charter boats. This is absolutely unrealistic knowing several operators who fish this area consistently. During the meetings held in Gloucester and Plymouth a captain asked captains in the audience who fishes the proposed area and over 50 hands went up.

I also have concerns once a DHRA is established, additional closed areas in the Stellwagen Bank National Marine Sanctuary will be added. Currently in the Florida Keys National Marine Sanctuary there are eighteen Sanctuary Preservation Areas which allow no bottom fishing with catch and release only and many do not allow any fishing.

In the Florida Keys Marine Sanctuary in the Special Research Areas, vessels are prohibited from entering the area without a Florida Keys National Marine Sanctuary Permit and there is "No Fishing Allowed or Possession of any Marine Life". I honestly feel the creation of the DHRA will lead to a much larger "NO FISHING ZONE" where you would not be allowed to transit without a permit from the Stellwagen Bank National Marine Sanctuary or transit through the area with bait or fish on board, even if fishing in other areas. I feel that the establishment of the DHRA is the first step in making Stellwagen Bank National Marine Sanctuary a "NO FISHING ZONE" as recommended by some environmental groups.

In the Sanctuary Management Plan of 2010, Chapter VII (Action Plans) it states to "Acquire and maintain a dedicated, year round enforcement boat to conduct routine sanctuary patrols and to expand patrol-related outreach and interpretive enforcement efforts." I believe one of the main reasons the SBNMS is proposing a DHRA is to have additional justification to acquire a dedicated law enforcement boat, similar to ones in other sanctuaries. Without the DHRA the chances of obtaining this vessel and appropriate funding would be reduced.

The establishment of a DHRA would cause an economic hardship to an industry that fishes about six months a year with the customer base wanting cod and haddock. Listening to the Sanctuary Superintendent state there are other species to fish for, such as striped bass and tuna is a clear indication of his lack of knowledge of the industry. Charter boats start fishing in March and April, and there are no tuna in Massachusetts Bay during this period. Striped Bass with only one allowed, do not arrive until mid May and once again the customer base of the ground fish fleet want to fish for ground fish, not striped bass or tuna.

The party charter boat fleet has been reduced by 39% over the past eight years due to the fact it is extremely difficult to make money. This is similar to the commercial fleet where ports such as Gloucester, Plymouth, Scituate, Portsmouth and Portland have far fewer boats fishing today than years past.

This reduction in effort means there is far less impact caused by recreational fisherman.

Just like everything else expenses keep rising with inflation. The added costs and loss of customers will result in an economic disaster to the charter/party industry and other marine related businesses. I encourage council members to read on the Greater Atlantic Region Office website

“The Economics of the Recreational For-Hire Fishing Industry in the Northeast United States for 2013” report. There was over \$4.9 billion in expenditures on fishing trips and durable equipment expenditures across the Greater Atlantic Region in 2011.

The recreational angler has little impact on the bottom using weights, jigs and hook and line to harvest fish for personal consumption. Creating a DHRA and shutting out the recreational angler will have no benefit to the protection of juvenile cod compared to the massive amount of fish eaten daily by spiny dogfish and seals in the area. Any changes other than STATUS QUO, NO ACTION will virtually be the end of the charter/party industry from the South Shore of Massachusetts which fishes Stellwagen Bank. This will also result in a loss of revenue to the local hotels, tackle shops, restaurants, marinas, boat dealers etc. in the local area. If you have any questions please feel free to contact me anytime.

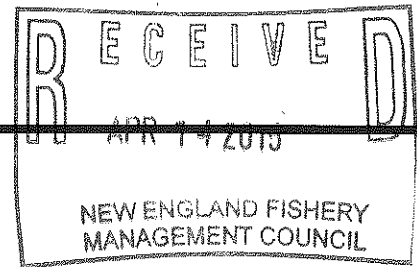
Respectfully,

David Waldrip
Charter Boat Relentless
captdave@relentlesscharters.com

Copy: Mr. John Bullard
Mr. Terry Stockwell
Dr. John Quinn
Mr. Mark Alexander
Dr. Matthew McKenzie
Mr. Terry Alexander
Mr. Vincent Balzano
Ms. Mary Beth Tooley
Mr. Mark Gibson

Ms. Mr. Frank Blount
Mr. Mr. David Preble
Dr. David Pierce
Dr. Michael Sissenwine
Mr. Douglas Grout
Ms. Ellen Goethel
Mr. Peter Kendall
Mr. John Pappalardo
Ms. Elizabeth Etrie
Captain Barry Gibson
Captain Charlie Wade
Captain Mike Pierdinock

Sherie Goutier



Subject: FW: DHRA Vote - "No Action"

From: Beth Casoni [mailto:beth.casoni@lobstermen.com]

Sent: Monday, April 13, 2015 4:09 PM

To: Libby Etrie; Terry Alexander

Cc: Frank Blount; David Preble; David Pierce; Tom Nies; Terry Stockwell; Barry Gibson; Doug Grout; Dave Waldrip; Charlie Wade; Lou Gainor; Vito Giacalone; Vito Giacalone; Thomas Benjamin (HOU); Jim Quigley; Valanzola Jared (SEN); John Bullard; John Pappalardo; Ellen Goethel; John Quinn; Matt McKenzie; Vincent Balzano; Mary Beth Tooley; Mark Gibson; Michael Sissenwine; Peter Kendall; Rich Ruais; Ralph Pratt

Subject: DHRA Vote - "No Action"

Terry and Libby,

On behalf of the numerous members of the Massachusetts Lobstermen's Associations' (MLA) that are charter boat captains and also shore side businesses

I would like to thank you for voting against the proposed DHRA and/or closure of 55 sq miles of ideal fishing grounds at the last NEFMC Habitat Committee meeting.

Both of these industries (marinas/marine stores and Charter boats) will be negatively impacted by the implementation of the proposed DHRA.

I am very concerned that after all of the comments both orally and written the Habitat Committee voted to support the DHRA and that if nobody shows

Up at a committee meeting then there must be no opposition for the DHRA?

As you know, I sit on the Habitat AP and voted against recommending this to the Committee. I also found it concerning that an individual on the AP voted in favor of the DHRA when there is a direct conflict as this encompasses a portion of Stellwagen Bank. It was my understanding that if there was a conflict of interest one could not vote for or against and issue? I will need to get this clarified further. As you know I am new to the Councils processes and appreciate the continued encouragement and support I have been given on both the Habitat AP and VMS and Law Enforcement AP. Thank you ☺

The MLA had representation at all of the public hearings which provided us the opportunity to comment on the details concerning the flawed science and flawed economics being utilized to decide on this area for research. At each of these meetings there were in attendance an estimated 200+, many MLA members, charter boat captains and recreational anglers both in Plymouth and Gloucester scoping meetings all submitting comments against the proposed DHRA.

The MLA has opposed the proposed NEFMC DHRA since the inception and dating back to the Stellwagen Bank Sanctuaries SERA I & SERA II, which were both defeated.

Consequently, we are greatly concerned going forward as the Council prepares for a full meeting next week and our position on ANY DHRA has not changed (No Action).

The recent devastating and negative economic impacts due to the newly released "MA Restricted Area" closure here in the Commonwealth has had on the shore side businesses

Is real and to consider the implementation of another closure at this time would be ruinous to these businesses.

I have cc'd the NEFMC members in this email requesting their support to vote against the proposed DHRA (No Action).

The MLA is also actively working with both State and Federal Legislators on this as the negative economic impact of this DHRA are real and substantial.

We will also be attending the NEFMC meeting next week and look forward to your continued support.

Thank you again for your support in opposing the DHRA.

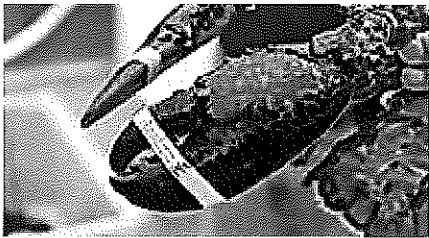
Kind regards,

Beth Casoni, *Executive Director*

Massachusetts Lobstermen's Association

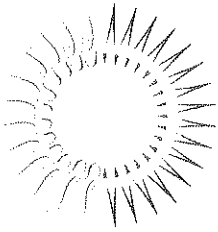
8 Otis Place~Scituate, MA 02066

o. 781-545-6984 c. 508-738-1245



www.lobstermen.com





THE
PEW
CHARITABLE TRUSTS

Mr. John Bullard, Regional Administrator
NOAA Fisheries - Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930-2276

April 14, 2015

Dear Mr. Bullard:

I am writing on behalf of The Pew Charitable Trusts to convey continuing concerns about habitat protections in New England's ocean waters. As you know, we have followed the development of the region's Omnibus Essential Fish Habitat (EFH) Amendment 2 (Amendment or OHA2) closely, including submitting proposals for Habitat Areas of Particular Concern (i.e., during phase I) and providing numerous written comments on the evolving amendment, most recently as comments on the Draft Environmental Impact Statement (DEIS) for OHA2.¹ We submit the present letter based on recent decisions by the New England Fishery Management Council (Council) and ask that this letter be included as part of the administrative record of decision for OHA2.

The New England Fishery Management Council (Council) is now rapidly approaching final action on the Amendment (i.e., choosing final alternatives from those presented in the DEIS). Our level of concern about the Amendment remains very high, as does that of a large community of stakeholders that includes many scientists, fishermen, whale and seabird enthusiasts and others who value the ocean resources we all hold in public trust. Based on the recent decisions of the habitat committee (March 23-24, 2015), to be presented to the full Council as recommendations during its April 21-23 meeting, this Amendment will represent a significant set-back for habitat protection and will not comport with existing laws and regulations on protecting EFH.

We urge you as the Greater Atlantic Regional Administrator for the National Oceanic and Atmospheric Administration's Fisheries Service (NOAA Fisheries) to convey the strongest possible signal to the Council that an amendment based on the Habitat Committee's recommendations cannot be approved by the agency and the EFH amendment must do much more to protect *those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity*.² The following points outline our concerns with the Committee's recommendations and are discussed in greater detail below:

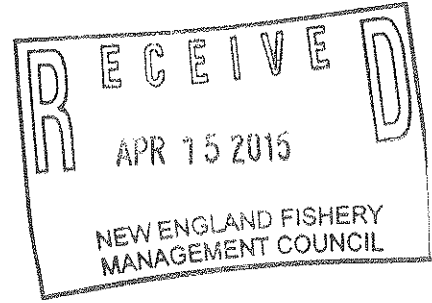
- The Council is proceeding without regard for the law or those who took time to provide public comment on the DEIS;
- Of the 159,502 individuals who commented on the DEIS, 153,694 asked for increased habitat protection (96%);

¹ Draft Environmental Impact Statement (DEIS), dated October 1, 2014, available at: www.greateratlantic.fisheries.noaa.gov/regs/2014/October/14habo2anoa.html.

² 16 U.S.C. § 1802(10).

Thomas A. Nies, Executive Director
New England Fishery
Management Council, 50 Water Street,
Mill 2, Newburyport, MA 01950

April 15, 2015



Dear Mr Nies:

Please accept the appended document (i.e., letter to NOAA Fisheries Regional Administrator Bullard) as public comment for the April 2015 Council meeting (meeting materials). This submission concerns the habitat amendment (OHA2).

Sincerely,

Jud

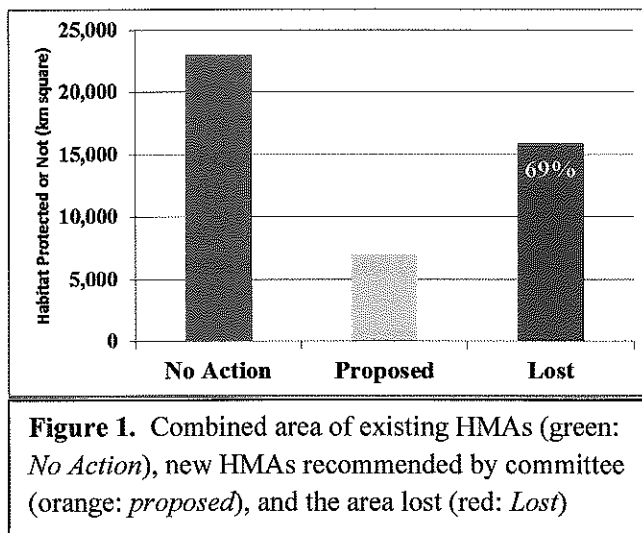
John D. Crawford

mb - 4/16/15 J.D.C.

- The committee proposal for final action will reduce the overall footprint for habitat and spawning protection from where it is now by over 69%: this is the wrong direction;
- Within the Council’s jurisdiction (232,156 km²; federal water)³ the current portfolio of habitat management areas (HMAs)(i.e., no action in DEIS) represents just 10% but the proposed changes will decrease this to a mere 3% of the area over which the Council holds stewardship responsibility;
- To date science-based goals have not been established for the overall area needed to achieve the goals of the Amendment or the law relating to EFH, nor for the proportion of the fishing vulnerable areas, juvenile or spawning hotspots, thereby allowing the Council decision-making process to proceed largely detached from the underlying scientific analyses assembled over a period of more than a decade.
- HMAs, Habitat Areas of Particular Concern (HAPCs) and spawning areas all need robust protection from damaging fishing but the proposals allow exemptions for too many fishing gears;
- Dredges of all kinds (e.g., scallop and clam) and mid-water trawls must be prohibited within HMAs and HAPCs;
- Forage fish must be recognized by the Council and NOAA Fisheries as a vital component of EFH, as the law does; forage fish must be protected along with other key habitat attributes;
- HAPCs are of particular concern for good reason and must be afforded stronger protections than other EFH areas – yet none are proposed;
- New alternatives, crafted by the Council after the DEIS, must be analyzed and supported scientifically;
- New information and proposals provided by the public must be thoroughly considered as part of finalizing this amendment – that is the purpose of offering the public an opportunity to comment (National Environmental Policy Act – NEPA);

Reducing overall area protected through choice of habitat management areas.

The new habitat management areas that the Habitat Committee is recommending to the full Council will result in eliminating protection from an area on the order of the combined land area of Rhode Island and Connecticut – some 15,926 km² (Figure 1). That is, the Council will be advised by this committee to reduce the overall footprint of habitat protection by nearly 70% through an amendment the purpose of which is to improve protection



³ From boundary with Mid-Atlantic, south from Rhode Island to the EEZ, to the Hague Line; see §600.15 50 CFR Ch. VI (10–1–01 Edition), § 600.105 Inter-council boundaries.

of EFH.⁴ These new recommendations are based upon decisions made at the March 23-24 committee meeting in Portland, Maine. The changes in overall area stem from recommending alternatives different from those identified to the public as preferred in the DEIS, as well as alterations to the boundaries of alternatives in the DEIS that result in new, yet to be analyzed alternatives. For Georges Bank and the Southern New England area, these changes were built upon selecting alternatives in sub-regions where the Council did not identify preferred alternatives in the DEIS before public comment.

As observers, these committee decisions did not appear to us to be based on science, new economic analysis or new information provided through the comment period. The decisions were apparently not motivated or supported by any analysis that has been made public. Beyond comments raised by the public during the meeting, there was little substantive discussion of existing or new information as a basis for producing a new package of alternatives to be recommended to the full Council. To the best of our knowledge, there has been no analysis suggesting that a new network of HMAs reduced by 69% from the existing network can meet the EFH goals of the Council or NOAA Fisheries (i.e., 7 thousand instead of 23 thousand km²). Data and analyses presented from a number of sources suggest that the new preferred areas now in play will do a poor job of protecting hotspots for juvenile and spawning fish, areas of high vulnerability based on the Swept Area Seabed Impact (SASI) analysis,⁵ or protecting those areas with high value for managed fish species identified in an analysis of *persistence* over a period of nearly four decades (1970 and 2006).⁶

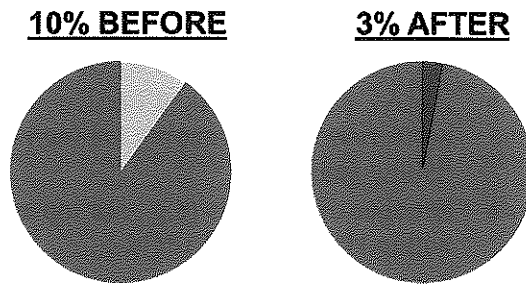


Figure 2. The current HMAs (*No Action*) represent 10% of the whole area under the Council’s jurisdiction (orange wedge, left pie) whereas the new HMAs recommended by committee represent 3% (red wedge, right

The Council and NOAA Fisheries are responsible for stewarding EFH within a New England jurisdiction of just over 232 thousand km². At present, the existing areas protected (No Action HMA alternatives) span only 10% of this jurisdiction. The plan that the Council is heading toward lowers this to a mere 3% (Figure 2). The proposed reductions are most extreme on Georges Bank (88%) and in the Southern region (65%), but are substantial within the Gulf of

⁴ New England ocean habitat is currently protected through a combination of area identified as groundfish closed areas and habitat areas.

⁵ The Council technical advisors developed the Swept Area Seabed Impacts (SASI) method for identifying vulnerable habitat areas and used Local Indicators of Spatial Association (LISA, based on Anselin L (1995) *Geographical Analysis* 27(2):93-115. LISA cluster analysis for identification of areas that are vulnerable to fishing impacts.

⁶ Comment letters addressed to John Bullard from The Nature Conservancy, January 8, 2015 and The Pew Charitable Trusts, January 8, 2015; data and analysis of areas supporting the long-term persistence of managed demersal fishes were presented to NOAA Fisheries by The Nature Conservancy in correspondence dated November 7, 2014 and discussed in the TNC comment letter dated January 8, 2015; various analyses presented by the Closed Area Technical Team (CATT) and Habitat Plan Development Team (PDT).

Maine too (35%; Figure 3). Neither the DEIS nor the Council have presented a compelling analysis showing that this wholesale reduction in habitat protection would lead to better conservation, benefit to fish, fisheries or the ecosystems that support them.

To date science-based goals have not been established for the overall area needed for effective EFH protection (e.g., to achieve the goals of the Amendment or the law relating to EFH). Similarly, goals were not defined for proportion of the vulnerable clusters (SASI/LISA) or fish hotspots (juvenile and spawning). This absence of objective goals has facilitated a Council decision-making process that is largely detached from the underlying scientific analyses assembled over a period of more than a decade. While it is likely that some of the new designated areas will protect particularly important habitat areas, no evidence has been presented that any benefits so attained will even come close to offsetting such a massive overall reduction in protected area.

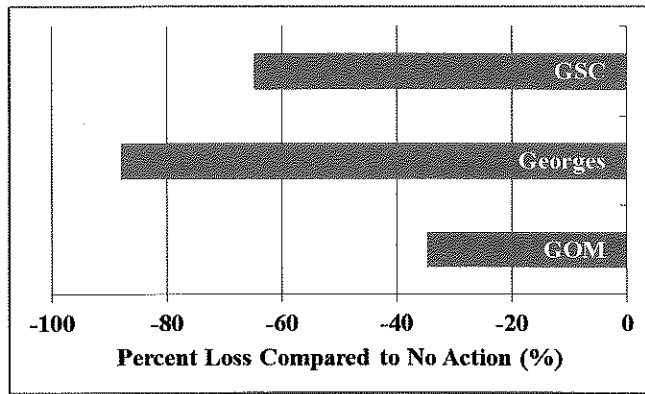


Figure 3. Area lost by sub-region as percentage of existing *no action* HMA areas. Note negative percentages are left to the of zero.

During the public comment period for the Amendment’s DEIS (October 10, 2014 through January 8, 2015), an enormous number of individuals and organizations weighed-in on the habitat Amendment. Of the 159,502 individuals represented among the letters, e-mails, and petitions, 96% (153,694) indicated the view that the amendment should increase habitat protection, not reduce it by over two thirds, as the committee’s recommendations would. The numbers were similar on other more specific issues including support for adding new HMA areas in Eastern Maine (Alternative 2), preserving the existing areas in Central Maine (Alternative 1; includes Cashes ledge closed area and Jeffrey’s Bank habitat closure), and in Western Maine (Alternative 1; the Western Gulf of Maine Closed Area).⁷ Overwhelming support was also registered for the new Georges Bank alternative positioned on the northern edge of the bank (Alternative 8).⁸ These results are presented in Figure 4 and Table 1.

⁷ Cashes Ledge closed area and the Western Gulf of Maine closed area both include within them habitat closures; the Amendment should establish each of these larger areas as habitat management areas (HMA); the Pew-Earthjustice letter (page 10 of Council comment compendium), signed or submitted by 149,920 individuals, supports the no action alternatives (Alternative #1) for the Gulf of Maine, stating: “In the Gulf of Maine, maintaining the current closures is the best choice available, along with the addition of two areas Down East.”

⁸ Note the Pew-Earthjustice letter (Ibid), signed by 149,920 individuals, supports Georges alternative 8 with “...On Georges Bank, the alternative with the best protection is a new area that includes important habitat in the Northern Edge...”.

Inadequate protection of spawning for managed species.

Nearly every comment that dealt with spawning (99.9%) argued that the habitat amendment was failing to adequately address spawning as a key EFH issue (i.e., 155,334 vs. 32 who felt that the protection offered for spawning in amendment was sufficient; Figure 5 and Table 1). Despite this public input, and detailed remarks on spawning made during the comment period by Pew and many others, and at the committee meeting, the committee is forging ahead with weak recommendations for final action on spawning protections.

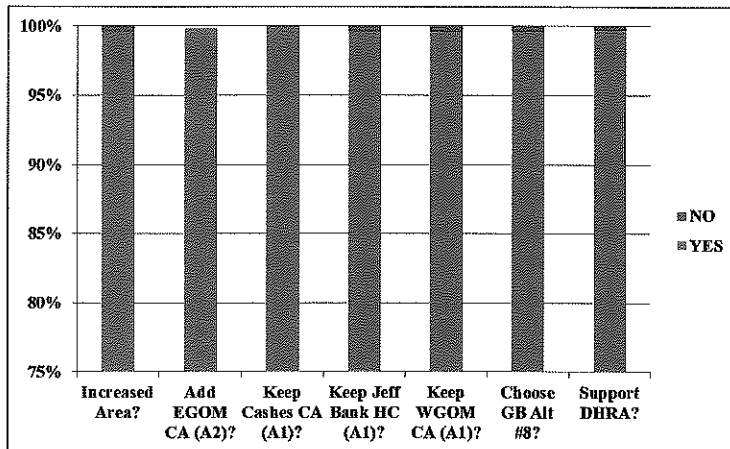


Figure 4. Summary of public comments as percentage of totals for each issue, presented as stacked bars. Blue portion is percentage that supported (“yes”) and the red portion is percentage that did not support (“no”); blue plus red = 100% (see numbers in Table 1).

For the Gulf of Maine, the committee recommends reliance on the inadequate system of seasonal closures developed for a framework adjustment to the Multi-species Fishery Management Plan (FMP)(i.e., framework 53). First of all, framework 53 proposes measures designed to protect only Atlantic cod in the Gulf of Maine whereas the omnibus plan for habitat protection amends all the Council’s FMPs. NOAA Fisheries raised a number of concerns about the efficacy of the measures chosen for framework 53, as has the habitat Plan Development Team (PDT).⁹ Second, framework 53 has not been implemented yet and was only resubmitted to NOAA Fisheries for possible approval March 16, 2015.

For Georges Bank and Southern New England, the Council identified as preferred for the DEIS a spawning protection alternative that was identified as deficient by NOAA Fisheries (Alternative 2B).¹⁰ Rather than correct this deficiency, the committee has recommended an even weaker alternative for this sub-region, Alternative 3 with options B and C (see DEIS Volume 3, pp 108-116). This alternative protects less area (e.g., only part of Closed Area II) and includes exemptions such that both scallop and clam dredging would be allowed in spawning areas.

⁹ See Framework 53 Proposed Rule, *Summary of NMFS Concerns on Gulf of Maine Cod Protection Measures*, Federal Register / Vol. 80, No. 45 / Monday, March 9, 2015, p 12405; memorandum from the Habitat PDT to the Habitat Committee, dated April 8, 2015.

¹⁰ Letter to Council chair Ernest F. Stockwell III, dated January 8, 2015, from Regional Administrator John Bullard.

These spawning protection proposals to be recommended to the full Council are wholly inadequate and cannot be accepted as a responsible answer to the mandate to protect spawning areas for fish as part of EFH. The Council should address spawning protection by revisiting the best available science that was assembled in support of the DEIS by the Closed Area Technical Team (CATT) and habitat PDT. This science has not been used sufficiently to guide decisions on spawning protection.

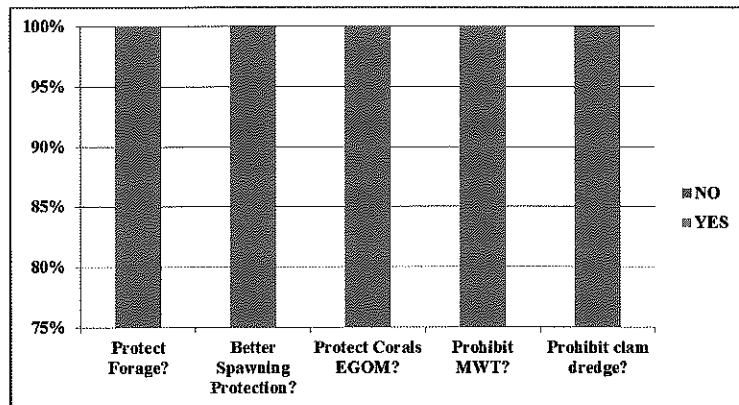


Figure 5. Summary of public comments as percentage of totals for each issue, presented as stacked bars (see caption for Figure 4).

In two previous letters, we have urged the Council to reconsider the near shore waters of the Gulf of Maine for their potential for rebuilding stocks and restoring ecological function to the region.¹¹ Specifically, we recommended that the Council establish a multi-function HMA in the near-shore Gulf of Maine, based on the spawning and juvenile groundfish work of the CATT,¹² and also considering forage concerns (river herring hotspots and spawning in Atlantic herring). The specific relationship between forage fish and the migration and spawning of Atlantic cod has been discussed in the scientific literature but has been ignored by the Council in the design of proposed EFH measures.¹³

An HMA defined by a line 20 nm seaward of shore, extending from a point due east of Chatham, Massachusetts to the border with Canada, could protect both spawning and juvenile groundfish, protect spawning Atlantic herring, and safeguard those areas of groundfish EFH that contain forage as a component of their EFH. Similar attention should be directed to the CATT analyses and its use in defining off-shore spawning and multi-function areas to address current shortcomings of the amendment. On Georges Bank and Southern New England, the only viable alternative is Alternative 1, no action. In general, the alternatives considered by the Council do a poor job of capturing spawning and juvenile hotspots. The typical HMA alternative (median) includes 4% or less of the juvenile hotspots. The relationship between spawning hotspots and spawning alternatives is more difficult to quantify but the protection appears to be similarly poor.

¹¹ Letter to Council Executive Director Thomas Nies, dated March 17, 2015, from Pew Charitable Trusts; Letter to Regional Administrator John Bullard, dated January 8, 2015, from Pew Charitable Trusts.

¹² Results presented to the Council, April 23, 2013, Mystic, including recommendations on spawning protection in the near-shore Gulf of Maine based upon hotspots; see *Juvenile groundfish habitat and groundfish spawning area recommendations for Omnibus Habitat Amendment 2*, Presentation available on council website.

¹³ Lichter J (2013) Gadids and Alewives: Structure within complexity in the Gulf of Maine. *Fisheries Research* 141:70–78; Ames EP (2010) Multispecies Coastal Shelf Recovery Plan: A Collaborative, Ecosystem-Based Approach. *Marine and Coastal Fisheries: Dynamics, Management, and Ecosystem Science* 2:217–231; see Pew Comment letter on DEIS, addressed to John Bullard, January 8, 2015.

For trawl LISA clusters, the relationship to alternatives is again very weak (explained in our January 8, 2015 comment letter).

Neglect of forage fish as a vital component of EFH.

Over five thousand comments specifically addressed the issue of forage fish as a component of EFH for managed species and every one of these (100%) indicated that this issue has been neglected in the DEIS. Forage is part of the definition of EFH put forward in the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and is addressed in regulations and national standard guidelines. The legal obligations to protect prey as a component of EFH for managed species are clear and have been repeatedly drawn to the attention of the Council and NOAA Fisheries with respect to deficiencies of this Amendment.¹⁴

Trying to manage fisheries without conserving the food sources that the target predator fish depend upon does not comply with the MSA and its implementing regulations. Prey species are a critical component of EFH and the law requires that adverse impacts on EFH be minimized.¹⁵

Nevertheless, not a single alternative has been developed to protect EFH that contains forage for managed predators. Furthermore, the amendment fails to address spawning in Atlantic herring, arguably the most important forage species in the Northeast today and a species whose management plan is amended by this omnibus action. Several letters have presented ideas for alternatives that could address the forage issue more substantively, as described in our recent letter to the Council.¹⁶ To date these have not been given serious consideration so far as we are aware.

The Council's preferred alternative for textual descriptions of the EFH of each of the species covered does not even mention food as part of the EFH definition – though other alternatives included in the DEIS do include prey information. This deficiency is easily addressed. The EFH designations for the managed species in DEIS Volume II need to be updated to include the prey

Table 1. Summary information from public comment and graphed in Figures 4 and 5 above. Counts based on public comments posted for DEIS.

Figure 4	N Responses	YES	NO
Increased Area?	154,247	99.6%	0.4%
Add EGOM CA (A2)?	150,380	99.8%	
Keep Cashes CA (A1)?	152,763	100.0%	0.0%
Keep Jeff Bank HC (A1)?	154,247	99.6%	0.4%
Keep WGOM CA (A1)?	154,247	99.6%	0.4%
Choose GB Alt #8?	151,125	99.6%	0.4%
Support DHRA?	155,938	99.7%	0.3%
Figure 5			
Figure 5	N Responses	YES	NO
Protect Forage?	5,408	100.0%	0.0%
Better Spawning Protection?	155,366	100.0%	0.0%
Protect Corals EGOM?	153,259	100.0%	0.0%
Prohibit MWT?	153,765	100.0%	0.0%
Prohibit clam dredge?	152,437	100.0%	0.0%

¹⁴ Letters from Earthjustice to Council Executive Director Nies, March 20, 2015 and to NOAA Fisheries Regional Administrator John Bullard, April 10, 2015; letter from Pew Charitable Trusts to Council Executive Director Tom Nies, March 17, 2015; letter from Pew Charitable Trusts to NOAA Fisheries Regional Administrator John Bullard, January 8, 2015; letter from CLF et al, to Council Executive Director Tom Nies, February 20, 2014.

¹⁵ 16 U.S.C. § 1853 (a)(7).

¹⁶ Letter to Council Executive Director Thomas Nies, dated March 17, 2015, from Pew Charitable Trusts; Letters to Regional Administrator John Bullard, dated January 8, 2015, from Pew Charitable Trusts and from Conservation Law Foundation et al, dated February 20, 2014.

species information currently in Appendix B, so that the textual descriptions appropriately describe EFH consistent with the regulations.¹⁷

NOAA Fisheries and the Council are clearly well aware of the primacy that the regulations confer upon EFH text descriptions over all other presentations or definitions for EFH. This issue was discussed extensively at the April 9, 2015 Committee meeting by NOAA Fisheries staff and Council members when making decisions about how to reconcile text with maps and other descriptions of EFH for scallops, black back flounder, and juvenile cod (see meeting motions for April 9, 2015 committee meeting). Despite numerous letters and public comments on this issue, including comments at this most recent committee meeting, NOAA Fisheries and the Council still have not addressed this important but simple matter of discussing prey in the text description for each managed species. The Pacific Fishery Management Council identifies prey as a component of EFH in their salmon and groundfish FMPs.¹⁸ Without addressing this deficiency in the OHA2, the Council and NOAA Fisheries will be compromised in EFH consultations where prey for managed species are at issue.

Inadequate protection of protected habitat and spawning areas.

Areas that will contribute to the EFH purposes and goals spelled out in the MSA, regulations, national standard guidelines and by the Council itself, need to be protected. Larger areas with comprehensive protection from fishing and other human disturbances are the most beneficial, supporting more large fish, in terms of species and biomass.¹⁹ As noted in the DEIS, fishing activities of various kinds disrupt spawning behavior and remove spawning fish, in addition to damaging benthic habitat.²⁰ Thus, allowing mid-water trawling, dredging, or other types of fishing is expected to undermine the value of the existing protected areas in New England, and will do so in the future. Most of the committee-recommended habitat management areas, and spawning areas are proposed with numerous exemptions for fishing gear, including shellfish dredges and trawls known to catch groundfish. Over one hundred and fifty thousand individuals specifically commented on allowing mid-water trawling, clam dredges and scallop draggers into the habitat areas – these gears do not belong inside habitat management areas or spawning grounds. Lines on the map riddled with gear exemptions are of little ecological value.

No specific protections offered for Habitat Areas of Particular Concern.

The Council appears to be continuing along a path that will designate but not protect HAPCs. HAPCs are subsets of EFH that have special conservation concern due to their rarity, ecological

¹⁷ 50 C.F.R. §§ 600.815(a)(i)(1), (iv)(B).

¹⁸ See Pacific Coast Salmon Fishery Management Plan, Appendix A; see also Pacific Coast Groundfish Fishery Management Plan, Appendix B2.

¹⁹ Graham J et al. (2014) Global conservation outcomes depend on marine protected areas with five key features. *Nature* 506: 216–220; Letter to Regional Administrator John Bullard from Graham D. Sherwood, Ph.D., dated January 8, 2015.

²⁰ See Letter to Regional Administrator John Bullard from JD Crawford, May 23, 2013; Letter to Regional Administrator John Bullard from 111 Scientists, April 9, 2013; Dean M et al (2012) Disruption of an Atlantic Cod Spawning Aggregation Resulting from the Opening of a Directed Gill-Net Fishery. *North American Journal of Fisheries Management* 32(1):124–134; Morgan MJ et al (1997) An observation on the reaction of Atlantic cod (*Gadus morhua*) in a spawning shoal to bottom trawling. *Can J Fish Aquatic Sci* 54 (1):217-223; Zemeckis DR et al (2014) Spawning Dynamics and Associated Management Implications for Atlantic Cod. *North American Journal of Fisheries Management* 34:424–42.

importance, and/or vulnerability to degradation. The Council must develop and apply specific measures within these high priority areas to facilitate their protection, conservation, and management.

Conclusions

As you know, the MSA requires that "...a national program for the conservation and management of the fishery resources of the United States is necessary to...facilitate long-term protection of essential fish habitats..."²¹ and "... the Secretary, in consultation with participants in the fishery, shall provide each Council with recommendations...to ensure the conservation and enhancement of that habitat."²² The alternatives chosen by the habitat committee (March 23-24, 2015) are inconsistent with the purposes and goals of the Act.

The wisdom of Congress embodied in the MSA notwithstanding, common sense should lead all those concerned about the future of fisheries in New England to pursue expanded protections for fish habitat. The cod resource has been decimated, halibut before it, too many stocks are still subjected to overfishing and are depleted, and the ecosystem is degraded.²³ Those who have depended upon on the goods and services of the region's marine ecosystems for their prosperity are suffering as a consequence, and the ecological assets of future generations are being liquidated.

Well over one hundred thousand interested citizens (159,502)²⁴ expressed their views on an issue vital to the future of the United States: maintaining the health and resilience of ocean ecosystems for future generations. Ocean waters in the U.S. are held in public trust and every commenter on this habitat amendment shares with all others both a stake in and a responsibility for this shared resource. The signals reflected in these comments are clear. The vast majority are concerned with how we are managing ocean habitat, almost all would like more habitat protection, protection of corals²⁵ and forage fish within this amendment, much better treatment of spawning habitat, destructive fishing gears kept out of closed areas, and they support dedicated habitat research areas within the Western Gulf of Maine and throughout the New England region. The Council's apparent disregard for the views solicited through scoping is disturbing, creating the appearance of a process that has been overtaken by the near-term economic interests of a small minority.

²¹ 16 U.S.C. § 1801(a)(6).

²² 16 U.S.C. § 1855(b)(1)(B) (underline added).

²³ Ecosystem Assessment Program (2009) Ecosystem Assessment Report for the Northeast U.S. Continental Shelf Large Marine Ecosystem. U.S. Department of Commerce, Northeast Fisheries Science Center Reference Document 09-11: 61 pp; Murawski SA (2000) Definitions of overfishing from an ecosystem perspective. *ICES Journal of Marine Science*. 57(3): 649-658.

²⁴ By our count this is the total number of individuals represented within the comments submitted during the comment period. Not every person commented on every issue discussed in this letter. Consequently, the denominator for computing percentages is not always equal to this total number – in many cases it is less reflecting the total number that commented on a given issue or question.

²⁵ Auster PJ et al. (2014) Imaging Surveys of Select Areas in the Northern Gulf of Maine for Deep-sea Corals and Sponges during 2013-2014. Submitted to the New England Fisheries Management Council, October 30, 2014; Hanging Coral Gardens in Gulf of Maine Add to Excitement of Summer Full of Deep-Sea Coral Discoveries. Northeast Fisheries Science Center Newsroom, SS14.08, September 2, 2014: www.nefsc.noaa.gov/press_release/pr2014/scispot/ss1408.

We encourage NOAA Fisheries to send the strongest possible message to the Council at this juncture so that the Amendment can be significantly strengthened and NOAA Fisheries can meet the MSA's purposes and related requirements "to conserve and manage the fishery resources," "to promote domestic commercial and recreational fishing under sound conservation and management principles," "to achieve and maintain, on a continuing basis, the optimum yield from each fishery,"²⁶ and to "describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat."²⁷

The Administration, NOAA leadership, and managers of ocean resources from around the world have identified habitat protection as a top priority for ensuring that ocean ecosystems attain the resilience needed to withstand the stresses of climate change.²⁸ As a partner in the *National Fish, Wildlife and Plants Climate Adaptation Partnership*, NOAA has produced valuable guidance on climate adaptation for marine ecosystems.²⁹ The number one goal identified among seven "goals to help fish, wildlife, plants, and ecosystems cope with the impacts of climate change" is:

"Conserve habitat to support healthy fish, wildlife, and plant populations and ecosystem functions in a changing climate."³⁰

The mission of NOAA Fisheries includes responsible stewardship and the Northeast desperately needs this:³¹

"NOAA Fisheries is responsible for the stewardship of the nation's ocean resources and their habitat. We provide vital services for the nation: productive and sustainable fisheries, safe sources of seafood, the recovery and conservation of protected resources, and healthy ecosystems—all backed by sound science and an ecosystem-based approach to management."

²⁶ MSA § 2 Findings, Purposes and Policy (b) Purposes (1) and (3); 16 U.S.C. § 1801 (b)(1), (3).

²⁷ MSA § 303 Contents Of Fishery Management Plans: (a) Required Provisions; 16 U.S.C. § 1853 (a)(7).

²⁸ See letter from John D. Crawford to John Bullard, NOAA Regional Administrator, concerning the threats of climate change, dated June 9, 2014.

²⁹ National Fish, Wildlife and Plants Climate Adaptation Strategy, National Fish, Wildlife and Plants Climate Adaptation Partnership. 2012. Association of Fish and Wildlife Agencies, Council on Environmental Quality, Great Lakes Indian Fish and Wildlife Commission, National Oceanic and Atmospheric Administration, and U.S. Fish and Wildlife Service. Washington, DC, ISBN: 978-1-938956-00-3, DOI: 10.3996/082012-FWSReport-1. <http://www.wildlifeadaptationstrategy.gov/pdf/NFWPCAS-Final.pdf>.

³⁰ National Fish, Wildlife and Plants Climate Adaptation Partnership (2012). Chapter 3: Climate Adaptation Goals, Strategies & Actions.

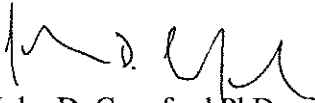
³¹ NOAA Fisheries Mission.

We strongly urge NOAA Fisheries to support the Council in finalizing an amendment that significantly improves habitat protection in the Northeast for target species, for their prey, and for other species and substrates that are vital as habitat.

You have repeatedly heard from the scientific community on this issue, most recently from an international group of 147 scientists including a former NOAA Chief Scientist and authors of a prominent scientific paper demonstrating the critical importance of rigorous protection of large marine areas in order to gain benefits for fish.³² The response from the general public has been massive, with over 150,000 comments of various forms urging NOAA Fisheries to improve habitat protection in New England. While the Council trends toward risky decisions and inadequate protections,³³ NOAA Fisheries must promote expanding, not diminishing, habitat protections. The decisions about this Amendment will impact the region for decades to come.

NOAA Fisheries in the Northeast must exhibit leadership to uphold this important mission, ensuring that decisions about oceanic habitat in New England are made for the future and not driven by short-term economic interests.

Sincerely,



John D. Crawford PhD
U.S. Oceans, Northeast

³² Letter from 150 scientists to John Bullard, NOAA Regional Administrator, dated January 8, 2015, commenting on the DEIS; Graham J et al. (2014) Global conservation outcomes depend on marine protected areas with five key features. *Nature* 506: 216–220.

³³ *Risky Decisions: how denial and delay brought disaster to New England's historic fishing grounds*. Pew Charitable Trusts, October 2014.

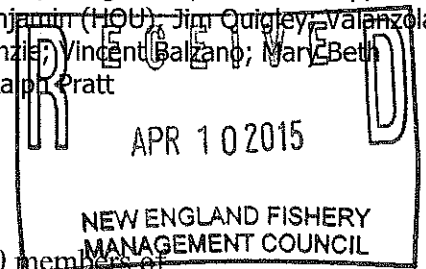
From: Michael Pierdinock

Sent: Monday, April 13, 2015 2:24 PM

To: Libby Etrie; Terry Alexander

Cc: Frank Blount; David Preble; David Pierce; Tom Nies; Terry Stockwell; Barry Gibson; Doug Grout; Dave Waldrip; Charlie Wade; Lou Gainor; Beth Casoni; Vito Giacalone; Vito Giacalone; Thomas Benjamin (HOU); Jim Quigley; Valanzola Jared (SEN); John Bullard; John Pappalardo; Ellen Goethel; John Quinn; Matt McKenzie; Vincent Balzano; Mary Beth Tooley; Mark Gibson; Michael Sissenwine; Doug Grout; Peter Kendall; Rich Ruais; Ralph Pratt

Subject: DHRA Vote - "No Action"



Terry and Libby:

On behalf of the recreational anglers and charter boat captains or over 50,000 members of the Recreational Fishing Alliance ("RFA") and over 130 members of the Stellwagen Bank Charter Boat Association ("SBCBA") and all of the businesses that will be negatively impacted by implementation of the proposed DHRA and/or closure of 55 square miles of prime fishing grounds to groundfishing, we want to thank you for your vote against the proposed DHRA at the Habitat Committee meeting.

The public hearings provided us the opportunity via testimony and correspondence to provide the details concerning the flawed science and flawed economics being utilized to select this area for research. Over 200 anglers showed up at the Plymouth and Gloucester meetings against the proposed DHRA. Our federal and state representatives recognize the negative financial impact to the recreational anglers, charter boat fleet and entire community if implemented. We have been fighting the battle against the proposed DHRA dating back to before SERA I/II with the NEFMC and the Sanctuary. Therefore, there should be no surprise concerning our position that has also been well documented by the NEFMC RAP.

We will be attending the NEFMC meeting and look forward to your continued support. With the zero cod bag limit, 3 to 4 haddock and 1 striped bass per person planned for 2015, we are left with few options. As a result this is neither the time nor place to implement such a closure. I have cc'd the remainder of the NEFMC in this email requesting their support to vote against the proposed DHRA (No Action).

We have provided correspondence recently as well as over the past several years pointing out the flawed science and flawed economics associated with the selection of the proposed DHRA for research that is on file at the NEFMC. If for some reason it is still not clear that the recreational community is adamantly against the proposed DHRA that is well documented via the NEFMC RAP as well as correspondence and testimony from recreational anglers and charter boat captains at the recent public hearings as well as over the past several years please promptly email or give me a call to provide you the evidence or historical correspondence as well as to discuss any questions you may have further.

Thanks

Capt. Mike Pierdinock

CPF Charters "Perseverance" - New Bedford

Recreational Fishing Alliance - Massachusetts Chairman

Stellwagen Bank Charter Boat Association - Board of Directors

Stellwagen Bank National Marine Sanctuary Advisory Council - Recreational Seat

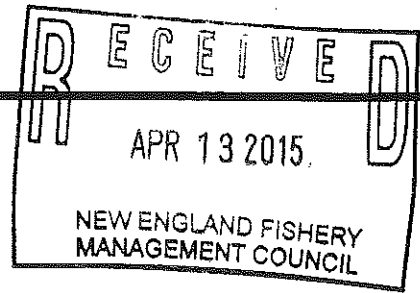
New England Fishery Management Council - Enforcement Advisory Panel

(617) 291-8914

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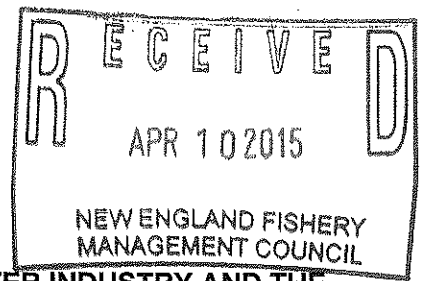
Joan O'Leary

From: james foderaro <jimf4444@icloud.com>
Sent: Monday, April 13, 2015 6:41 PM
To: info info
Subject: Closures



As a rec cod fisherman for the past 43 years I think you should vote for the closure. I The fish are more important than fishermans livelihood. Thanks Jim Foderaro Sent from my iPad

mb - 4/16/15



Addendum 1 Final

**TERMS OF AN AGREEMENT BETWEEN THE OFFSHORE LOBSTER INDUSTRY AND THE
SECTOR TRAWL FISHERMEN**

The Addendum /Agreement Period will commence upon execution by all parties.

This document is intended to describe the basic terms of a formal agreement between the Offshore Lobster Fixed Gear Fishermen and Sector Trawl Fishermen in the groundfish sectors.

The agreement is limited to the area now and formerly known as Closed Area 2 (CAII; see illustration attached).

The Parties to the Agreement will be:

1. All Sector Trawl Vessels requesting access to CAII (also referred to as mobile gear)
2. All Offshore Lobster vessels fishing with traps in CAII (also referred to as fixed gear)

From June 15 to October 31

41 30 north to the southern boundary of the Triangle (Areas B and C) will be no trawling by Sector Vessels.

41 30 south (Area D), status quo / shared by mobile gear and fixed gear.

Triangle (Area A), status quo / shared by selective mobile gear¹ and fixed gear fishermen

From November 1 to June 15

41 30 north to the southern boundary of the Triangle (Areas B and C) will be no Lobster gear set or stored in the area.

41 30 south (Area D), status quo / shared by mobile gear and fixed gear.

Triangle (Area A), status quo / shared by selective mobile gear¹ and fixed gear fishermen

¹ Selective Mobile Gear is described as: "that which is currently required within a SAP."
(Should a SAP be modified, Selective Gear description will remain as currently described in 2012.)

mb, pmf ~ 4/16/15

For any fishing year in which access to the area (within what is currently a portion of Closed Area II) from 41 30 to 42 10 and from 67 20 to the Hague Line (Areas B and C), the undersigned groundfish Sectors will incorporate specific reference to this agreement in their Annual Sector Operations Plans. In doing so, any sector vessels entering the area will carry onboard a Letter of Authorization that identifies the Sector affiliation of the vessel and a copy of their Sector Operation Plan, which will reference the Agreement between the Lobster Fishery and the Sector.

Offshore Lobster Fishermen will be responsible for communicating, to the best of their ability, with all Area 3 fixed gear lobster fishermen, including those entering CAII, throughout the entire year to ensure that all vessels abide by the agreement. All Area 3 fixed gear lobster permit holders will be notified by certified mail and copies of said notification will be provided to the qualifying sectors.

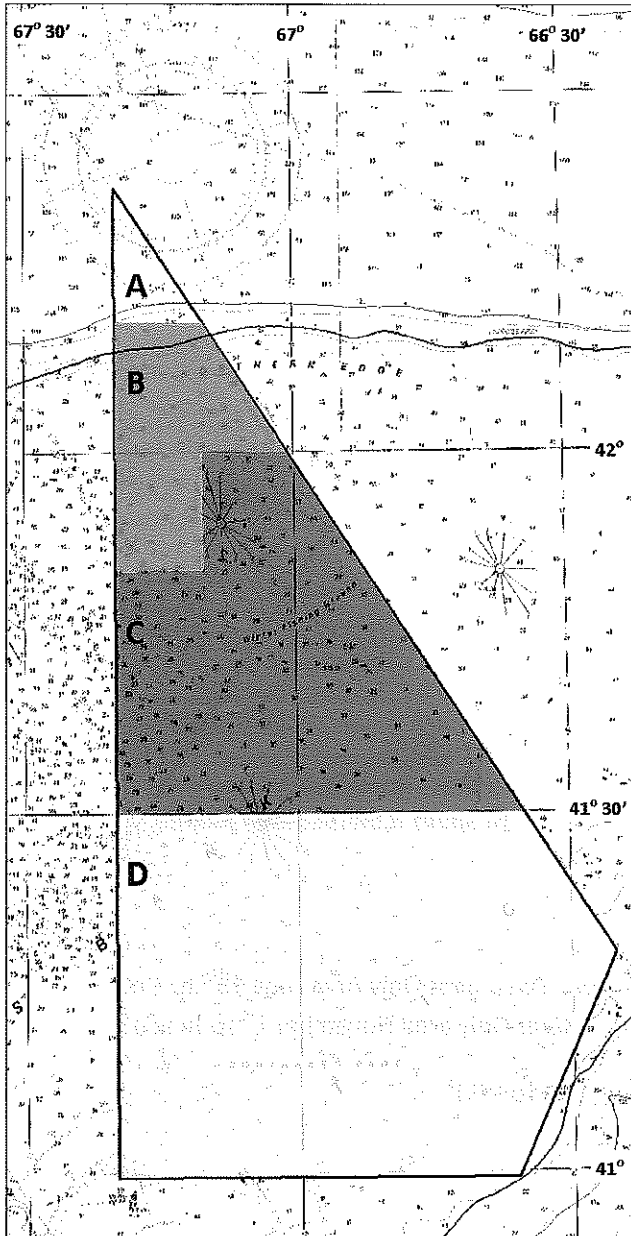
Offshore Lobster Fishermen agree to remove all gear from the water by midnight October 31st from the CAII area North of 41 30 to the Southern Boundary of the Triangle (Areas B and C), except any area/s from 41 30 to 42 10 and east of 67 20 that prohibit mobile gear (currently the HAPC area)² and no lobster gear will be set in the area until June 15th. Any lobster gear set or stored in this area from November 1st through June 15th would be considered derelict gear. In the case where an act of God may prevent the removal of fixed gear by October 31, the situation will be communicated immediately to qualifying sectors and gear removal will commence immediately upon the situation being resolved.

All parties will work out the details of communication and education regarding the terms and consequences of the agreement or breach of the agreement.

This agreement remains in effect in 2015, and thereafter, unless amended or terminated by the mutual agreement of the parties. Should either industry group want to change the provisions of the agreement, they must provide written notice six months in advance of any proposed change, unless mutually agreed otherwise, and afford the other party an opportunity for direct dialog and meetings on the proposed changes.

² At the time of this addendum the Habitat Omnibus Amendment 2 has not been finalized. This section contemplates potential changes to Habitat Management Areas resulting from the OA2 within the area covered by this agreement.

CLOSED AREA II Agreement Areas



Developed by Heidi Henninger, AOLA; January, 6 2014

Closed Area II		
Point	N. Lat	W. Long
1	42°22'	67°20'
2	41°18.6'	66°24.8'
3	41°00'	66°35.8'
4	41°00'	67°20'
A		
Point	N. Lat	W. Long
1	42°22'	67°20'
2	42°10'	67°09.3'
3	42°10'	67°20'
B – HAPC		
Point	N. Lat	W. Long
1	42°10'	67°20'
2	42°10'	67°09.3'
3	42°00'	67°00.5'
4	42°00'	67°10'
5	41°50'	67°10'
6	41°50'	67°20'
C		
Point	N. Lat	W. Long
1	42°00'	67°10'
2	42°00'	67°00.5'
3	41°30'	66°34.8'
4	41°30'	67°20'
5	41°50'	67°20'
6	41°50'	67°10'
D – Scallop CA II Access Area		
Point	N. Lat	W. Long
1	41°00'	67°20'
2	41°00'	66°35.8'
3	41°18.6'	66°24.8'
4	41°30'	66°34.8'
5	41°30'	67°20'

Signatures to the
AGREEMENT BETWEEN OFFSHORE LOBSTER INDUSTRY
AND SECTOR TRAWL FISHERMEN

The following signatures refer to the attached agreement, specifying spatial and temporal bottom-sharing of Groundfish Closed Area II between the above stated gear sectors. The signatories are authorized representatives of NE Groundfish Sectors who have submitted this agreement to be incorporated into their Annual Sector Operation Plans and representatives of NE offshore lobster fishery that have incorporated this agreement into the Atlantic States Marine Fisheries Commission's American Lobster Plan.

The undersigned representatives have entered this agreement for the sole purpose of alternating access to eliminate gear conflicts between Sector trawl vessels and lobster/fix gear fishermen in the specified area. This agreement was negotiated and agreed with the starting point being an attempt to allow the lobster fishery to prosecute their fishery during the period most important to that fishery.

Trawl fishermen have not entered this agreement for the purpose of protecting egg bearing lobster and wanted to make it clear that the discussions leading to this agreement did not represent in any way, a determination that such protection was warranted or even considered by the negotiating parties. This is stated for the specific purpose of clarifying the record following the motion made by the ASFMC Lobster Board in which reference to "concentrations of egg bearing females..." was made. Any such references incorporated into the ASFMC Lobster Addendum XX are unilateral statements that cannot be concluded by virtue of the existence of this agreement.

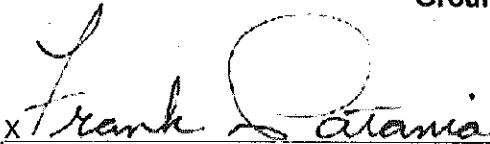
Effective Date of Addendum I: March 3, 2015

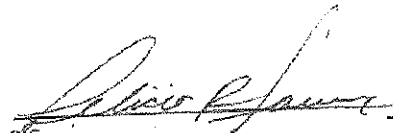
AOLA Offshore Lobster Representative


X 

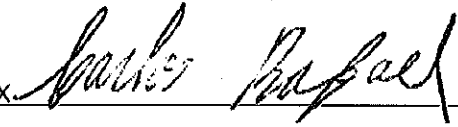
J. Grant Moore, President AOLA

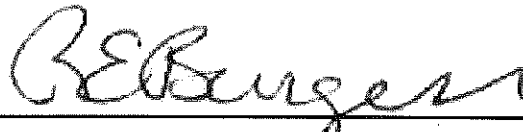
Groundfish Sector Representatives

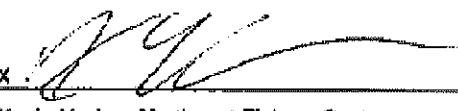
x 
Frank Patania, Sustainable Harvest Sector

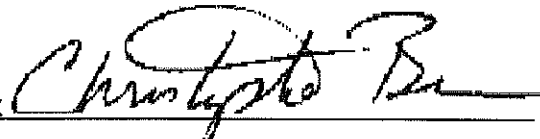

Felicio Lourenzo, Northeast Fishery Sector 8

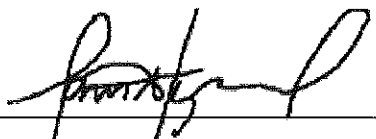
x 
Joe Orlando, Northeast Fishery Sector 2

x 
Carlos Rafael, Northeast Fishery Sector 9

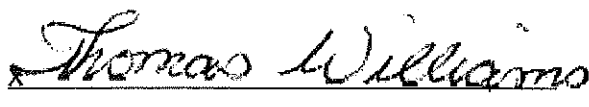
x 
Richard Burgess, Northeast Fishery Sector 3

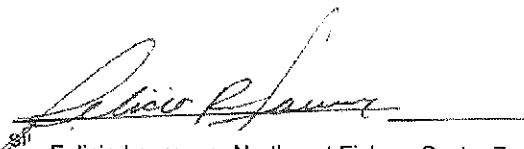
x 
Kevin Norton, Northeast Fishery Sector 10

x 
Christopher Brown, Northeast Fishery Sector 5

x 
James Hayward, Northeast Fishery Sector 11

x 
Michael Walsh, Northeast Fishery Sector 6

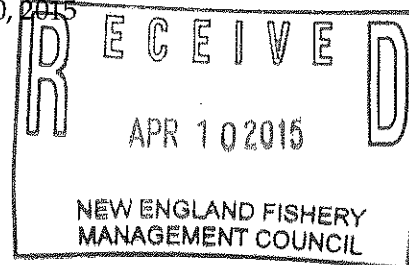

Thomas Williams Sr., Northeast Fishery Sector 13


Felicio Lourenzo, Northeast Fishery Sector 7



Mr. John K. Bullard
Regional Administrator NOAA Fisheries
Greater Atlantic Regional Office
55 Great Republic Drive
Gloucester, MA 01930-2276

April 10, 2015



Dear Mr. Bullard,

We are writing regarding the Omnibus Habitat Amendment 2 (OHA2). Unfortunately, the Habitat Committee (Committee) recommendations made during its March 23-24 meeting represent significant rollbacks from existing habitat protections and would not meet legal requirements to minimize the adverse impacts of fishing to the extent practicable, and ensure the conservation and enhancement of EFH for each FMP.¹ The National Marine Fisheries Service (NMFS or NOAA Fisheries) should advise the New England Fisheries Management Council (Council) to choose additional and/or other alternatives in order comply with the Magnuson-Stevens Act, the Administrative Procedure Act (APA) and to meet the goals and objectives of this amendment.

While we appreciate that based on the most recent scientific information some boundaries for protecting EFH may change, and that if fully justified the total area protected could potentially be reduced through this action, the Committee recommendations are extreme and represent such significant rollbacks from status quo EFH protection we are confident they would not pass legal review. As part of reaching our conclusion, we highlight the following:

- **A 35-percent loss in the total EFH area protected in the Gulf of Maine would occur if the Committee recommendations are approved:²**
 - Small Eastern Gulf of Maine HMA with Option 1;
 - Central Gulf of Maine Alternative 3, Option 1, without Platts Bank (Modified Cashes Ledge, Modified Jeffreys Bank, Fippennies Ledge, Ammen Rock);
 - Western Gulf of Maine habitat closure, Western Gulf of Maine groundfish closure with the eastern boundary shifted to match the habitat closure, Alternative 7a (roller gear), and Alternative 8 (shrimp exemption).³

¹ 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a)(9), (10); (b).

² Currently 4,902 km² are protected in the Gulf of Maine; the preferred alternative proposes to protect 3,196 km². See DEIS Volume I, Table 33, p. 369/483.

mb, pmf - 4/16/15

- **An 88-percent loss in the total EFH area protected on Georges Bank would occur if the Committee recommendation is approved:**⁴
 - Alternative 7, option 1: CAII EFH South HMA MBTF & Georges Shoal 2 MBTG.
- **A 65-percent loss in the total EFH area protected in the Great South Channel would occur if the Committee recommendations are approved:**⁵
 - Alternative 5, option 1: Nantucket Shoals HMA;
 - Cox Ledge HMAs (1 and 2), with a prohibition on trawl ground cables with bridles capped at 30 fathoms per side, and a prohibition on hydraulic clam dredges.
- **The Committee recommendations do not improve spawning protections consistent with the Magnuson-Stevens Act and the goals and objectives of the OHA2:**
 - In the Gulf of Maine, NE Multispecies (Groundfish) Framework 53 spawning and cod protection measures and Alternative 3 (Massachusetts Bay Spawning Protection Area);
 - On Georges Bank, Alternative 3 (Closed Area I North and Closed Area II, Feb 1-April 15) with Options B and C;
 - No spawning protections for any species affected by the OHA2 other than groundfish.
- **Rather than propose new or additional protections in the identified habitat areas of particular concern (HAPCs), the Habitat Committee recommended opening up significant portions of the Cashes HAPC, the entirety of the Northern Edge HAPC, and an exemption to allow highly destructive clam dredging within the proposed Great South Channel HAPC area.**

In their totality, these alternatives represent a nearly 70-percent reduction in the total EFH area protected, fail to adequately protect spawning habitat, and fail to protect the areas identified as particularly valuable EFH. These recommendations do not meet the goals and objectives of this amendment which include *enhanced* groundfish productivity, *improved* spawning protection, *improved* protection of critical groundfish habitats, and *improved* refuge for critical life history stages for all managed species (i.e., omnibus).⁶ For comparison, the status quo groundfish/habitat management areas amount to approximately 10-percent of the total area

³ The shrimp exemption area (23-percent) was removed from the overall footprint of the WGOM habitat box for the purposes of this calculation. Alternatively, the roller gear exemption could provide a rationale for setting the whole area to zero protection.

⁴ Currently 10, 801 km² are closed on Georges Bank; the preferred alternative proposes to close 1,303 km². The inclusion of this alternative is charitable in light of the scallop and lobster access. See DEIS Volume I, Table 33, p. 369/483.

⁵ Currently 7,285 km² are closed in the Great South Channel; the preferred alternatives propose to close 2,563 km². See DEIS Volume I, Table 33, p. 369/483.

⁶ See OHA2 pp. 76-77, available at:

<http://s3.amazonaws.com/nefmc.org/14haboa2eisvol1summaryaffectedenvironment.pdf>

under the Council's jurisdiction, however, under the Habitat Committee's recommendations, this percentage drops to just 3-percent. Further, the total area slated to lose protected status (15,926 km²) is larger than the size of Connecticut and Rhode Island combined (15,220 km²).⁷ In addition to doing little, if anything, to enhance or improve EFH protection consistent with the law, these recommendations are inconsistent with the guidance of the Intergovernmental Panel on Climate Change⁸ and NOAA Fisheries own plans for habitat and adaptation which urge robust habitat protection in order to build resiliency against the consequences of rapid climate change.⁹

In the Gulf of Maine, where the Council had already identified its preferred alternatives for the DEIS (5,874 km²), the Committee recommended cropping the footprint by another 2,678 km², or a reduction of 46-percent over the Council's previously chosen preferred alternatives. Specifically, the Committee recommended eliminating the entire Machias HMA (rather than addressing or eliminating the grey zone where Canadian effort overlaps effort in a small portion of the HMA), eliminating the Large Eastern Maine HMA (which contains greater diversity of habitat than the Small Eastern Maine HMA and affords more protection for juvenile groundfish), eliminating a quarter of the Western Gulf of Maine Groundfish Closed Area (the removal of which has not been analyzed in the OHA2 and only been analyzed for groundfish in Framework 48), reducing the Cashes Ledge Groundfish Closed Area by sixty percent (any reduction in this closed area, known for its spectacular species and habitat diversity including a rare offshore kelp forest would not be acceptable based on the best available science, or precautionary in light of the lack of survey data for this area and the depleted status of Gulf of Maine cod which demands protection of Gulf of Maine cod EFH within the Cashes Ledge

⁷ Connecticut (12,542) + Rhode Island (2,678) = 15,220 (in km²). See http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_area.

⁸ The Intergovernmental Panel on Climate Change (IPCC) is the international body for assessing the science related to climate change, under the auspices of the United Nations (UN) and World Meteorological Organization (WMO). See <http://www.ipcc.ch/report/ar5/index.shtml>.

⁹ See National Fish, Wildlife and Plants Climate Adaptation Strategy, National Fish Wildlife and Plants Climate Adaptation Partnership. 2012. Association of Fish and Wildlife Agencies, Council on Environmental Quality, Great Lakes Indian Fish and Wildlife Commission, National Oceanic and Atmospheric Administration, and U.S. Fish and Wildlife Service. Washington, DC, <http://www.wildlifeadaptationstrategy.gov/pdf/NFWPCAS-Final.pdf>; see also National Fish, Wildlife and Plants Climate Adaptation Partnership (2012). Chapter 3: Climate Adaptation Goals, Strategies & Actions. <http://www.wildlifeadaptationstrategy.gov/strategy.php>.

GCA),¹⁰ reforming and shrinking the Jeffrey's Bank Habitat Closure and adding a fraction of only one of two proposed areas in Eastern Maine. All of these regressive decisions were made against a backdrop of over 150 thousand public comments supporting the new Eastern Maine preferred alternatives in the DEIS and No Action in the remainder of the Gulf, including comments providing new data and analysis that support retaining these areas as they were proposed in the DEIS.

On Georges Bank and in the Great South Channel, where the Council has not selected preferred alternatives, the Habitat Committee selected "the industry" proposed alternatives. On Georges Bank the Committee rejected alternatives proposed by NOAA Fisheries and multiple conservationist groups, and selected the alternative specifically identified in the NOAA Fisheries letter as an inadequate option.¹¹ The Committee ignored NOAA Fisheries' warnings that the northern edge of Georges Bank should remain off limits to damaging trawl fishing and advice to protect additional areas near the northern edge. Without any actual data reflecting the estimated value of accessible scallops if existing Closed Areas I and II were reopened, the Committee nonetheless justified its actions based on the need to access valuable scallops in the northern edge. The data presented in recent SAFE reports do not support this justification nor the economic valuation of Northern Edge Alternative 8, the only Georges Bank alternative that offers significant EFH protection by capturing more SASI LISA clusters than any other proposed alternative.

The primary emphasis of the Magnuson-Stevens Act's EFH provisions is to minimize the adverse effects on habitat caused by fishing; and it is simply not practicable to provide such sweeping scallop industry access in order for that industry to maximize its short-term economic gains as much as possible as possible when the area that is identified as holding positive long-term biological benefits for overfished groundfish stocks in rebuilding plans. The alternatives that appear to be favored right now (Alternative 7 and two new alternatives added at the

¹⁰ See DEIS, Vol II, p. 392/456 (discussing unique nature of the closed area). More than the Cashes Ledge HAPC is required. The DEIS recognizes the Cashes Ledge GCA as an important spawning ground for Gulf of Maine cod. See DEIS, Vol. III, p. 101 and Table 17. This is a known cod abundance area and there continue to be remnant populations of resident and migratory cod in the Cashes Ledge GCA. Further, this area represents EFH for a wide range of other commercial species including haddock, pollock, American plaice and others. Any action to remove protections from this area that has benefitted from over a decade of limited benthic disturbance from fishing would be irresponsible and inconsistent with the substance, the goals and the objectives of the Amendment.

¹¹ See January 8, 2015 letter from John Bullard to Terry Stockwell at pp. 3-4 ("While Alternative 7 would close roughly double the amount of area as the HAPC, it is not equivalent in terms of habitat protection and thus may not compensate for the adverse effects of opening a portion of the HAPC. The DEIS5 concludes that the two habitat management areas of Alternative 7 would be expected to result in slightly negative habitat impacts relative to the status quo and neutral impacts relative to several of the other alternatives, despite its larger size.").

Committee's April 9, 2015 meeting) are inconsistent with the goals and objectives of this amendment, and are arbitrary and capricious under the APA and inconsistent with the Magnuson-Stevens Act's requirements to minimize to the extent practicable the adverse effects of fishing on EFH, and to take other actions to conserve and enhance EFH.¹²

I. PUBLIC COMMENT ON THE DEIS PROVIDES A BASIS FOR NEW ALTERNATIVES THAT MEET LEGAL MANDATES

As the vast majority of the 159,502 public comments submitted on the draft environmental impact statement (DEIS) pointed out, the OHA2 has fundamental flaws, including that it fails to protect habitat for spawning and juvenile fish, and it fails to protect prey as a component of essential fish habitat for managed species, consistent with the Magnuson Stevens Act. In addition, NOAA Fisheries provided substantive comments and EFH recommendations¹³ on numerous issues where the current proposed action is inadequate, and recommended approaches that would meet legal requirements and the Agency's policy goals.¹⁴ A significant amount of new information and analysis was presented during public comment that must be meaningfully considered as part of this action and incorporated into the analysis and final decision-making.

The National Environmental Policy Act (NEPA) requires that relevant new information be carefully considered as part of the final EIS, and specifically in this case the new information requires that existing or new alternatives analyzed in light reasonable concerns raised by public comment. Specifically, the new information provides a basis for new or reconfigured Habitat Management Areas (HMAs) where there has already been significant scientific analysis. These alternatives include the following: (1) Stellwagen Bank HMA as Atlantic Cod EFH to protect sandlance (i.e., food for grow to maturity); (2) HMA Alternative that Seasonally Protects River Herring as Atlantic Cod EFH (i.e., food for grow to maturity); (3) Revision of management for existing HMA Alternative so they will Protect Spawning Atlantic Herring in addition to other functions; and (4) a Multi-Function HMA for near-shore Gulf of Maine that protects spawning and juvenile groundfish, spawning Atlantic herring, and considers other forage concerns (i.e. river herring hotspots), discussed further below.¹⁵ Additionally, NOAA Fisheries and the Council have failed to provide any meaningful analysis of substantial new information on

¹² 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a)(9), (10); (b).

¹³ 50 C.F.R. § 600.815(b) ("NMFS will provide such recommendations for the initial incorporation of EFH information into an FMP and for any subsequent modification of the EFH components of an FMP.").

¹⁴ See January 8, 2015 and March 16, 2015 letters from NOAA Fisheries Regional Administrator John Bullard to NEFMC Chairman Terry Stockwell.

¹⁵ Comment Letters are available at: <http://s3.amazonaws.com/nefmc.org/1-OHA2-Public-comment-letters.pdf>. See Conservation Law Foundation at pp. 133-197; see also Pew Charitable Trusts Letter at pp. 665-703.

groundfish habitat use (i.e., *persistence*) offered by the Nature Conservancy,¹⁶ most of which supports choices different from those being made by the Council, including selection of Alternative 8 on Georges Bank, maintaining Closed Area 1, and choosing Alternative 3 (not 5) in the Great South Channel without allowing dredging of the bottom (see Committee decisions made April 9, 2015).

A. The OHA2 Fails to Identify and the Committee Failed To Recommend any Alternatives that Protect Prey as EFH for Managed Species Consistent With the Magnuson Stevens Act

As our March 20, 2015 letter discussed, there are legal obligations to protect prey as a component of EFH for managed species (*see also* CLF et al, February 20, 2014, Pew Charitable Trusts January 8, 2015). The Magnuson-Stevens Act defines EFH as those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity. 16 U.S.C. § 1802(10). If an area contains an important food source for a managed stock, that area should be designated as EFH if there would be adverse impact on the managed species in the absence of that prey.¹⁷ The presence of prey contributes to the quality of foraging habitat and is a component of EFH. With regard to prey, the DEIS needs to be improved in order to: (1) address prey species distributions in the text description of the alternatives; (2) provide maps for prey species not managed by the Council; and (3) adequately analyze feeding as a factor in the adverse impacts analysis or the development of the HMAs (at present, the DEIS merely summarize what managed species eat for food).¹⁸ Forage fish such as sandlance, alewives, blueback herring, and Atlantic herring have been identified as key prey species for Atlantic cod, haddock and other managed fish in the DEIS and other scientific documents in the record. The existing analysis, supported by additional information received during the public comment period, require the adoption of alternatives to protect prey as a component of EFH for managed species.¹⁹

At the Committee meeting on March 23, 2015 Earthjustice commented on the need to update the text descriptions in the DEIS. We are concerned that all of the discussion about prey, a critical component of EFH for managed species, is in Appendix B, rather than in the text

¹⁶ *See supra* at fn 15, pp.603-664.

¹⁷ FMP's "shall" minimize adverse effects on EFH to the extent practicable, 16 U.S.C. § 1853(a)(7). Feeding (prey) is an essential element of EFH. 16 U.S.C. § 1802(10). The regulatory definition of "adverse effect" includes loss of prey and its habitat if it modifies the quality or quantity of EFH. 50 C.F.R. 600.810(a).

¹⁸ The EFH designations for the managed species in Volume II also need to be updated to include the prey species information currently in Appendix B, so that the textual descriptions appropriately describe EFH consistent with the regulations. 50 C.F.R. §§ 600.815(a)(i)(1), (iv)(B).

¹⁹ The Pacific Fishery Management Council has recently identified prey as a component of foraging EFH in both their salmon FMP and groundfish FMP. *See* Pacific Coast Salmon Fishery Management Plan, Appendix A; *see also* Pacific Coast Groundfish Fishery Management Plan, Appendix B2.

descriptions found in the EIS. The relevant regulations state: "FMPs must describe and identify EFH *in text* that clearly states the habitats or habitat types determined to be EFH for each life stage of the managed species," 50 C.F.R. 600.815 (a)(1)(italics added); and "[i]f there are differences between the descriptions of EFH in text, maps, and tables, *the textual description is ultimately determinative of the limits of EFH,*" 50 C.F.R. 600.815 (a)(4)(B) (italics added). Further, the definition of adverse effect "specifically mentions the loss of or injury to prey species and their habitats as potential adverse effects to EFH because, as mentioned above, prey can be a vital component of habitat for managed species."²⁰ However, as an example of the OHA2's treatment of prey as a component of EFH, the text description for Atlantic cod fully describes the physical characteristics of EFH for all life stages of cod (eggs, larvae, juvenile and adults) and other relevant information,²¹ yet nothing directs the reader toward the updated (revised summer 2014) lists of prey species for Atlantic cod found in Appendix B or other information gleaned by the Planning Development Team on the importance of prey species and habitat.²² The EFH designations for the managed species in Volume II must be updated to include the prey species information currently in Appendix B, so that the textual descriptions appropriately describe EFH consistent with the regulations.

NOAA Fisheries and the Council are clearly well aware of the primacy that EFH text descriptions have over all other presentations or definitions for EFH. This issue was discussed extensively at the April 9, 2015 Committee meeting by NOAA Fisheries staff when making decision about how to reconcile questions about EFH for scallops, black back flounder, and juvenile cod (see meeting motions for April 9, 2015). It appears arbitrary (and shortsighted) to the public interested in the prey dimensions of EFH to neglect prey in the EFH text descriptions when such text descriptions are being addressed for other interested parties.

Scientific information presented during public comment demonstrates that prior analysis could be used to support alternatives that protect prey as EFH consistent with the law including:

- **A Stellwagen Bank HMA for the conservation of sandlance as Atlantic Cod EFH.** Stellwagen Bank has been recognized as a hotspot for cod feeding on sandlance in the recent cod stock assessment and in peer reviewed publications (Richardson *et al.*, 2014: Can. J. Fish. Aquat. Sci. Vol. 71). Thus, this portion of cod EFH (see DEIS Volume 2, Map 41) is particularly important to cod as a feeding area and should be protected as an HMA with measures suitable for protecting cod and their prey. The boundary of the areas is shown approximately in Richardson *et al.*, but could also be defined by depth contour around the bank (depth=60 meters). This alternative has been described in previous letters (CLF *et al.*, 2014 and Earthjustice Jan 8, 2015).

²⁰ See Final Rule and regulations implementing EFH, 67 Fed. Reg. 2343, 2347 (Jan. 17, 2002).

²¹ See Volume II, pp. 89-93/456 for Atlantic cod.

²² See Appendix B, p. 12/113 for Atlantic cod.

- **A New Seasonal HMA to Protect River Herring as Atlantic Cod EFH.** Published research has focused on the specific role of river herring in the spawning and feeding of groundfish.²³ Areas of groundfish EFH that coincide with river herring concentrations must be considered as particularly important areas and protected as HMAs because they contain food for seriously compromised stocks like cod. The times and locations of high rates of at-sea river herring catch were identified in a paper published by Cournane *et al.* 2013 (Fisheries Research 141:88– 94 – Figure 2), and also analyzed extensively during the development of Atlantic Herring Amendments 4 and 5. An alternative for seasonal HMAs within the OHA2 based upon Figure 2 in Cournane *et al.* should be included the OHA2. These HMAs should extend from shore to the boundary as indicated in the March 17, 2015 Letter submitted by the Pew Charitable Trust to Tom Nies.

B. The OHA2 Fails to Identify and the Committee Failed to Recommend HMAs that Protect Spawning Fish Consistent With the Magnuson Stevens Act and Improve Spawning Protections consistent the Goals and Objectives of the Amendment

The Committee’s recommendations for spawning protection – Framework 53 measures, the Massachusetts Bay Spawning Protection Area, and Alternative 3 on Georges Bank would not satisfy legal requirements under the Magnuson Stevens Act, or the goals and objectives of this amendment. Spawning, including pre-spawning behaviors and aggregation, is obviously vital to the future of fish and fisheries, and consequently is specifically identified in the Magnuson-Stevens Act where the act defines EFH.²⁴ Objective K (added in 2011) calls for: “Improved groundfish spawning protection’ including protection of localized spawning contingents or sub-populations of stocks (Goals 9 and 10).”²⁵ As discussed in prior letters, the decision to largely ignore the areas identified by the Closed Area Technical Team (CATT) as key areas for spawning groundfish is inconsistent with the best available science. The plan to address the spawning issue in a future action through the Northeast Multispecies FMP, instead of the current Omnibus Habitat Amendment is also problematic.²⁶ The measures for Cod proposed in Framework 53 are not even adequate for Cod – only one of the many species

²³ Ames EP (1997) Cod and Haddock Spawning Grounds in the Gulf of Maine. Island Institute, Rocland, Maine; Ames EP, Lichter J (2013) Gadids and Alewives: Structure within complexity in the Gulf of Maine. Fisheries Research 141: 70– 78; Zemeckis D et al (2014) Spawning site fidelity by Atlantic cod (*Gadus morhua*) in the Gulf of Maine: implications for population structure and rebuilding. ICES J. Mar. Sci. 71 (6): 1356-65; Ames EP (2010) Multispecies Coastal Shelf Recovery Plan: A Collaborative, Ecosystem-Based Approach. Marine and Coastal Fisheries: Dynamics, Management, and Ecosystem Science 2:217–231; *see* species summaries in Collette and Klein-MacPhee (2002) Bigelow and Schroeder’s Fishes of the Gulf of Maine, Smithsonian Press, DC.

²⁴ 16 U.S.C. § 1802(10).

²⁵ *See supra* at fn 6.

²⁶ *See* DEIS volume 3, p. 176.

covered by the omnibus amendment (see memorandum from the Habitat PDT to the Habitat Committee, dated April 8, 2015).

Although one of the purposes of Framework 53 was to enhance spawning protection for GOM cod given the poor status of the stock, there is little support in the record for the Gulf of Maine Cod Protection Measures approved by the Council. Framework 53 proposes to reconfigure the GOM rolling closures by adding some closures and removing others, including all closures in April and one in June. *See* 80 Fed. Reg. 12395 (Mar. 9, 2015). The Council's rationale for this reconfiguration is to provide additional fishing opportunities to target healthy stocks, however, Earthjustice shares NOAA Fisheries concerns that the additional closures in May and June are unlikely to benefit GOM cod because there has been little to no fishing activity in those times and places anyway. *Id.* at 12403 (*see also* April 8, 2015 Memorandum from the Habitat PDT to the Habitat Committee, entitled *Analyses requested at February 24, 2015 Committee Meeting*).

The removal of all of the April rolling closures in an area of historical importance to spawning cod is particularly problematic. The record shows that the removal of these closures is likely to shift effort onto areas of high GOM cod concentration while possibly targeting other stocks. *Id.* at 12406. Loss of the April closures may also have an impact on other groundfish stocks including GOM winter flounder, CC/GOM yellowtail flounder, plaice, and GOM haddock that are currently afforded secondary protection under these closures. *Id.* In addition to mortality from fishing, there is also scientific information showing that fishing on spawning fish may affect behavior even if they are not caught by disrupting signals and ultimately reducing reproductive success. Whatever small economic benefits may be afforded in the short term by additional opportunities to target other stocks, GOM cods ability to rebuild is dependent upon reproductive success every year between now and 2024. This is the wrong time to make a short-term economic trade-off to the detriment of GOM cod.

Habitat issues related to groundfish spawning should be addressed comprehensively in the Omnibus Habitat Amendment 2 (OHA2), not Framework 53. The proposed measures in Framework 53 do not meet the goals and objectives of Framework 53, and do they meet the goals and objectives of the OHA2. Thus, they would not satisfy NOAA Fisheries' legal obligations to protect spawning habitat as part of this amendment. NOAA Fisheries should disapprove the Gulf of Maine Cod Protection measures described in Framework 53 (which reconfigure the GOM rolling closures), *id.* at 12403, because they will inhibit rebuilding, and work with the Council to develop an improved suite of seasonal closures based on the Closed Area Technical Team /PDT analysis that offers protections for all groundfish, not just GOM cod.

In addition to groundfish, the OHA2 amends the Atlantic herring FMP (a managed species) which is also prey for a number of depleted groundfish stocks without proposing protections for well-known herring spawning areas. Although Objective K calls for "improved...protection of localized spawning contingents or sub-populations of stocks," nothing identified in the OHA2 or recommended by the Committee achieves this objective.

Herring are a vital food source for the region's most important groundfish stocks including Atlantic cod, haddock and other species. Scientific studies show that spawning aggregations are disrupted by fishing. Because herring egg mats are attached to the seafloor they are vulnerable to mobile gear contacting the bottom. New analysis presented during the public comment demonstrates that some of the prior analysis could be used to support new alternatives that protect spawning to comply with the law. These alternatives include the following:

- **An HMA that Protects Spawning Atlantic Herring.** The EFH maps for many groundfish overlap extensively with herring spawning grounds and other components of EFH for Atlantic herring. This was a principal conclusion of an analysis presented to NOAA Fisheries and the Council in a letter February 20, 2014 (*see CLF et al., 2014, Figure 1A, page 13*), and in public comments submitted by the Pew Charitable Trust on the DEIS (*see January 8, 2015 letter*). These letters presented maps of herring spawning areas from the most recent stock assessment for herring, and from the EFH source documents, showing their relationship to HMA options that are being considered. These relationships are further supported by updated spawning data accepted by the Committee on April 9, 2015. Those HMA alternatives in the DEIS that could provide protection for herring spawning and eggs, and which include aggregations of this prey species within groundfish EFH, must be given the highest priority when the Council finalizes OHA2. The HMA alternatives that overlap extensively with herring spawning areas and groundfish EFH include:
 - a) Eastern Gulf of Maine Alt. 2: Large Eastern Maine HMA and Machias HMA.
 - b) Western Gulf of Maine Alt. 1/No Action: Western Gulf of Maine Groundfish and Habitat Closure Areas
 - c) Georges Bank Alternative 8: The Northern Georges HMA
 - d) Georges Bank Closed Area I: Part of Alternative 1 (no action)
 - e) Great South Channel (GSC) and Southern New England: Alternative 3 - GSC East HMA

C. The OHA2 Fails to Identify and the Committee Failed to Recommend a Multi-Function HMA That Protects Prey for Managed Species and Spawning In the Inshore Gulf of Maine

Several comment letters urged the Council to take an integrated view of habitat protection (*see PCT January 8, 2015 Letter*), and seek out HMAs that could achieve multiple goals for specific stocks and the ecosystem (e.g., Pew Charitable Trust letter to Paul Howard dated July 18, 2011). The alternative for a Multi-Function HMA for the inshore Gulf of Maine described below would achieve this goal and advance recovery of the ecology of this area.

- **A Multi-Function HMA.** Based on the work of the Closed Area Technical Team (CATT) on spawning and juvenile groundfish, and also considering forage concerns (river

herring hotspots and spawning in Atlantic herring), an alternative could be developed that defines a line 20 nm seaward of shore,²⁷ and extends from a point due east of Chatham to the border with Canada that protects spawning and juvenile groundfish, spawning Atlantic herring, and safeguards those areas of groundfish EFH that contain forage as a component of their EFH (described on pages 13-15 of the Pew Charitable Trusts January 8, 2015 Letter).²⁸

II. PRACTICABILITY

A recent letter submitted by representatives of the Atlantic Scallop fishery asserts that it would not be practicable to protect the HAPCs in the Great South Channel and on Georges Bank because of lost revenue to the Scallop fishery.²⁹ These arguments lack merit. While there is not an explicit standard for practicability determinations, NOAA Fisheries must take a comprehensive and long-term view of the practicability of protecting habitat in New England.³⁰ This is especially important considering the depleted state of fisheries resources and the mounting influences of climate change. While “practicability” requires a reasonable balancing of the costs and benefits of competing interests, it is not a free pass to do as little, or nothing, as possible in order to limit the economic impacts to certain components of the fishing industry.³¹

²⁷ Under the Magnuson-Stevens Act there is authority to regulate in state waters when necessary. See 16 U.S.C. § 1856(b); see also 16 U.S.C. §§ 1852(h)(1), 1853(b)(3)(A), (b)(12).

²⁸ The new spawning analysis presented by NOAA Fisheries at the March 11, 2015 Habitat Plan Development Team (PDT) meeting adds further support for the ecological value of this HMA alternative, revealing extensive overlap between near-shore spawning areas for Atlantic herring and groundfish EFH. The HMA would also capture the areas shown in DEIS map 35, volume 3 (p 141), as recommended by the PDT and CATT in 2013. Such an HMA should include near shore waters to maximally benefit juvenile cod (see also DEIS on juvenile cod EFH). Though this area has received previous analysis and consideration, including a recommendation by the PDT, the analysis did not consider this as a joint spawning and juvenile area that has significant benefits for Atlantic and river herring as forage within groundfish EFH.

²⁹ See January 28, 2015 Letter from Kelly Drye & Warren LLP to NEFMC.

³⁰ See e.g., Letter from Guillermo Herrera, Jan. 6, 2014 (Letter, #86 in the Council compilation). NOAA Fisheries’ January 8, 2015 Letter to the NEFMC also indicates that to date the practicability analysis in the DEIS fails to fully account for the benefits to all sectors of the fishing industry that would come from increased productivity associated with habitat protection.

³¹ One example of the potentially flawed practicability analysis is the disparity between Table 140 in Volume III, p. 645 which estimates the long term and short term yield potential from Alternative 8 as almost double any other alternative for GB, despite information in Figure 6 of the Draft SAFE Report for Framework 26 to the Scallop FMP which indicates that the highest scallop abundance is on the southern flank of Georges Bank rather than the Northern Edge.

One of the purposes of the Magnuson-Stevens Act is to develop a national program for the conservation and management of national fishery resources that “facilitate[s] long-term protection of essential fish habitats.”³² In order to this purpose, Congress directed NOAA Fisheries to minimize the adverse effects of fishing on EFH. The 1996 Sustainable Fisheries Act amendments to the Magnuson-Stevens Act, which included the EFH mandate, give conservation of fisheries priority over short-term economic interests. Several courts have supported this view. *See Natural Res. Def. Council*, 2014 WL 5148407 at *2, fn3; *see also NRDC v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005) (“The purpose of the Act [as amended by the SFA] is clearly to give conservation of fisheries priority over short-term economic interests.”). The D.C Circuit has explicitly rejected the idea that the MSA’s economic and conservation goals are in conflict. *See Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). There is no conflict, because the Magnuson Stevens Act places conservation before economic priorities. *Id.*

NOAA Fisheries’ January 8, 2015 Letter to the NEFMC indicates that it too is concerned that the practicability analysis in the DEIS fails to fully account for the benefits to all sectors of the fishing industry that continued habitat protection would provide to the productivity in other fisheries. As we have previously commented, the practicability determinations in the DEIS do not provide an adequate basis upon which decisions about the long-term costs and benefits of habitat protection for the New England community can be based.³³ The analysis places too much weight on near-term economic costs and benefits to commercial fisheries while inadequately valuing future benefits, and it fails to model responses of fishermen to new habitat protection measures. Relying upon the short-term practicability analysis to justify actions similar to the extreme rollbacks recommended by the Habitat Committee is not defensible, will jeopardize the health of these valuable public resources, and ignores the thousands of public comments calling for enhanced habitat protections.

In general, where scientific uncertainty is high, additional caution should be taken in fisheries management decisions. Earthjustice strongly urges NOAA Fisheries and the Council to take a much more cautious approach than the approach recommended by the Habitat

³² 16 U.S.C. § 1801(a)(6).

³³ In the case of habitat and fishery-relevant biological processes, significant uncertainties exist but are poorly characterized within the DEIS and are not well accounted for within the range of habitat areas and regulatory approaches offered. For example, the DEIS does not adequately develop alternatives that reflect discount rates that value future benefits of habitat that has been protected in a precautionary manner. The analysis also fails to explore behavioral responses to proposed regulations, neglecting possible behavioral dynamics that would mitigate presumed negative effects of area closures and regulations. Additionally, the DEIS neglects consideration of policy mechanisms that could be deployed to reduce the negative impacts of closure options (e.g., complementary regulatory actions), thus shifting the outcome of the practicability equation. Overall, little attention is given to the long-term health of ocean ecosystems and the benefits this will have for industries beyond commercial fishing.

Committee – one that reflects social and biological uncertainties, and places appropriate value on restoring and conserving marine resources for future generations. At present, the recommended actions are inappropriately based on the near-term economic considerations of some influential commercial fishermen.

Conclusion

This Amendment is an important opportunity to help restore and protect New England's fisheries and the larger ocean ecosystem. To comply with the Magnuson-Stevens Act, NEPA, and the APA, the final OHA2 must significantly improve EFH protections over the substantial rollbacks to protected areas recommended by the Habitat Committee, including by taking actions that will support juvenile and spawning groundfish as well as forage as a component of EFH. It would be inconsistent with the Magnuson-Stevens Act to take action, as the Habitat Committee has recommended, that is primarily based on the short-term economic interests of certain commercial fishermen to the detriment of the long-term ecological health of the Northwest Atlantic Ocean and the economic interests of all fishermen and the nation.

Thank you for considering these comments.

Sincerely yours,

/s/ Roger Fleming

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