

Conservation Law Foundation
Executive Summary of Comments on the Omnibus Habitat Amendment 2 Draft
Environmental Impact Statement

Introduction: The Legal Basis of the Omnibus Habitat Amendment, its Purpose, and the Critical Need to Protect Essential Fish Habitat

The New England Fishery Management Council (NEFMC) adopted its first Omnibus Habitat fishery management plan in 1998, amending various fishery management plans under its jurisdiction, including groundfish and sea scallops, to identify and protect essential fish habitat. That plan was ruled legally inadequate in 2000, and it has taken the Council 14 years to produce a new proposal to finally meet its legal obligations under section 303(a)(7) of the Magnuson-Stevens Fisheries Conservation and Management Act (MSA). The purpose of Omnibus Habitat Amendment 2 (Amendment) is to “describe and identify essential fish habitat . . ., 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.” “Essential fish habitat” (EFH) is a statutorily defined term that refers to “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.”

It would be difficult to overstate the critical importance of successfully tackling EFH protection in New England at this time. Numerous groundfish stocks including severely depleted Georges Bank and Gulf of Maine cod and yellowtail flounder stocks are in crisis. Ocean acidification and the impacts of climate change on New England’s ocean have never been more evident, and the implications more uncertain. At no time in the management of our oceans has there been a greater need for precaution to mitigate this ecological uncertainty. Unfortunately and predictably, the Council has proposed an Amendment that ignores that need and proposes to reduce protected habitat, in some scenarios by as much as 70%.

Severe Deficiencies in the Draft Environmental Impact Statement

NEFMC has developed an Amendment that proposes to drastically reduce defined EFH in New England, drastically reduce the extent of EFH protected, and forego taking any management actions that would further limit allowed trawling and other fishing in areas that have served for nearly twenty years as refuges for numerous commercial fish and other protected marine species. The current proposed Amendment and its underlying analysis contained in a draft Environmental Impact Statement (DEIS) fail to comply with the law and, more importantly, would put the region’s goal of producing valuable, diverse, and sustainable fisheries even further

from reach. Some of the most glaring deficiencies in the proposed Amendment and DEIS analysis include:

1. The DEIS fails to identify and analyze a broad range of feasible alternatives and is legally inadequate.

Under the National Environmental Policy Act (NEPA), before a federal action like the Amendment can be taken, the agencies must take a “hard look” at the potential environmental impacts associated with the proposed action as well as a broad and comprehensive set of feasible alternatives to its proposed action. This “hard look” is set forth first in a DEIS and then in a final EIS. The DEIS for this Amendment fails to meet these requirements for providing a broad and comprehensive range of feasible alternatives.

Several alternatives are simply not feasible because they would violate the law, such as the Alternative 2 for every area, which would do away with any protected habitats in New England’s waters. As a decision-making tool, this document is in many respects incomprehensible, rife with inconsistencies and internal contradictions that make the range of choices difficult, if not impossible to understand, let alone compare in a clear manner, even for people who have been closely following this process for a decade. The DEIS should be revised to ensure that every section of the alternatives analysis contains a comparison of the existing conditions (which in most instances is the “no action” alternative) to each proposed new alternative, as well as an ability to compare each new alternative to other new proposed alternatives.

2. The Central Gulf of Maine Cashes Ledge and Jeffrey’s Bank Closed Areas should remain closed.

The DEIS concludes that the “no action” Alternative 1, which would retain the existing Cashes Ledge GCA and Jeffrey’s Bank Habitat Closed Area, has the most positive cumulative impacts of any of the alternatives proposed in the CGOM sub-region; however, the Council’s preferred Alternative 4 is one that will remove protection from over 70% of the Cashes Ledge Groundfish Closed Area (Cashes Ledge GCA).

Retaining the existing protections for the Cashes Ledge GCA would also be the appropriate precautionary approach to take in light of the admitted lack of data to support opening the area and the data that establishes the area not only as essential habitat for the

threatened cod but for a wide range of other commercial species including haddock, pollock, American plaice, and others.

Cashes Ledge Closed Area is also an area well known for its ability to support a uniquely abundant variety of species and a diverse selection of habitats including steep, kelp-covered ledges, muddy basins, and boulder and cobble areas. In light of the DEIS' recognition of the benefits keeping Cashes Ledge closed area, the Council's preferred alternative to remove the 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.

3. The practicability analysis is flawed.

In developing the Amendment, the Council and NOAA Fisheries are required to consider the practicability of the proposed and final management measures, meaning that the Council should consider the nature and extent of the adverse effect on essential fish habitat (EFH) and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation.

Here, the Council does not even define what it means by "practicability" and provides no direction as to how it weighed practicability of the various alternatives leaving the public only to guess. What is clear is that the Council's analysis fails to adequately account for the role that areas protected against the impacts of fishing play in hedging the numerous forms of uncertainty. It also provides no support for its assumptions related to the likely human behavioral response to management measures (e.g., shifts in effort and location of fishing as a result of opening or closing and area).

4. The DEIS should recommend against an exemption that allows hydraulic clam dredges within any proposed habitat protected area.

The Council has proposed management measures that would allow fishing with a hydraulic clam dredge within each protected area, including those from which all other bottom tending mobile gear would otherwise be prohibited. This is despite the fact that the DEIS recognizes that hydraulic clam dredges "have a more severe immediate impact on surface and sub-surface habitat features than other fishing gears used in the Northeast region."

5. Gear modification approaches proposed in the Amendment and DEIS are not based on the best available science.

The Council proposes some alternatives that would allow modified trawl fishing gear within habitat protected areas as the only means of protecting vulnerable habitat. The only reason to do this is to allow fishing with destructive gear to continue in areas of vulnerable habitat from which they would otherwise be precluded. The rationalization for this alternative is that gear could be modified to reduce impacts to the habitat, but that reasoning has limited empirical support and, more importantly, ignores the fact that the Council's own science advisors recommended against the use of gear modification options because available information was inconclusive that such gear modifications would be effective in reducing the adverse effects of fishing on habitat.

6. The DEIS fails to include alternatives that protect prey species.

The availability of prey species is an important component of EFH. A loss of prey that will reduce the capacity of the habitat to support predator fish like cod and haddock should be avoided. The Amendment and DEIS are essentially void of any discussion or consideration of prey species and must be supplemented with a detailed analysis of the distribution of prey, the impacts on prey from fishing activities and how those impacts can in turn have an impact on managed species.

Management measures to address these impacts should include a prohibition on fishing with mobile gear and any gear capable of catching the critical prey fish Atlantic herring, particularly in areas where they spawn and their egg mats develop. Such measures should also address the impacts to other prey species such as sand lance, river herring, shad, krill, and copepods.

7. The DEIS fails to consider alternatives for the protection of spawning for all stocks within the scope of the Amendment and the proposed alternatives are not based on the best available science.

Essential fish habitat includes marine areas, both on the ocean floor and in the water column, that are important for spawning for all species. However, the current set of proposed alternatives fails to address spawning protections for all stocks covered by the analysis. Instead, the alternatives identified in the DEIS are limited expressly to management actions designed to reduce adverse impacts exclusively on spawning groundfish, ignoring all other stocks. Even the

Amendment's analysis of groundfish spawning protection areas is seriously deficient, particularly in its failure to consider protecting large, productive females, especially cod, whether they are in the act of spawning or not. Instead, the Council summarily rejected virtually all the best science it had on management opportunities for improved spawning protections and developed no alternatives analyzing those opportunities.

8. Comments on the management alternatives in specific areas:

a. Central Gulf of Maine

The DEIS is unequivocal in its support for the status quo in the CGOM as it indicates that the Alternative 1/No Action outscores Alternative 4 as to virtually every relevant factor, often substantially. Importantly, Alternative 1/No Action has more positive impacts for groundfish and is highly positive for habitat benefits, the two areas of foremost concerns and of primary objective of this Amendment. The Council's selection of Alternative 4 as its preferred alternative is nothing less than an arbitrary and capricious decision that ignores substantial evidence in the record that uniformly and significantly favors Alternative 1/No Action and is a capitulation to commercial fishing pressure. The DEIS and Amendment should be changed to identify Alternative 1/No Action as the preferred alternative.

b. Western Gulf of Maine Sub-region

The preferred Alternative 1/No Action retains the existing WGOM GCA and is an appropriate preferred alternative that will meet the goals and objectives of the Amendment and maintain the economic and habitat stability associated with the existing closed area. Exemptions associated with hydraulic surf clam dredging (see discussion above related to this exemption) and shrimp trawling should be eliminated from the entirety of the closure due to the damaging nature of the hydraulic clam gear and the combination of low shrimp stocks and the distance of this area from traditional inshore shrimp grounds. A year-round spawning closure should extend the boundaries of this closure to provide protection to the entirety of Jeffrey's Ledge and to known and ongoing aggregations of spawning GOM cod and habitat associated with such spawning.

c. Eastern Gulf of Maine Sub-region

The preferred Alternative 2 for the Eastern Gulf of Maine sub-region, with two new EFH areas proposed in the waters of Penobscot Bay and off of Machias, is an appropriate and practicable HMA. These are important and distinct ecological areas supported by data and will serve an important role in rebuilding stocks of forage fish in the Down East region that will, in turn, benefit the groundfish species that are struggling to re-establish themselves in this area.

d. Georges Bank Sub-region

The two primary goals of this Amendment are to meet the EFH protection requirements of the MSA and to improve protection of habitats associated with spawning and juvenile groundfish. As a result of the unreasonable and infeasible range of alternatives proposed in this Georges Bank sub-region, only the Alternative 1/No Action and Alternative 8 are capable of meeting these goals and objectives. Alternative 1/No Action is consistent with the precautionary principle, but if Alternative 8 is preferred it will represent a significant new closure.

e. Great South Channel and Southern New England

The Great South Channel is an ecologically important area for many species, including fish, marine mammals, and other species. This area is important for spawning of Atlantic herring and serves as a migration route for river herring, shad, and other species moving in and out of the Gulf of Maine and Georges Bank. Although considerable vulnerable habitat has been identified here by the Council, only a portion of that identified area is included among the EFH alternatives contemplated by the Council. The only alternative that proximately serves the goals and objectives of the Amendment is Alternative 1/No Action. All other proposed alterations compromise spawning hotspots and important EFH and fail to meet the goals and objectives.