

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*  
Executive Director

ESTIMATED TIME 6 HOURS
---------------------------

DATE: June 4, 2003

SUBJECT: Essential Fish Habitat (EFH)

**ACTION REQUIRED:**

- (a) Update on SEIS development.
- (b) Report on Coral/Sponge bycatch limits.
- (c) Committee report on HAPC process.

**BACKGROUND**

After the April meeting, NMFS and Council staff pulled together a 'crash team' to prepare a draft supplemental environmental impact statement (EIS) for EFH by the August 1 deadline. On May 20, NMFS and the plaintiffs filed a joint stipulation to amend the original settlement agreement deadlines (attached as Item C-3(a)). Under the new agreement, a preliminary draft EIS must be released for Council review by September 15, and the Draft EIS published for public comment by January 16, 2004. In October 2003, the Council will review the preliminary draft and identify a preliminary preferred alternative.

The Council requested that staff provide additional information on TAC reductions and coral/byozoan and sponge bycatch limit components of EFH mitigation Alternative 5B in the Aleutian Islands. In addition to providing detailed information on how these reductions and bycatch limits were set for the EIS analysis, the Council requested that staff also bring forth information on vessel specific bycatch limits, if possible. Staff has prepared a short discussion paper on these issues, attached as Item C-3(b).

The Council directed the EFH Committee to develop and recommend a process to identify and evaluate potential 'habitat areas of particular concern' (HAPC). The Committee met May 5-6th in Juneau and drafted a recommended HAPC process attached as Item C-3(c). Note that the revised settlement agreement requires that "final regulations implementing HAPC designations, if any, and any associated management measures that result from this process will be promulgated no later than August 13, 2006, and will be supported by appropriate NEPA analysis." At this meeting, the Council may wish to make a preliminary decision on the HAPC process, so that it can be included within the preliminary draft EIS and released for public comment prior to the October Council meeting. The Council had previously noticed that they plan to initiate the HAPC process in October, 2003.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RECEIVED  
U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

2003 MAY 20 PM 6:48

NANCY M.  
MAYER-WHITTINGTON  
CLERK

AMERICAN OCEANS CAMPAIGN, *et al.*,

Plaintiffs,

v.

DONALD L. EVANS, Secretary of Commerce,  
*et al.*,

Defendants.

Civ. No: 1:99CV00982 (GK)

**JOINT STIPULATION AND [PROPOSED] ORDER TO AMEND DECEMBER 17,  
2001, JOINT STIPULATION AND ORDER AS TO THE NORTH PACIFIC FISHERY  
MANAGEMENT REGION**

WHEREAS, plaintiffs in this case challenged the federal defendants' approval (in whole or in part) of certain fishery management plan amendments concerning essential fish habitat (EFH) in the following fishery management regions: Caribbean, Gulf of Mexico, New England, North Pacific, and Pacific (hereinafter "the EFH Amendments");

WHEREAS, plaintiffs alleged that federal defendants' approval of the EFH Amendments violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and federal defendants' own regulations, because federal defendants had (1) failed to analyze adequately the potential adverse effects of fishing gear on EFH; (2) failed to analyze adequately whether there were any practicable steps to minimize any such adverse effects of fishing on EFH; and (3) failed to take all practicable steps to minimize any such adverse effects of fishing on EFH;

WHEREAS, plaintiffs also alleged that federal defendants' approval of the EFH Amendments violated the National Environmental Policy Act (NEPA), because federal defendants had failed to analyze adequately the potential direct and indirect environmental

impacts of fishing on EFH and to develop and analyze adequately a range of alternatives for minimizing any such adverse effects of fishing on EFH;

WHEREAS, the Texas Shrimp Association and Wilma Anderson (defendant-intervenors) intervened to defend the partial approval of the Gulf of Mexico EFH Amendment;

WHEREAS, in a Memorandum Opinion and Order filed on September 14, 2000, the Court denied defendant-intervenors' motion to dismiss plaintiffs' Magnuson-Stevens Act claim as to the Gulf of Mexico EFH Amendment, and granted federal defendants' and defendant-intervenors' summary judgment motions as to plaintiffs' Magnuson-Stevens Act claims;

WHEREAS, in its September 14, 2000, Memorandum Opinion and Order, the Court granted plaintiffs' summary judgment motion as to the NEPA claims relating to the EFH Amendments at issue in this case;

WHEREAS, in its September 14, 2000, Memorandum Opinion and Order, the Court remanded the EFH Amendments at issue in this case to the federal defendants to comply with NEPA; and

WHEREAS, in its September 14, 2000, Memorandum Opinion and Order, the Court enjoined federal defendants "from enforcing the EFH Amendments until such time as they perform a new, thorough, and legally adequate EA [(environmental assessment)] or EIS [(environmental impact statement)] for each EFH Amendment";

WHEREAS, the parties submitted a Joint Stipulation and [Proposed] Order on December 5, 2001, on a number of issues, including the preparation of the EISs for all of the fisheries that were challenged in this lawsuit; the schedule for the preparation and issuance of the EISs and Records of Decision (RODs); and NMFS's decisionmaking based on the EISs and RODs.

**WHEREAS, the Court approved of the Joint Stipulation and entered it as an Order on December 17, 2001;**

**WHEREAS, NMFS has determined that it needs additional time to prepare and issue the EIS concerning EFH for the North Pacific fishery management region, pursuant to the December 17, 2001, Joint Stipulation and Order;**

**WHEREAS, plaintiffs have agreed that NMFS may have additional time to prepare and issue the EIS concerning EFH for the North Pacific fishery management region;**

**NOW THEREFORE, the undersigned Parties have conferred and hereby agree to amend Paragraphs 6, 9, and 11 of the December 17, 2001, Joint Stipulation and Order, only insofar as those paragraphs affect the EIS concerning EFH for the North Pacific fishery management region, as follows:**

**1. NMFS will prepare the EIS concerning EFH for the North Pacific fishery management region, in accordance with the following revised schedule:**

- |   |   |
|---|---|
| <b>Preliminary Draft EIS available for review by North Pacific Fishery Management Council</b> | <b>September 15, 2003</b>                         |
| <b>Draft EIS published for public comment:</b>  | <b>By no later than January 16, 2004</b>          |
| <b>Draft EIS public comment period:</b>   | <b>By no later than January 16-April 15, 2004</b> |
| <b>Issuance of Final EIS:</b>   | <b>By no later than June 1, 2005</b>              |
| <b>Issuance of ROD:</b>   | <b>By no later than August 13, 2005</b>           |

**2. The EIS concerning EFH for the North Pacific fishery management region will consider a range of reasonable alternatives for minimizing the adverse effects (as defined by the EFH regulations at 50 C.F.R. § 600.810 (2002)) of fishing on EFH, including potential adverse effects.**

3. After the issuance of the ROD, if NMFS determines that an FMP amendment and implementing regulations, or other regulations issued pursuant to the Magnuson-Stevens Act, are necessary, NMFS will approve an FMP amendment and implementing regulations, or other regulations, as quickly as practicable, but, in any event, no later than August 13, 2006. Any FMP amendments or regulations will be developed and approved in accordance with the Magnuson-Stevens Act, NEPA, and other applicable laws.

4. In accordance with the Magnuson-Stevens Act and the motion of the North Pacific Fishery Management Council (Council) of April 6, 2003, on EFH, NMFS will work with the Council to develop a process for the evaluation and possible designation of Habitat Areas of Particular Concern (HAPCs) and the implementation of any associated management measures. Final regulations implementing HAPC designations, if any, and any associated management measures that result from this process will be promulgated no later than August 13, 2006, and will be supported by appropriate NEPA analysis.

5. In the process to prepare the EIS concerning EFH for the North Pacific fishery management region and in the process to consider the designation of HAPCs and the implementation of any associated management measures, NMFS will make public all available information not otherwise considered confidential, privileged, or protected under applicable laws and agreements with other governmental and tribal entities, about the location, type and relative abundance of structure-forming invertebrates (e.g., corals and sponges) and their associated species, including but not limited to bycatch information gathered from at-sea observers, trawl survey data, and submersible/ROV observation information by NMFS and other scientists. NMFS will analyze all relevant information as part of the EFH EIS process and the HAPC process.

6. All terms in the December 17, 2001 Joint Stipulation and Order not inconsistent with this Joint Stipulation remain in force. Nothing in this Joint Stipulation shall be construed as requiring actions inconsistent with existing law, including the Magnuson-Stevens Act and NEPA.

Respectfully submitted this 20<sup>th</sup> day of May, 2003.

Eric Bilsky  
ERIC BILSKY  
SYLVIA LIU  
Oceana, Inc.  
2501 M Street, N.W.  
Suite 300  
Washington, D.C. 20037  
Tel: (202) 833-3900  
Fax: (202) 833-2070

Attorneys for Plaintiffs

Anthony P. Hoang / *By oral permission on 5/20/03*  
ANTHONY P. HOANG  
SAMUEL D. RAUCH, III  
United States Department of Justice  
Environment and Natural Resources Division  
General Litigation Section  
P.O. Box 663  
Washington, D.C. 20044-0663  
Tel: (202) 305-0241  
Fax: (202) 305-0267

Attorneys for Federal Defendants

James P. Walsh / *By oral permission on 5/20/03*  
JAMES P. WALSH  
RICHARD L. CYS  
Davis, Wright, Tremaine, LLP  
1155 Connecticut Avenue, N.W., Suite 700  
Washington, D.C. 20036  
Tel: (415) 276-6556  
Fax: (415) 276-6599

Attorneys for Texas Shrimp Association and Wilma Anderson

**[PROPOSED] ORDER**

APPROVED and ENTERED as an Order of this Court, on this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

---

**HON. GLADYS KESSLER**  
United States District Judge

The following counsel should be notified of the entry of this Order:

Eric Bilsky  
Sylvia Liu  
Oceana, Inc.  
2501 M Street, N.W.  
Suite 300  
Washington, D.C. 20037

Richard L. Cys  
James P. Walsh  
Davis, Wright, Tremaine, LLP  
1155 Connecticut Avenue, N.W., Suite 700  
Washington, D.C. 20036

Samuel D. Rauch, III  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7369  
Washington, D.C. 20044-7369

Anthony P. Hoang  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 663  
Washington, D.C. 20044-0663

05/20/2003 19:02 FAX 2028332070

OCEANA

009

RECEIVED  
U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

**CERTIFICATE OF SERVICE**

2003 MAY 20 PM 6:48

On May 20, 2003, I served true copies of the Joint Stipulation and [Proposed] Order to Amend December 17, 2001, Joint Stipulation and Order as to the North Pacific Fishery Management Region on the following by United States first class mail:

Richard L. Cys  
James P. Walsh  
Davis, Wright, Tremaine, LLP  
1155 Connecticut Avenue, N.W., Suite 700  
Washington, D.C. 20036

Samuel D. Rauch, III  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7369  
Washington, D.C. 20044-7369

Anthony P. Hoang  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 663  
Washington, D.C. 20044-0663

  
Sylvia F. Liu



**Additional Details of EFH Mitigation Alternative 5B**  
prepared by Council staff 6/3/03

In April 2003, the Council requested that staff provide information, for the June meeting, on TAC reductions and coral/byrozoan and sponge bycatch limit components of EFH mitigation alternative 5B. Recall that Alternative 5B would allow bottom trawling only in designated open areas, defined as those areas with higher effort distribution (with the exception of specific areas with high coral/bryozoan and sponge bycatch rates and low CPUE). In addition to providing information on how these reductions and bycatch limits were established and evaluated within the EIS analysis, the Council requested that staff also look at vessel specific bycatch limits. The draft of Chapter 2 provided to the Council for review in April contained the following wording for these components of 5B:

"A reduction of groundfish TACs in proportion to the amount that was historically harvested with trawl gear from the Aleutian areas that would no longer open to bottom trawling (non-'open' areas and coral/sponge areas). The overall reduction would be in the order of 3.7% (all species combined). However, these TAC reductions would be made for individual stocks or species complexes based on analysis of 1998-2002 data – meaning an X% reduction in the BSAI Pacific cod TAC, an X% reduction in the AI Atka mackerel TAC, an X% reduction in the Pacific ocean perch TAC, and so forth [Data not yet available to fill in the blanks]. No TAC reduction would be made for pollock, as this species would be harvested with pelagic trawl gear and thus not subject to closures.

Coral/bryozoan and sponge bycatch limits that close specific fisheries and areas if exceeded. If a bycatch limit is attained (all species of corals and bryozoans, or all species of sponges) by a fishery within a regulatory area, the regulatory area remains closed to that fishery for the remainder of the fishing year. Closure areas would be based on Aleutian Islands regulatory areas 541, 542, and 543. Fisheries to be included in this program include the trawl fisheries for Pacific cod, Atka mackerel, Pacific ocean perch, and possibly other fisheries. Bycatch limits will be based on levels of coral/bryozoans and sponges historically taken by these fisheries in these areas. The limits will be as listed below [Data not yet available to fill in the blanks]:

<u>Fishery</u>	<u>541</u>	<u>542</u>	<u>543</u>
Pacific cod			
sponge	X mt	X mt	X mt
coral/bryozoans	X mt	X mt	X mt
Atka mackerel			
sponge	X mt	X mt	X mt
coral/bryozoans	X mt	X mt	X mt
Pacific ocean perch			
sponge	X mt	X mt	X mt
coral/bryozoans	X mt	X mt	X mt
Other trawl targets? (to be determined)			
sponge	X mt	X mt	X mt
coral/bryozoans	X mt	X mt	X mt

**TAC Reductions**

We examined observer data from 1998-2002 to estimate the percent of catch taken from areas that would be closed to bottom trawling under Alternative 5B. Based on the amount of total catch (all species) across all five years, the percent of catch outside the 'open' areas in the trawl fisheries was as follows: Atka mackerel, 5.55%; Pacific cod, 10.23%; and rockfish, 11.99% (Table 1). No other fisheries would be affected, as the amounts are insignificant for other species. Note that these numbers are substantially different than the 3.7% which had been reported in the draft Chapter 2, because the previous figure was based on 1990-2001 data (which had included 1990-1998 AI pollock fisheries in the official tons of catch).

In the case of Atka mackerel, the TAC reduction is straightforward, because the TAC is set for the AI management areas, and 98% is allocated to the trawl fishery (2% to jig gear). Thus the TAC reduction for trawl gear within each regulatory area (541, 542, 543) would be a 6 % reduction in AI Atka mackerel trawl TAC (rounded number).

For Pacific cod, a TAC reduction is more complex. The Pacific cod TAC is specified BSAI-wide, so any TAC reduction would also reduce catches in the Bering Sea as well as the AI area. Further, the BSAI Pacific cod TAC is allocated to trawl (47%), jig (2%), and fixed gear, 51% (fixed gear is then further suballocated to many sectors). The TAC reduction be applied to the 47% BSAI trawl Pacific cod TAC, resulting in an 10% reduction in the BSAI Pacific cod trawl TAC (rounded number). The draft EIS will assume that the catch would be reduced in both the AI and BS; these reductions would likely occur in similar proportion to recent catches (approximately 25% AI; 75% BS).

For rockfish, the TAC reductions are fairly straightforward. In the BSAI area, rockfish TACs are set separately for the BS and AI region. AI rockfish are managed into the following complexes: Pacific ocean perch, northern rockfish, shortraker/rougheye, and other rockfish. Nearly all the catch is taken by trawl gear, with the exception of shortraker/rougheye, whose AI TAC is allocated to trawl (80%) and fixed gear (20%). Thus the TAC reductions would be as follows: 12% for POP, northerns, and other rockfish, and a 12% reduction in the AI shortraker/rougheye TAC apportioned to trawl gear (rounded numbers).

Application of these percentages to the 2003 TACs, results in the reductions shown in **Table 2**. The preliminary draft EFH EIS analysis and RIR has been prepared using these TAC reductions.

### **Coral/bryozoan and Sponge Bycatch Limits**

We examined observer data from 1998-2002 for trawl fisheries in the Aleutian Islands to generate estimates of bycatch rates for two groups (coral/bryozoans and sponges), by target fishery and regulatory area (541, 542, 543). The corals and bryozoans are combined because this is how they are treated in the observer data. Estimates of coral/bryozoan and sponge bycatch in the Atka mackerel, Pacific cod, and rockfish trawl fisheries in the Aleutian Islands (federal zones 541, 542, and 543) were developed by creating an annual bycatch rate from observer data <sup>1</sup> and then applying this rate to parallel NMFS blend data. The rates included data from Community Development Quota (CDQ) harvests as well as discarded harvests. Likewise, the rates were applied to blend data containing both CDQ and discarded harvests. Coral/bryozoan and sponge bycatch rates were computed from sampled haul information taken from the 1998-2002 NPFMC Observer report file in the following manner:

1. Vessel specific annual coral/bryozoan and sponge bycatch rates were computed for each federal zone by dividing the sum of the coral/bryozoan (or sponge) weights (kg) by the sum of the round metric tons of the specie identified as the weekly target for a given vessel and year. Vessel specific rates were created for two reasons: First, vessel specific records allow an enumeration of unique vessels in subsequent summarizations, which in turn are required for confidentiality assessments. Second, the researchers would be able to review the incidence and relative amounts of coral/bryozoan (or sponge) bycatch among the vessels in a given fishery. Note that these data are not discloseable to the public.

---

<sup>1</sup> NPFMC Observer EFH Report file. This file was developed from observer data by Council staff with the assistance of Dr. Craig Rose. Observer data were assigned a weekly target species specifically intended to mirror the weekly targeting algorithm used by the NMFS sustainable fisheries.

2. A fleetwide bycatch rate was computed from the vessel specific data by, again, summing the total sampled coral/bryozoan weights (kg) and dividing by the total target species' round metric tons within each zone. The rate is expressed in kilograms of coral/bryozoans (or sponge) per round metric ton of the target species.

Estimates of the coral/bryozoan and sponge bycatch were computed by multiplying the above rates with the trawl-caught Atka mackerel, Pacific cod, or rockfish total catch where these species were identified as targets in the NMFS 1998-2001 blend data for federal zones 541, 542, and 543.

The fleetwide incidental catch rates for each bycatch group, target fishery, area, and year (**Tables 3 and 4**) were applied to the corresponding best blend catch estimate of the target species to generate total bycatch estimates (mt). The catches across all management areas by target fishery and bycatch group are shown in **Tables 5 and 6**.

Bycatch limits were set at or near the upper end of the observed bycatch levels. This procedure has generally been used by the Council in previous actions to establish initial bycatch limits for salmon, herring, and crab. The intention of these limits is to control bycatch within historically observed levels. Once the fishing industry adapts to these limits, they can be reduced over time (as has been done with crab and chinook salmon limits). The preliminary draft EFH EIS analysis and RIR is being prepared assuming that under these bycatch limits, closures of the fleet would be relatively uncommon.

The expanded catch amounts shown in **Tables 7 and 8** were used to set the bycatch limits based on the maximum annual amount estimated for the years examined. In the cases where data were limited by confidentiality (i.e., the Pacific cod fishery in 543), the amount for the adjacent area was used. In some cases, the bycatch limits were reduced if there appeared to be outliers, defined as an annual bycatch estimate over 2 mt that was more than twice the amount estimated for any of the other years examined [note that outliers occurred in four instances: 1998 sponge catch in the 541 Pacific cod fishery, 1998 coral/bryozoan catch in the 541 Pacific cod fishery, 1999 sponge catch in the 543 Atka mackerel fishery, and 1999 catch of coral/bryozoans in the 543 rockfish fishery]. In all cases, the limits were rounded to the nearest mt. The bycatch limits (mt), using this methodology result as follows:

<u>Fishery</u>	<u>541</u>	<u>542</u>	<u>543</u>
Atka mackerel			
sponge	8	18	25
coral/bryozoans	1	2	5
Pacific cod			
sponge	11	7	7
coral/bryozoans	2	1	1
Rockfish			
sponge	2	2	30
coral/bryozoans	1	1	5

## Discussion

There are other ways to estimate bycatch of corals/bryozoans and sponges. Galen Tromble from NMFS inseason management noted that if NMFS had to make estimates of catch for these organisms, they would use the same methodology used for PSC estimates. The rates are generated by dividing the EXTRAPOLATED\_WEIGHT (this is a column in the observer data) of the species in question by the total of the EXTRAPOLATED\_WEIGHT of the GROUND FISH SPECIES in the haul. So the denominator would not be the OTC or the weight of just the 'target' species or the sum of all the extrapolated weights -- just those

of the FMP groundfish species. Galen further noted that for the proposed "cap" setting purpose however, the results would likely be in the right ballpark -- but they won't exactly match the methodology that NMFS uses to monitor.

Individual vessel bycatch limits may be impractical and unworkable as a way to control bycatch of sponges, corals, and bryozoans. The Council has previously explored the use of individual bycatch quotas and vessel bycatch accountability (remember IBQ's and VBA's?) for crab and halibut, but these were found to be unworkable due to statistical and legal problems of enforcing individual vessel limits. Additionally, in the case of sponges and corals/bryozoans, the statistics of extrapolating from random fragments of coral are likely to be very imprecise without whole haul censusing to get enforceable results.

**Table 1.** Total observed catch (mt) for the Aleutian Islands region, inside and outside the 'open' areas designated for mitigation Alternative 5B, based on observed vessels, 1998-2002. Effort is the area swept, which is based on haul duration and gear of each target fishery (C. Rose).

Fishery	Atka Mackerel Trawl	P cod trawl	Pollock trawl	Rockfish trawl	Sablefish & Greenland Turbot trawl
Amount (OTC)	312,513.39	101,562.04	6,134.32	53,669.46	9,226.70
Amount (OTC) inside closures	17,331.85	10,393.50	106.10	6,433.45	0.06
Amount (OTC) outside	295,181.54	91,168.54	6,028.22	47,236.01	9,226.64
<b>% of fishery effected by closure</b>	<b>5.55%</b>	<b>10.23%</b>	<b>1.73%</b>	<b>11.99%</b>	<b>0.00%</b>
Effort overall	5,605.38	6,142.02	254.96	1,035.88	710.16
Effort km2 within closures	382.19	584.09	1.86	128.23	1.19
CPUE =(OTC)/(Effort)	55.75	16.54	24.06	51.81	12.99
Amount (CPUE) inside closures	45.35	17.79	57.04	50.17	0.05
Amount (CPUE) outside (Catch T-Catch1_/(Effort T-Effort 1)	56.51	16.40	23.82	52.04	13.01

**Table 2.** Reduction in 2003 TACs based on percent TAC reductions associated with mitigation Alternative 5B.

Species/Fishery Component	TAC Reduction %	2003 TAC (Trawl Only) (mt)	2003 TAC Reduction (mt)
AI Atka Mackerel	6.0%	45,649	2,739
BS Pacific cod *	10.0%	67,658	6,766
AI Pacific cod *	10.0%	22,553	2,255
Total Pacific Cod		90,210	9,021
AI, POP, NRF, ORF	12.0%	17,716	2,126
AI, SRF/RRF	12.0%	538	65
Total Rockfish		18,254	2,190

**Table 3**

Observed Aleutian Islands Trawl Bryozoan and Coral Bycatch  
By Target Species and Federal Zone, 1998-2002

Weekly Target Species	Zone	Year	Observed Vessels	Vessels W/ Bryozoan bycatch	Sampled Hauls	Unsampled Hauls	% Sampled Hauls W/ Bryozoan	Bryozoan Bycatch Rate (kg/ton)	Observed Bryozoan Bycatch (kg)	Target Species (mtons)
Atka Mackerel	541	1998	7	0	134	46	0.0	.	.	9,265
		1999	10	6	205	74	19.0	0.066	893	13,533
		2000	9	8	168	67	23.2	0.079	1,105	13,966
		2001	9	7	83	44	34.9	0.109	1,301	11,953
		2002	9	3	41	5	7.3	0.004	17	4,567
	All Years	12	10	631	236	17.4	0.062	3,316	53,284	
	542	1998	8	3	144	159	13.2	0.122	2,110	17,302
		1999	9	5	202	168	7.9	0.011	201	17,748
		2000	8	5	309	186	13.3	0.055	1,269	22,943
		2001	9	9	319	129	20.1	0.065	2,240	34,424
		2002	10	9	272	25	13.6	0.043	1,033	23,889
	All Years	13	12	1246	667	14.2	0.059	6,853	116,307	
	543	1998	9	6	282	229	8.9	0.132	2,764	20,990
		1999	9	7	326	138	13.8	0.125	1,883	15,133
		2000	6	3	113	30	41.6	0.312	4,116	13,201
2001		8	8	272	165	23.9	0.265	6,233	23,489	
2002		8	7	304	32	28.3	0.285	6,126	21,478	
All Years	11	11	1297	594	20.7	0.224	21,124	94,291		
Pacific Cod	541	1998	16	9	221	267	23.1	0.505	3,796	7,526
		1999	14	9	344	127	20.1	0.113	1,322	11,708
		2000	24	13	322	156	9.6	0.027	256	9,525
		2001	17	7	284	109	28.2	0.099	735	7,405
		2002	24	12	305	239	9.2	0.094	1,216	12,979
	All Years	54	36	1476	898	17.5	0.149	7,325	49,143	
	542	1998	8	4	61	65	14.8	0.331	864	2,607
		1999	7	3	46	20	13.0	0.015	46	3,023
		2000	14	5	114	61	16.7	0.045	198	4,411
		2001	12	5	116	69	20.7	0.176	784	4,456
		2002	13	5	169	46	26.0	0.293	2,207	7,531
	All Years	28	15	506	261	20.2	0.186	4,098	22,029	
	543	1998	2	0	2	1	0.0	.	.	.
		2000	2	2	33	23	78.8	.	.	.
		2001	2	1	4	5	75.0	.	.	.
2002		3	3	35	17	82.9	2.543	4,517	1,776	
All Years		5	3	74	46	78.4	3.718	13,176	3,543	
Rockfish	541	1998	3	0	7	4	0.0	.	.	1,000
		1999	4	1	18	16	11.1	.	.	2,155
		2000	5	4	27	13	18.5	0.063	157	2,501
		2001	4	2	34	54	8.8	.	.	1,585
		2002	5	1	20	24	5.0	.	.	2,174
	All Years	10	4	106	111	10.4	0.083	783	9,415	
	542	1998	5	1	29	8	6.9	.	.	3,917
		1999	6	4	45	17	24.4	0.393	1,668	4,239
		2000	5	2	32	23	9.4	.	.	2,674
		2001	5	3	17	43	17.6	0.140	264	1,882
		2002	5	2	25	23	52.0	.	.	3,170
	All Years	9	7	148	114	21.6	0.162	2,576	15,882	
	543	1998	5	2	33	17	15.2	.	.	3,694
		1999	4	2	68	19	7.4	.	.	6,160
		2000	6	4	55	25	12.7	1.096	6,018	5,490
2001		4	1	20	12	25.0	.	.	2,568	
2002		5	1	52	25	15.4	.	.	3,678	
All Years	8	5	228	98	13.2	1.754	37,875	21,590		

From NPFMC EFH Observer Report File, April 2003  
A '.' denotes confidential data  
Report2a.sas

**Table 4.**

Observed Aleutian Islands Trawl Sponge Bycatch  
By Target Species and Federal Zone, 1998-2002

Weekly Target Species	Zone	Year	Observed Vessels	Vessels W/ Sponge bycatch	Sampled Hauls	Unsampled Hauls	% Sampled Hauls W/ Sponge	Sponge Bycatch Rate (kg/ton)	Observed Sponge Bycatch (kg)	Target Species (mtons)
Atka Mackerel	541	1998	7	6	134	46	42.5	0.787	7,289	9,265
		1999	10	8	205	74	43.9	0.299	4,042	13,533
		2000	9	8	168	67	53.0	0.564	7,872	13,966
		2001	9	9	83	44	39.8	0.115	1,369	11,953
		2002	9	4	41	5	24.4	0.062	281	4,567
		All Years	12	12	631	236	44.2	0.391	20,852	53,284
	542	1998	8	5	144	159	50.7	0.560	9,683	17,302
		1999	9	7	202	168	61.9	0.851	15,102	17,748
		2000	8	7	309	186	46.9	0.390	8,944	22,943
		2001	9	9	319	129	46.7	0.499	17,186	34,424
		2002	10	9	272	25	43.0	0.222	5,291	23,889
		All Years	13	12	1246	667	48.9	0.483	56,206	116,307
	543	1998	9	6	282	229	38.3	1.039	21,798	20,990
		1999	9	9	326	138	73.3	3.408	51,571	15,133
		2000	6	4	113	30	59.3	0.548	7,228	13,201
2001		8	8	272	165	28.3	0.299	7,026	23,489	
2002		8	8	304	32	51.6	2.715	58,303	21,478	
	All Years	11	10	1297	594	50.0	1.548	145,926	94,291	
Pacific Cod	541	1998	16	13	221	267	48.9	3.733	28,091	7,526
		1999	14	10	344	127	46.8	0.818	9,573	11,708
		2000	24	17	322	156	23.3	0.242	2,303	9,525
		2001	17	13	284	109	44.4	0.298	2,207	7,405
		2002	24	15	305	239	24.3	0.262	3,396	12,979
		All Years	54	43	1476	898	36.9	0.927	45,570	49,143
	542	1998	8	6	61	65	57.4	1.695	4,418	2,607
		1999	7	6	46	20	89.1	1.080	3,264	3,023
		2000	14	13	114	61	53.5	1.894	8,353	4,411
		2001	12	7	116	69	50.0	1.444	6,434	4,456
		2002	13	12	169	46	52.1	2.102	15,827	7,531
		All Years	28	24	506	261	55.9	1.738	38,296	22,029
	543	1998	2	0	2	1	0.0	.	.	.
		2000	2	1	33	23	18.2	.	.	.
		2001	2	1	4	5	75.0	.	.	.
2002		3	1	35	17	20.0	.	.	1,776	
		All Years	5	2	74	46	21.6	.	.	3,543
Rockfish	541	1998	3	0	7	4	0.0	.	.	1,000
		1999	4	2	18	16	22.2	.	.	2,155
		2000	5	2	27	13	7.4	.	.	2,501
		2001	4	2	34	54	8.8	.	.	1,585
		2002	5	3	20	24	35.0	3.903	8,483	2,174
		All Years	10	6	106	111	15.1	1.112	10,474	9,415
	542	1998	5	0	29	8	0.0	.	.	3,917
		1999	6	4	45	17	33.3	0.840	3,559	4,239
		2000	5	3	32	23	21.9	0.799	2,136	2,674
		2001	5	3	17	43	23.5	0.095	179	1,882
		2002	5	4	25	23	72.0	0.961	3,046	3,170
		All Years	9	7	148	114	29.7	0.562	8,921	15,882
	543	1998	5	3	33	17	15.2	0.454	1,676	3,694
		1999	4	2	68	19	14.7	.	.	6,160
		2000	6	3	55	25	23.6	1.380	7,574	5,490
2001		4	2	20	12	40.0	.	.	2,568	
2002		5	5	52	25	61.5	12.232	44,989	3,678	
	All Years	8	6	228	98	29.8	4.624	99,826	21,590	

From NPFMC EFH Observer Report File, April 2003  
A '.' denotes confidential data  
Report2a.sas

**Table 5**Observed Aleutian Islands Trawl Bryozoan and Coral Bycatch  
By Target Species and Federal Zone, 1998-2002

Weekly Target Species	Zone	Year	Number Observed Vessels	Vessels W/ Bryozoan bycatch	Sampled Hauls	Unsampled Hauls	% Sampled Hauls W/ Bryozoan	Bryozoan Bycatch Rate (kg/ton)	Bryozoan Bycatch (kg)	Target Species (mtons)
Atka Mackerel	ALL	1998	10	6	560	434	7.9	0.103	4,874	47,557
		1999	10	9	733	380	13.6	0.064	2,978	46,414
		2000	9	9	590	283	21.5	0.130	6,491	50,109
		2001	9	9	674	338	23.4	0.140	9,775	69,867
		2002	10	10	617	62	20.4	0.144	7,175	49,934
		All Years	14	13	3174	1497	17.5	0.119	31,293	263,881
Pacific Cod	ALL	1998	19	11	284	333	21.1	****	****	****
		1999	14	10	390	147	19.2	0.093	1,367	14,731
		2000	26	15	469	240	16.2	****	****	****
		2001	19	9	404	183	26.5	****	****	****
		2002	24	12	509	302	19.8	0.356	7,940	22,287
		All Years	55	36	2056	1205	20.4	0.329	24,599	74,715
Rockfish	ALL	1998	6	2	69	29	10.1	****	****	****
		1999	7	4	131	52	13.7	2.612	32,794	12,554
		2000	6	5	114	61	13.2	****	****	****
		2001	5	3	71	109	15.5	0.179	1,081	6,036
		2002	5	3	97	72	22.7	0.073	658	9,022
		All Years	11	7	482	323	15.1	0.879	41,234	46,888

From NPFMC EFH Observer Report File, April 2003  
A '.' denotes confidential data  
\*\*\*\* Data are masked to preserve confidentiality  
Report2b.sas

**Table 6.**Observed Aleutian Islands Trawl Sponge Bycatch  
By Target Species and Federal Zone, 1998-2002

Weekly Target Species	Zone	Year	Number Observed Vessels	Vessels W/ Sponge bycatch	Sampled Hauls	Unsampled Hauls	% Sampled Hauls W/ Sponge	Sponge Bycatch Rate (kg/ton)	Sponge Bycatch (kg)	Target Species (mtons)
Atka Mackerel	ALL	1998	10	8	560	434	42.5	0.815	38,769	47,557
		1999	10	10	733	380	61.9	1.524	70,715	46,414
		2000	9	9	590	283	51.0	0.480	24,044	50,109
		2001	9	9	674	338	38.4	0.366	25,581	69,867
		2002	10	10	617	62	46.0	1.279	63,874	49,934
		All Years	14	13	3174	1497	48.4	0.845	222,984	263,881
Pacific Cod	ALL	1998	19	16	284	333	50.4	****	****	****
		1999	14	11	390	147	51.8	0.871	12,837	14,731
		2000	26	21	469	240	30.3	****	****	****
		2001	19	15	404	183	46.3	0.719	8,692	12,098
		2002	24	17	509	302	33.2	0.876	19,521	22,287
		All Years	55	45	2056	1205	41.0	1.127	84,231	74,715
Rockfish	ALL	1998	6	3	69	29	7.2	****	****	****
		1999	7	5	131	52	22.1	2.621	32,902	12,554
		2000	6	4	114	61	19.3	****	****	****
		2001	5	3	71	109	21.1	3.048	18,396	6,036
		2002	5	5	97	72	58.8	6.265	56,519	9,022
		All Years	11	8	482	323	26.6	2.543	119,221	46,888

From NPFMC EFH Observer Report File, April 2003  
A '.' denotes confidential data  
Report2b.sas



**Table 7.** Estimated Aleutian Islands Trawl Bryozoan Bycatch,  
By Fishery and Federal Zone, 1998-2002

		FEDERAL ZONE								
		541			542			543		
Weekly Target Species	Year	Bryozoan bycatch Rate (kg/ton)	Target* Total Tons	Bryozoan Expanded (tons)	Bryozoan bycatch Rate (kg/ton)	Target* Total Tons	Bryozoan Expanded (tons)	Bryozoan bycatch Rate (kg/ton)	Target* Total Tons	Bryozoan Expanded (tons)
Atka Mackerel	1998	0.00	10,673	0.00	0.12	19,904	2.43	0.13	24,193	3.19
	1999	0.07	14,565	0.96	0.01	21,505	0.24	0.12	16,187	2.02
	2000	0.08	13,961	1.10	0.06	22,203	1.23	0.31	10,200	3.18
	2001	0.11	7,686	0.84	0.07	31,780	2.07	0.27	20,008	5.31
Pacific Cod	1998	0.50	12,642	6.38	0.33	4,003	1.33	0.00	.	.
	1999	0.11	13,210	1.49	0.02	642	0.01	.	.	.
	2000	0.03	13,998	0.38	0.04	2,782	0.12	7.18	.	.
	2001	0.10	9,630	0.96	0.18	3,833	0.67	2.17	.	.
Rockfish	1998	0.00	1,562	0.00	0.07	2,022	0.13	0.04	4,198	0.19
	1999	0.13	2,495	0.32	0.39	2,913	1.15	5.01	6,577	32.94
	2000	0.06	1,939	0.12	0.04	2,074	0.08	1.10	4,483	4.91
	2001	0.22	2,745	0.59	0.14	2,326	0.33	0.19	2,921	0.54

From NPFMC EFH Observer Report File, April 2003, and from NMFS Blend data  
A '.' denotes confidential data  
\* Taken from blend data. CDQ and discard data are included.

**Table 8.** Estimated Aleutian Islands Trawl Sponge Bycatch,  
By Fishery and Federal Zone, 1998-2002

		FEDERAL ZONE								
		541			542			543		
Weekly Target Species	Year	Sponge bycatch Rate (kg/ton)	Target* Total Tons	Sponge Expanded (tons)	Sponge bycatch Rate (kg/ton)	Target* Total Tons	Sponge Expanded (tons)	Sponge bycatch Rate (kg/ton)	Target* Total Tons	Sponge Expanded (tons)
Atka Mackerel	1998	0.79	10,673	8.40	0.56	19,904	11.14	1.04	24,193	25.12
	1999	0.30	14,565	4.35	0.85	21,505	18.30	3.41	16,187	55.17
	2000	0.56	13,961	7.87	0.39	22,203	8.65	0.55	10,200	5.59
	2001	0.11	7,686	0.88	0.50	31,780	15.86	0.30	20,008	5.98
Pacific Cod	1998	3.73	12,642	47.19	1.69	4,003	6.78	0.00	.	.
	1999	0.82	13,210	10.80	1.08	642	0.69	.	.	.
	2000	0.24	13,998	3.38	1.89	2,782	5.27	0.01	.	.
	2001	0.30	9,630	2.87	1.44	3,833	5.53	0.22	.	.
Rockfish	1998	0.00	1,562	0.00	0.00	2,022	0.00	0.45	4,198	1.91
	1999	0.72	2,495	1.79	0.84	2,913	2.45	4.51	6,577	29.68
	2000	0.01	1,939	0.01	0.80	2,074	1.66	1.38	4,483	6.18
	2001	0.27	2,745	0.74	0.10	2,326	0.22	6.93	2,921	20.23

From NPFMC EFH Observer Report File, April 2003, and from NMFS Blend data  
A '.' denotes confidential data  
\* Taken from blend data. CDQ and discard data are included.

**DRAFT**

**Proposed HAPC Process  
Drafted by the  
EFH Committee**

**May 5-6, 2003**

Habitat areas of particular concern (HAPC) are those areas of special importance that may require additional protection from adverse effects. Regulations at 50 CFR 600.815(a)(8) provide that "FMPs should identify specific types or areas of habitat within EFH as habitat areas of particular concern based on one or more of the following considerations:

- (i) The importance of the ecological function provided by the habitat.
- (ii) The extent to which the habitat is sensitive to human-induced environmental degradation.
- (iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type.
- (iv) The rarity of the habitat type."

In June 1998, the Council identified several habitat types as HAPC within the essential fish habitat amendments 55/55/8/5/5. Habitat types, rather than specific areas, were designated as HAPC because little was known at the time regarding where these habitat types were located. These HAPC types included:

1. Areas with living substrates in shallow waters (e.g., eelgrass, kelp, mussel beds, etc.)
2. Areas with living substrates in deep waters (e.g., sponges, coral, anemones, etc.)
3. Freshwater areas used by anadromous fish (e.g., migration, spawning, and rearing areas)

A summary of the History HAPC by NPFMC is provided in Chapter 2 of the EFH EIS.

The Council formed an EFH Committee in April 2001 to act as a steering committee for the EFH EIS process. The Committee's overarching goal was to facilitate input by the industry, conservation community, Council, and general public into the EFH EIS process. In regards to HAPC, the committee worked cooperatively with Council staff and NMFS to identify alternative criteria and approaches that could be used to designate and manage HAPC areas. The Committee met for the first time May 20, 2001 and has continued to hold meetings through May 2003. The Committee aided in formulating the HAPC designation alternatives referred to in Chapter 2.

In April 2003 the Council directed the EFH Committee to develop and recommend a HAPC process. The EFH Committee met May 5-6 and developed the draft process described here. The process will be presented to the Council for approval in June 2003.

## HAPC Process Executive Summary

The Committee suggests that consistent with the NEPA process the Council adopts the following outline.

1. A. Council considers establishing HAPC criteria
- B. Council considers establishing HAPC priorities; priorities reviewed every HAPC cycle.
  - Receives comment from scientific community, AP, NMFS, ADFG, public. Criteria for scientific evaluation of proposals identified, along with criteria for evaluating management measures.

*NOTE: The EFH Committee seeks suggestions on how to develop the appropriate ecological and socioeconomic criteria for evaluating HAPC proposals in two separate processes.*

2. Call for proposals (open to ADFG, NMFS, public, etc.) Proposals submitted on HAPC form developed by Council.
3. Proposals screened by Council staff to determine consistency with EFH Final Rule and application completeness. If not consistent or complete, proposal is rejected. If accepted, proposal is forwarded to next step.
4. Proposals reviewed by science technical committee for goals, objectives and appropriate management measures. If management measures are included, review such measures for suitability to an adaptive management approach. Preliminary evaluation by two discrete bodies evaluates these proposals for 1) ecological considerations 2) socioeconomic practicability. Proposals forwarded to next step with recommendations and comments.
5. Proposals reviewed by EFH/HAPC Review Committee, management measures evaluated and recommendations prepared for Council family (AP, SSC, Council)
6. Council selection of a range of HAPC alternatives for analysis to address each identified Council priority. Council identifies preliminary management measures where appropriate, and initiates NEPA analysis.
7. Stakeholder process(es) initiated.
8. Technical/Public Workshop: Science/Technical review team, EFH/HAPC review committee, and public meet to review stakeholder recommendations. EFH/HAPC committee finalizes recommendations for Council on management measures, research design, and adaptive management strategy.
9. Public comment on NEPA analysis.
10. Council receives a summary of public comments and takes final action by Council on HAPC selections and management alternatives.

Each proposal that was received and/or considered by the Council would have one of three possible outcomes:

- (1) The proposal could be accepted and the area designated as a HAPC
- (2) The proposal could be used to identify an area or topic requiring more research, which the Council would request from NMFS or another appropriate agency;
- (3) The proposal could be rejected.

## Elements of the HAPC process

### 1a. Council consideration of establishing HAPC criteria

- Public comment received from scientific community, AP, NMFS, ADFG, and public. Criteria for scientific evaluation of proposals identified, along with criteria for evaluating management measures.

In soliciting HAPC proposals, the Council may decide to: identify as criteria only those considerations outlined in the EFH Final Rule; provide additional guidance to the public by establishing criteria or priorities in addition to those outlined in the EFH Final Rule; or adopt the category/process outlined by the ecosystem committee in 2001. These alternatives, along with some options or variations, are outlined below. Once identified, any additional criteria or priorities, along with the criteria developed for the scientific review (outlined in section 3), should be widely publicized to guide development of HAPC proposals.

**Alternative A)** HAPC identified using considerations from EFH final rule (outlined below).

According to the language of the NMFS EFH Final Rule, EFH that is judged to be particularly important to the long-term productivity of populations of one or more managed species, to be particularly vulnerable to degradation, or to be particularly rare should be identified as a "habitat area of particular concern" (HAPC) to help provide additional focus for conservation efforts. The rule provides the four basic considerations of an area for HAPC designation. The four considerations are:

- (1) the importance of the ecological function provided by the habitat;
- (2) the extent to which the habitat is sensitive to human-induced environmental degradation;
- (3) whether, and to what extent, development activities are, or will be, stressing the habitat type; and,
- (4) the rarity of the habitat type.

The Final Rule also specifies that habitats that are particularly vulnerable to specific fishing equipment types should be identified for possible designation as habitat areas of particular concern. The intent of the HAPC designation is to identify those areas that are known to be important to species that are in need of additional levels of protection from adverse impacts (fishing or non-fishing). Designation of habitat areas of particular concern is intended to determine what areas within EFH should receive more of the Council's and NMFS' attention when providing comments on federal and state actions, and in establishing higher standards to protect and/or restore such habitat.

**Alternative B)** Council establishes additional criteria for HAPC identification.

Criteria alternatives (alternatives are not intended to be mutually exclusive):

- 1) Whether the Council designates HAPC as sites or types, management measures, if needed, will be applied to a habitat feature in a specific geographic location, identified on a chart, that meet the considerations established in the regulations, and will be developed to address identified problems for FMP species and achieve clear, specific adaptive management objectives (included in the Introduction).
- 2) The evaluation and development of HAPC management measures, where management measures are appropriate, shall be guided by the EFH Final Rule.

**1B. Council considers establishing HAPC priorities; priorities reviewed every Council cycle.**

- Public comment received from scientific community, AP, NMFS, ADFG, and public. Criteria for scientific evaluation of proposals identified, along with criteria for evaluating management measures.

**Alternative A)** Council does not set priorities

**Alternative B)** Council selects habitat priorities (priorities reviewed and either modified or reaffirmed prior to each call for proposals)

Priority options (options are not necessarily mutually exclusive):

- 1) Rank the HAPC considerations established by NMFS according to the priorities of the Council. HAPC proposals that target higher Council priorities could be weighted higher than others.
- 2) Emphasize habitat critical to "species of concern," defined on a local, regional or area-wide scale (depleted, over-fished, etc.). The HAPC guidelines state that: "The intent of the HAPC designation is to identify those areas that are known to be important to species which are in need of additional levels of protection from adverse impacts (fishing or non-fishing)."
- 3) Establish as a priority one or more of the existing HAPC designations as stated in the 1998 Environmental Assessment as follows:
  1. Areas with living substrates in shallow waters (e.g., eelgrass, kelp, mussel beds, etc.)
  2. Areas with living substrates in deep waters (e.g., sponges, coral, anemones, etc.)
  3. Freshwater areas used by anadromous fish (e.g., migration, spawning, and rearing areas)

**2. Call for proposals for HAPC Process**

Proposal Cycle Options:

1. Proposals are solicited and reviewed every:
  - a) 3 years
  - b) 5 years
2. Proposals submitted during:
  - a) regular plan/ regulatory amendment cycle (Summer call for proposals due in the Fall)
  - b) Separate cycle

**Any member of the public may propose a HAPC, including fishery management agencies, other government agencies, scientific and educational institutions, non-governmental organizations, communities, industry groups.**

Scientific and technical information on habitat distributions, gear effects and fishery distributions, and economic data should be made easily accessible prior to a call for proposals.

The National Marine Fisheries Service Alaska Region website has a number of valuable tools for assessing habitat distributions, understanding ecological importance and assessing impacts. Other key information is more difficult to access. Information on EFH distribution, living substrate distribution, fishing effort, catch and bycatch data, gear effects, known or estimated recovery times of habitat types, prey species, and freshwater areas used by anadromous fish should be easily accessible from a central

area. This information should be available from the same place that the public accesses the HAPC proposal form.

**The format for a HAPC proposal should include:**

- Name of proposer, address, and affiliation
  - Title of proposal : *Provide a title for the HAPC proposal and a single, brief paragraph concisely describing the proposed action.*
  - Identify the habitat and FMP species the HAPC proposal is intended to protect.
  - Statement of purpose and need.
  - A description of whether and how the proposed HAPC addresses the four considerations set out in the final EFH regulations.
  - Specific objectives for this proposal
  - Proposed solutions to achieve these objectives ( how might the problem be solved)
  - Methods of measuring progress towards those objectives.
  - Expected benefits of the proposed HAPC, and provide supporting information/data.
  - Identify the fisheries, sectors, stakeholders and communities to be affected by the establishment of the proposed HAPC (Who benefits from the proposal who would it harm?) and any information you can provide on socioeconomic costs.
  - Provide clear geographic delineation for proposed HAPC ( written latitude and longitude reference point and delineation on an appropriately scaled NOAA chart)
  - Provide best available information and sources of such information to support the objectives for the proposed HAPC. (*Citations for common information or copies of uncommon information*)
3. **Proposals screened by Council staff** to determine consistency with EFH Final Rule and application completeness. If not consistent or complete, proposal is rejected, If accepted, proposal is forwarded to next step.

#### **4. Establishing Scientific Criteria for Evaluating HAPC proposals:**

Proposals reviewed by science technical committee for goals, objectives and appropriate management measures. If management measures are included, review such measures for suitability to adaptive management approach. Preliminary evaluation by two discrete bodies evaluates these proposals for 1) ecological considerations 2) socioeconomic practicability. Proposals forwarded to next step with recommendations and comments. It is requested that when the rationale of a proposal has merit, but it lacks in supportive data, that the scientific committee makes a reasonable effort to provide references regarding appropriate data queries and information sources to fill in the missing information.

The Council should establish a HAPC technical/scientific review consisting of scientists from the appropriate disciplines. It is recommended that scientists with appropriate expertise from federal, state, university and independent affiliations be asked to participate on the HAPC scientific committee. National Marine Fisheries Service: Alaska Fisheries Science Center/ Auke Bay Laboratories staff familiar with habitat distributions and species requirements in the Alaska Region.

- Alaska Department of Fish and Game Biologists familiar with crab, scallop salmon and rockfish habitats/ species requirements.
- University of Alaska: School of Fisheries and Ocean Sciences
- Independent Scientists: Somebody familiar with the science of marine protected areas and marine reserves. No suggestions at this time.

When organizing the make up of the scientific committee considerations of the individual's time, availability and funding for travel must be considered. For the accelerated process that will commence

sometime by November 2003, state and federal employees may be the only ones available to work on this. If NMFS or the NPFMC cannot fund expenses for university and other independent scientists, it would be useful to still invite them to participate, recognizing funding limitations. Some independent scientists may have great interest in participating and have available funding. An additional idea is to have the federal and state scientific committees send out their comments on proposals to a few independent researchers to acquire additional review and new perspectives. In the long term, the NMFS may want to seek funding from sources such as the North Pacific Research Board, to fund independent and interagency committee members in a formal HAPC review process.

5. **Proposals reviewed by EFH/HAPC Review Committee**, management measures evaluated and recommendations prepared for Council family (AP, SSC, Council)
6. **Council selection of a range of HAPC alternatives** for analysis to address Council priorities if identified. Preliminary management measures identified where appropriate.
7. **Stakeholder process(es) initiated.**

The Committee recommends that the Council establish a stakeholder review process after step 6 in the suggested HAPC Process Outline. If one or more communities are affected the Committee recommends appropriate outreach. Different stakeholder processes may be appropriate based on the nature of the HAPC proposal. The Council may consider the following options:

**Option 1:** The stakeholder process is conducted by the EFH committee.

- a) EFH committee holds meetings in each region affected by proposals.
- b) Committee holds meetings in location(s) determined to be most convenient.

**Option 2:** The NPFMC designates a HAPC committee. The HAPC committee could be composed of stakeholders from different communities, have industry representation, include current EFH committee members, independent scientists, native/ tribal representatives, conservation NGOs, federal and state representatives.

- a) The HAPC committee holds meetings in each region affected by proposals.
- b) Committee holds meetings in location(s) determined to be most convenient.

**Option 3:** In addition to the EFH committee, *two stakeholders from each region* affected by proposals are appointed to the committee. Regional stakeholders are active on the committee during regionally based meeting.

**Option 4:**

- a) **HAPC committee plus two scientists**, plus two stakeholders from each region affected by proposals hold committee meetings to review HAPC proposals.
- b) **EFH committee plus two scientists**, plus two stakeholders from each region affected by proposals hold committee meetings to review HAPC proposals.

**Option 5:** Request that appropriate regional fish and game advisory committees review proposals and report their comments back to:

- a) NPMFC
- b) EFH/ HAPC committee

**Option 6:** Three regional committees of stakeholders are formed to review proposals in their designated regions: Gulf of Alaska, Bering Sea and Aleutian Islands.

- Option: each regional committee has a representative from current EFH committee who would help keep groups working in a consistent framework. For example: one or both chairs of EFH committee.

**8. Technical Review teams (ecological/socio-economic) review prior to Public Workshop evaluation proposals with defined criteria.**

**Ecological Criteria:**

The evaluation of candidate Habitat Areas of Particular Concern (HAPC), whether they are habitat types, specific sites or a network of habitat areas, should incorporate scientific review at multiple stages of the public process. Recognizing the importance of integrated scientific review to a process for identifying and evaluating potential HAPC areas, the North Pacific Fishery Management Council stated at the April 2003 meeting, "The evaluation (of HAPCs) shall include efficacy, scientific review and appropriate mitigation measures." This paper is designed to facilitate discussion among the Essential Fish Habitat Committee for how scientific review should be incorporated into the overall HAPC process.

A preliminary step in evaluating HAPC proposals is to develop scientific criteria that the proposals will be measured against. An accepted list of scientific criteria will help guide what habitat types to consider, focus critical habitat areas for inclusion, plus give guidance to the size, shape and configuration of specific HAPC sites. These criteria are suggested for use by the scientific review committee when evaluating proposals. The criteria used by the scientific review committee in evaluating proposals should also be adopted by the NPFMC and presented to the public, so that the public understands how proposals will be scored. These ecological/ social criteria may be different from other criteria that the NPFMC uses to evaluate proposals (e.g. practicability and enforceability).

*These options are not intended to be mutually exclusive. Others may have additional ideas for option 2 (additional ecological criteria).*

**Option 1:** At a minimum, HAPC selection should meet the threshold of one or more of the considerations established in EFH Final Rule §600.815(a)(8); ecological importance, rarity, vulnerability and sensitivity to anthropogenic degradation.

~~**Option 2:** Additional ecological criteria to consider when evaluating HAPC proposals are (adapted from ADF&G 2002):~~

- ~~○ Exploited species should be present, preferably in areas important to one or more vulnerable life stages, such as spawning or rearing;~~
- ~~○ Site size should be large enough to meet the objectives of proposed sites;~~
- ~~○ Inclusion of high quality habitats or unique bathymetric features;~~
- ~~○ Inclusion of vulnerable, rare or endemic species; and~~
- ~~○ High biodiversity and/ or high productivity areas.~~

~~The Alaska Department of Fish and Game (ADF&G 2002) provides a full suite of criteria, including social and economic considerations, which should be incorporated into the public process that the NPFMC selects for designating Habitat Areas of Particular Concern. However it is important that biological criteria precede and inform the socioeconomic evaluation, since conserving and enhancing the ecological function of these priority habitats within EFH should be the primary objective.~~

*Some EFH Committee concurred on eliminating this option, and seek SSC opinion an alternate yardstick for scientific merits of a proposal.*



### Evaluation of Candidate HAPCs:

The team should evaluate each proposal on the basis of how well it meets the criteria for HAPC, and determine whether designation and any management measures are warranted. The review should be based on whether the proposal has an acceptable degree of scientific merit.

In the NPFMC Environmental Assessment of Habitat Areas of Particular Concern (NPFMC 2000), proposed HAPC types and areas were evaluated using a ranking system that provided a relative score to the proposed HAPCs by weighing them against the four considerations established in the EFH final rule. Scoring systems are relatively strait forward and easy to use. However, a written description should accompany the ranking so it is clear what data, scientific literature and professional judgments were used in determining the relative score.

Evaluation matrix of proposed HAPC types and areas. (NPFMC 2000)

Proposed HAPC area	Data Level	Sensitivity	Exposure	Rarity	Ecological Importance
Seamounts and Pinnacles	1	Medium	Medium	High	Medium
Ice Edge	3	Low	Low	Low	High
Continental Shelf Break	3	Medium	Medium	Low	High
Biologically Consolidated Sediments	1	Low	Medium?	Low	Unknown

\*This matrix is put forward for the purpose of discussion. If additional criteria are adopted (see recommendations above), they should be incorporated into the evaluation matrix or considered in written comments by the scientific panel. Other ranking methods may be useful.

Each proposal should be evaluated against some type of standardized system that weighs the proposal against the adopted ecological criteria and socioeconomic criteria (if social scientists are part of the committee). *Additionally, the scientific review panel should provide comments on the ability of the proposal to meet stated goals and objectives.*

The science review team could also rank the proposals.

### Scientific Uncertainty:

It is definite that there will be some level of scientific uncertainty in the design of proposed HAPCs to meeting their stated goals and objectives. Some of this uncertainty may reside in the fact that the public will not have access to all relevant scientific information. However, recognizing time and staff constraints, it cannot be expected that the scientific committee fill all the information gaps of proposals.

In the end, the North Pacific Fishery Management Council will have to recognize data limitations and uncertainties, and weigh precautionary strategies for conserving and enhancing HAPCs while maintaining sustainable fisheries. Tools are available to help resource managers measure risks and uncertainty that provide a quantitative approach in determining the results of management actions. In order to facilitate such decisions, it will be useful to have the scientific committee highlight available science and information gaps that may have been overlooked or not available to the submitter of the HAPC proposal.

### **Socioeconomic Criteria:**

The EFH mandate states that EFH measures are to minimize impacts on EFH “to the extent practicable” so socioeconomic considerations have to be balanced against expected ecological benefits at some relevant point in the development of measures. NMFS’ final rule for developing EFH plans states specifically that (Section (2) *ii* F.R. page 2378) FMPs should “identify a range of potential new actions that could be taken to address adverse effects on EFH, include an analysis of the practicability of potential new actions, and adopt any new measures that are necessary and practicable”. In contrast to a process where the ecological benefits of EFH or HAPC measures are the singular initial focus and a later step is used to determine practicability, this alternative approach would undertake the consideration of practicality simultaneously. The benefit of this simultaneous consideration of both aspects of the EFH mandate is that it would help to avoid the risk of creating a set of alternatives that may hold benefits to habitat but may not individually or collectively be likely to pass the practicable test.

To accomplish this simultaneous evaluation, relevant social and economic information should be developed from the outset. Specifically, HAPC proposals should be required to identify as extensively as possible the exact locations that would be affected if the proposed HAPC mitigation measures were implemented. Proposals and preliminary technical analysis should also identify to the extent possible, affected fishing communities and provide some initial assessment of the potential effects on those communities, employment and earnings in the fishing and processing sectors, and related infrastructure. Preliminary analysis should also provide information on the potential relocating fishing activities to other areas if the proposed mitigation is enacted.

As soon as possible in the initial technical review process, an assessment of the socioeconomic information provided in the proposal should be made and social scientists on the technical review teams. Team members should begin to supplement this information as needed so as to analyze the resulting economic and social impacts of proposals, both individually and cumulatively. Analysis should include: cultural values of the area, and potential of tourism and non-consumptive recreational use, an assessment of the effects on fishing communities including changes in net revenues, efficiency changes and net national benefit consideration from such things as deadweight losses for unrecoverable fishing opportunities (if applicable) or changes in CPUES and attendant efficiency losses from the outcome of increasing effort in sub-optimal fishing areas or areas with higher bycatch rates.

To accomplish this, economists and other social scientists will have to be included on separate HAPC technical review teams. Management and enforcement will also need representation in the early stages of HAPC review as well. Set up to evaluate both ecological and socioeconomic tradeoffs separately from the outset, the task of these technical review teams will be to evaluate the environmental benefits, social and economic costs, and general management cost and enforceability of individual proposals. The Committee recommends that two teams be created 1 ecological and 1 socioeconomic, and that their reviews be conducted simultaneously.

Cumulative impacts analysis must be considered because there may be many HAPC proposals that pass initial review. Cumulative impacts must be assessed because several HAPC proposals considered at the same time or in sequence could affect the same groups of fishermen or communities and fisheries or management areas as a whole. Evaluating effects of individual proposals in isolation could overlook the overall practicability consideration which the EFH final rule states must be balanced against ecological benefits.

Assessment of the “practicability consideration” up front for HAPC proposal development and evaluation would undoubtedly require additional initial burden on groups or individuals making

proposals and social scientists on preliminary scientific on preliminary review teams. In overall scope and depth of work, however, the same elements will be required if the practicability test was left for later consideration. The benefit of this early consideration of social, economic, and management cost and enforcement practicability is that the alternatives developed for analysis can are more likely to have approval because an assessment of practicability has already been undertaken.

**9. Technical/Public Workshop:** Science/Technical review team, EFH/HAPC review committee, and public meet to review stakeholder recommendations. EFH/HAPC committee finalizes recommendations for Council on management measures, research design, and adaptive management strategy.

**10. Public Comment:** Council receives a summary of public comments and takes final action by Council on HAPC selections and management alternatives.

Each proposal that was received and/or considered by the Council would have one of three possible outcomes:

- (1) The proposal could be accepted and the area designated as a HAPC
- (2) The proposal could be used to identify an area or topic requiring more research, which the Council would request from NMFS or another appropriate agency;
- (3) The proposal could be rejected.

#### **Literature Cited:**

ADF&G 2002. Marine Protected Areas in Alaska: Recommendations for a Public Process. Alaska Department of Fish and Game Division of Commercial Fisheries. Juneau, AK.

Auster, P.J. 2001. Defining Thresholds for Precautionary Habitat Management Actions in a Fisheries Context. North American Journal of Fisheries Management 21: 1-9.

NPFMC 2000. Draft Environmental Assessment/ Regulatory Impact Review. Habitat Areas of Particular Concern. North Pacific Fishery Management Council. Anchorage, AK.

Roberts. C.M. et al. 2003. Application of Ecological Criteria in Selecting Marine Reserve and Developing Reserve Networks. Ecological Applications. 13(1): S215-S228.

**ADDENDUM: from New England Council  
Supportive Data and Information:**

The HAPC proposal form will have a section asking the submitter to include any supportive data and other relevant material. The New England Fishery Management Council has detailed a list of accepted information sources to support HAPC proposals. This or a similar list may be useful to detail, so the public knows what scientific information the review panel will be looking for.

From - NEFMC Habitat Areas of Particular Concern Process:

General Scientific Data and Information – The information used by the proposer to justify an HAPC proposal comes from scientific peer-reviewed journals, government technical reports, or from unpublished scientific data. This category includes any scientific data or information that are not site-specific but still bear relevance on the issue by demonstrating one of the HAPC criteria.

Site-Specific Scientific Data and Information – The information used by the proposer to justify an HAPC proposal comes from scientific peer-reviewed journals, government technical reports, or from unpublished scientific data. This category includes any scientific data or information that are derived from or for the specific area under consideration in the HAPC proposal.

Literature Review - The information used by the proposer to justify an HAPC proposal comes from a review of peer-reviewed literature and government technical reports. This includes summaries of the results of scientific studies published in peer-reviewed journals and technical documents. The literature review may be prepared by the proposer or may be prepared by another source and should clearly articulate the link between the area, habitat type, or species in question with at least one of the HAPC criteria.

Substrate Mapping – The information used by the proposer to justify an HAPC proposal includes substrate mapping of the specific area under consideration. The source of the substrate mapping should be a federal agency, such as the U.S. Geological Survey, a state agency, an academic institution, or a research collaborative. The substrate maps should be provided to the Council and readily available for external review.

Oceanographic Information – The information used by the proposer to justify an HAPC proposal includes information on the oceanographic features occurring in the specific area under consideration. This information can include, but not be limited to, the tracking of currents, identification of relatively stable and persistent gyres, oceanographic fronts, thermoclines, haloclines, or pycnoclines. Reference to any transient oceanographic feature(s) should include a description of the importance of the feature to the target species or habitat type.  
NEPMC, 2002.

Traditional Knowledge: Incorporate all traditional knowledge as information to justify a HAPC proposal.

The Ocean  
Conservancy



May 2, 2003

Delivered via First Class Mail and Email (stoch\_a@hotmail.com)

Mr. Stosh Anderson, Chairman  
Essential Fish Habitat Committee  
North Pacific Fishery Management Council  
605 West 4th, Suite 306  
Anchorage, Alaska 99501-2252

RECEIVED

MAY - 2003

N.P.F.M.C

Dear Mr. Anderson and EFH Committee Members,

The protection of Essential Fish Habitat (EFH) is of utmost importance to the continued viability of Alaska's fisheries and the communities they support. Habitat Areas of Particular Concern (HAPC) are the most important EFH to protect, based on the criteria that NOAA Fisheries outlined in the EFH Final Rule (67 Fed. Reg. 2343, January 17, 2002.). We appreciate the work the EFH Committee has done thus far and hope to work with the Committee in developing recommendations to the North Pacific Fishery Management Council (NPFMC) for an effective HAPC process.

We commend the NPFMC and NOAA Fisheries for designating corals, sponges, and all other living substrates off Alaska as HAPCs based on their ecological importance, vulnerability to human impacts, and current threats from fishing. This was a big step forward, providing a starting point for a process to develop management measures to protect these areas from adverse impacts. We now know that corals and sponges are HAPC, we know where they are, and we know what threatens them. The designation and protection of additional HAPCs, such as such as submarine canyons, seamounts, continental slopes, and prey species, should also be accomplished through the EFH Fishery Management Plan amendments and we believe the Committee's recommendations can further this process.

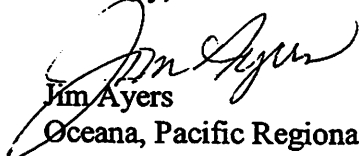
We understand that the Committee is going to discuss a long-term HAPC process. We offer the following comments based on that understanding:


- ◆ 50 C.F.R. Part 600.815(a)(8) specifies that HAPCs are to be designated based on one or more of four specifically enumerated criteria. In order to be valid, any additional criteria would have to be published in the Federal Register for public notice and comment, and promulgated in the Code of Federal Regulations pursuant to the provision of the Administrative Procedure Act (5 U.S.C. sec. 551 et seq.).
- ◆ HAPCs should be defined as both sites and types. To the extent there are concerns about manageability of HAPCs defined by type, if we do not know the full distribution of a HAPC type, for example mitigation measures can be crafted based on type definitions (i.e. HAPC bycatch caps).

- ◆ Upon receipt of HAPC proposals from non-agency members of the public, NMFS staff should make available to the committee, the proponent, and the public any additional relevant economic, biological, geologic, or oceanographic information to augment the information contained in the proposal. The public cannot be expected to be experts; this is NMFS' job.
- ◆ Economic data on fisheries and fishing effort is not fully available to the public at present due to confidentiality concerns. Therefore, HAPC proposals cannot be expected to contain economic information that is not publicly and readily available.
- ◆ A technical team should be responsible for evaluating proposals based on the HAPC criteria. Stakeholders should be able to make comments on proposals, but not have the power to reject proposals prior to analysis.
- ◆ Significant data are available on currently designated HAPCs and other potential HAPCs. Observer bycatch data and trawl survey data may not give us the full distribution of these habitats, but they do show quite clearly the known locations of HAPCs among trawlable sites and among areas that have been fished in the last decade. We also have geographic coordinates from research dives of the exact locations where these HAPCs have been observed by scientists. The technical review team should identify data available for HAPC designation and protection and make recommendations about the quality and appropriate uses of each data source.
- ◆ Scientific evaluation of the extent to which HAPC proposals meet the four criteria in the EFH Final Rule must occur prior to a determination of practicability. Once the four criteria have been evaluated, economic considerations may be part of the practicability analysis performed by the decisionmaker.
- ◆ Though it may be difficult to assess economic and fisheries productivity benefits of HAPC protections, this assessment must be done based on the best available information, so the costs and benefits can be compared.

Thank you for your hard work on this process and we look forward to working with you to develop recommendations for a HAPC process that will keep Alaska's fisheries vibrant and productive.

Sincerely,

  
Jim Ayers  
Oceana, Pacific Regional Director

  
Kris Balliet  
The Ocean Conservancy, Alaska Director

CC: David Benton, NPFMC  
Dr. James Balsiger, NOAA Fisheries  
Ben Enticknap (ben@akmarine.org)

David Benton, Chairman  
North Pacific Fisheries Management Council  
605 West 4th, Suite 306  
Anchorage, Alaska 99501-2252  
Phone: (907) 271-2809

RECEIVED

MAY 16 2003

N.P.F.M.C.

MAY 12 03

Dear Chairman Benton,

I am writing regarding the motion by the North Pacific Fisheries Management Council to include Dinglebar Lingcod gear as bottom contact gear for Alternative 6 in your EFH process. As a long time dinglebar lingcod fisherman with experience in many other commercial, sport, and subsistence fisheries in Alaska I am interested in what the criteria and standards are for classifying lingcod dinglebar gear as bottom contact gear? Was there any testimony from dinglebar fishermen presented to the council before this decision was made? Did the Council view video or other evidence showing the nature of the dinglebar lingcod fishery?

I have fished dinglebar gear for lingcod for many years and have helped pioneer the evolution of both regulations (I authored the regulation limiting dinglebar fishing for lingcod to one bar at a time) and gear (the big ugly lures most commonly used now were brought to Alaska with my input at Murray Pacific) for this fishery. On my best dinglebar days the bar seldom touches the bottom. I tag off the depth to fish on my wire and using my plotter and sounder work the area where the lings are gathered feeding without risking losing the bar by hanging it on the rocks. When the bar does touch the bottom it is very briefly and I am always, always closely attending the wire and raise it quickly

My bottle train is attached two fathoms above the bottom of the bar and rarely comes in contact with the bottom. After an initial learning curve where I did lose some bars and train, I seldom, (about one a season) hang a bar or train any more. Based on my experience guided sport fishing for halibut (where you anchor on the spots), longlining, and seining I would classify dinglebar lingcod fishing as less of a bottom contact gear than any of the above.

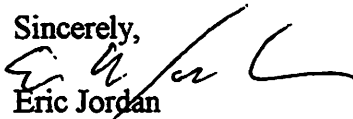
While it is true that dinglebar lingcod gear does occasionally come into contact with the bottom when the bottom of the dinglebar touches the bottom at about 2 mph it would be a very strict definition that classed any gear that came into contact with the bottom as rarely as dinglebar gear does as "bottom contact gear".

Having said all of the above, I do believe there are good reasons to protect some areas from dinglebar lingcod fishing for biological reasons. I supported and helped develop consensus support for protection of the 19/34 pinnacles near Sitka. This is an area I had fished extensively with dinglebar lingcod gear. The videos produced by the Alaska Marine Conservation Council from ADF&G submarine research show how dense lingcod can aggregate on top of a pinnacle. I have viewed this film for hours as part of the editing process, at booths during fish expo and other shows, and at home. I have yet to see any damage to benthic habitat from all the lingcod dinglebar fishing I did on that extremely challenging spot to fish with dinglebar gear.

So, in conclusion, I am concerned about the classification of lingcod dinglebar gear as "bottom contact gear". I would like to see the criteria and standards used to

classify gear types as "bottom contact gear". I would like to see a copy of the fisherman and scientific testimony and materials reviewed by the NPFMC before making this decision. If gear types that I feel are more intrusive on the benthic habitat such as guided sport fishing for halibut and seining are not included as "bottom contact gear" then I would respectfully ask the NPFMC to reconsider the classification of dingle-bar lingcod gear as "bottom contact gear".

Sincerely,

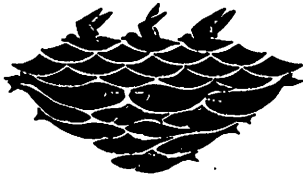


Eric Jordan

F/V I Gotta

Sitka, AK 99835





# Alaska Marine Conservation Council

Box 101145 • Anchorage, Alaska 99510  
(907) 277-5357 • (fax) 277-5975  
amcc@akmarine.org • www.akmarine.org

June 3, 2003

David Benton, Chairman  
North Pacific Fishery Management Council  
605 W. 4<sup>th</sup> Avenue, Suite 306  
Anchorage, AK 99501-2252

RE: Agenda Item C-3: Essential Fish Habitat.

RECEIVED  
JUN - 3 2003  
N.P.F.M.C.

Dear Chairman Benton:

The Alaska Marine Conservation Council is pleased with the North Pacific Fishery Management Council's action last April to initiate the development of a process for identifying and evaluating potential Habitat Areas of Particular Concern (HAPC). As a member of the Essential Fish Habitat (EFH) Committee charged with the initial development of this process, I would like to comment on some of the alternatives outlined in the HAPC process document, and highlight positive and negative attributes of this proposed process. I urge you to bear in mind these comments as you finalize the HAPC process.

## I. Council consideration of establishing HAPC criteria (1a).

*AMCC recommends that the NPFMC adopt alternative A under item 1a. "Council consideration of establishing HAPC criteria." By choosing alternative A, the NPFMC will remain consistent with the rules and regulations published in the EFH final rule. The language in the EFH final rule states:*

FMPs should identify specific types or areas of habitat within EFH as habitat areas of particular concern based on one or more of the following considerations:

- i. The importance of the ecological function provided by the habitat.
- ii. The extent to which the habitat is sensitive to human-induced environmental degradation.
- iii. Whether, and to what extent, development activities are, or will be, stressing the habitat type.
- iv. The rarity of the habitat type.

- EFH Final Rule. §600.815(a)(8)

The EFH committee also put forward additional criteria for how management measures would be applied to any proposed HAPC site or type. Alternative B (Council establishes additional criteria for HAPC identification) states, "Whether the Council designates HAPC as site or types, management measures, if needed, will be applied to a habitat feature in a specific geographic location, identified on a chart, that meet the considerations established in the regulations..." This alternative appears to be limiting reasonable management approaches for protecting habitat areas of particular concern at a region-wide level.

AMCC does not want to preclude valuable management tools for protecting ecologically important and sensitive habitat features by limiting management measure to only "specific geographic locations." For example, tools such as gear modification and policies preventing developing fisheries for HAPC biota, adopted at a regional level, are reasonable and valuable approaches for protecting sensitive habitat features. These tools would appear to be precluded if alternative B were adopted by the NPFMC as it currently reads.

AMCC suggests alternative language for alternative B as follows:

- Whether the Council designates HAPC sites or types, HAPCs should be identified using the considerations established in the EFH Final Rule. Management measures, if needed, should be designed to address probable or existing problems for FMP species and their habitat and achieve clear, specific adaptive management objectives.

## **II. Council considers establishing HAPC priorities; priorities reviewed every Council cycle (1b).**

In contrast to setting additional criteria for HAPC proposals, it will be useful to the public if the NPFMC establishes priorities at the beginning of each HAPC cycle. *AMCC recommends that the NPFMC prioritize proposals that address the three existing HAPC designations as stated in the 1998 Environmental Assessment (Alternative B (3) under item 1b).* Presently, HAPCs are designated as:

- i. Areas with living substrates in shallow waters (e.g. eelgrass, kelp, mussel beds, etc.)
- ii. Areas with living substrates in deep waters (e.g., sponges, coral, sea whips, etc.)
- iii. Freshwater areas used by anadromous fish (e.g., migration, spawning and rearing areas.)

Current HAPC designations were selected because of their ecological importance, sensitivity, rarity or vulnerability to disturbance. By retaining these as a priority, the public will be on notice that the NPFMC is particularly interested in proposals that address these habitat features. These priorities could be reconsidered every Council cycle based on public and agency comments.

### **III. Call for proposals for HAPC cycle.**

Outlining the proposal format is an important step of this process since it provides the public a clear and consistent framework for developing proposals. AMCC concurs with the recommended proposal format. However, we stress that these are not additional criteria as determined by the Council under item 1a of this proposed process, but a format to follow for anyone submitting a proposal.

The format for proposals asks for a great deal of information that may not be available to the public such as information on “socioeconomic costs” of proposals or “methods for measuring progress” towards the objectives of proposed HAPCs. A proposal should not be rejected because it lacks this information, but rather the format should be a note to the public that this information would be useful if available.

We stress the committee’s recommendation that, *“Scientific and technical information on habitat distributions, gear effects and fishery distributions, and economic data should be made easily accessible prior to the call for proposals...This information should be available from the same place that the public accesses the HAPC proposal.”* By providing this basic and essential information, the public will be able to incorporate current scientific and economic information into the development of HAPC proposals.

### **IV. Proposals screened by Council staff.**

The Committee’s document states, “Proposals screened to determine consistency with EFH Final Rule and application completeness. If not consistent or complete, proposal is rejected.”

Although we agree that proposals should be consistent with the EFH Final Rule, the language appears far too ambiguous in light of what constitutes a “complete proposal.” As noted above, aspects of the proposal format requests information that may not be available to the public. We recommend this language be changed to:

- Proposals screened to determine consistency with HAPC considerations of the EFH Final Rule. If proposal is not consistent with the HAPC considerations of the EFH Final Rule, proposal is rejected.

### **V. Establishing scientific criteria for evaluating proposals.**

The process outlined by the EFH committee calls for multiple reviews of proposals by two committees, one that reviews the proposals against ecologically based criteria and one that reviews them against socioeconomic criteria. AMCC supports the concept of this process but wishes to provide additional comments on both the ecological and socioeconomic review of the proposals.

**a. Ecological Criteria:**

The four considerations for HAPCs outlined in the EFH Final Rule are of course the proper guidelines for evaluating proposals. However it would be beneficial to illuminate upon these considerations. For example, what constitutes an important ecological function or a rare habitat type? AMCC recommends that the scientific review panel consider additional ecological criteria that elucidate the considerations established in the EFH final rule. Additional criteria may include<sup>1</sup>:

- i. Exploited species should be present, preferably in areas important to one or more vulnerable life stages, such as spawning or rearing;
- ii. Site size should be large enough to meet the objectives of proposed sites;
- iii. Inclusion of high quality habitats or unique bathymetric features;
- iv. Inclusion of vulnerable, rare or endemic species;
- v. Level of disturbance (less is better); and
- vi. Areas of high biological diversity.

**b. Socioeconomic criteria:**

In determining the “practicability of proposals” the NPFMC must balance the ecological need for designating habitat areas of particular concern with the potential long and short-term costs and benefits to associated fisheries and the nation. Determining practicability is not solely a matter of economic “costs and benefits” but also a matter of the importance of maintaining the ecological integrity of the proposed habitats. Although a socioeconomic review of HAPC proposals is warranted, the section in the Committee’s document under “socioeconomic criteria” misses the mark by 1) requesting an unreasonable and unattainable level of socioeconomic information from the public, 2) implying that the determination of “practicability” is solely a measure of economics and 3) requires an unnecessary analytical burden before the NPFMC even selects the HAPC proposals that will be carried forward in an environmental analysis (EA or EIS).

The information requests detailed in the EFH committee’s proposed process on socioeconomic criteria go far beyond what is an appropriate request of the public. For example the document states, “Proposals and preliminary technical analysis should also identify, to the extent possible, affected fishing communities and provide some initial assessment of the potential effects on those communities, employment and earnings in the fishing sectors, and related infrastructure.” It is one thing to request this information from a technical team with the appropriate expertise, but not of the public.

Furthermore, the detailed technical analysis requested of this socioeconomic committee is an inappropriate predetermination of practicability. For example, it is requested that in the preliminary review by the technical committee they provide an analysis of, “efficacy changes and net national benefit considerations from such things as deadweight losses and

---

<sup>1</sup> Adapted from: Alaska Department of Fish and Game 2002. Marine Protected Areas in Alaska: Recommendations for a Public Process. Regional Information Report 5J02-08. ADF&G. Juneau, AK.

unrecoverable fishing opportunities.” The preliminary socioeconomic review - occurring prior to the NPFMC’s selection of a range of HAPC alternatives for analysis - does not necessitate a detailed and quantitative analysis of HAPC proposals. This is the role of the analysts after the Council has selected alternatives and options. Rather the review should be a more qualitative review of HAPC proposals, providing a relative scoring of proposals against socioeconomic criteria. It is this type of evaluation that will be useful to the NPFMC in selecting a range of HAPC proposals for analysis. Finally, the EFH final rule states, “In determining whether management measures are practicable, Councils are not required to perform a formal cost/ benefit analysis.” §600.815(a)(2)(iii).

## VI. Stakeholder Process:

The EFH Committee outlined six options for formulating the stakeholder process. AMCC supports the Committee’s recommendation that the stakeholder process be established after the NPFMC selects a range of HAPC proposals for analysis. Additionally, we stress the recommendation by the committee that, *“If one or more communities are affected the Committee recommends appropriate outreach.”* It is crucial that communities be engaged in any HAPC proposals that may be affecting them and have the opportunity to be fully engaged and provide meaningful comment on the proposals.

AMCC looks forward to the onset of the HAPC process. The outline by the EFH committee is a good start and with the necessary changes, the NPFMC will have created a valuable process for submitting and reviewing proposals. Thank you for your commitment to establish this process and your consideration of these comments.

Sincerely,



Ben Enticknap  
Fishery Project Coordinator



June 3, 2003

Delivered via Facsimile and First Class Mail

Mr. David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Avc., Suite 306  
Anchorage, AK 99501-2252

Dr. James Balsiger, Regional Administrator  
NOAA Fisheries, Alaska Region  
709 West 9<sup>th</sup> St.  
Juneau, AK 99802-1668

RECEIVED  
JUN - 3 2003  
N.P.F.M.C

Dear Chairman Benton and Dr. Balsiger:

The protection of Essential Fish Habitat (EFH) is of utmost importance to the continued viability of Alaska's fisheries and the communities they support. Habitat Areas of Particular Concern (HAPC) are the most important EFH to protect, based on the criteria that NOAA Fisheries outlined in the EFH Final Rule (67 Fed. Reg. 2343, January 17, 2002). We appreciate the work the EFH Committee has done thus far and look forward to continuing to work with the Committee as it develops a HAPC process. We expect that process to protect the most important and vulnerable habitats in the North Pacific.

After attending the EFH Committee meeting in Juneau and reviewing the Draft HAPC Process dated May 5-6, 2003, we would like to offer the following comments:

- HAPC criteria must be based upon the enumerated criteria set forth in the EFH Final Rule.
- The burden should not be placed on the proponent of a HAPC proposal to include a highly technical level of scientific and economic information.
- Scientific and economic information, including information from the groundfish observer database, should be made readily available to the public.
- Scientific and economic reviews of the document should be kept separate to ensure the integrity of the scientific review, which should include an independent peer review process.

June 3, 2003

Page 2 of 3

- Practicability, or a weighting of the ecological benefits and socioeconomic costs, should only be determined at the end of the HAPC process by the NPFMC and NOAA Fisheries.

The EFH Final Rule states that HAPCs should be designated based upon one or more of the following considerations:

- (i) The importance of the ecological function provided by the habitat;
- (ii) The extent to which the habitat is sensitive to human-induced environmental degradation;
- (iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type; and
- (iv) The rarity of the habitat type.<sup>1</sup>

These criteria were developed through a lengthy public process initiated by NOAA fisheries that took into account comments by agency scientists and other interested parties. There is no need to reinitiate this process. Concerns raised by industry over including socioeconomic criteria will specifically be addressed in the practicability determination made by the NPFMC and NOAA Fisheries.

The HAPC proposal process should be as user-friendly as possible. The Ocean Conservancy and Oceana strongly disagree with the EFH Committee's recommendation that Council staff determine whether proposals should be rejected or accepted.<sup>2</sup> Not only would this place an impractical burden on the public to include an unspecified degree of information in a proposal, but it empowers Council staff to screen out proposals without forwarding them to the appropriate decisionmakers. Council staff should be empowered to use their expertise to fill in the gaps and offer recommendations, but not to act as a filter before proposals are given the opportunity for public scrutiny and NEPA analysis. This will ensure that the development of HAPCs occurs through an open public process accessible to everyone.

The EFH Committee recommended that the format for a HAPC proposal should include an identification of "the exact locations that would be affected"<sup>3</sup> and the "fisheries, sectors, stakeholders, and communities to be affected."<sup>4</sup> While this information is important for the decisionmaking process and will be identified during the NEPA evaluation and technical reviews, it is not currently available to the public. Due to alleged confidentiality constraints and the current unavailability of specific information from the groundfish observer database, it is unreasonable to require the public to include this information until the agency makes this information available. While the EFH settlement agreement will compel the disclosure of structure-forming invertebrates,<sup>5</sup> the majority of information concerning discrete spatial location of fisheries has not been made available. NOAA Fisheries and the NPFMC should make this data readily available during the process.

<sup>1</sup> 50 C.F.R. Part 600.815(a)(8).

<sup>2</sup> See Draft Proposed HAPC Process, May 5-6, 2003 at pg. 3.

<sup>3</sup> Id. at pg. 10.

<sup>4</sup> Id. at pg. 6.

<sup>5</sup> Joint Stipulation and Proposed Order to Amend December 17, 2001, Joint Stipulation and Order as to the North Pacific Fishery Management Region at pg. 4.

June 3, 2003

Page 3 of 3

The Ocean Conservancy and Oceana support the EFH Committee's recommendation for an independent technical review of the scientific merits of each proposal. This technical review should involve review by independent scientists, and should occur before any practicability determination is made. This would meet the mandates of the both MSFCMA and NEPA.

The Ocean Conservancy and Oceana also recognize the importance of a socioeconomic review of all proposals. The EFH Committee, however, has recommended a process by which a socioeconomic review is incorporated as a filter to screen out proposals that are not practicable in order to "avoid the risk of creating a set of alternatives that . . . may not be practicable."<sup>6</sup> This pre-decision practicability determination violates NEPA in two ways. The first is that it does not allow for an adequate review of a broad range of alternatives.<sup>7</sup> The second is that the agency would be forwarding only management measures predetermined to be practicable. The NEPA process is intended to give the decisionmakers information necessary to assess tradeoffs between various approaches so that they may then make a determination of practicability. A pre-EIS determination of practicability violates the very heart of NEPA. The alternatives must range from full protection of HAPCs to partial protection so that the NEPA analysis will clearly define the choices the decisionmaker has available. No proposal that meets HAPC criteria should be denied full analysis and consideration based on a pre-determination of practicability.

In conclusion, HAPCs are the most important subset of EFH. The Ocean Conservancy and Oceana appreciate the ongoing development of a long-term HAPC process and look forward to working with the NPFMC and NOAA Fisheries to protect already designated HAPCs and to develop an ongoing process that protects habitat and keeps Alaska's fisheries vibrant and productive.

Sincerely,



Jim Ayers  
Oceana, Pacific Regional Director



Kris Balliet  
The Ocean Conservancy, Alaska Director

<sup>6</sup> See Draft Proposed HAPC Process, May 5-6, 2003 at pg. 10.

<sup>7</sup> 40 CFR §1502.14.





175 SOUTH FRANKLIN STREET, SUITE 418 JUNEAU, ALASKA 99801 907.586.4050 WWW.OCEANA.ORG

Delivered via Facsimile and First Class Mail

Mr. David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Ave, Suite 306  
Anchorage, AK 99501-2252

Dr. James Balsiger, Regional Administrator  
NOAA Fisheries, Alaska Region  
709 W. 9<sup>th</sup> St.  
Juneau, AK 99802-1668

June 3, 2003

RE: Coral and sponge bycatch limits in the Essential Fish Habitat Environmental Impact Statement (EFH EIS) Alternative 5B

Dear Chairman Benton and Dr. Balsiger:

We are pleased that we were able to reach agreement on a time extension for the Essential Fish Habitat Environmental Impact Statement, and look forward to the additional analysis afforded by the additional time.

As NMFS and the Council have continued their work on the alternatives and analysis, so have we. Alternative 5B for the Aleutians is a model for how to protect EFH and maintain vibrant fisheries. We commend the Council for directing staff at the April 2003 meeting to analyze coral and sponge bycatch limits applied at both individual and sector-wide levels and for taking a closer look at these limits at your upcoming meeting.

We must all recognize that while bycatch limits would be a substantial improvement for protecting corals and sponges, these animals need to be treated differently than fish. Corals and sponges that are destroyed do not recover for hundreds if not thousands of years. As Essential Fish Habitat, when corals and sponges disappear so do the associated commercial fish species. Long-term protections must account for the long-lived nature of these creatures.

Bycatch caps are not the final solution to this habitat destruction, but annual caps would be a significant step to protect habitat while maintaining vibrant fisheries. Bycatch limits are an essential component of Alternative 5B because they provide an incentive for the trawl industry to avoid contacting their gear with coral and sponge habitat in the open areas of the alternative, consistent with Magnuson-Stevens Act requirements. 16 U.S.C. 1853(a)(11). NMFS has recommended this habitat protection tool on several occasions

RECEIVED  
JUN - 3 2003  
N.P.F.M.C



CHLORINE-BLEACH FREE

Oceana  
Coral and Sponge Bycatch Caps  
June 3, 2003  
Page 2 of 3

(including "Draft Strawman Mitigation Alternatives" dated 9-23-02 and "Potential alternatives for mitigation for the effects of fishing on EFH" dated 2-25-02). We understand that there has been much discussion about the appropriate methods for applying and enforcing these limits, and that Council staff Dave Witherell has developed one methodology for applying coral and sponge bycatch limits to the trawl fisheries in the Aleutians. While we look forward to his presentation, we expect different approaches to be aired in the forthcoming EFH EIS.

The process and analyses required by the National Environmental Policy Act are effective tools to determine the best way to enact new policies to protect habitat and maintain vibrant fisheries. The purpose of an EIS is to inform the public and decision-makers about the relevant issues, the environmental consequences of various alternative actions, and the trade-offs associated with each alternative action. Considering the additional time NMFS now has to complete the EFH EIS, the EIS should provide the public and decision-makers the data and information they need to make an informed decision about the best way to develop and enforce coral and sponge bycatch limits.

Because we do not yet have information to estimate the biomass or full distribution of corals and sponges, bycatch limits should be set based on historic bycatch levels. Coral and sponge bycatch from areas that become closed under Alternative 5B should not count toward this average. This is necessary to ensure that the coral and sponge bycatch mitigated by the area closures is not simply relocated to open areas. To meet the coral and sponge bycatch reduction objectives of Alternative 5B, coral and sponge bycatch limits should be established through a three-step process:

1. Calculate average bycatch that came from areas that remain open to trawling.
2. Set the initial limit at a reduced level from this average.
3. Develop an annual reduction schedule for each bycatch limit.

The EFH EIS should also discuss and explore various incentives for the trawl industry to avoid coral and sponge habitat and management tools that result from exceeding the bycatch limits. Ideally, this analysis should reveal the most appropriate and effective tool for each fishery situation. For example, some Atka mackerel seasons may be too short in duration to effectively impose in-season penalties, so delayed management measures may be more appropriate. Possible tools explored by the EFH EIS should include adaptations of a Vessel Incentive Program (VIP), permanent closures in areas of high bycatch, inseason fishery closures, future TAC reduction and/or reduced seasonal apportionment.

A possible unintended consequence of coral and sponge bycatch limits is that they may create an incentive for gear modifications that retain less bycatch despite causing the same amount of habitat damage. This would reduce documentable bycatch without reducing impacts on benthic habitats. The EFH EIS should examine gear restrictions that prevent this type of modification to ensure that the bycatch limits truly provide an incentive for the industry to avoid gear contact with sensitive benthic habitat.

Oceana  
Coral and Sponge Bycatch Caps  
June 3, 2003  
Page 3 of 3

These are a subset of the many questions that should be answered in a comprehensive EIS. The biggest mistake we could make at this point would be to limit our options to one specific bycatch limit methodology. Coral and sponge bycatch limits can work and are necessary to protect the habitat that produces our vibrant fisheries. We hope to work with the Council and the agency through the EFH EIS process to do the best job we can to develop bycatch limits that are enforceable and effectively meet habitat protection objectives.

Sincerely,



Jim Ayers  
Pacific Regional Director

# MARINE CONSERVATION ALLIANCE

P O Box 20676  
JUNEAU, AK 99802

(907) 523-0731  
FAX (907) 523-0732

ALYESKA SEAFOODS  
ALASKA DRAGGERS  
ASSOCIATION  
ALASKA GROUND FISH DATA  
BANK  
ALASKAN LEADER FISHERIES  
ALASKA PACIFIC SEAFOODS  
ALEUTIAN ISLANDS BROWN  
CRAB COALITION  
ALEUTIAN FRIBILOF ISLAND  
COMMUNITY DEVELOPMENT  
ASSOCIATION  
AKUTAN, ATKA, FALSE PASS, NELSON LAGOON,  
NEKULSHI, ST. GEORGE  
BRISTOL BAY ECONOMIC  
DEVELOPMENT CORP.  
ALEKHAG, CLARK'S POINT, OSLINGHAM,  
EKEGAK, ERUK, ERWOK, KING SALMON,  
LEVELOCK, MAHOKOTAK, NARNDIG, PILOT POINT,  
PORT HERZEN, PORTAGE, GREEN BAY,  
TOGAK, TWIN HILLS, UGASHIK  
CENTRAL BERING SEA  
FISHERMEN'S ASSOCIATION  
ST. PAUL  
CITY OF UNALASKA  
COASTAL VILLAGES REGION  
FUND  
CHODDINAUK, CHEVUK, EEK, GOODNEWS BAY,  
HOOPER BAY, KIPYUK, KONGIGAK,  
KWEILLINGOK, MEKORTYUK, NAPAKUK,  
NAPASKAK, NEWTON, NIGHTHUTE, OSCARVILLE,  
PLATYUK, QUONAGAK, SAGAMON BAY,  
TOSOOK BAY, TUNTUTULAK, TUNUNAK  
GROUND FISH FORUM  
HIGH SEAS CATCHERS  
COOPERATIVE  
ICICLE SEAFOODS  
MID-WATER TRAWLERS  
COOPERATIVE  
MOTHERSHIP GROUP  
PV EXCELLENCE  
PV OCEAN PRODIGY  
PV GOLDEN ALASKA  
NORTH PACIFIC FISHERIES  
RESEARCH FOUNDATION  
NORTH PACIFIC LONGLINE  
ASSOCIATION  
NORTH PACIFIC SCALLOP  
COOPERATIVE  
NORTON SOUND ECONOMIC  
DEVELOPMENT  
CORPORATION  
BREYD MISSION, DOMEDE, ELM, GAMBELL,  
GOLDYUK, KOTYUK, NOME, SAINT MICHAEL,  
SAVOONGA, SHAKTOOLUK, STEBBINS, TELLER,  
UNALASKALET, WALES, WHITE MOUNTAIN  
PACIFIC SEAFOOD  
PROCESSORS ASSOCIATION  
PROWLER FISHERIES  
SEAFOOD COLD STORAGE  
ASSOCIATION  
SOUTHWEST ALASKA  
MUNICIPAL CONFERENCE  
TRIDENT SEAFOODS CORP.  
UNITED CATCHER BOATS  
AKUTAN CATCHER VESSEL ASSOC.  
ARCTIC ENTERPRISE ASSOC.  
NORTHERN VICTOR FLEET  
PETER PAN FLEET COOPERATIVE  
UNALASKA CO-OP  
UNISEA FLEET COOPERATIVE  
WESTWARD FLEET COOPERATIVE  
WESTERN ALASKA  
FISHERIES, INC.  
YUKON DELTA FISHERIES  
DEVELOPMENT  
ASSOCIATION  
ALASKAN, EMBODAK, GRAYLING, KOTLIK,  
MOUNTAIN VILLAGE, NUNAM IOUA

June 3, 2003

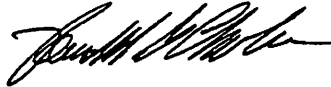
David Benton  
Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, AK 99501

Re: HAPC Process Comments

Dear Chairman Benton:

Attached are the comments of the Marine Conservation Alliance(MCA) on the draft HAPC Process paper submitted to the Council by the EFH Committee. The MCA has incorporated its preferred approach into the document before the Council to highlight the MCA position and for ease of reference for the Council.

Sincerely,



Ron Clarke  
Executive Director

RECEIVED  
JUN - 3 2003  
N.P.F.M.C

## DRAFT

### Proposed HAPC Process

#### Incorporating the comments of the Marine Conservation Alliance

Habitat areas of particular concern (HAPC) are those areas of special importance that may require additional protection from adverse effects. The interim final rule states, "In determining whether a type, or area of EFH is a HAPC, one or more of the following criteria must be met:

- (i) The importance of the ecological function provided by the habitat.
- (ii) The extent to which the habitat is sensitive to human-induced environmental degradation.
- (iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type.
- (iv) The rarity of the habitat type."

In June 1998, the Council identified several habitat types as HAPC within the essential fish habitat amendments 55/55/8/5/5. Habitat types, rather than specific areas, were designated as HAPC because little was known at the time regarding where these habitat types were located. These HAPC types included:

1. Areas with living substrates in shallow waters (e.g., eelgrass, kelp, mussel beds, etc.)
2. Areas with living substrates in deep waters (e.g., sponges, coral, anemones, etc.)
3. Freshwater areas used by anadromous fish (e.g., migration, spawning, and rearing areas)

A summary of the History of HAPC by NPFMC is provided in Chapter 2 of the EFH EIS.

The Council formed an EFH Committee in April 2001 to act as a steering committee for the EFH EIS process. The Committee's overarching goal was to facilitate input by the industry, conservation community, Council, and general public into the EFH EIS process. In regards to HAPC, the committee worked cooperatively with Council staff and NMFS to identify alternative criteria and approaches that could be used to designate and manage HAPC areas. The Committee met for the first time May 20, 2001 and has continued to hold meetings through May 2003. The Committee aided in formulating the HAPC designation alternatives referred to in Chapter 2.

In April 2003 the Council directed the EFH Committee to develop and recommend a HAPC process. The EFH Committee met May 5-6 and developed the draft process described here. The process will need to be formalized by the Council in June to meet the requirements of the settlement agreement dated May 20, 2003.

4. In accordance with the Magnuson-Stevens act and the motion of the North Pacific Fishery Management Council (Council) of April 6, 2003, on EFH, NMFS will work with the Council to develop a process for the evaluation and possible designation of Habitat Areas of Particular Concern (HAPCs) and the implementation of any associated measures. Final regulations implementing HAPC designations, if any, and any associated management measures that result from this process will be promulgated no later than August 13, 2006, and will be supported by appropriate NEPA analysis.
5. In the process to prepare the EIS concerning EFH for the North Pacific fishery management region and in the process to consider the designation of HAPCs and the implementation of any associated management measures, NMFS will make public all available information not otherwise considered confidential, privileged, or protected under applicable laws and

agreements with other governmental and trial entities, about the location, type and relative abundance of structure-forming invertebrates (e.g. corals and sponges) and their associated species, including but not limited to bycatch information gathered from at-sea observers, trawl survey data, and submersible/ROV information by NMFS and other scientists. NFMS will analyze all relevant information as part of the EFH EIS process and the HAPC process.

## HAPC Process Executive Summary

*MCA*  
The Committee suggests that consistent with the NEPA process the Council adopt the following outline.

1. A. Council considers establishing HAPC criteria  
B. Council considers establishing HAPC priorities; priorities reviewed every HAPC cycle.
2. Call for proposals (open to ADFG, NMFS, public, etc., consistent with normal Council process and timing). Proposals submitted on HAPC form developed by Council.
3. Proposals screened by Council staff to determine consistency with EFH/HAPC Final Rule and application completeness. If not consistent or complete, proposal is rejected. If accepted, proposal is forwarded to next step.
4. Proposals reviewed by Technical Review Committee. Proposals are evaluated for:
  - 1) ecological considerations
  - 2) socioeconomic practicability and
  - 3) management and enforceability.Proposals forwarded to Council with recommendations and comments.
5. Council selects HAPC proposals for NEPA analysis.
6. Council determines appropriate stakeholder process.
7. Council determines need for further technical review
8. Public comment on NEPA analysis.
9. Council receives a summary of public comments and takes final action on HAPC selections and management alternatives, if any.

## Draft HAPC process

### **1A. Council consideration of establishing HAPC criteria**

Public comment received from scientific community, AP, NMFS, ADFG, and public. Criteria for scientific evaluation of proposals identified, along with criteria for evaluating management measures. In soliciting HAPC proposals, the Council may decide to: identify as criteria only those considerations outlined in the EFH Final Rule; provide additional guidance to the public by establishing criteria or priorities in addition to those outlined in the EFH Final Rule; or adopt the category/process outlined by the ecosystem committee in 2001. These alternatives, along with some options or variations, are outlined below. Once identified, any additional criteria or priorities, along with the criteria developed for the scientific review, should be widely publicized to guide development of HAPC proposals.

**Alternative A)** HAPC identified using considerations from EFH final rule (outlined below).

According to the language of the NMFS EFH Final Rule, EFH that is judged to be particularly important to the long-term productivity of populations of one or more managed species, to be particularly vulnerable to degradation, or to be particularly rare should be identified as a "habitat area of particular concern" (HAPC) to help provide additional focus for conservation efforts. The rule provides the four basic considerations of an area for HAPC designation. The four considerations are:

- (1) the importance of the ecological function provided by the habitat;
- (2) the extent to which the habitat is sensitive to human-induced environmental degradation;
- (3) whether, and to what extent, development activities are, or will be, stressing the habitat type; and,
- (4) the rarity of the habitat type.

The Final Rule also specifies that habitats that are particularly vulnerable to specific fishing equipment types should be identified for possible designation as habitat areas of particular concern. The intent of the HAPC designation is to identify those areas that are known to be important to species that are in need of additional levels of protection from adverse impacts (fishing or non-fishing). Designation of habitat areas of particular concern is intended to determine what areas within EFH should receive more of the Council's and NMFS' attention when providing comments on federal and state actions, and in establishing higher standards to protect and/or restore such habitat.

**Alternative B)** Council establishes additional criteria for HAPC identification.

Criteria alternatives (alternatives are not intended to be mutually exclusive):

- 1) Whether the Council designates HAPC as sites or types, management measures, if needed, will be applied to a habitat feature in a specific geographic location, identified on a chart, that meet the considerations established in the regulations, and will be developed to address identified problems for FMP species and achieve clear, specific adaptive management objectives (included in the Introduction).



2) The evaluation and development of HAPC management measures, where management measures are appropriate, shall be guided by the EFH Final Rule.

**Alternative C)**

**\*\*MCA preferred alternative\*\***

Council establishes additional criteria for HAPC identification as follows:

The Council requires that a proposal to designate a HAPC successfully address at least two of the considerations listed in the EFH Final Rule, with one of them being #4, rarity of the habitat type. The four considerations are:

- (1) the importance of the ecological function provided by the habitat;
- (2) the extent to which the habitat is sensitive to human-induced environmental degradation;
- (3) whether, and to what extent, development activities are, or will be, stressing the habitat type; and,
- (4) the rarity of the habitat type.

Also, the Council requires that:

- (1) a HAPC proposal address identified problems for FMP species, and
- (2) management measures, if any, are applied in a specific geographic location, identified on a chart.

**1B. Council considers establishing HAPC priorities; priorities reviewed every Council cycle.**

**Alternative A)** Council does not set priorities

**Alternative B)** Council selects habitat priorities (priorities reviewed and either modified or reaffirmed prior to each call for proposals)

Rank the HAPC considerations established by NMFS according to the priorities of the Council. HAPC proposals that target higher Council priorities could be weighted higher than others.

**Alternative C)**

**\*\*MCA preferred alternative\*\***

Council gives priority to the HAPC proposals that meet all four criteria in the EFH Final rule.

**2. Call for proposals for HAPC Process**

**\*\*MCA preferred alternatives\*\***

- (1) HAPC proposals should be solicited every five years, and

(2) on the same cycle as the regular plan or regulatory amendment cycle.

**Proposal Cycle Options:**

1. Proposals are solicited and reviewed every:
  - a) 3 years
  - b) 5 years
2. Proposals submitted during:
  - a) regular plan/ regulatory amendment cycle (Summer call for proposals due in the Fall)
  - b) Separate cycle

**Any member of the public may propose a HAPC**, including fishery management agencies, other government agencies, scientific and educational institutions, non-governmental organizations, communities, industry groups.

**\*\*MCA recommends\*\***

that HAPC proposals be taken from any individual or entity permitted to submit proposals for regular plan/regulatory amendments.

**The Format for a HAPC proposal should include:**

- Name of proposer, address, and affiliation
  - Title of proposal: *Provide a title for the HAPC proposal and a single, brief paragraph concisely describing the proposed action.*
  - Identification of the habitat and FMP species the HAPC proposal is intended to protect.
  - Statement of purpose and need.
  - A description of whether and how the proposed HAPC addresses the four considerations set out in the final EFH regulations.
  - Specific objectives for this proposal, including proposed management measures and their specific objectives, if appropriate.
  - Proposed solutions to achieve these objectives ( how might the problem be solved)
  - Methods of measuring progress towards those objectives.
  - Expected benefits to the FMP species of the proposed HAPC, and supporting information/data.
  - Identification of the fisheries, sectors, stakeholders and communities to be affected by the establishment of the proposed HAPC (Who benefits from the proposal and who would it harm?) and any information you can provide on socioeconomic costs, including catch data from the proposed area over the last five years.
  - Clear geographic delineation for proposed HAPC (written latitude and longitude reference points and delineation on an appropriately scaled NOAA chart)
  - Provide best available information and sources of such information to support the objectives for the proposed HAPC. (*Citations for common information or copies of uncommon information*)
3. **Proposals screened by Council staff** to determine consistency with EFH Final Rule and application completeness. If not consistent or complete, proposal is rejected, If accepted, proposal is forwarded to next step.

#### 4. Proposals reviewed by a Technical Review Committee.

The Council names a Technical Review Committee made up of scientists in the appropriate disciplines, social scientists and economists, and management and enforcement specialists. The team evaluates the proposals for ecological, socio-economic, management and enforceability considerations, and for practicability. The team ranks the proposals using a system like the matrix illustrated below, and makes their recommendations directly to the Council.

##### Evaluation of Candidate HAPC's:

The team should evaluate each proposal on the basis of how well it meets the criteria for HAPC established in step #1 and the requirements established in step #2 above, and determine whether designation and any management measures are warranted. The review team should give all considerations equal attention, but the overall depth of analysis at this stage needs further thought.

In the NPFMC Environmental Assessment of Habitat Areas of Particular Concern (NPFMC 2000), proposed HAPC types and areas were evaluated using a ranking system that provided a relative score to the proposed HAPCs by weighing them against the four considerations established in the EFH final rule.

Two more columns should be added to the matrix. One column is to score the level of socio-economic impact, with the lower the impact, the higher the score. The final column is to score the level of likelihood that the proposal will successfully address the identified problem of the FMP species. To arrive at this score, reviewers must consider the known information on the relative linkage of the habitat function to the health and productivity of the FMP species.

The "Data Level" column should be modified to be "Level and Certainty of Data" to reflect not only the amount of data available, but also the scientific certainty of the information supporting the proposal.

A written description should accompany the ranking so it is clear what data, scientific literature and professional judgments were used in determining the relative score.

Evaluation matrix of proposed HAPC types and areas, with example proposals for illustration only. (NPFMC 2000)

Proposed HAPC area	Data Level	Sensitivity	Exposure	Rarity	Ecological Importance
Seamounts and Pinnacles	1	Medium	Medium	High	Medium
Ice Edge	3	Low	Low	Low	High
Continental Shelf Break	3	Medium	Medium	Low	High
Biologically Consolidated Sediments	1	Low	Medium?	Low	Unknown

##### Socioeconomic and other criteria:

The EFH mandate states that EFH measures are to minimize impacts on EFH "to the extent practicable" so socioeconomic considerations have to be balanced against expected ecological

benefits at the earliest point in the development of measures. NMFS' final rule for developing EFH plans states specifically that (Section (2) *ii F.R.* page 2378) FMPs should "identify a range of potential new actions that could be taken to address adverse effects on EFH, include an analysis of the practicability of potential new actions, and adopt any new measures that are necessary and practicable". In contrast to a process where the ecological benefits of EFH or HAPC measures are the singular initial focus and a later step is used to determine practicability, this approach would undertake the consideration of practicality simultaneously.

Specifically, HAPC proposals should be rated on their identifying as extensively as possible the exact locations that would be affected if the proposed HAPC mitigation measures were implemented. Proposals should also be rated on their identifying affected fishing communities and the potential effects on those communities, employment and earnings in the fishing and processing sectors, and related infrastructure.

Management and enforcement will also need representation in the review, to evaluate general management cost and enforceability of individual proposals.

**5. Council selection of HAPC proposals for analysis, to address Council priorities if identified.**

**6. Stakeholder input**

The Council retains the authority to set up a stakeholder process as appropriate to obtain input on proposals.

**7. Technical reviews**

The Council retains the authority to obtain additional technical reviews as needed from scientific, socio-economic and management experts.

**8. Public comment on NEPA analysis**

**9. Council action**

As per the normal Council process, the Council receives public comments and takes final action on HAPC selections and management alternatives.

**Literature Cited:**

ADF&G 2002. Marine Protected Areas in Alaska: Recommendations for a Public Process. Alaska Department of Fish and Game Division of Commercial Fisheries. Juneau, AK.

Auster, P.J. 2001. Defining Thresholds for Precautionary Habitat Management Actions in a Fisheries Context. *North American Journal of Fisheries Management* 21: 1-9.

NPFMC 2000. Draft Environmental Assessment/ Regulatory Impact Review. Habitat Areas of Particular Concern. North Pacific Fishery Management Council. Anchorage, AK.

Roberts. C.M. et al. 2003. Application of Ecological Criteria in Selecting Marine Reserve and Developing Reserve Networks. *Ecological Applications*. 13(1): S215-S228.

**ADDENDUM: from New England Council  
Supportive Data and Information:**

The HAPC proposal form will have a section asking the submitter to include any supportive data and other relevant material. The New England Fishery Management Council has detailed a list of accepted information sources to support HAPC proposals. This or a similar list may be useful to detail, so the public knows what scientific information the review panel will be looking for.

From - NEFMC Habitat Areas of Particular Concern Process:

General Scientific Data and Information – The information used by the proposer to justify an HAPC proposal comes from scientific peer-reviewed journals, government technical reports, or from unpublished scientific data. This category includes any scientific data or information that are not site-specific but still bear relevance on the issue by demonstrating one of the HAPC criteria.

Site-Specific Scientific Data and Information – The information used by the proposer to justify an HAPC proposal comes from scientific peer-reviewed journals, government technical reports, or from unpublished scientific data. This category includes any scientific data or information that are derived from or for the specific area under consideration in the HAPC proposal.

Literature Review - The information used by the proposer to justify an HAPC proposal comes from a review of peer-reviewed literature and government technical reports. This includes summaries of the results of scientific studies published in peer-reviewed journals and technical documents. The literature review may be prepared by the proposer or may be prepared by another source and should clearly articulate the link between the area, habitat type, or species in question with at least one of the HAPC criteria.

Substrate Mapping – The information used by the proposer to justify an HAPC proposal includes substrate mapping of the specific area under consideration. The source of the substrate mapping should be a federal agency, such as the U.S. Geological Survey, a state agency, an academic institution, or a research collaborative. The substrate maps should be provided to the Council and readily available for external review.

Oceanographic Information – The information used by the proposer to justify an HAPC proposal includes information on the oceanographic features occurring in the specific area under consideration. This information can include, but not be limited to, the tracking of currents, identification of relatively stable and persistent gyres, oceanographic fronts, thermoclines, haloclines, or pycnoclines. Reference to any transient oceanographic feature(s) should include a description of the importance of the feature to the target species or habitat type.  
NEPMC, 2002.

Traditional Knowledge: Incorporate all traditional knowledge as information to justify a HAPC proposal.

# MARINE CONSERVATION ALLIANCE

P O Box 20676  
JUNEAU, AK 99802

(907) 523-0731  
FAX (907) 523-0732

ALYESKA SEAFOODS  
ALASKA DRAGGERS  
ASSOCIATION  
ALASKA GROUND FISH DATA  
BANK  
ALASKAN LEADER FISHERIES  
ALASKA PACIFIC SEAFOODS  
ALEUTIAN ISLANDS BROWN  
CRAB COALITION  
ALEUTIAN PRIBILOF ISLAND  
COMMUNITY DEVELOPMENT  
ASSOCIATION  
AGUTAN, ATKA, FALSE PASS, NELSON LAGOON,  
NIKOLSKI, ST. GEORGE  
BRISTOL BAY ECONOMIC  
DEVELOPMENT CORP.  
ALASKA, CLARK'S POINT, DELINGHAM,  
EGERSI, EKUK, EKWOK, KING SALMON,  
LEVELOCK, MANOKOTUK, NARADK, PILOT POINT,  
POINT HEDDEN, PORTAGE CREEK, SOUTH NARADK,  
TOGIAK, TURN HILLS, UZUNAK  
CENTRAL BERING SEA  
FISHERMEN'S ASSOCIATION  
ST. PAUL  
CITY OF UNALASKA  
COASTAL VILLAGES REGION  
FUND  
CHODINA, CHEVUK, EDK, GOODNEWS BAY,  
HOOPER BAY, KORYUK, KONGSIAK,  
KWILLINGOK, MEKORYUK, NARADK,  
NARASIAK, NEWTOK, NIGHTMUTE, OSCARVILLE,  
PLATINUM, CUNWAGAK, SCHARNOV BAY,  
TOGSOOK BAY, TUNTULUAK, TUNUNAK  
GROUND FISH FORUM  
HIGH SEAS CATCHERS  
COOPERATIVE  
ICICLE SEAFOODS  
MID-WATER TRAWLERS  
COOPERATIVE  
MOTHERSHIP GROUP  
PV EXCELLENCE  
OCEAN PRODIGY  
PV GOLDEN ALASKA  
NORTH PACIFIC FISHERIES  
RESEARCH FOUNDATION  
NORTH PACIFIC LONGLINE  
ASSOCIATION  
NORTH PACIFIC SCALLOP  
COOPERATIVE  
NORTON SOUND ECONOMIC  
DEVELOPMENT  
CORPORATION  
BREVG MISSION, DIOMEDE, ELIN, GAMBELL,  
GOLDVON, KOTUK, NOMS, SAINT MICHAEL,  
SAYDONIA, SHAKTOLIK, STEEBING, TELLER,  
UNALASKA, WALES, WHITE MOUNTAIN  
PACIFIC SEAFOOD  
PROCESSORS ASSOCIATION  
PROWLER FISHERIES  
SEAFOOD COLD STORAGE  
ASSOCIATION  
SOUTHWEST ALASKA  
MUNICIPAL CONFERENCE  
TRIDENT SEAFOODS CORP.  
UNITED CATCHER BOATS  
ARUTIAN CATCHER VESSEL ASSO.C.  
ARCTIC ENTERPRISE ASSO.C.  
NORTHERN VICTOR FLEET  
PETER PAN FLEET COOPERATIVE  
UNALASKA COOP  
UNISEA FLEET COOPERATIVE  
WESTWARD FLEET COOPERATIVE  
WESTERN ALASKA  
FISHERIES, INC.  
YUKON DELTA FISHERIES  
DEVELOPMENT  
ASSOCIATION  
ALASKAN, ENHONAK, GRAYLING, KOTUK,  
MOUNTAIN VILLAGE, NUNAM IQUA

June 3, 2003

David Benton  
Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, AK 99501

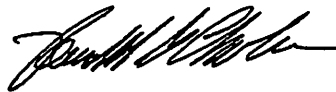
Re: Essential Fish Habitat EIS Preparation

Dear Chairman Benton:

Attached is a letter from David Frulla, Esq., explaining a recent federal district court in New York dealing with EFH issues in the tilefish FMP. Mr. Frulla, who participated in the tilefish case, prepared this analysis at the request of the Marine Conservation Alliance.

We believe that this case, and a second case on the same FMP, provide important guidance on the interpretation of the statutory and regulatory underpinnings of the EFH program. We recommend that the Council review the letter and provide guidance to the team of analysts preparing the EFH EIS. The court made it clear that the Council and NMFS could decline to impose restrictions on fishing if the record has no evidence of actual adverse impacts on habitat on which the managed species depends, and that "inferences" do not amount to the scientific evidence required under the MSA. The approach by the court should be incorporated in the analysis in the EIS.

Sincerely,



Ron Clarke  
Executive Director  
Marine Conservation Alliance

RECEIVED  
JUN - 3 2003  
N.P.F.M.C.

**BRAND & FRULLA**

A PROFESSIONAL CORPORATION  
923 FIFTEENTH STREET, N.W.  
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700

TELECOPIER: (202) 737-7565

June 3, 2003

**VIA HAND DELIVERY  
AND FIRST CLASS MAIL**

Mr. David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4th, Suite 306  
Anchorage, Alaska 99501-2252

RECEIVED  
JUN - 3 2003  
N.P.F.M.C.

**Re: Recent Essential Fish Habitat Court Decisions**

Dear Mr. Benton:

We are writing on behalf of the Marine Conservation Alliance ("MCA")<sup>1</sup> to bring to the Council's attention the United States District Court's decision in *NRDC v. Evans*, — F.Supp.2d —, 2003 WL 1702008 (S.D.N.Y. 2003).<sup>2</sup> The case involved national environmental organizations' challenge to the essential fish habitat provisions of the Mid-Atlantic Tilefish Fishery Management Plan.

In briefest summary, United States District Judge Berman held that the Mid-Atlantic Fishery Management Council and NMFS acted according to law in declining to consider measures to reduce the adverse impacts by bottom-tending mobile fishing gear on tilefish essential fish habitat because the record did not show actual evidence of

<sup>1</sup> MCA members include fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses. The MCA is dedicated to promoting the sustainable use of North Pacific marine resources by present and future generations, based on sound science, prudent management, and a transparent, open public process. The MCA seeks practical solutions to resource use questions that protect both the marine environment and North Pacific fishing communities. The MCA also supports research and public education about the fishery resources of the North Pacific.

<sup>2</sup> This firm represented three commercial fishing associations (National Fisheries Institute – Scientific and Monitoring Committee, Garden State Seafood Association, and Long Island Commercial Fishing Association) who participated as "friends of the court" (*amici curiae*) in that case. These organizations include members and participants who fish with bottom-tending mobile trawl and dredge gear.

**BRAND & FRULLA**

Mr. David Benton, Chairman  
June 3, 2003  
Page 2

adverse impacts from that gear on tilefish or the habitat on which tilefish depend. Importantly, NMFS, the Mid-Atlantic Council, and the court all concluded that "inferences" that trawl gear could have adverse impacts to tilefish EFH based on otter trawls' alleged adverse impacts in near-shore and inshore areas remote from tilefish EFH did not amount to the "evidence" that the Magnuson-Stevens Act's EFH regime requires to trigger the development and consideration of mitigating measures (and their costs and benefits). We respectfully submit that this case should provide important guidance for other fishery management councils working to comply with the SFA's EFH requirements in the face of limited information about the actual effects of fishing gear on managed species' EFH.

**I. THE TILEFISH DECISION AND FISHERY****A. Development of the Tilefish FMP**

Golden tilefish have a close and demonstrated relationship to specific habitat. They are a long-lived and slow-growing fish that create "burrows" in the bottom (usually in clay substrate) along the Atlantic outer continental shelf break (and elsewhere outside the Mid-Atlantic Council's jurisdiction). Successive generations of tilefish can inhabit these burrows for many years. Tilefish need these burrows for breeding and survival. The FMP's EFH provisions thus explained, "Tilefish are clearly shelter-oriented fishes and certain types of sediments (firm clay) in which their burrows can be created and maintained seem essential to tilefish well-being." FMP at 41.

The tilefish fishery is a very discrete one. The directed fishery is currently prosecuted by a handful of longline fishermen home-ported in New Jersey and Long Island. There is a very limited tilefish bycatch in the trawl fishery, and, while the trawl fleet was active in creating the fishery, that fleet's participation has dwindled. FMP at 73-74.

NMFS classified tilefish over-fished in 1998. The Mid-Atlantic Council thereupon developed a tilefish FMP, which was implemented in 2001. Among other things, the FMP developed a rebuilding program that reduced tilefish landings by about 50% to approximately 2 million pounds per year; created a limited access fishery to which most of the quota was allocated, along with a modest open access regime allowing the landing of some bycatch; and defined tilefish EFH.

Mobile gear fisheries, such as bottom-tending otter trawls and mid-water trawls, prosecute other, more valuable fisheries including those for summer flounder and squid, mackerel, and butterfish, in areas ultimately designated as tilefish EFH. Indeed, tilefish EFH comprises some of the most important fishing grounds in the Mid-Atlantic.



**BRAND & FRULLA**

Mr. David Benton, Chairman

June 3, 2003

Page 3

Visual bottom surveys of what became tilefish EFH areas revealed the presence of trawl door marks. However, there exists no evidence that otter trawl gear has any negative impact on the "quality or quantity" of tilefish EFH. The FMP thus explained:

Unquestionably, from submersible vessel research, there are trawl door patterns observed in areas with tilefish burrows, but how much of an impact the doors have and how quickly tilefish can reopen their burrows, if sediment closed, are completely unknown at this time. It is fully recognized that tilefish are extremely important to maintaining habitat around their burrows and this is important for the entire demersal community around these burrows. Any short-term or long-term impacts of bottom tending mobile gear specifically to tilefish habitat are unquantifiable at this time.

FMP at 52.

That said, certain studies have claimed that bottom tending mobile gear has an adverse impact on, for instance, certain fragile, near-shore and inshore habitat areas remote from tilefish EFH, located offshore. FMP at 50.

On this record, the draft tilefish FMP proposed a series of what amounted to bottom-tending mobile gear closed areas to protect tilefish EFH. (While the draft FMP did not contain closure options *per se*, it would only have allowed trawl gear in these areas if it were re-rigged so as not to tend the bottom at all, thereby essentially precluding the Mid-Atlantic bottom and mid-water trawl fisheries.) The draft FMP explained its rationale for developing these options in the following terms:

Based on the best available scientific information, it can be *inferred* that trawling is causing long-term physical adverse impacts to tilefish EFH. It is further implied that in some cases those adverse impacts may be severe, at least locally.

Tilefish Draft FMP, *quoted in NRDC, 2003 WL 1702008, \*2 (emphasis added).*

The draft FMP then went out for public comment. Its EFH provisions received intense scrutiny and comment. Several environmental groups expressed strong support for the need to develop mitigating measures, claiming that it was a valid "precautionary" approach that was particularly warranted given that tilefish were long lived and slow growing. Countervailing comments – from NMFS, its science center, academia, and the industry – focused on the lack of actual evidence pointing to harmful impacts of mobile gear on tilefish EFH, as well as the serious economic consequences on fishermen prosecuting other fisheries in areas of identified Tilefish EFH. *Id.* at \*2-3

**BRAND & FRULLA**

Mr. David Benton, Chairman

June 3, 2003

Page 4

In the end, the Mid-Atlantic Council struck the above-quoted language from the final FMP. In its stead, the council implemented a research approach designed to further study the issue and make recommendations within two years, essentially deferring consideration of any mobile gear closure options. *Id.* at \*3-4.

The Mid-Atlantic Council based its decision on the absence of any data showing adverse impacts on the quality and quantity of tilefish EFH, some indications (including information presented by the leading tilefish scientist in the region) that such habitat was unaffected, and the clear economic impacts associated with closure of these areas to mobile gear. *Id.* at \*2-3. NMFS approved the FMP. The NRDC and Environmental Defense then filed suit challenging the FMP's failure to consider closed areas to protect tilefish EFH from the adverse impacts of bottom tending mobile gear.

**B. The Holding in NRDC v. Evans**

This suit alleged that NMFS, by approving this plan, violated the EFH provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1853(a)(7); the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f) and its implementing regulations. The MSA and APA challenge rested largely on (1) the "inference" in the draft FMP that tilefish EFH was negatively affected by trawl gear, and (2) clear evidence of trawl marks in tilefish EFH areas, which, to the plaintiffs, represented a "per se" indication that tilefish EFH was adversely impacted. The district court rejected both these arguments (as well as others).

The court accepted NMFS' justifications for not considering EFH mitigation measures further. Principally, NMFS successfully claimed that SFA did not require the Council and NMFS to consider EFH mitigation measures if the record did not contain actual evidence of adverse effects (as defined by NMFS regulations implementing the SFA's EFH provisions) by fishing gear on the EFH in question.

In reaching its decision, the court carefully reviewed NMFS's EFH regulations, such as 50 C.F.R. § 600.810(a), defining an "adverse effect" on EFH as "any impact, which reduces quality and/or quantity of [essential fish habitat]."<sup>3</sup> These regulations also require Councils to use the best scientific information, *id.* § 600.815(a)(1)(ii)(B), and

---

<sup>3</sup> The CFR goes on to say: "Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions."

**BRAND & FRULLA**

Mr. David Benton, Chairman  
June 3, 2003  
Page 5

define "identifiable" impacts to be minimized as those "both more than minimal and not temporary in nature." *Id.* § (a)(2)(ii). *NRDC*, 2003 WL 170200F, \*6.

The court then held that there was ample evidence on the record to support a finding that, according to the best scientific information, there exist no identifiable adverse effects on tilefish EFH from bottom-tending mobile gear within the meaning of the law. *Id.* The judge further found that NMFS properly exercised its discretion in finding that studies of gear impacts on EFH of other species was not "sufficiently analogous" to those affecting tilefish habitat. *Id.* In reaching this conclusion, the court cited with approval to the holding by Judge Gladys Kessler of the District of Columbia Federal District Court in *American Oceans Campaign v. Daley*, 183 F. Supp.2d 1, 11-17 (D.D.C. 2000), that "neither the statute nor the regulations requires the Councils to affirmatively conduct research to better identify EFH and the adverse effects of fishing on them, [so] reliance on the best available scientific information is sufficient." 183 F.Supp.2d. at 13. See *NRDC*, 2003 WL 1702008, \*6.

As to the argument that the observed trawl door patterns on the sea bed constitute "per se evidence of physical disruption," Judge Berman found ample evidence in the record to support the agency's conclusion that, despite such disruption, there was no evidence of any actual reduction in the quantity or quality of tilefish habitat. Included with this evidence were observations that in areas over which there had been significant fishing activity with bottom-tending gear, there existed "active twenty- to thirty-year old tilefish burrows." *NRDC*, *Id.* at \* 7. In the face of such findings, and despite the fact that tilefish themselves are overfished, the court upheld NMFS's finding that trawl marks alone did not amount to harm to tilefish EFH.

For their part, the environmental groups had argued that it was a likely inference that trawling stirred up sediments that would block access to and from the tilefish burrows, and that the precautionary approach warranted action on this basis. However, the court found there was no evidence of this effect, and thus concluded, "it was reasonable for [NMFS] not to impose new restrictions on bottom-tending gear given the lack of evidence that the gear had an identifiable adverse effect." *Id.* at \*8.

Turning to the contention that the Tilefish FMP's Environmental Impact Statement (required by NEPA) was deficient, the court refused to find that the plan's impact on the environment was not sufficiently considered. The plaintiffs alleged that because the Environmental Protection Agency, in a comment letter, stated that the alternatives "could have been more clearly defined," and because the document stated (accurately) that impacts of fishing on tilefish EFH were not known, the EIS was inadequate because further study was required. The plaintiffs argued that regulations governing EISs require an agency to either "obtain missing information or to include a statement in the [EIS] concerning the relevance and availability of the missing information, where there is incomplete or unavailable information pertaining to adverse impacts." *Id.* at \* 9 (citing 40 C.F.R. § 1502.22).

**BRAND & FRULLA**

Mr. David Benton, Chairman

June 3, 2003

Page 6

The court found, however, that the fact that impacts were unknown was supported by the record, and that the document did describe the available literature regarding trawl gear's effects on habitat impacts on EFH of other species. However, the court accepted as rational the FMP's conclusion that these studies were of little value to understanding impacts on EFH of burrowing species like tilefish. The court finally acknowledged the matter was undergoing further study. *Id.* at \*9.

Finally, the environmental groups criticized the brevity (three pages of analysis) with which the EIS treated the alternatives to no action/further research position adopted under the FMP. They tied their argument to a guidance letter issued by NMFS for revising EISs "deemed incomplete." *Id.* The court found that the Tilefish EIS followed the guidance letter and, more importantly, the legal requirements by discussing in detail the rejected alternative approaches. The EIS "discusse[d] the impacts of adopting these measures, and discusse[d] the difficulty of analyzing effects in the absence of data. It also discusse[d] the need for additional research." *Id.* (administrative record citations omitted). In finding that the EFH analysis met the applicable legal requirements, the court stated that an EIS "is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *Id.* at \* 10 (quoting *NRDC v. Calloway*, 524 F.2d 79, 88 (2<sup>d</sup> Cir. 1975)).

**II. ANALYSIS**

The tilefish case represents an important precedent for councils nationwide. It sets tangible and coherent limits on a council's obligation under the Sustainable Fisheries Act to protect essential fish habitat from the adverse impacts of fishing gear. Furthermore, the case set these limits even though tilefish are particularly associated with their EFH – the data do show that tilefish rely on their EFH for reproduction and survival. Nonetheless, Judge Berman did not sanction any departure from the statutory and regulatory requirements under the SFA and its implementing regulations that a duty to consider measures to mitigate adverse impacts of fishing gear on EFH arises only upon actual evidence of such adverse impacts.

In other fisheries, such as the North Pacific groundfish fishery, the dependence of stocks on habitat at various stages of life is not well understood, and the science linking these stocks to EFH is even more speculative. However, just as the MAFMC was faced with requests to close tilefish EFH to bottom-tending gear, the NPFMC is confronting similar logic and ensuing requests as the council undertakes to comply with NEPA requirements in connection with development of EFH measures under the SFA, as addressed in the consent agreement in *AOC v. Daley*. And, just as in the tilefish case, the MCA, communities, and various industry groups have made clear that the only

**BRAND & FRULLA**

Mr. David Benton, Chairman

June 3, 2003

Page 7

certain result of implementing such closures is serious economic impacts on the fishing industry and associated fishing-dependant communities.

Under the circumstances facing this Council as it decides how to move forward with measures designed to protect EFH for the various stocks under its authority, the tilefish decision offers two basic guideposts. First, when faced with a situation in which there is no scientific evidence demonstrating that fishing activities are adversely affecting a managed species or its EFH, the Council is under no obligation to impose closures or other mitigation measures. Nor is additional research required as part of any EFH rulemaking. As Judge Kessler has already ruled in the case under which your EFH EIS is being prepared, "reliance on the best available scientific information is sufficient."

Second, a council's obligations to develop proposals to mitigate adverse effects of fishing gear on EFH do not arise from inference, speculation, or surmise. In fact, the imposition of fishery management measures as a "political compromise," unmoored from a scientific basis, violates Magnuson-Stevens Act National Standard Two.<sup>4</sup> Accordingly, a council is not required to act just because an adverse impact may be theorized, such as via the theory that bottom-tending gear may stir-up sediment that could potentially block tilefish burrow access. Nor does evidence of an impact from fishing gear, such as trawl door marks among tilefish EFH, equate to evidence of an adverse impact. (In fact, given the high productivity of the species this Council manages, the inference of no adverse impacts on EFH seems to be the reasonable

---

<sup>4</sup> Indeed, a more recent decision than *NRDC* invalidated the tilefish limited access regime because the Tilefish FMP lacked scientific evidence to support its differential restrictions on trawlers' ability to participate in the tilefish fishery, even after rebuilding was accomplished. "While National Standard Two does not compel the use of specific analytic methods or require that an agency gather all possible scientific data before acting, the Standard does prohibit an agency from simply creating a rule based on mere political compromise." *Hadaja, Inc. v. Evans*, — F. Supp.2d —, 2003 WL 21190990, \* 7 (D.R.I., May 15, 2003). Furthermore, "[c]onclusory statements regarding the consideration of scientific data are not sufficient — the FMP must inform its audience of the actual scientific basis supporting it." *Id.* For its part, the U.S. Court of Appeals for the Ninth Circuit, with jurisdiction over Alaska, concluded that, even if a NMFS rule is "eminently fair," National Standard Two requires that it must nonetheless "be founded on science and law, not pure diplomacy." *Midwater Trawlers Cooperative v. Dep't of Commerce*, 282 F.3d 710, 720-21 (9<sup>th</sup> Cir. 2002) (invalidating tribal fishery allocation regime). See also *Hall v. Evans*, 165 F. Supp.2d 114 (D.R.I. 2001) (invalidating differential Atlantic monkfish harvest restrictions for lack of a science-based record rationale); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993) (same, for salmon escapement levels).

**BRAND & FRULLA**

Mr. David Benton, Chairman

June 3, 2003

Page 8

"default" position.)<sup>5</sup> Judge Berman explained that even "reasonable inferences" of adverse impacts are not enough to trigger the duty to mitigate impacts under the MSA, even where, as in that case, the Council changed its opinion from the draft to the final FMP and eliminated restrictions on trawling. In fact, if the best scientific information relating to habitat is speculative, no court has required NMFS to impose closures to protect EFH at the expense of the fishing industry.<sup>6</sup>

We understand that, as is the case for tilefish, there is no actual evidence that the fishing gear used in the BSAI/GOA groundfish fisheries adversely affects the "quality and/or quantity" of habitat which is essential to any of the regulated species. Nor is there any information that any of the managed species exhibit signs of habitat degradation. Indeed, we understand that the best available scientific information available in this region does not even make a clear link between the habitat designated as "essential" and the survival of the stocks (as was evident for tilefish), nor does it suggest that trawling impacts lessen the availability of EFH. The tilefish decision expressly found that such hypothetical impacts would not trigger a legal obligation on a council's part to develop and consider EFH mitigation alternatives.

---

<sup>5</sup> Judge Berman referenced a finding by Dr. Ken Able, a "recognized expert on tilefish," as providing a reasonable basis for a council to reach just such an inference even where observable trawl patterns were found in tilefish EFH. Dr. Able stated, "These fish survived multiple annual trawling during the most intense time of fishing.... **We can safely postulate that trawling does not impact the local environment or food chain to the detriment of the Tilefish lifecycle.** This is a more reasonable hypothesis than the assumption that trawling does significantly impact the habitat or food chain to the detriment of Tilefish. Our hypothesis of low impact is based upon what we know from trawl surveys and from what has been observed during submersible dives, while the draft plan's assumptions of significant impact on the [essential fish habitat] has no direct evidence or basis other than pure conjecture." *NRDC*, 2003 WL 1702008, \*7 (emphasis in original).

<sup>6</sup> In addition to the tilefish decision, this result has been reached in the following cases: *Conservation Law Foundation v. Daley*, 229 F. Supp.2d 29, 34 (D. Mass. 2002) (finding that the decision not to close groundfish EFH to scalloping lawful where the measure described efforts, such as reductions in time fished, which ameliorated adverse impacts on EFH), *appeal pending*; *Conservation Law Foundation v. Mineta*, 131 F. Supp.2d 19, 27-31 (D.D.C. 2001) (same, stating "Defendants have numerous—and oftentimes competing—statutory objectives to contend with in managing the New England waters; preservation of essential fish habitat is only one of many"); *American Oceans Campaign v. Daley*, 183 F.Supp.2d at 11-17 (finding that the generic EFH amendments of various Councils, including the NPFMC, did not violate the MSA or APA where they identified both measures which lessened impact on EFH and identified information which was lacking, though finding insufficient consideration of alternatives under NEPA).

**BRAND & FRULLA**

Mr. David Benton, Chairman

June 3, 2003

Page 9

Further, even if hypothetical impacts might trigger consideration of mitigating alternatives, there is ample case law support, referred to above, which suggests that measures less than draconian closure options are perfectly acceptable in meeting the requirement that an FMP reduce adverse impacts "to the extent practicable." 16 U.S.C. § 1853(a)(7).

In the same vein, we note that NMFS recently approved the EFH provisions of Amendment 13 to the Mid-Atlantic Council's Summer Flounder, Scup, and Black Sea Bass FMP, after having initially disapproved its EFH provisions. In that instance, the Mid-Atlantic Council re-affirmed its recommendation (which NMFS had originally disapproved) not to impose closures in the Mid-Atlantic to protect these regulated species' EFH from the adverse effects of trawl and dredge gear. That council based its decision on its conclusion that such closures would impose significant costs on the fishing industry that outweighed any speculative benefits from such closures.

Turning back to the North Pacific Council, no law requires its omnibus Essential Fish Habitat amendment to close fishing areas to protect EFH from any (if any) adverse effects of fishing gear. If actual evidence of adverse impacts on EFH exists (as the tilefish case sets out as a prerequisite for considering mitigating alternatives), the Council must consider a sufficient range of such alternatives. Closures are certainly within the realm of cognizable options under NEPA. That said, however, the council record may very well support a rational conclusion (based on considering the actual costs of further closures versus their speculative benefits), that existing measures which have the effect of reducing tow times, the amount of gear in the water, and other restrictions which lessen the impact of mobile gear on sensitive habitat, already satisfy the Sustainable Fisheries Act's requirement that fishing effects be minimized "to the extent practicable".

Thank you for taking the time to review these comments, and please contact us if we can provide any further information.

Sincerely,

  
David Frulla  
Shaun Gehan  
DEF

DEF/SMG:mlc

**DRAFT EFH Committee Report  
Juneau, Alaska  
Room 105 Federal Building  
May 5 -6, 2003**

Committee members present: Stosh Anderson (Chair), Linda Behnken, (vice chair), Scott Smiley, Earl Krygier, Ben Enticknap, John Gauvin, Glenn Reed, Gordon Blue, Michele Ridgway, and Jon Kurland

Agency Staff Present: Cathy Coon and John Lepore

Public attendees: Paul MacGregor, Dick Powell, Linda Kozak, Geoff Shester, Brent Paine, Janet Smoker, and Donna Parker

EFH and MPA definitions: (See attached appendix A)

Staff presented a list of common terms applicable for EFH /MPA processes. Ben Enticknap asked if the Council would take action on adopting these definitions. Stosh Anderson thought the Council would deal with this at the June Council meeting. The Board of Fish will be addressing them in their MPA committee in June and the next Joint Board Protocol Committee meeting this summer. The Committee made slight modifications to the MPA/ EFH definitions to clarify marine research reserves. It was suggested the concept of ecological function and adaptive management be incorporated into these definitions.

Motion: The Committee recommends the Council adopt these definitions as working definitions for EFH and MPA processes. (*passed unanimously*)

EFH/EIS Update and Schedule:

Jon Kurland provided the updated table of contents from the EFH/EIS and a tasking memorandum. Council staff is working with the agency to get the EIS together for publication by August 1<sup>st</sup>. He pointed out with the tight timeline drafts of the chapters will not be available until the entire document is completed.

Options for Handling HAPCs in the EIS:

Jon Kurland stated the existing HAPC alternatives in the EIS do not parallel very well with the HAPC process. The HAPC alternatives right now are a framework for designating HAPCs. It will be difficult to have a substantive analysis in the EIS to distinguish between them to meaningfully describe the environmental consequences of going with one alternative versus another. He suggested that if the Council retains this HAPC process, one way method could be to pull the existing HAPC alternatives out of the EFH/EIS and add in the discussion of process and discussion of reasonably perceived consequences that might come from the implementation of that process. The Committee could recommend pulling HAPCs out of the EIS if the Council proceeds with a separate process for HAPCs. As currently scoped, they went out with a notice of intent and scoping process that envisioned the EIS would identify alternatives for HAPCs. That originally was envisioned as meeting specific types of habitat, or sites, and full analysis of the specifics. Stosh Anderson asked if this was advisable, if they were dealing with an EFH/EIS in August of '03 or August of '04, to make recommendations for either deadline. Jon Kurland thought it advisable, either way, if the Council is going to proceed with a separate HAPC process.

Linda Behnken said her understanding was that the Council would not proceed with a separate HAPC process unless they got the extension. Jon Kurland said that has been implied but he did not know that it was stated as an explicit Council motion. Linda Behnken said her advice would be to only separate it out if the Council decides to proceed with the separate HAPC process so it stays in the EFH/EIS, unless there's this separate process. If there is a separate process then the Committee could discuss it.



**Motion:** The Committee moved that the HAPC alternatives get removed from the EIS only if there is an identified separate process. (*Passed unanimously*)

**Status of existing HAPC:** Linda Behnken said there was a lot of interest in the Council moving ahead on some sort of accelerated time frame in coming up with some management measures to address the HAPC types that were identified in the prior EFH EA. She asked if the Council picks a preferred alternative differing from status quo, what would happen to those HAPC sites that were identified in the last EA.

Jon Kurland gave a background on the EFH Amendments to the five FMPs that were implemented in 1999. Currently, there are currently three types of HAPCs designations in the regulations. In the EIS, one of the alternatives identified is the "no action" alternative, which would mean there are no HAPCs identified and the Council and Agency would have to implement an action to revoke the existing HAPC designations. If the Council were to choose one of the other alternatives in the EIS besides status quo, like specific sites, the existing HAPC would need to be revoked and then identify a process to identify new ones. The status quo alternative in the EIS would reaffirm the existing three designations. FMP amendments will be necessary if the Council does anything other than affirming exactly what was contained in the original EA. Depending on what is selected as the preferred alternative for any of the three actions, EFH designation, HAPC designation, or minimization, the amendments would need to try to put into effect what the Council selects as the preferred alternative. He added that it would not foreclose any future options.

John Lepore cautioned that if they look at the final rule, and what the Council should do when it comes to HAPCs, there's nothing that states that management measures have to necessarily follow the identification of HAPCs.

Linda Behnken encouraged legal counsel to walk the Council through the implications of status quo alternative and the no action alternative.

**Review of Subcommittee's work on HAPC Process:**

Stosh Anderson clarified the task of the subcommittee (Ben Enticknap, Linda Behnken, Heather McCarty, and John Gauvin) was to come up with a template or outline for the Committee to develop a long-term process that would be included in the EFH/ EIS only. His goal for this Committee, as soon as they develop the long-term process, was to make suggestions on how to modify the long-term process if they need a short-term process.

Linda Behnken identified the outline as a starting process for the document. She thought it was important to hand the Council a draft of a process with alternatives under each topic for the Council to deliberate.

Earl Krygier asked if they discussed a cycle when proposals would come up. Linda Behnken said they discussed a cycle of every three years as one alternative, or every five years as another. The other alternative for discussion is whether it should coincide with the regular call for proposals that happens over the summer, or whether it should be in a separate time frame so they are only prioritized against each other.

**Review of Science Committee comments on Draft HAPC Process:**

Staff gave a brief overview of who from the agency reviewed this information, their comments and suggestions. Scott Smiley asked if he had come across any discussion on the phrase ecological function. John LePore said after a quick review of the preamble and discussions about the HAPC considerations; it did not go into specific detail about ecological function. He thought it was more of a broad consideration of an ecological function of a particular area. Jon Kurland said the idea was that it was supposed to be a consideration that the Council could use if there was good information. It was not meant to be a standard for proof of ecological function or a particular type of function that is highlighted for preference over some other function. Scott Smiley asked how feeding habitat and spawning habitat was different from

EFH, which has all of those things already, defined in it. Jon Kurland said the Councils wanted flexibility in how they go about identifying HAPC.

John Lepore said in a Court of Law, the Court usually defers to the Agency and considers the Agency the expert in that field. When the Council is looking at one of those four considerations, as long as they document in the record why they are looking at a particular HAPC, and justify that, the Court would see the basis for the determination.

Scott Smiley could agree with ecological function if it was tied directly to FMP species and directly to a definable geographic area. Then when it is successfully implemented, it is not closing an entire swath or similar habitat all over the place. It is defined and localized and there is some significant scientific information to justify the claim. Gordon Blue agreed it was important to limit the geographic bounds.

Committee Discussion and Recommendations on HAPC process:

It was agreed that the Committee would review the original 11 items on the Suggested HAPC Process Outline, and incorporate concepts within the text. The draft HAPC process paper is attached in the Council notebooks under agenda item C-3(b), and the outline was incorporated into an executive summary.

The Committee agreed that HAPC sites be defined as specific geographic locations, identified on a chart, that meet the considerations established in the regulations. Management measures would be designated to address identified problems for FMP species and achieve clear, specific management objectives. Additionally, HAPC type designations would be used to focus research priorities, such as ascertaining ecological links between habitat and FMP species, etc. The intent is that the type designation alone would not invoke mitigation measures.

The Committee reiterates whether or not the Council goes with types or sites, management measures are attached only to specific locations.

Proposal process:

Earl Krygier asked how HAPC proposals of different subject matters could be packaged to analyze. John Lepore said that each proposal or similar topics would be a separate federal action. If the Council set up a "problem statement" and set up a specific priority, various proposals responding to a specific problem statement could be looked at as alternatives to address that problem statement. Scott Smiley asked John Lepore (NOAA GC) if additional things besides criteria and priorities would narrow the number of proposals. The Council will have to be able to give the reason why each one is moving forward for analysis, and at that point, they would make specific proposals for federal action and would initiate the NEPA process. John Lepore responded that the Council also had to provide a rationale, on the record, as to why they were not going to move a particular proposal forward. As with any Council action staff time and effort are always considered. If they articulate criteria, then they have to follow those criteria. That does not mean that stakeholders are no longer involved, it just indicates the proposal has moved ahead for analysis.

Scott Smiley asked if the Council feels that there is a specific concern, could Council ask staff to develop a HAPC to deal with a priority up front. Do they have to open it up for everybody and have this welter of varying proposals across a wide range of interests to deal with a "priority". Mr. Lepore said it was helpful to put the recommendations down for the Council, but a lot of the decisions would have to be made when they actually see the proposals. They can set up a process that has flexibility in it, but they will not be able to dictate how the analysis will be done. The Council may direct staff to incorporate several proposals and into a single HAPC analysis. Jon Kurland suggested that in the language they clarify that it is a range of HAPC alternatives, but ensure that the alternatives are meant to address a common problem, or identified priority of the Council. Michelle Ridgway suggested that if the Council established priorities is an effective means to engage the public in a process that's meaningful and

integrated from the beginning of their idea to it becoming an action to protect habitat. The establishment of priorities allows for adequate means for the public to propose topics that may effect a certain region.

Linda Behnken added that if the Council set up priorities for HAPC that any HAPC proposal still had to meet the considerations of the EFH Final Rule.

Request for Proposals:

The format for the request of proposals was created during the EFH Committee meeting in May 2002 during a Committee meeting in Sitka. Additionally the Northeast Council's format was incorporated for EFH Committee review.

Ben Enticknap suggested that a sub-criteria matrix could be used to help scientists evaluate a HAPC proposal. He suggested that some of these criteria in option 2 could be sub-criteria that help flush out what is an ecologically important area and what is a sensitive habitat. He was putting his list forward as ideas to generate discussion about how to flush out some sub criteria or further develop a criteria so that when the scientists are evaluating the proposals, that they can use, in a methodical way, to evaluate these proposals and objective.

John Gauvin suggested putting this in the instructions for the proposal application. He felt that if he wanted to do a proposal and he knew it was going to be graded by this, he would want to have this material to be really accessible so he could understand it and know how it was being reviewed. Scott Smiley agreed that with removing Option 2 and just letting the scientists do the evaluation. Ben Enticknap did not agree that removing Option 2 because they would be evaluating proposals on ecological importance. Michelle Ridgway also did not concur with striking it. Mr. Gauvin was more comfortable leaving this review for the scientists and not the reviewers. Linda Behnken suggested striking it and noting that some Committee members felt that this would be helpful and they would like to hear more from the SSC on whether they think it should be in there.

Linda Behnken said one comment they heard over and over from other areas was that they want this decision-making process to be as transparent as possible. She thought one benefit to the criteria being published is that the evaluation that the science team uses to guide their decision makes it transparent and people understand what the yardstick is. She was not sure this was the right yardstick and she hoped that when the scientists reviewed this, if they disagreed that they would give ideas on what a better yardstick would be. The Committee requests suggestion from the SSC what criteria they would outline for evaluation in proposals.

Review process:

There was discussion among the Committee and the Committee was in concurrence that the Council process would take about 18 months.

If management measures were needed Scott Smiley thought science/technical team should review what the stakeholders propose, but leave the design of the research adaptive management part to scientists. Stosh Anderson thought the SSC should be there to review not design the experimental design and critique it. Jon Kurland suggested that several steps in the outline be merged into a joint review committee and science group, in a workshop setting, trying to address both the technical and the other aspects. This would reduce the number of meetings and the time to process HAPC.

John LePore understood that getting as much information to the reviewers was a good thing, but they all need to recall that practicability is used when you are talking about mitigating from fishing impacts, and that is different than HAPC. HAPC had four considerations and they don't necessarily mitigate; all they are doing is designating.

Socioeconomic and Ecological criteria:

The Committee agreed that the proposals be evaluated separately for ecological and socioeconomic practicability such that one does not cancel the other out before it's viewed on both merits. The EFH Committee seeks suggestions on the appropriate development of appropriate ecological and socioeconomic criteria for evaluating HAPC proposals.

Ben Enticknap said he did not want to see proposals be evaluated on meeting the goals and objectives of ecological criteria be toned down because social scientists are saying it is not going to work for the accumulative fishing fleet. If a proposal moves forward that doesn't meet any type of ecological objective it is essentially wasting time, money, and effort to design a proposal that doesn't meet its objectives to protect the habitat adequately.

Michelle Ridgway said the key points are they support potentially concurrent socioeconomic and ecological analysis; that they be concurrent but discreet processes. They are not integrated as one but they're different. She suggested even taking out the term practicability and say practicality. Gordon Blue and Glenn Reed agreed, but both felt the term practicability needed to remain because that was what was in the statute.

Stakeholder Process:

The Committee supports the stakeholder process. If a HAPC impacts communities or are in any way affected, that a special effort should be made to go out and engage those communities and affected stakeholders from that region.

John Gauvin thought the MCA letter argued for an integrated science and stakeholder review, but when there are very different types of proposals, it would be hard to determine who those stakeholders would be. He spoke in favor of the EFH alternative where after the proposals is identified, they go into the communities most affected. Scott Smiley said that if they were talking about events that would affect a huge range of area and huge range of people, they would have to have a different kind of stakeholder process then if they have a targeted geographical site. The proposals that make it through the system would dictate the stakeholder process. The Council should charge the EFH Committee with establishing how to form the stakeholder inquiry after the HAPC proposal has been identified. Glenn Reed said another process to be considered could be drawn from comments about an RPA type committee that incorporates lots of different people and goes from region to region to hold meetings and involves people who may be impacted by the proposal. Maybe there could be three different regional groups. John LePore said that followed the model of IFQs.

Public Comment: May 5, 2003:

Geoff Shester: representing Oceana. He referred to their letter dated May 2, 2003. He said they would like to have a seat on future EFH or HAPC committee discussions.

Geoff Shester thought it would be worth looking into both options. If the proposer submits a proposal that turns out not to work, that shouldn't mean that they are done. He thought there should be a way to get stakeholders to take up that proposal, if they are interested in what the proposal's intent is, and craft management measures that better meet the goals.

Geoff Shester said the understanding they have from NOAA, and from reading the old Council documents, all living substrate is considered HAPC, including low relief, high relief etc. There are gradations based on recovery time and possibly ecological importance of maybe some of those within that HAPC being more important than others.

Geoff Shester said based on personal experience and trying to get information from NOAA and being denied based on confidentiality issues, it does not seem reasonable to require HAPC proposals to include that information. Rather it should be NOAA because they have access to that data.

**Donna Parker:** representing Arctic Storm Management Group. She felt this was an opportunity to accomplish two things. By meeting the deadline and focusing staff energy on the EFH/EIS and splitting forces to take on HAPC and EFH on the same time lines, they would get a better EFH/EIS. She asked that the Committee consider making a recommendation to the Council that now that the deadline can be made, the HAPC process should proceed on a separate rational schedule as was originally determined by this Committee. In trying to do both at the same time, they may come up with HAPCs that don't meet the criteria and options chosen by the Council. She then referred to her letter dated May 4, 2003 and reviewed her points.

Linda Behnken said one comment they got back from the scientific reviewers was that we really don't know much about ecological function. She said requiring proposals to meet every criteria does not seem possible if they don't really know much about one of the criteria. Ms. Parker agreed and said flushing out the meaning of the four criteria in the Final Rule would be time well spent.

Linda Behnken said with regard to the Committee that includes stakeholders, did she envision one committee or would there be a few stakeholders from each area. Ms. Parker said the RPA Committee dealt with just one committee and the different members would caucus if necessary.

**Marine Conservation Alliance:** Staff passed out a letter received from the dated April 16, 2003.

**Public Comment** May 6, 2003:

**Geoff Shester (Oceana):** The Final Rule says to place special attention when looking at adverse impacts on HAPCs. Based on that law, looking at the NEPA, what this does is provide a tool for actually looking at how you mitigate based on creating and evaluating management measures for both the public and decision makers to evaluate the measures for their affects on EFH and HAPC in both the environmental and human environment. The best way to do this is to create a range of alternatives from full protections of these identified HAPC and EFH to partial protection from these threats so you can look at the impacts of each of these alternatives to the habitat and to the socioeconomic. What is does is clearly defines a set of choices so that then, after seeing this analysis, the Council can then determine what is practicable based on looking at all the costs and benefits. Without a broad context and without looking at a full range of alternatives, and being able to document the determination of practicability, the Council will not be on solid ground and will have no justifiable basis for making a decision on practicability. He said they do need an EA to make this decision, but if proposals that meet HAPC criteria are denied analysis and consideration based on an uninformed determination of practicability, then what we have done is ignored the law and we have not done what we are here to do today. What's practicable might change depending on the importance or rarity, etc. of the habitat that we're protecting. The Council and public and decision makers need to have that clearly laid out, including alternatives that may not turn out to be practicable because if those don't exist, how can you justify your choice of practicability later in the process.

Geoff Shester said there was no way to determine practicability without doing an analysis in terms of knowing all the costs and benefits. If it's going to cause some pain to an individual fisherman or an individual sector, then maybe that fisherman or individual sector does not think that that's a practicable alternative. But if we can't see the costs and benefits weighed in a formal analysis, then we don't have the ability to justify a decision that has already been made.

## APPENDIX A: Suggested Working Definitions for EFH and MPA processes:

**Marine:** All areas seaward of the mean higher high water line, out to the 200 mile limit of the Exclusive Economic Zone (EEZ).

**Marine Protected Area (MPA):** Geographically defined areas designated with year round protection to enhance the management of marine resources. This definition includes areas where extraction of certain fishery resources is prohibited, and/or areas where specific gear types are prohibited. NMFS recognizes the definition of a Marine Protected Area as defined by Executive Order 13158: "Any area of the marine environment reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein."

**Marine Reserve(MRV):** A type of MPA where removal or disturbance of specified resources is prohibited. Marine reserves are also known as "no-take zones"\*. Marine reserves are a restrictive class of MPAs.

\***Marine Research Reserve (MRR):** A MRR is an area where all specified marine resources are protected from any disturbance or removal activity, except as necessary for monitoring or research.

**Marine managed Area (MMA):** A geographically defined area designated with special protections, including seasonal protections, of marine resources. This is similar to a marine protected area (MPA) but without the requirement of year-round protection; hence, an MPA is a restrictive class of MMA.

**Other managed areas (OMA):** This includes areas that already have a legislative designation and include: state parks, national wildlife refuges, and estuarine reserves.

**Essential fish habitat (EFH):** Means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. For the purpose of interpreting the definition of essential fish habitat: "Waters" include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; "substrate" includes sediment, hard bottom, structures underlying the waters, and associated biological communities; "necessary" means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle. (EFH Final Rule 600.10)

**Habitat Areas of particular concern (HAPC):** , Subsets of EFH that are identified by a Council under 50 CFR 600.815(a)(8) Councils should identify specific types or areas of habitat within EFH as habitat areas of particular concern-based on one or more of the following considerations:

- (i) The importance of the ecological function provided by the habitat.
- (ii) The extent to which the habitat is sensitive to human-induced environmental degradation.
- (iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type.
- (iv) The rarity of the habitat type.

Note: Geographic areas encompassed by these definitions should be open for appropriate scientific research.

**Sources:**

Essential Fish Habitat Final Rule 50 CFR 600

Marine Protected Areas in Alaska: Recommendations for a public process. Regional Information Report 5J02-08, Alaska Department of Fish and Game, Juneau. July, 2002

NRC, 2001. Marine protected areas: tools for sustaining ocean ecosystems. Washington, D.C., National Academy Press. 272p.

# PUBLIC TESTIMONY SIGN-UP SHEET FOR AGENDA ITEM C-3 EFH

**PLEASE SIGN ON THE NEXT BLANK LINE.  
LINES LEFT BLANK WILL BE DELETED.**

	NAME	AFFILIATION
1.	Ben Enticknap	Alaska Marine Conservation Council
2.	Julie Bonny	AGDB
3.	Heather McPartty	Maine Conservation Alliance
4.	Don Swanson	GROUND FISH FORUM
5.	ED KILHARRISON	PCC
6.	Whit Sheard	TOC
7.	Linda Rozak	Korok + ASEOC.
8.	Paul Magregor	APA
9.	Thom Smith	NRA
10.		
11.		
12.		
13.		
14.		
15.		
16.		
17.		
18.		
19.		
20.		
21.		
22.		
23.		
24.		
25.		



# Alaska Marine Conservation Council

Box 101145 • Anchorage, Alaska 99510  
(907) 277-5357 • (fax) 277-5975  
amcc@akmarine.org • www.akmarine.org

C-3

Date: June 17, 2003  
To: North Pacific Fishery Management Council  
From: Ben Enticknap, Fishery Project Coordinator

**RE: Agenda Item C-3: Essential Fish Habitat – HAPC process**

The essential fish habitat (EFH) committee offered criteria in their proposed habitat area of particular concern (HAPC) process for establishing HAPCs and criteria for how management measures, if any, would be applied to a proposed HAPC site or type. After discussions with members of the public about AMCC's letter to the NPFMC dated June 3, 2003, we wish to provide a change in our recommendations. AMCC's suggested modifications are in italics and these are intended to replace our previously recommended language on page two of our letter.

**I. Council consideration of establishing HAPC criteria (1a).**

Alternative B) Council establishes additional criteria for HAPC identification.

- 1) Whether the Council designates HAPC as sites or types, management measures, if needed, will be applied to a habitat feature in a specific geographic location, identified on a chart, that meet the considerations established in the regulations, and will be developed to address identified problems for FMP species *and their habitat* and achieve clear, specific adaptive management objectives.
- 2) *In addition to site specific management measures, there are management tools that may be reasonable and appropriate for broader application to HAPC types. These include gear modifications, the Council's existing prohibition on directed fisheries for HAPC biota, bycatch controls, or bycatch retention for data collection needs.*

Rationale for suggested changes:

AMCC does not want to preclude valuable management tools for protecting ecologically important and sensitive habitat features by limiting management measures to only "specific geographic locations." For example, tools such as gear modification and policies preventing developing fisheries for HAPC biota, adopted at a regional level, are reasonable and valuable approaches for protecting sensitive habitat features. These tools would appear to be precluded if alternative B, as written by the EFH committee, were adopted as it currently is written.