AGENDA C-4
JUNE 2001

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver
Acting Executive Director

ESTIMATED TIME
2 HOURS

DATE: May 29, 2001

SUBJECT: Essential Fish Habitat

ACTION REQUIRED

Receive committee report.

BACKGROUND

Chairman Benton recently appointed an Essential Fish Habitat (EFH) Committee to help address Council and NMFS obligations in regard to EFH (Item C-4(a)). The report from the Committee's first meeting (held on May 30) will be provided separately at this meeting. The primary Council issue is to submit revised FMP amendments that: standardize an analytical approach to quantify, to the extent practicable, the impact of fishing activities on EFH for each of the FMPs; how much habitat is needed to achieve MSY or some comparable metric of fisheries sustainability for each FMP; how much is currently being fished; how much is protected already; and finally, to consider options for designating EFH other than the status quo.

In June 1999, several environmental and fishing groups challenged the scope and substance of the environmental assessment (EA) prepared for the EFH Amendments 55/55/8/5/5 (*American Oceans Campaign et.al.v. Daley*, Civ. No. 99-982 (D.D.C. September 14, 2000)). On September 14, 2000, the U.S. District Court issued an opinion finding the EA insufficient in scope and analytical substance and requiring NMFS to prepare an analysis that is legally sufficient under NEPA. Therefore, NMFS is re-evaluating the EFH components originally developed as part of Amendments 55/55/8/5/5 (Item C-4(b)). The SEIS will supersede the EA previously prepared in support of Amendments 55/55/8/5/5.

NMFS announced its intent to prepare an SEIS (Item C-4(c)) in accordance with National Environmental Policy Act (NEPA) for EFH components of the following fishery management plans (FMP): Groundfish Fishery of Bering Sea Aleutian Islands Area; Groundfish of the Gulf of Alaska; Bering Sea/ Aleutian Islands King and Tanner Crabs; Scallop Fishery off Alaska; and Salmon Fisheries in the EEZ off the coast of Alaska. The proposed action to be addressed in the SEIS is the development of the mandatory EFH provision of the FMPs. The scope of the analysis will cover all of the required EFH components of the FMPs as described in section 303(a)(7) of the Magnuson-Stevens Fishery Conservation and Management Act. NMFS will hold public scoping meetings and accept written comments to determine the issues of concern and the appropriate range of management alternatives to be addressed in the SEIS to describe and identify EFH and potential Habitat Area of Particular Concern (HAPC) designations, to minimize to the extent practicable the adverse effects of fishing on EFH, and to identify other actions to encourage the conservation and enhancement of EFH.

The first public scoping meeting will be held on Monday June 4, 2001 in Kodiak, Alaska. Subsequent scoping meetings are scheduled for June 8, 2001 in Dutch Harbor, June 11, 2001 in Anchorage, June 19, 2001 in Seattle, June 20, 2001 in Juneau, and June 21, 2001 in Sitka (Item C-4(d)). Mike Payne will further describe for the Council the timing and nature of this process.

EFH COMMITTEE

Appointed 5/15/01

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BSAI Amendment 55 Essential Fish Habitat (EFH)

Dates: NMFS published EFH guidelines as interim final rule on December 19, 1997 (62 FR 66531). Amendment 55 was adopted by the Council in June 1998 along with EFH amendments for other FMPs (groundfish, salmon, scallops, crab). The final rule for BSAI and GOA Amendments 55/55 was published on April 26, 1999 (64 FR 20216). Effective date of implementation was January 20, 1999.

Purpose and Need: The Magnuson -Stevens Act was amended in 1996 by the Sustainable Fisheries Act. The new Act mandated that any FMP must include a provision to describe and identify essential fish habitat (EFH) for the fishery, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat. Essential fish habitat has been broadly defined by the Act to include "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity". All eight regional councils are required to amend their fishery management plans by October 1998 to:

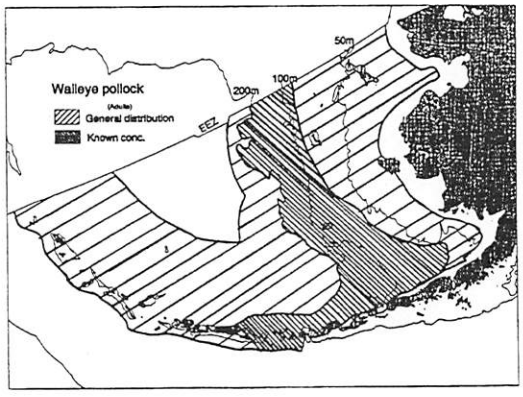
- identify and describe EFH for species managed under a fishery management plan;
- describe adverse impacts to that habitat from fishing activities and non-fishing activities;
- recommend conservation and enhancement measures necessary to help minimize impacts, protect, and restore that habitat; and
- include conservation and enhancement measures necessary to minimize to the extent practicable, adverse impacts from fishing on EFH.

The purpose of this amendment is to provide for improved long-term productivity of the fisheries, to allow NMFS and the Council to be more proactive in protecting habitat areas, and by alerting other federal and state agencies about areas of concern. Federal agencies engaging in activities that may adversely affect EFH must consult with NMFS regarding those activities. NMFS must, and the Council may, make suggestions on how to mitigate any potential habitat damage. The Council will be required to comment on any project that may adversely affect salmon habitat or habitat of any other anadromous fish (smelt, steelhead, etc.).

Regulation Summary: The alternative adopted and approved defined EFH as all habitat within a general distribution for a species life stage, for all information levels and under all stock conditions. A general distribution area is a subset of a species range. For any species listed under the Endangered Species Act, EFH includes all areas identified as "critical habitat". EFH was described in text, tables, and maps. Habitat areas of particular concern were identified as living substrates in shallow and deep waters, and freshwater habitats used by anadromous fish.

Analysis: A 364-page EA (final draft dated January 1999) and a background assessment report were prepared for this amendment. Three alternatives including the status quo were considered. The other alternative that was not chosen would have defined EFH only as areas of high concentration for each life stage. The alternative chosen was more conservative in that defining a larger area may offer more protection.

Results: Since the amendment was approved, NMFS has been sued by a coalition of plaintiffs (Earthjustice Legal Defense Fund, Center for Marine Conservation, National Audubon Society, and others) who allege that the EFH amendment failed to meet statutory requirements (did not analyze the effects of fishing on habitat, and did not impose practicable measures to minimize impacts of fishing gear) and violated the National Environmental Policy Act (NEPA).



Example of EFH distribution map.

In February 2000, the Council reviewed the first draft analysis for management measures that would identify additional habitat areas of particular concern (HAPC) types and areas, and take additional measures to protect HAPC from potential effects caused by fishing activities. Alternative management actions that were considered included making HAPC biota (e.g., mussels, kelp, sponges) a prohibited species, and prohibiting bottom fishing in areas shown to have concentrations of Gorgonian coral, which have been shown to be long lived (500 yrs), vulnerable to fishing gear, and important habitat for rockfish. Based on public testimony, and input from its advisory committees, the Council voted to split the amendment and associated analysis into two parts. Part one, which the Council adopted as final action in April 2000, prohibits the commercial harvest, sale and processing of sponges and corals. Part two of the HAPC amendments, which will require a longer time line, will be to develop a more comprehensive and iterative process for HAPC identification and habitat protection involving researchers, stakeholders, and management agencies.

BILLING CODE: 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[I.D.]

Groundfish Fisheries of the Bering Sea and Aleutian Islands Area and the Gulf of Alaska, King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands, Scallop and Salmon Fisheries off the Coast of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent to prepare a supplemental environmental impact statement (SEIS); request for written comments; notice of scoping meetings.

SUMMARY: NMFS announces its intent to prepare an SEIS in accordance with the National Environmental Policy Act of 1969 (NEPA) for the essential fish habitat (EFH) components of the following fishery management plans (FMPs): Groundfish Fishery of the Bering Sea and Aleutian Islands Area; Groundfish of the Gulf of Alaska; Bering Sea/Aleutian Islands King and Tanner Crabs; Scallop Fishery Off Alaska; and Salmon Fisheries in the EEZ Off the Coast of Alaska. The proposed action to be addressed in the SEIS is the development of the mandatory EFH provisions of the FMPs. The scope of the analysis will cover all of the required EFH components of the FMPs as described in section 303(a)(7) of

the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). NMFS will hold public scoping meetings and accept written comments to determine the issues of concern and the appropriate range of management alternatives to be addressed in the SEIS to describe and identify EFH and potential Habitat Area of Particular Concern (HAPC) designations, to minimize to the extent practicable the adverse effects of fishing on EFH, and to identify other actions to encourage the conservation and enhancement of EFH.

DATES: Written comments will be accepted through July 21, 2001 (see ADDDRESSES). The first public scoping meeting will be held on Monday, June 4, 2001, in Kodiak, Alaska. Subsequent scoping meetings are scheduled for June 8, 2001 in Dutch Harbor, June 11, 2001 in Anchorage, June 19, 2001 in Seattle, June 20, 2001 in Juneau, and June 21, 2001 in Sitka (see SUPPLEMENTARY INFORMATION).

ADDRESSES: Written comments on issues, alternatives for identifying and describing EFH, HAPC, and management measures and alternatives to minimize, to the extent practicable, any adverse effects of fishing on EFH should be sent to James W. Balsiger, Administrator, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK, 99802. Comments may be sent via facsimile (fax) to (907) 586-7012. NMFS will not accept comments by e-mail or internet. See SUPPLEMENTARY INFORMATION for dates, times and locations of public scoping meetings.

FOR FURTHER INFORMATION CONTACT: Cindy Hartmann, EFH Coordinator, HCD Juneau, (907) 586-7235.

SUPPLEMENTARY INFORMATION:

Amendments to the Magnuson-Stevens Act in 1996 set forth new mandates for NMFS and Regional Fishery Management Councils (Regional Councils) to identify and protect important marine and anadromous fish habitat. The Regional Councils, with assistance from NMFS, were required to delineate EFH for all managed species. EFH is defined in the Magnuson-Stevens Act as "...those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity ((Sec. 3. 104-297 (10))." In response to the amended Magnuson-Stevens Act and based on guidelines for the EFH contents of FMPs (CFR 600 Subpart J) the North Pacific Fishery Management Council (Council) completed preparation of the following five EFH FMP amendments in 1998: Amendment 55 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area; Amendment 55 to the FMP for Groundfish of the Gulf of Alaska; Amendment 8 to the FMP for the King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands; Amendment 5 to the FMP for Scallop Fisheries Off Alaska; and Amendment 5 to the FMP for the Salmon Fisheries in the EEZ Off the Coast of Alaska (Amendments 55/55/8/5/5). These EFH FMP amendments were reviewed and approved by the Secretary of Commerce and took effect on January 20, 1999 (64 FR 20216). These FMP amendments identified EFH for

over 130 managed species.

In June 1999, several environmental and fishing groups challenged the scope and substance of the environmental assessment (EA) prepared for Amendments 55/55/8/5/5 (*American Oceans Campaign et.al.v. Daley*, Civ. No. 99-982 (D.D.C. September 14, 2000)). On September 14, 2000, the U.S. District Court issued an opinion finding the EA insufficient in scope and analytical substance and requiring NMFS to prepare an analysis that is legally sufficient under NEPA. Therefore, NMFS is re-evaluating the EFH components originally developed as part of Amendments 55/55/8/5/5. The SEIS will supersede the EA previously prepared in support of Amendments 55/55/8/5/5.

The proposed action to be addressed in the SEIS is the development of the mandatory EFH provisions of the affected FMPs as described in section 303(a)(7) of the Magnuson-Stevens Act and based on the guidance in 50 CFR 600 Subpart J. The following three types of actions will be specifically analyzed, (1) identify and describe EFH for managed species; (2) identify HAPCs within EFH; and (3) minimize, to the extent practicable, adverse effects on EFH caused by fishing. The scope of the new SEIS will cover all of the required EFH components of FMPs. NMFS will consider the need to revise the previously approved EFH provisions of these FMPs based on any available new scientific information, and the revised analysis of EFH alternatives.

The EA prepared for Amendments 55/55/8/5/5 covered all five FMPs. For this new NEPA analysis, a single SEIS may be prepared that analyzes the required EFH components for all five FMPs or multiple SEISs may be prepared that analyze the required EFH components for a particular FMP.

Alternatives

NMFS will evaluate a range of alternatives for developing mandatory EFH provisions for the Council's five FMPs. NMFS is seeking information from the public through the scoping process on the range of alternatives to be analyzed and on the environmental, social, and economic issues to consider in the analysis. Alternatives will be developed based on significant issues raised during the scoping process.

Alternatives for Designation of EFH

Alternatives for the designation of EFH may include those identified in the EA for Amendments 55/55/8/5/5, plus additional alternatives. Alternatives already identified include: (1) no action (no designation of EFH); (2) EFH is all habitat within a general distribution for a species life stage; and (3) EFH is a subset of all habitat within a general distribution e.g., areas of known concentration. Other possible EFH alternatives could include a habitat based approach, a core habitat approach (comparable to critical habitat for endangered species), and an

ecosystem approach which may address prey and reproductive associations.

Alternatives for Designation of HAPC

HAPC are subsets of EFH. HAPC are those areas of special importance that may require additional protection from adverse effects. HAPCs are defined on the basis of the ecological importance, sensitivity to human-induced environmental degradation, stress to the habitat from development activities, and rarity of the habitat. Amendments 55/55/8/5/5 identified 3 types of habitat as HAPC (living substrates in shallow water, living substrates in deep waters, and freshwater areas used by anadromous fish) but did not map or designate specific areas as HAPC. In August 1998, the Council received 6 proposals concerning HAPC. The proposals included the following: (1) identifying where living substrate in shallow water and deep water occur in the BSAI and GOA; (2) adding seamounts/pinnacles, ice edge, shelf break, and biologically consolidated fine-grained sediments as types of HAPC; (3) developing a procedure to assess potential adverse impacts to HAPC; (4) nominating Prince William Sound black hole, Chirikov Basin, and Kodiak red king crab areas as HAPC; (5) protecting important habitat for *C. bairdi* crab by establishing a no fishing zone in a specified area of the Bering Sea; and (6) establishing the Kodiak red king crab areas as HAPC. These proposals and/or others may be nvestigated as part of the

EFH SEIS.

An HAPC EA prepared by Council staff in 2000, considered protection measures for corals and sponges. Specific areas were proposed for protection and stakeholder meetings were held. Currently no specific actions from these meetings are being evaluated. An HAPC alternative to protect corals and sponges is possible in the SEIS.

Alternatives for Effects of Fishing on EFH

The alternatives analysis will identify a range of approaches that could be taken to minimize any potential adverse effects of fishing on EFH. The range of alternatives may include measures such as banning specific gear types, closing an area to fishing, rotational closure areas, protected areas or other measures. A no action alternative will be included as an alternative. The selected range of alternatives will be informed by comments NMFS receives during the scoping process.

Public Involvement

NMFS will work with the Council throughout the development of the SEIS. The Council has formed an EFH Oversight Committee that will help keep the Council an integral part of the NEPA process for EFH. Council staff will assist in the development of the SEIS. The public will be able to provide oral and written comments on EFH at Council meetings.

A principal objective of the scoping and public involvement process is to identify a reasonable range of management alternatives that, with adequate analysis, will sharply define critical issues and provide a clear basis for defining those alternatives and choosing the preferred alternative.

NMFS is seeking written comments on the scope of issues that should be addressed in the SEIS. Also, NMFS invites specific comment on the appropriate extent of EFH and HAPCs for Council-managed species and on the scientific basis for EFH and HAPC designations. NMFS also solicits any new information related to the impacts of fishing and non-fishing activities on EFH and HAPCs for fishery resources managed under the Council's FMPs and possible management measures designed to mitigate adverse fishing impacts.

Dates and Times for Public Information Meetings

The public is invited to assist NMFS and the Council in developing the scope of alternatives to be analyzed. The first public scoping meeting will be held on: Monday, June 4, 2001, from 7-9 p.m., at the Fishery Industrial Technology Center, 118 Trident Way, Kodiak, Alaska.

Additional scoping meetings will be held in other communities as follows:

1. Anchorage - Z. J. Loussac Library, public conference room, level 1, 3600 Denali Street, 2:30 to 6:30 p.m., Anchorage,

AK, Monday, June 11, 2001;

2. Juneau - Federal Building, room 445, 709 W. 9th, 2 to 5:30 p.m. and Centennial Hall Convention Center, Egan Room, 101 Egan Drive, 7 to 9 p.m., Juneau, AK, Wednesday, June 20, 2001;

3. Seattle - Alaska Fisheries Science Center, room 2079, 7600 Sand Point Way NE, 1:30 to 5:30 p.m., Seattle, WA, Tuesday, June 19, 2001;

4. Sitka - Harrigan Centennial Hall, Maksoutoff Room, 330 Harbor Drive, 2 to 5:30 and 7 to 9 p.m., Sitka, AK, Thursday, June 21, 2001;

5. Unalaska - City Hall, Council Chambers, 245 Raven Way, 4 to 8 p.m., Unalaska, AK, Friday, June 8, 2001.

Special Accommodations:

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cindy Hartmann (see ADDRESSES), (907) 586-7585, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 et. seq.

Dated: May xx, 2001

Bruce Morehead

Acting Director, Office of Sustainable Fisheries

AGENDA C-4(d)
JUNE 2001

National Marine Fisheries Service

Alaska Region

Supplemental Environmental Impact Statement (SEIS):
Essential Fish Habitat (EFH) components of the FMPs for the Groundfish Fishery of the BSAI, Groundfish of the GOA, BSAI King and Tanner Crabs, Scallop Fishery, and Salmon Fisheries

NMFS announces its intent to prepare an SEIS in accordance with the National Environmental Policy Act of 1969 (NEPA) for the essential fish habitat (EFH) components of the following fishery management plans (FMPs): Groundfish Fishery of the Bering Sea and Aleutian Islands Area; Groundfish of the Gulf of Alaska; Bering Sea/Aleutian Islands King and Tanner Crabs; Scallop Fishery Off Alaska; and Salmon Fisheries in the EEZ Off the Coast of Alaska. The proposed action to be addressed in the SEIS is the development of the mandatory EFH provisions of the FMPs. The scope of the analysis will cover all of the required EFH components of the FMPs as described in section 303(a)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

NMFS will hold public scoping meetings and accept written comments to determine the issues of concern and the appropriate range of management alternatives to be addressed in the SEIS to describe and identify EFH and potential Habitat Area of Particular Concern (HAPC) designations, to minimize to the extent practicable the adverse effects of fishing on EFH, and to identify other actions to encourage the conservation and enhancement of EFH. **Written comments will be accepted through July 21, 2001.**

Public Meeting Schedule and Locations

PLACE	TIME	DATE
Anchorage Z.J. Loussac Library, public conference room, level 1, 3600 Denali Street	2:30 to 6:30 p.m.	Monday, June 11
Juneau Federal Building, room 445, 709 W. 9th St.	2 to 5:30 p.m.	Wednesday, June 20
Juneau Centennial Hall Convention Center, Egan Room, 101 Egan Drive	7 to 9 p.m.	Wednesday, June 20
Kodiak Fishery Technology Center, 118 Trident Way	7 to 9 p.m.	Monday, June 4
Seattle Alaska Fisheries Science Center, room 2079, 7600 Sand Point Way NE	1:30 to 5:30 p.m.	Tuesday, June 19
Sitka Harrigan Centennial Hall, Maksoutoff Room, 330 Harbor Drive	2 to 5:30 p.m. and 7 to 9 p.m.	Thursday, June 21
Unalaska City Hall, Council Chambers, 245 Raven Way	4 to 8 p.m.	Friday, June 8

Litigation Summary

Plaintiffs argue that the defendants developed and approved FMP amendments that violate the MSA are arbitrary, capricious and contrary to law in violation of the APA.

The amendment did not:

- Contain an adequate assessment of the effects of fishing and fishing gear on EFH;

(2) Contain an adequate identification and assessment of potential measures to minimize adverse effects of fishing on EFH;

(3) Failed to impose practicable measures to minimize the impact of fishing activities on EFH.

Plaintiffs claim that bottom trawling and other fishing activities harm EFH.

- Various fishery management measures can be used to protect EFH from the effects of fishing activities such as these. However, defendants have failed to investigate adequately certain measures to determine whether they are practicable.

- Defendants have failed to identify, include, and implement practicable measures to protect EFH in these waters. These failures violate non-discretionary duties imposed upon defendants by the plain language of the MSA and implementing regulations.

- Additionally, plaintiffs argue that the defendants' approved these amendments in reliance upon inadequate environmental analyses in violation of the NEPA.

Plaintiffs claim that the EA contains an inadequate evaluation of the environmental effects of the proposed action. Therefore, the EA lacks justification for the agency's finding of no significant impact by and fails to:

- Evaluate the long-term or cumulative impacts of approving the amendments on EFH affected by ongoing fishing activities, including but not limited to bottom trawling;

- Adequately evaluate practicable methods to minimize the effect of fishing on EFH; and

- Address an adequate range of alternatives.

Court Decision Summary

Plaintiffs asked the court to consider:

- A declaratory judgment that defendants violated the MSA, NEPA, and the APA by approving the North Pacific EFH groundfish amendments;

- A remand of the legally deficient sections of the EFH groundfish amendments to defendants with instructions to revise them, and by a date certain, to comport with the requirements of the MSA, including the requirement to assess and minimize the adverse effects of fishing gears on EFH to the extent practicable, and

- An order requiring defendants to prepare a new analysis that complies with NEPA to accompany the revised EFH groundfish amendments and to include in that NEPA analysis an assessment of the long-term and cumulative environmental impacts of minimizing the adverse effects of fishing on EFH, along with a detailed assessment of alternative methods for protecting EFH.

Court Decision Summary (continued)

On September 14, 2000, the U.S. District Court for the District of Columbia issued the following memorandum opinion and order in the EFH lawsuit;

- The EFH Amendments did not violate the MSA, but they did violate NEPA. Therefore, the court ordered the Defendants to perform a new and thorough EA or EIS for all the challenge amendments, including Amendments 55/55, in compliance with the requirements of NEPA.

- The court issued a permanent injunction, enjoining Federal defendants from enforcing the EFH amendments until the Secretary performs a new, thorough, and legally adequate EA or EIS for each EFH Amendment, in compliance with the requirements of NEPA.

MSFCMA Claim

In determining whether the actions of the Defendants were non-compliant with the MSA and therefore in violation of the APA, the court applied a highly deferential standard of review of the agency's actions given the highly complicated scientific data that the agency must interpret. The court concluded that the Secretary's approval of Amendments 55/55 was reasonable, finding that the Secretary approved the amendments after considering whether the amendments complied with the MSA, given how little scientific information was available to the Council at that time.

The court also determined that it was reasonable for the Secretary to conclude that the amendments did not need to include additional protective measures, given the lack of scientific evidence available to the Council and the Secretary and the existing protective measures already in place.

NEPA Claim

In determining whether the actions of the Federal defendants were non-compliant with NEPA and therefore in violation of the APA, the court reviewed the EAs and concluded that each of the EAs were insufficient and failed to comply with the requirements of NEPA and the regulations promulgated by CEQ and NOAA. The court based this decision on several deficiencies:

- The EAs did not consider the factors for determining significance in deciding whether an EIS was necessary as outlined in NOAA's own Administrative Order on NEPA.

- All of the EAs discuss the environmental impacts of the proposed action and alternative(s) in vague and general terms, without discussing what the impact would be to the specific EFHs that the Amendments are intended to protect; and

- All of the EAs spent more time describing the proposed alternative and the requirements of NEPA than actually analyzing the proposed alternative and complying with the requirements of NEPA; and

NEPA Claim (continued)

- The EAs failed to consider all relevant and feasible alternatives and failed to fully explain the environmental impact of the proposed action and alternatives.

- The EAs did not meet the following four factors set for evaluating the legal adequacy of an EA or a FONSI.
  - The EAs did not take a "hard look" at the problem (the court found that there was no substantive discussion of the actual environmental consequences and impacts of fishing on the designated EFHs).
  - The EAs failed to identify the relevant areas of environmental concern (the court found that the EAs only discuss fish habitats in general terms, describing the types of EFHs that should be protected, but not specifying which EFHs needed protection and why).
  - The EAs failed to make a convincing case that the impacts from the action were insignificant.
  - Finally, the EAs failed to demonstrate that any significant impacts were mitigated by the alternative selected.

NMFS - TIMETABLE AND STATUS OF EIS ANALYSIS

Where are we now?

- Settlement discussions relative to the timetable for completion of the EFH EIS on the NPFMC FMPs are ongoing. The timetable we are working on at this time is consistent with that used to develop the groundfish EIS - 24 months; however, this is still under negotiation.

- NMFS/AKR is developing of Notice of Intent to conduct scoping on actions that need to be addressed by NMFS and the alternatives that might be examined in the NEPA analysis. This notice must describe the scoping process including logistics for meetings.

Where are we now? (continued)

- Concurrent with the scoping process, we are developing technical teams:

    - to standardized an analytical approach to quantify, to the extent practicable, the impact of fishing activities on EFH for each of the FMPs; how much habitat is needed to achieve MSY or some comparable metric of fisheries sustainability for each FMP; how much is currently being fished; how much is protected already; and finally,

    - to consider options for designating EFH other than the status quo.

Final Thoughts

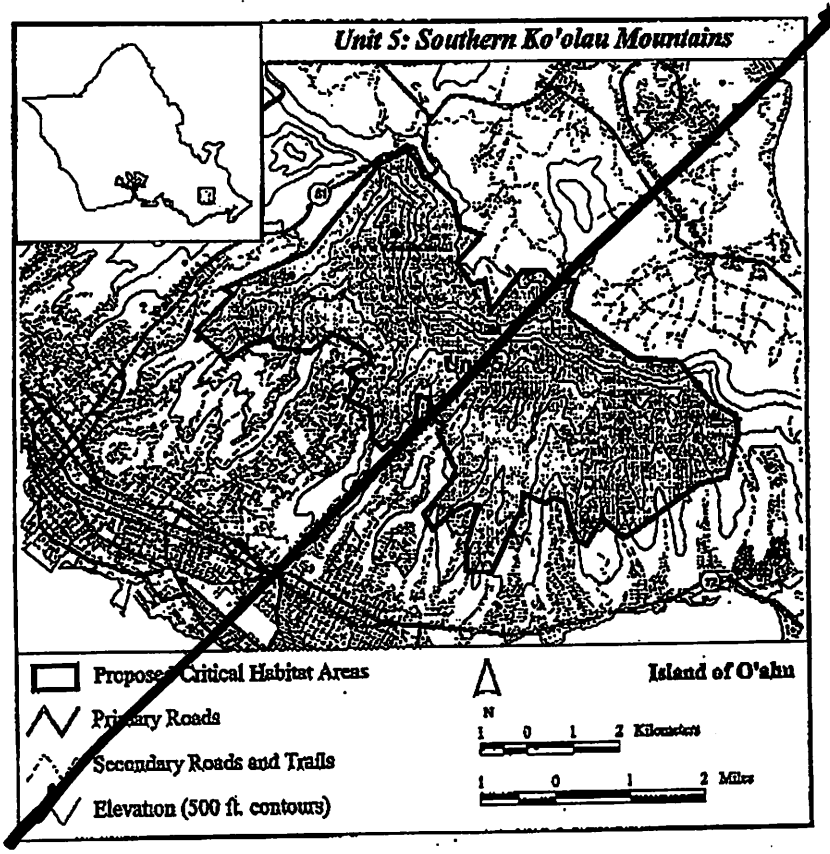
Since the focus of the AOC v. Daley is the effects of fishing on EFH, the portion of the EIS dealing with options to address fishing impacts is considered most important. Therefore, it is critical that we are clear in how we measure these potential impacts and , to the extent practicable, whether alternatives are present to minimize any potential adverse effects.

Finally, NMFS recommends that this be a NPFMC issue for each of the following meetings to, at a minimum provide an update, but more importantly to get a buy-in on the analytical approach used to quantify impacts and identify EFH for each FMP.

EFH NOTICE

C-4

Mike Payne NMFS



BILLING CODE 4310-55-C

Dated: May 30, 2001

Marshall P. Jones Jr.,

Acting Assistant Secretary for Fish and Wildlife and Parks.

(Proposed: Designation of critical habitat for the Oàhu èlepaio (*Chasiempis sandwichensis ibidis*))

[FR Doc. 01-14171 Filed 6-5-01, 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[I.D. 053001D]

Groundfish Fisheries of the Bering Sea and Aleutian Islands Area and the Gulf of Alaska, King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands, Scallop and Salmon Fisheries off the Coast of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent to prepare a supplemental environmental impact statement (SEIS); request for written comments; notice of scoping meetings.

SUMMARY: NMFS announces its intent to prepare an SEIS in accordance with the National Environmental Policy Act of 1969 (NEPA) for the essential fish habitat (EFH) components of the following fishery management plans (FMPs): Groundfish Fishery of the Bering Sea and Aleutian Islands Area, Groundfish of the Gulf of Alaska; Bering Sea/Aleutian Islands King and Tanner Crabs; Scallop Fishery Off Alaska; and Salmon Fisheries in the EEZ Off the Coast of Alaska. The proposed action to be addressed in the SEIS is the development of the mandatory EFH provisions of the FMPs. The scope of the analysis will address the required EFH components of the FMPs as described in section 303(a)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). NMFS will hold public scoping meetings and accept written comments to determine the issues of concern and the appropriate range of management alternatives to be addressed in the SEIS to describe and identify EFH and potential Habitat Area of Particular Concern (HAPC) designations, to minimize to the extent practicable the adverse effects of fishing on EFH, and to identify other actions to encourage the conservation and enhancement of EFH.

DATES: Written comments will be accepted through July 21, 2001. The first public scoping meeting will be held on Monday, June 4, 2001, in Kodiak, AK. See **SUPPLEMENTARY INFORMATION** for dates, times, and locations of additional public scoping meetings.

ADDRESSES: Written comments should be sent to P. Michael Payne, Assistant Regional Administrator, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802. Comments may be sent via facsimile (fax) to (907) 586-7012. NMFS will not accept comments by e-mail or Internet. See **SUPPLEMENTARY INFORMATION** for dates, times, and locations of public scoping meetings.

FOR FURTHER INFORMATION CONTACT: Cindy Hartmann, EFH Coordinator, Juneau, AK, (907) 586-7235.

SUPPLEMENTARY INFORMATION: Amendments to the Magnuson-Stevens Act in 1996 set forth new mandates for NMFS and Regional Fishery Management Councils (Regional Councils) to identify and protect important marine and anadromous fish habitat. The Regional Councils, with

assistance from NMFS, were required to delineate EFH for all managed species. EFH is defined in the Magnuson-Stevens Act as " .those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity " In response to the amended Magnuson-Stevens Act and based on guidelines for the EFH contents of FMPs (50 CFR part 600 subpart J), the North Pacific Fishery Management Council (Council) completed preparation of the following five EFH FMP amendments in 1998: Amendment 55 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area; Amendment 55 to the FMP for Groundfish of the Gulf of Alaska; Amendment 8 to the FMP for the King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands; Amendment 5 to the FMP for Scallop Fisheries Off Alaska; and Amendment 5 to the FMP for the Salmon Fisheries in the EEZ Off the Coast of Alaska (Amendments 55/55/8/5/5) These EFH FMP amendments were reviewed and approved by the Secretary of Commerce and took effect on January 20, 1999 (64 FR 20216) These FMP amendments identified EFH for over 130 managed species.

In June 1999, several environmental and fishing groups challenged the scope and substance of the environmental assessment (EA) prepared for Amendments 55/55/8/5/5 (*American Oceans Campaign et al v Daley*, Civ No. 99-982 (D.D.C.)). On September 14, 2000, the U S District Court issued an opinion finding the EA insufficient in scope and analytical substance and requiring NMFS to prepare an analysis that is legally sufficient under NEPA. Therefore, NMFS is re-evaluating the EFH components originally developed as part of Amendments 55/55/8/5/5. The SEIS will supersede the EA previously prepared in support of Amendments 55/55/8/5/5.

The proposed action to be addressed in the SEIS is the development of the mandatory EFH provisions of the effected FMPs as described in section 303(a)(7) of the Magnuson-Stevens Act and based on the guidance in 50 CFR part 600 subpart J. The following three types of actions will be specifically analyzed: (1) Identify and describe EFH for managed species; (2) identify HAPCs within EFH; and (3) minimize, to the extent practicable, adverse effects on EFH caused by fishing. The scope of the new SEIS will cover all of the required EFH components of FMPs. NMFS will consider the need to revise the previously approved EFH provisions of these FMPs based on any available new scientific information, and the revised analysis of EFH alternatives.

The EA prepared for Amendments 55/55/8/5/5 covered all five FMPs. For this new NEPA analysis, a single SEIS may be prepared that analyzes the required EFH components for all five FMPs or multiple SEISs may be prepared that analyze the required EFH components for individual FMPs.

Alternatives

NMFS will evaluate a range of alternatives for developing mandatory EFH provisions for the Council's five FMPs. NMFS is seeking information from the public through the scoping process on the range of alternatives to be analyzed and on the environmental, social, and economic issues to consider in the analysis Alternatives will be developed based on significant issues raised during the scoping process.

Alternatives for Designation of EFH

Alternatives for the designation of EFH may include those identified in the EA for Amendments 55/55/8/5/5, plus additional alternatives. Alternatives already identified include: (1) No action (no designation of EFH); (2) EFH is all habitat within a general distribution for a species life stage; and (3) EFH is a subset of all habitat within a general distribution, e.g., areas of known concentration. Other possible EFH alternatives could include a habitat-based approach, a core habitat approach (comparable to critical habitat for endangered species), and an ecosystem approach that may address prey and reproductive associations.

Alternatives for Designation of HAPCs

HAPCs are subsets of EFH. HAPCs are those areas of special importance that may require additional protection from adverse effects. HAPCs are defined on the basis of the ecological importance, sensitivity to human-induced environmental degradation, stress to the habitat from development activities, and rarity of the habitat. Amendments 55/55/8/5/5 identified 3 types of habitat as HAPCs (living substrates in shallow water, living substrates in deep waters, and freshwater areas used by anadromous fish) but did not map or designate specific areas as HAPCs. In August 1998, the Council received 6 proposals concerning HAPCs. The proposals included the following: (1) Identifying where living substrate in shallow water and deep water occur in the BSAI and GOA; (2) adding seamounts/pinnacles, ice edge, shelf break, and biologically consolidated fine-grained sediments as types of HAPC; (3) developing a procedure to assess potential adverse impacts to HAPCs; (4) nominating Prince William Sound black hole, Chirikov Basin, and Kodiak red king crab areas as HAPCs; (5) protecting important habitat for C. bairdi crab by establishing a no-fishing zone in a specified area of the Bering Sea; and (6) establishing the Kodiak red king crab areas as an HAPC. These proposals and/or others may be investigated as part of the EFH SEIS.

An HAPC EA prepared by Council staff in 2000 considered protection measures for corals and sponges. Specific areas were proposed for protection and stakeholder meetings were held. Currently, no specific actions from these meetings are being evaluated. An HAPC alternative to protect corals and sponges is possible in the SEIS

Alternatives for Effects of Fishing on EFH

The alternatives analysis will identify a range of approaches that could be taken to minimize any potential adverse effects of fishing on EFH. The range of alternatives may include measures such as banning specific gear types, closing areas to fishing, rotational closure areas, protected areas or other measures. A no-action alternative will be included as an alternative The range of alternatives will be developed based on comments NMFS receives during the scoping process.

Public Involvement

NMFS will work with the Council throughout the development of the SEIS. The Council has formed an EFH Oversight Committee that will help keep the Council an integral part of the NEPA process for EFH. Council staff will assist in the development of the SEIS. The public will be able to provide oral and written comments on EFH at Council meetings.

A principal objective of the scoping and public involvement process is to identify a reasonable range of management alternatives that, with adequate analysis, will delineate critical issues and provide a clear basis for both distinguishing between those alternatives and selecting a preferred alternative. NMFS is seeking written comments on the scope of issues that should be addressed in the SEIS Also, NMFS invites specific comment on the appropriate extent of EFH and HAPCs for Council-managed species and on the scientific basis for EFH and HAPC designations. NMFS also solicits any new information related to the impacts of fishing and non-fishing activities on EFH and HAPCs for fishery resources managed under the Council's FMPs and possible management measures

designed to mitigate adverse fishing impacts.

Dates and Times for Public Scoping Meetings

The public is invited to assist NMFS and the Council in developing the scope of alternatives to be analyzed. The first public scoping meeting will be held on: Monday, June 4, 2001, from 7-9 p.m., at the Fishery Industrial Technology Center, 118 Trident Way, Kodiak, AK.

Additional scoping meetings will be held in other communities as follows:

1 Friday, June 8, 2001, Unalaska, City Hall, Council Chambers, 245 Raven Way, 4 to 8 p.m., Unalaska, AK;

2 Monday, June 11, 2001, Anchorage, Z. J Loussac Library, public conference room, level 1, 3600 Denali Street, 2:30 to 6:30 p.m., Anchorage, AK;

3 Tuesday, June 19, 2001, Seattle, Alaska Fisheries Science Center, room 2079, 7600 Sand Point Way NE, 1:30 to 5:30 p.m., Seattle, WA.

4. Wednesday, June 20, 2001, Juneau, Federal Building, room 445, 709 W. 9th Street, 2 to 5:30 p.m. and Centennial Hall Convention Center, Egan Room, 101 Egan Drive, 7 to 9 p.m., Juneau, AK; and

5. Thursday, June 21, 2001, Sitka, Harrigan Centennial Hall, Maksoutoff Room, 330 Harbor Drive, 2 to 5:30 and 7 to 9 p m., Sitka, AK.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cindy Hartmann (see ADDRESSES), (907) 586-7585, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et. seq.*

Dated: May 31, 2001

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 01-14258 Filed 6-1-01; 4:52 pm]

BILLING CODE 3510-22-S

NMFS Public Meeting

Welcome,

We will be discussing some old and some new ideas for the identification of EFH and why we are re-visiting our descriptions.

http://www.fakr.noaa.gov

WHAT IS NEPA?

NATIONAL ENVIRONMENTAL POLICY ACT

"To ensure that balanced decision making regarding the environment occurs in the public view"

Establishes an Impact Analysis Process to Determine Whether an Action Significantly Affects the Human Environment, or not.

WHAT TRIGGERS A SIGNIFICANT ACTION?

- Action is Controversial
- Action is Related to Other Actions - Cumulative Effect
- Action affects an ESA Species

Appropriate Level of Review

An Environmental Assessment is appropriate Where the Federal Action Results in No Significant Impacts on the Human Environment

An Environmental Impact Statement (EIS) is Appropriate when the Action Results in Significant Effects

Impacts may be either Positive or Negative

WHAT IS AN ENVIRONMENTAL IMPACT STATEMENT?

- An EIS is a Decision Making Document
- An EIS discusses environmental impacts of an action and informs decision-makers and public of effects of the action, and proposes reasonable alternatives to a proposed action that minimizes adverse impacts

HOW DOES THIS EIS RELATE TO THE GROUNDFISH EIS?

- The Groundfish EIS is an FMP level analysis that addresses the impacts of managing fisheries at Policy Level. It is broad in scope and addresses alternative fisheries management strategies to the current FMP
- The EFH EIS tiers down from this, is action specific therefore narrower in scope, and focuses on the designation of EFH and the affects of fishing on EFH

WHAT IS THE SCOPING PROCESS AND WHEN DO YOU BEGIN?

- Scoping Process begins after the decision has been made to prepare an EIS
- It begins by publishing a Notice of Intent in the FEDERAL REGISTER
- It initiates the public process

Notice of Intent

- Proposed Action
- Scope of Action
- Notice Scoping Meetings and,
- Request written public comment to determine issues of concern and alternatives to be addressed
- Written comments will be accepted through July 21, 2001.

ACTION & SCOPE:

The proposed **action** to be addressed in the EIS is the development of the mandatory EFH provisions of the following FMPs:

- Groundfish Fishery of the Bering Sea and Aleutian Islands Area
- Groundfish of the Gulf of Alaska
- Bering Sea/Aleutian Islands King and Tanner Crabs
- Scallop Fishery Off Alaska
- Salmon Fisheries in the EEZ Off the Coast of Alaska.

The **scope** of the analysis will cover all of the required EFH components of the FMPs as described in section 303(a)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Scoping Purpose

- hold public scoping meetings
- accept written comments to determine the **issues of concern** and the appropriate **range of management alternatives to be addressed**
- describe and identify EFH and potential Habitat Area of Particular Concern (HAPC) designations, to minimize to the extent practicable the adverse effects of fishing on EFH
- identify other actions to encourage the conservation and enhancement of EFH.

What is EFH?

Background

- Amendments to the Magnuson-Stevens Act in 1996 set forth new mandates for NMFS and Regional Fishery Management Councils (Regional Councils) to identify and protect important marine and anadromous fish habitat.
- The Regional Councils, with assistance from NMFS, were required to delineate EFH for all managed species.
- In response to the amended Magnuson-Stevens Act and based on guidelines for the EFH contents of FMPs (CFR 600 Subpart J), the Councils completed preparation of the following five EFH FMP amendments in 1998.
- These EFH FMP amendments were reviewed and approved by the Secretary of Commerce and took effect on January 20, 1999 (64 FR 20216).
- At this time, an EA was prepared and a finding of no significant impact was determined.

Litigation Brief

- In June 1999, several environmental and fishing groups challenged the "No Significance" determination and the scope and substance of the EFH EA (*American Oceans Campaign et.al.v. Daley*, Civ. No. 99-982 (D.D.C. September 14, 2000)).
- On September 14, 2000, the U.S. District Court issued an opinion finding the EA insufficient in scope and analytical substance and requiring NMFS to prepare an analysis that is legally sufficient under NEPA.
- The court reviewed the EAs and concluded that each of the EAs were insufficient and failed to comply with the requirements of NEPA and the regulations promulgated by CEQ and NOAA.

NEPA Deficiencies

- The EAs did not consider the factors for determining significance in deciding whether an EIS was necessary.
- All of the EAs discuss the environmental impacts of the proposed action and alternative(s) in vague and general terms, without discussing what the impact would be to the specific EFHs that the Amendments are intended to protect; and
- All of the EAs spent more time describing the proposed alternative and the requirements of NEPA than actually analyzing the proposed alternative; and
- The EAs failed to consider all relevant and feasible alternatives and failed to fully explain the environmental impact of the proposed action and alternatives.

Development of EFH EIS

- The following three types of actions will be specifically analyzed:
  - identify and describe EFH for managed species;
  - identify HAPCs within EFH; and
  - minimize, to the extent practicable, adverse effects on EFH caused by fishing.
- NMFS will consider the need to revise the previously approved EFH provisions of these FMPs based on any available new scientific information, and the revised analysis of EFH alternatives.
- a single EIS may be prepared or multiple EISs may be prepared for a particular FMP.

Alternatives

- NMFS will evaluate a range of alternatives for developing mandatory EFH provisions for the Council's five FMPs.
- NMFS is seeking information from the public through the scoping process on the range of alternatives to be analyzed and on the environmental, social, and economic issues to consider in the analysis.
- Alternatives will be developed based on significant issues raised during the scoping process.

Existing EFH Alternatives

- Alternatives already identified in the EFH EA include:
  (1) no action (no designation of EFH);
  (2) (approved alt) EFH is all habitat within a general distribution for a species life stage; and
  (3) EFH is a subset of all habitat within a general distribution e.g., areas of known concentration.

  The approved alternative #2 is based on EFH species distribution by 1) existing best scientific information (at that time) and 2) highest area of species catch effort.

  Summarized as: One would expect to have a 90% chance of finding that species at in the area **plus** a little cushion to be conservative, given the lack of hard data for the species.

New EFH Concepts

- May include those previously identified in the present EFH EA **plus** additional alternatives.
- Habitat based concept: EFH may be defined as the habitat where physical information can be related to the species or multispecies.
- Core habitat concept: EFH may be defined as the minimum habitat required to sustain maximum yield.
- HAPC Concept: EFH may be defined as range of unique habitat types of special concern.
- Ecosystem concept: EFH may be defined as the area required by multispecies associations or assemblages to maintain diversity and sustainability-includes abiotic and biotic parameters.

Alternatives for Designation of HAPC

- HAPC are subsets of EFH.
- HAPC are those areas of special importance that may require additional protection from adverse effects.
- HAPCs are defined on:
  - the basis of the ecological importance,
  - sensitivity to human-induced environmental degradation,
  - stress to the habitat from development activities, and
  - rarity of the habitat.

Existing HAPC Types

- living substrates in shallow water;
  - submerged aquatic vegetation, certain emergent wetlands, and intertidal areas such as eelgrass, kelps
- living substrates in deep waters;
  - Offshore areas of complex habitats, high micro diversity, and rich epifaunal communities such as coral areas, seamounts
- freshwater areas used by anadromous fish
  - Migration corridors and spawning habitats such as rivers, streams, lakes, and contiguous wetland areas

Additional HAPC Proposals (not yet approved)

In August 1998, the Council received 6 proposals concerning HAPC. The proposals included:

- identifying where living substrate in shallow water and deep water occur in the BSAI and GOA;
- adding seamounts/pinnacles, ice edge, shelf break, and biologically consolidated fine-grained sediments as types of HAPC;
- developing a procedure to assess potential adverse impacts to HAPC;
- nominating Prince William Sound black hole, Chirikov Basin, and Kodiak red king crab areas as HAPC;
- protecting important habitat for *C. bairdi* crab by establishing a no fishing zone in a specified area of the Bering Sea; and
- establishing the Kodiak red king crab areas as HAPC.

HAPC Proposals (cont.)

- An HAPC EA prepared by Council staff in 2000, considered protection measures for corals and sponges.
- Specific areas were proposed for protection and stakeholder meetings were held. Currently no specific actions from these meetings are being evaluated.
- An HAPC alternative to protect corals and sponges is possible in the EIS.

Effects of Fishing on EFH

- The alternatives analysis will identify a range of approaches that could be taken to minimize any potential adverse effects of fishing on EFH.
- The range of alternatives may include measures such as:
  - banning specific gear types,
  - closing an area to fishing,
  - rotational closure areas,
  - protected areas or other measures.
  - A no action alternative will also be included.
- The selected range of alternatives will be informed by comments NMFS receives during the scoping process.

Public Involvement

A principal objective of the scoping and public involvement process is to identify a reasonable range of management alternatives that, with adequate analysis, will sharply define critical issues and provide a clear basis for defining those alternatives and choosing the preferred alternative.

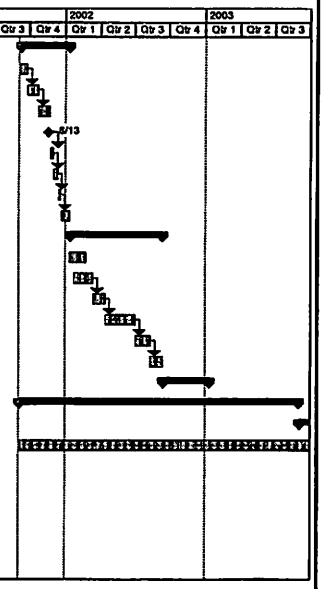
- Written comments will be accepted through July 21, 2001.
- Comments may be sent via facsimile (fax) to (907) 586-7012. NMFS will not accept comments by e-mail or internet.

NMFS seeks your input

- NMFS is seeking written comments on the scope of issues that should be addressed in the SEIS.
- NMFS invites specific comment on the appropriate extent of EFH and HAPCs for Council-managed species and on the scientific basis for EFH and HAPC designations.
- NMFS also solicits any new information related to the impacts of fishing and non-fishing activities on EFH and HAPCs for fishery resources managed under the Council's FMPs and possible management measures designed to mitigate adverse fishing impacts.

Draft EFH EIS Timeline

ID	Task Name	Duration	Start	Finish
1	Scoping	129 days	Mon 6/4/01	Wed 10/10/01
2	Publish NOI and Hold Scoping Meetings	18 days	Mon 6/4/01	Thu 6/21/01
3	Public Comment Period	30 days	Fri 6/22/01	Sat 7/21/01
4	Prepare Preliminary Draft Scoping Summary Report	30 days	Sun 7/22/01	Mon 8/20/01
5	NPFMC EFH Steering Committee Review of PDSSR	2 days	Mon 8/13/01	Tue 8/14/01
6	Review of PDSSR: HQ;Region;NPFMC	10 days	Tue 8/21/01	Thu 8/30/01
7	Prepare Draft Scoping Summary Report	11 days	Fri 8/31/01	Mon 9/10/01
8	NMFMC EFH Steering Committee review of DSSR	8 days	Tue 9/11/01	Tue 9/18/01
9	Public Review of DSSR	22 days	Wed 9/19/01	Wed 10/10/01
10	Prepare Preliminary Draft EIS	243 days	Thu 10/11/01	Tue 6/11/02
11	Develop Preminlinary Draft Alternatives	42 days	Thu 10/11/01	Wed 11/21/01
12	NPFMC and Public Comment on Preliminary Draft Alternatives	51 days	Mon 10/22/01	Tue 12/11/01
13	Finalize Draft Alternatives and Work Assignments	31 days	Wed 12/12/01	Fri 1/11/02
14	Do Analysis and Write Draft Sections	79 days	Sat 1/12/02	Mon 4/1/02
15	Compile, Print & Distribute PDEIS for Internal and Council Review	40 days	Tue 4/2/02	Sat 5/11/02
16	Review of Preliminary DEIS by Agencies and NPFMC	31 days	Sun 5/12/02	Tue 6/11/02
17	Prepare Draft EIS	121 days	Wed 6/12/02	Thu 10/10/02
22	Final EIS	729 days	Fri 6/1/01	Sat 5/31/03
32	Review and ROD	76 days	Sun 6/1/03	Fri 8/15/03
36	Total EIS Timeline	802 days	Mon 6/4/01	Fri 8/15/03



June
NOI Meeting Schedule

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
3	4	5	6	7	8	9
	Kodiak - Fishery Industrial Technology Center, 116 Trident Way, 7-9 p.m.				Unalaska - City Hall, Council Chambers, 245 Raven Way, 4 to 8 p.m.	
10	11	12	13	14	15	16
	Anchorage - Z. J. Loussac Library, public conference room, level 1, 3600 Denali Street, 2:30 to 8:30 p.m.					
17	18	19	20	21	22	23
		Seattle - Alaska Fisheries Science Center, room 2079, 7600 Sand Point Way NE, 1:30 to 5:30 p.m.	Juneau - Federal Building, room 445, 709 W. 9th, 2 to 5:30 p.m. and Centennial Hall Convention Center, Egan Room, 101 Egan Drive, 7 to 9 p.m.	Sitka - Harrigan Centennial Hall, Maksoutoff Room, 330 Harbor Drive, 2 to 5:30 and 7 to 9 p.m.		

ADDRESSES & FURTHER INFORMATION

- Written comments on issues, alternatives, concepts, HAPC, and management measures should be sent to:

P. Michael Payne, Assistant Regional Administrator
Habitat Conservation Division
NMFS Alaska Region
P.O. Box 21668
Juneau, AK 99802.

THANK YOU

Cindy Hartmann, EFH Coordinator
Habitat Conservations Division
Juneau, Alaska
(907) 586-7235
fax: (907) 586-7012

NMFS Alaska Region Website
http://www.fakr.noaa.gov

1 of 1 DOCUMENT

AMERICAN OCEANS CAMPAIGN, et al., Plaintiffs, v. WILLIAM M. DALEY, et al., Defendants.

Civil Action No. 99-982 (GK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2000 U.S. Dist. LEXIS 15991

September 13, 2000, Decided

September 14, 2000, Filed

DISPOSITION:
[*1] Plaintiffs' Motion for Summary Judgment Against Federal Defendants [# 22] granted in part and denied in part, Federal Defendants' Motion for Summary Judgment [# 27] granted in part and denied in part, Plaintiffs' Motion for Summary Judgment Against Intervenor-Defendants [# 30] granted and Intervenor-Defendants' Motion for Summary Judgment [# 26] denied.

COUNSEL:
For FLORIDA WILDLIFE FEDERATION, AMERICAN OCEANS CAMPAIGN, CAPE COD COMMERCIAL HOOK FISHERMEN'S ASSOCIATION, INC., REEFKEEPER INTERNATIONAL, CENTER FOR MARINE CONSERVATION, INSTITUTE FOR FISHERIES RESOURCES, NATIONAL AUDUBON SOCIETY, NATIONAL RESOURCES DEFENSE COUNCIL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INCORPORATED, plaintiffs: Stephen Elston Roady, EARTH JUSTICE LEGAL DEFENSE FUND, Ocean Law Project, Washington, DC.

For WILLIAM M. DALEY, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, defendants: Anthony P. Hoang, Jane P. Davenport, Charles C. Carson, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For TEXAS SHRIMP ASSOCIATION, intervenor-defendant: James Patrick Walsh, Richard Lee Cys, DAVIS WRIGHT TREMAINE, Washington, DC.

For WILMA ANDERSON, intervenor-defendant: [*2] Richard Lee Cys, DAVIS WRIGHT TREMAINE, Washington, DC.

JUDGES:
Gladys Kessler, U.S. District Judge.

OPINIONBY:
Gladys Kessler

OPINION:

MEMORANDUM OPINION

Plaintiff environmental groups bring this action against William M. Daley in his capacity as Secretary of the Department of Commerce ("Secretary"), as well as the National Oceanic and Atmospheric Administration ("NOAA") and the National Marine Fisheries Service ("NMFS"). The Texas Shrimp Association and Wilma Anderson (collectively, "Intervenor-Defendants") intervened in this case as Defendants.

This matter is before the Court on Plaintiffs' Motion for Summary Judgment Against the Federal Defendants [# 22], the Federal Defendants' Motion for Summary Judgment [# 27], Plaintiff's Motion for Summary Judgment Against the Intervenor-Defendants [# 30], and the Intervenor-Defendants' Motion for Summary Judgment [# 26]. Upon consideration of the motions, oppositions, replies, the arguments made at the motions hearing, and the entire record herein, for the reasons discussed below, Plaintiffs' Motion for Summary Judgment Against the Federal Defendants is **granted in part and denied in part**, Plaintiffs' Motion for Summary Judgment [*3] Against the Intervenor-

Defendants is **granted**, the Federal Defendants' motion is **granted in part and denied in part**, and the Intervenor-Defendants' motion is **denied**.

I. Standard of Review

Initially, it must be remembered that the Court is bound by a highly deferential standard of review for agency action. Under the Administrative Procedure Act ("APA"), an agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making this finding, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). The Court may not substitute its judgment for that of the agency. Id. If the "agency's reasons and policy choices ... conform to 'certain minimal standards of rationality' ... the rule is reasonable and must be upheld", Small Refiner Lead Phase-Down Task Force v. EPA, 227 U.S. App. D.C. 201, 705 F.2d 506, 521 (D.C. Cir. 1983) [*4] (citation omitted), even though the Court itself might have made different choices. This standard presumes the validity of agency action. Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 541 F.2d 1, 34 (D.C. Cir. 1976)(en banc), cert. denied, 426 U.S. 941 (1976).

Courts also give a high degree of deference to agency actions based on an evaluation of complex scientific data within the agency's technical expertise. See Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983); NRDC v. EPA, 263 U.S. App. D.C. 231, 824 F.2d 1211, 1216 (D.C. Cir. 1987)(citing NRDC v. EPA, 259 U.S. App. D.C. 5, 812 F.2d 721, 725 (D.C. Cir. 1987))("It is not for the judicial branch to undertake comparative evaluations of conflicting scientific evidence.")

II. Statutory Framework

The Fishery Conservation and Management Act ("FCMA", also known as the Magnuson-Stevens Act), enacted in 1976, 16 U.S.C. § 1801, et seq., provides the basic statutory framework for the protection and management of the nation's marine fishery resources. The FCMA establishes eight Regional Fishery Management Councils, each of [*5] which has the authority and responsibility to govern conservation and management of the fisheries under its jurisdiction. 16 U.S.C. § 1852. The Councils perform this function by developing and implementing fishery management plans ("FMPs"). After a Council develops an FMP, the Secretary of Commerce, acting through NOAA and NMFS, evaluates the plans and determines whether they comply with the FCMA. Depending on his determination, he may approve, disapprove, or partially approve these plans. 16 U.S.C. § 1854.

The approval of the FMPs requires several steps: first, an immediate review of the FMP to ensure it is consistent with the FCMA; second, publication of the FMP in the Federal Register, followed by a 60-day comment period; and third, approval, disapproval, or partial approval of the FMP, by the Secretary within 30 days of the end of the comment period. The Secretary may refuse to approve an FMP recommended by a Council if it violates any of the ten National Standards established by the FCMA for FMPs. 16 U.S.C. § 1853(a)(1-10). The Councils may, once an FMP has been approved, adopt amendments to the FMPs as conditions [*6] in the fisheries change, but approval of such amendments must undergo the same evaluation process.

In 1996, Congress passed the Sustainable Fisheries Act ("SFA"), which amended the FCMA. One of the main thrusts of the SFA was the long-term protection of essential fish habitat ("EFH"). The statute defines EFHs as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." 16 U.S.C. § 1802(10). The SFA required the Councils to submit amendments to their various FMPs (each Council may have several FMPs), which were to describe and identify EFHs (including adverse impacts on such EFHs), and consider actions to ensure the conservation and enhancement of those EFHs. 16 U.S.C. § 1855(b)(1)(A). The statute required the Councils to submit such EFH amendments n1 to the Secretary by October 1998. After receiving such amendments, the Secretary was required to subject them to the evaluation procedure that FMPs and their amendments are normally put through, and then approve, disapprove, or partially approve them.

n1 EFH amendments are nothing more than amendments to FMPs specifically addressing the issue of EFHs. EFH amendments are thus a type of FMP amendment, and the two terms will be used interchangeably.

[*7]

III. Factual Background n2

n2 Pursuant to Local Rule 7.1(h), "in determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are

admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." The Court thus takes these facts from the parties' statements of material facts not in dispute. Furthermore, since this case is a review of an administrative agency's decision, the Court also relies on facts contained in the administrative record.

On December 19, 1997, NMFS promulgated EFH regulations in an Interim Final Rule, as required by the FCMA; these regulations became effective January 20, 1998. The Environmental Assessment (EA) prepared for these regulations, pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., noted the need for a long-term plan for the conservation and management of essential fish habitats ("EFH"). [*8]

In August 1997, NMFS contracted with the American Fisheries Society to make a comprehensive literature survey of scientific reports addressing fishing impacts on habitat. The survey, called the Auster/Langton Study (the "Study"), reviewed 90 studies from around the world and concluded that 88 of those studies found some impacts resulting from fishing gear. The Study concluded, however, that the overall impact of fishing-related activities in North American waters is unknown despite research efforts spanning 80 years. NMFS provided the Auster/Langton Study to the Regional FMCs, and noted that the Study was only a starting point, not a replacement for the EFH assessments for which the FMCs were responsible.

Each of the five Regional Councils affected by the SFA submitted draft EFH amendments to NMFS for review and comments. In their final EFH amendments, all Councils identified some EFHs within each of their jurisdictions, yet none adopted measures that would restrict fishing gear in order to minimize adverse effects of fishing related activities on EFH.

A. Gulf of Mexico Fishery Management Council (GMFMC)

The GMFMC prepared a Generic EFH Amendment to amend its seven FMPs for [*9] managed species in the Gulf of Mexico.

In a letter to NMFS dated February 3, 1997, the GMFMC noted that because of the existing measures it had already adopted to regulate fishing activities, the effect on EFHs from allowable gear was only minimally adverse. In response to this letter, several dissenting members of the GMFMC sent a letter to NMFS expressing their concern over the GMFMC's position, stating specifically that the GMFMC had not examined gear effects on habitat, and that the GMFMC's conclusions were fallacious.

The GMFMC submitted an outline of its first draft of the Generic EFH Amendment on June 24, 1997; this outline included a heading on adverse impacts from fishing-related activities. The first draft of the Generic EFH Amendment, submitted January 27, 1998, did not, however, contain any measures that would minimize adverse impacts on EFH. Under the subsection "Potential management options to minimize identified threats from fishing-related activities," the amendment stated that such options would be considered in future amendments.

The March 1998 draft of the Generic EFH Amendment completely removed the headings on fishing impacts on EFH; these sections were [*10] replaced by a two-page description of the effects of fishing-related activities on EFH. This description noted that little is known in the literature about specific gear effects on EFH in the Gulf of Mexico, and noted that management measures already in place were sufficient to protect the EFHs. The March draft also lacked any proposed management measures for protecting EFHs. The Council based its failure to submit EFH protection on the lack of information needed to analyze the effects of gear on EFHs, and the likely controversial nature of such measures. The draft deferred management measures to future amendments.

After NMFS reviewed the Generic EFH Amendment, it concluded that the fishing impacts section was inadequate and overlooked existing data that would have been informative. In comments submitted to GMFMC, NMFS also noted that the analysis section was too general in nature to be useful, failed to utilize existing scientific data, and failed to adequately address the requirements of the EFH regulations.

The GMFMC submitted its final version of the Generic EFH Amendment to NMFS in October 1998. This draft contained only a cursory discussion of the effects of three types of [*11] fishing gear on EFHs. The 60-day comment period on the Amendment ended January 8, 1999. On February 8, 1999, NMFS partially approved the Amendment. NMFS approved GMFMC's assessment of impacts on EFH of the three types of fishing gear that were addressed in the Amendment: trawls, recreational fishing gear, and traps/pots. NMFS also approved the section noting that no further action was necessary for protecting and conserving EFHs. NMFS noted that GMFMC lacked the detailed scientific information necessary to determine the practicality of additional management measures. NMFS did not, however, approve GMFMC's failure to assess other types of gear on EFHs. NMFS also did not set a date by which

GMFMC was to revise its EFH amendment to address NMFS' disapproval.

The GMFMC prepared an EA for the Generic EFH Amendment, which concluded that the Amendment did not significantly affect the quality of the human environment. The only two alternatives considered by NMFS were the status quo and approval of the Amendment.

B. New England Fishery Management Council (NEFMC)

The NEFMC prepared an Omnibus EFH Amendment to amend its four FMPs for managed species off the New England Coast.

In 1997, [*12] the NEFMC created an EFH Technical Team to prepare its EFH Amendment. In a March 23, 1998, memo, the Technical Team stated that it was breaking the process down into phases: in the first phase, EFHs would be identified and described; in the second phase, the effects of fishing activities on those EFHs would be assessed, as would any management measures necessary to minimize those impacts.

NMFS staff offered guidance to NEFMC's Technical Team, specifically as to what activities and gear NEFMC needed to assess, and what sorts of information had to be included in the EFH Amendment. The NEFMC submitted its EFH Amendment to NMFS on October 7, 1998. The Amendment contained no assessment of fishing gear impacts on EFHs. The 15-page discussion of fishing gear contained minimal discussion of the likely impacts of the various types of gear considered on the EFHs; the discussion primarily emphasized the lack of information on the specific effects of any specific gear on any particular habitat or species. The Amendment discussed how existing management measures affected EFHs, but did not consider any new measures that could be taken. The EFH Amendment's conclusion section stated that existing [*13] and recently proposed measures met the standards of the SFA and the FCMA.

NMFS prepared an EA for NEFMC's EFH Amendment. The section on environmental impacts of the proposed measures was only one paragraph long, and essentially discussed currently existing management measures. The EA addressed three options: the status quo, the EFH Amendment, and a total closure of the habitat area of particular concern (HAPC) to all fishing gear. The EA lacked any discussion of the long-term impacts of any of these options. The Secretary determined that no significant environmental impact would arise from the EFH Amendment, and approved the NEFMC's Omnibus EFH Amendment after the notice-and-comment period.

C. Caribbean Fishery Management Council (CFMC)

The CFMC prepared an EFH Generic Amendment to amend the existing FMPs for managed species in the Caribbean.

The CFMC was informed at a public meeting of the possible effects of net fishing on coral reefs. The CFMC identified various methods to minimize this impact, but included them in the EFH Amendment only as "conservative recommendations", rather than as required management measures. The Council's reasoning was that little information was [*14] available on the practicality of management measures and on the adverse impacts of fishing related activities, and that previous efforts were sufficient to protect the EFHs.

The CFMC submitted its final EFH Amendment to NMFS in October 1998. The 60-day comment period on this Amendment ended January 19, 1999. On February 18, 1999, NMFS approved the CFMC's Amendment, noting that any weakness in the Amendment was due to the lack of scientific information on Caribbean species and ecosystems. NMFS did not, however, give the CFMC a specific date by which it should propose more concrete management measures for the protection of the EFHs identified.

NMFS prepared an EA on the CFMC's EFH Amendment, and found that no significant impact would result from the Amendment. The only two options considered were the status quo and adoption of the EFH Amendment.

D. Pacific Fishery Management Council (PFMC)

From the outset, the PFMC relied heavily on NMFS for necessary material related to the definition of EFHs and potential impacts to those EFHs. Accordingly, in February 1997, NMFS prepared a draft EFH recommendations memo for fishing impacts in the groundfish fishery. In an NMFS meeting discussing [*15] the memo, a representative from the Environmental Protection Agency noted that the Council had sufficient information available to it to prepare an assessment of the impact of fishing-related activities on this area, even though little of that information was specific to Pacific Coast groundfish EFHs. In subsequent meetings, the NMFS Technical Team discussed specific management measures to minimize the adverse effects of fishing on that EFH.

In a second draft of the proposed recommendations, dated March 17, 1998, NMFS included a draft discussion of fishing impacts, and recommendations for actions the PFMC should take. In June 1998, NMFS submitted its final recommendations to the PFMC. The recommendations concluded that significant impacts to

EFHs might occur from fishing in the areas within PFMC's jurisdiction, but that PFMC would encounter difficulty in proceeding because of the lack of scientific information. The discussion also noted the existing and growing body of research on fishing gear that should inform PFMC's actions. NMFS recommended that PFMC create gear performance standards to assess gear impacts on habitat.

The PFMC adopted NMFS' recommendations for its EFH Amendment, [*16] but failed to act upon NMFS' recommendations to implement specific measures. The PFMC's reasoning for not adopting any measures to protect EFHs was that there was virtually no information connecting fishing gear or activities to destruction of EFHs within its jurisdiction, nor was there information on the efficacy of methods to reduce any adverse effects. Despite the fact that the PFMC's Amendment contained no measures to reduce the adverse effects of fishing, NMFS approved the EFH provisions of PFMC's Amendment.

NMFS prepared an EA on PFMC's Amendment. The only two alternatives analyzed were the status quo, and the Amendment. The EA summarizes the potential impacts of fishing gear on EFH, but contains no long-term or cumulative analysis of the impacts of such gear on EFHs.

E. North Pacific Fishery Management Council (NPFMC)

The NPFMC prepared two EFH Amendments, amending two of its FMPs for managed species in the Bering Sea and Aleutian Islands, and in the Gulf of Alaska.

The NPFMC decided early on to defer consideration of fishing gear assessment and management measures until completion of the identification of EFHs. The reasons for deferring this task was the controversy [*17] that would have resulted from regulation of fishing activities in those areas, and the lack of available information on EFHs within its jurisdiction. The final Amendment NPFMC submitted to NMFS contained very little analysis of measures that could be adopted to minimize the adverse effects of fishing on EFHs; the Amendment did, however, discuss how past efforts minimized the adverse effects of fishing related activities. NMFS approved NPFMC's EFH Amendment.

The EA performed on the Amendment contained only a brief analysis of the cumulative impact of fishing on EFHs. The EA contained discussion of past actions taken by NPFMC in protecting EFHs, but did not discuss the environmental impact of any new measures that might be taken.

IV. Analysis

Plaintiffs bring two causes of action against the Federal Defendants, each of which must be analyzed within the framework of the APA. Their first claim is that the Federal Defendants violated the FCMA in approving the EFH Amendments promulgated by the Councils. Their second claim is that the Federal Defendants violated the National Environmental Policy Act ("NEPA") by performing limited, inadequate Environmental Assessments ("EA") for [*18] each of the Amendments, rather than full Environmental Impact Statements ("EIS"), and by making findings of no significant impact ("FONSI") as to each of the Amendments. As to both claims, Plaintiffs argue that Defendants have violated the APA's prohibition against agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The Federal Defendants argue that Plaintiffs have no standing to bring the instant suit. The Intervenor-Defendants argue that this court cannot review Plaintiffs' FCMA claim, because the statute does not allow for judicial review of the EFH Amendments. Finally, the Federal Defendants argue that the requirements of the FCMA were met by each of the EFH Amendments in dispute (as least to the extent that those Amendments were approved), and that their decision to perform an EA and make a FONSI as to each Amendment complied with the requirements of NEPA. Since the questions of standing and reviewability are threshold questions, they will be addressed first.

A. Do Plaintiffs Have Standing to Bring their Claims?

To prove standing, Plaintiffs must show: (1) they have [*19] suffered a concrete, personal, and particularized injury in fact to a legally protected interest; (2) a causal connection between the injury and the action of the defendant, fairly traceable to the challenged action; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). In making this showing, Plaintiffs cannot rest on mere conclusory allegations but must set forth specific facts, either through affidavits or other evidence, which for purposes of the summary judgment motion will be accepted as true. Id. at 561. The injury prong of this test can be satisfied by alleging injury to aesthetic interests. Animal Legal Defense Fund v. Glickman, 332 U.S. App. D.C. 104, 154 F.3d 426, 432 (D.C. Cir. 1998) (en banc) (hereinafter "ALDF").

The Federal Defendants argue that the allegations of harm found in the affidavits submitted by several of the

Plaintiffs are merely vague and conclusory, thus failing to satisfy the Lujan requirement of a particularized injury in fact.

Injury to aesthetic [*20] interests satisfies the first prong of the Lujan test. As the D.C. Circuit Court of Appeals found in ALDF, 154 F.3d at 434, "the Supreme Court and [the District of Columbia] circuit have frequently recognized the injury in fact of plaintiffs who suffered aesthetic injury stemming from the condition and quality, or despoliation, of an environmental area that they used." Plaintiffs argue that they have suffered injuries to their aesthetic, environmental, and recreational interests, and submitted several affidavits to that effect from various individuals who either represent or are members of the several Plaintiff environmental groups. These individuals claim that NMFS' actions (or inactions) have harmed them because EFHs are not being properly protected from commercial fishermen. Many affiants list specific locations where they have fished or recreated (scuba diving, photographing reefs, etc.), n3 that they believe need to be better protected by more stringent EFH Amendments. The affiants state that without better protections, the EFHs will deteriorate, preventing them from enjoying their beauty. They also state that the deterioration of the EFHs will lead to very [*21] low fish populations, preventing them from recreationally fishing these waters.

n3 For example, Peter Van Tuyn states that he has fished out of False Pass, Alaska, as well as in Ikatan Bay, south of the Aleutian Islands. Decl. Of Van Tuyn at P 4. Kathryn Arbuthnott states that she has scuba dived coral reefs off Florida, from Key West to the Dry Tortugas, and off Puerto Rico (including reefs off Parguera, Mayaguez, and Desecheo). Decl. Of Arbuthnott at PP 2, 3.

Because these affidavits show particularized injuries to Plaintiffs' aesthetic, environmental, and recreational interests, Plaintiffs have standing to bring their claims.

B. Does the FCMA Allow Judicial Review of Plaintiffs' Claims?

Intervenor-Defendants (who are commercial fishers who would be affected by restrictions on fishing gear in EFHs), argue that the statute prevents Plaintiffs from obtaining judicial review in this case. n4 Their argument rests on 16 U.S.C. § 1855(f), which reads as follows:

(1) Regulations [*22] promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that--

(A) section 705 of such Title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.

(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

n4 The Federal Defendants stated at oral argument that their position on this issue is that the Secretary has taken reviewable action, as defined by the APA, and therefore this case is subject to judicial review.

[*23]

Intervenor-Defendants argue that the statute clearly states that only regulations promulgated under this chapter are judicially reviewable. They further argue that since none of the EFH Amendments resulted in the promulgation of a formal regulation, there is no regulation which Plaintiffs can challenge. Intervenor-Defendants maintain that until an action is taken to implement the EFH Amendments, the Federal Defendants' actions are not reviewable by this Court.

Since all agency action is reviewable under the APA, the definition of "regulation" in the above-cited statute must be determined in light of that statute, unless the FCMA specifies a different definition, which it does not. Under the APA, the terms "rule" and "regulation" are used interchangeably. "Courts and Congress treat the terms 'regulation' and 'rule' as interchangeable and synonymous. When we speak of an agency's 'regulation'--a term nowhere mentioned in the Administrative Procedure Act, 5 U.S.C. § 551 et seq.--we have in mind what the APA defines as a 'rule,'..." National Treasury Employees Union v. Weise, 321 U.S. App. D.C. 341, 100 F.3d 157, 160 (D.C. Cir. 1996).

The APA [*24] defines "rule" very broadly to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," 5 U.S.C. § 551(4). Thus the Secretary's actions approving in full and

approving in part the EFH Amendments in this case constitute "rules" under the APA, because the Secretary can only approve EFH Amendments after he has determined they are in compliance with the FCMA. This determination of compliance requires an interpretation of the FCMA, and thus is an action reviewable by this Court. Furthermore, the EFH Amendments apply generally to many fisheries, have future effect, are designed to interpret and prescribe law and policy, and thus fall under the definition of "rule" as that term is defined in the APA.

Intervenor-Defendants cite two cases in support of their argument, both of which are distinguishable. In Cape Cod Commercial Hook Fishermen's Ass'n v. Daley, 30 F. Supp. 2d 111 (D. Mass. 1998), one of the eight regional Councils issued experimental fishing permits afer passage of the Sustainable Fisheries Act, which amended the FCMA and was codified under various [*25] sections of the FCMA. Plaintiffs in that case alleged that issuance of the permits violated the FCMA. The district court, relying on 16 U.S.C. § 1855(f)(1)(A) and (B), ruled that it had no jurisdiction to review the Council's issuance of experimental fishing permits under the FCMA, because the issuance of such permits was not a "regulation" or an action "approved" by the Secretary. In this case, however, each of the EFH Amendments was affirmatively approved by the Secretary, and this approval constitutes a reviewable action under the APA and FCMA.

The other case Intervenor-Defendants rely on is Southeastern Fisheries Ass'n v. Mosbacher, 773 F. Supp. 435 (D.D.C. 1991), which was decided before passage of the Sustainable Fisheries Act. Intervenor-Defendants rely on footnote 9 in this case, which reads, "while plaintiffs appear also to challenge the FMP itself, it is the regulations which implement the FMP, rather than the FMP itself, which are subject to judicial review." Id. at 439 n.9. This footnote, however, is dicta, and in any event is not binding on this Court. Furthermore, it is unpersuasive given the braod definition of [*26] "rule" under the APA. See National Treasury Employees Union, 100 F.3d at 160.

C. Were the Actions of the Federal Defendants "not in accordance with law" (the FCMA) and Therefore In Violation of the APA?

Plaintiffs argue that the Secretary violated the APA by approving the five Councils' EFH Amendments because those Amendments violated the FCMA. Defendants argue that the EFH Amendments complied with the statute and applicable regulations, and therefore the Secretary's approval conformed with the APA.

Review of the Secretary's action must be especially deferential, given the highly complicated scientific data that the agency must interpret. See Baltimore Gas & Elec. Co., 462 U.S. at 103. Where the agency decision turns on issues requiring the exercise of technical or scientific judgment, it is essential for judges to "look at the decision not as the chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." Ethyl Corp., 541 F.2d at 36.

In approving, disapproving, [*27] or partially approving an amendment to an FMP, the Secretary must consider whether it complies with the ten "National Standards" for FMPs set forth in the FCMA, 16 U.S.C. § 1851(a)(1)-(10), and whether it complies with all other applicable laws. 16 U.S.C. § 1854(a)(1)(A). Congress granted the Secretary broad discretion to balance the ten National Standards in determining whether an FMP has complied with them. Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996), cert. denied, 520 U.S. 1185, 137 L. Ed. 2d 681, 117 S. Ct. 1467 (1996).

The Essential Fish Habitat Regulation, issued by the Secretary to guide the Councils in formulating EFH Amendments which comply with the National Standards, is very specific about what those Amendments should include. See 50 C.F.R. § 600.815. It describes how the Council should gather and organize data necessary for identifying EFH, 50 C.F.R. § 600.815(a)(2)(i), and warns that the Councils should strive to obtain data sufficient to describe each EFH with the highest level of detail. Id. The Regulation also directs the Councils to gather data for each [*28] managed species within a potential EFH regarding that species' current and historic stock size, geographic range, habitat requirements organized by life history stage, and the distribution, density, growth, mortality, and production of each species at each life history stage within all habitats occupied or formerly occupied. 50 C.F.R. § 600.815(a)(2)(i)(B).

The Regulation also describes the different levels of information that might be available and should be gathered in the process of identifying EFHs, 50 C.F.R. § 600.815(a)(2)(i)(C), and provides guidance as to how to identify EFHs given the level of information available with respect to a potential EFH. 50 C.F.R. § 600.815(a)(2)(ii)(A). The Regulation provides further guidance in identifying EFHs, depending on the status of the stock of fish, and the quantity and quality of habitats available to those fish. 50 C.F.R. § 600.815(a)(2)(ii).

With respect to the adverse effects of fishing activities, the Regulation provides guidance as to the types of adverse effects that should be protected against, the assessment of such effects that the Councils must undertake, and the considerations that the Councils

should take into account [*29] in determining whether to take any actions to mitigate such adverse effects. 50 C.F.R. § 600.815(a)(3). The Regulation further instructs that the EFH Amendment must assess all potential adverse effects of all types of fishing equipment used in a specific EFH, and must pay particular attention to habitat areas of special concern. 50 C.F.R. § 600.815(a)(3)(ii). The Regulation suggests consideration of the following actions to mitigate adverse effects: fishing equipment restrictions, harvest limits, and total or partial closure of affected areas. 50 C.F.R. § 600.815(a)(4).

1. Did the Secretary's Approval of the GMFMC's EFH Amendment Violate the APA Because It Was Not in Accordance With the FMCA?

The Secretary gave partial approval to the GMFMC's Generic EFH Amendment. The following relevant aspects of the Amendment were approved: identification and description of EFHs, assessment of the impacts of three types of fishing gear (trawls, recreational fishing gear, and traps/pots), and the determination that no further action was necessary to protect and conserve EFHs. The Secretary, however, disapproved the GMFMC's failure to assess other types of fishing gear on EFHs. In reaching [*30] his conclusion that the GMFMC's Generic EFH Amendment complied with the FCMA in all other respects, the Secretary noted that the GMFMC lacked the detailed scientific information necessary to determine the practicability of additional management measures.

Plaintiffs argue that the Secretary's approval of the Generic EFH Amendment did not comply with the FCMA because the Amendment's discussion of the effects of fishing activities on EFH is brief and cursory, because the discussion of the three types of gear analyzed was brief and inadequate, because the Amendment failed to consider other types of gear used in the relevant EFHs, and because the Amendment failed to consider and analyze options to minimize the adverse effects of fishing on EFHs.

Plaintiffs also argue that the fact that the Secretary failed to give the GMFMC a date certain by which to revise its EFH Amendment to correct its deficiencies entails the conclusion that the Secretary abused his discretion. The statute gives the GMFMC a "reasonable" amount of time to correct deficiencies. By not placing time limits on the GMFMC, Plaintiffs argue that the Secretary is essentially giving it an indefinite, and inherently unreasonable, [*31] amount of time in which to make its corrections.

Defendants concede that the Generic EFH Amendment failed to consider the effect of certain types of fishing gear on EFHs that it had identified, but note that this failure is why the Secretary did not grant complete approval to the Amendment. With respect to the adequacy of the analysis of the effects of fishing activities on EFHs, and specifically of the effects of the three types of gear analyzed, Defendants argue that the discussion is sufficient, and is based on the best available scientific information. Finally, Defendants argue that the GMFMC adequately considered the best scientific information in determining that no additional measures were needed to mitigate the adverse effects of fishing on the EFHs, since existing fishing management measures sufficiently protected them.

Since neither the statute nor the regulation requires the Councils to affirmatively conduct research to better identify EFHs and the adverse effects of fishing on them, reliance on the best available scientific information is sufficient. See 50 C.F.R. § 600.815(a)(2)(i)(C) (describes types of information Councils should gather and organize [*32] , but does not require Councils to create new data); 50 C.F.R. § 600.815(a)(3)(ii) ("Councils should use the best scientific information available"); 50 C.F.R. § 600.815(a)(3)(iii) (Councils must adopt practical mitigating measures "if there is evidence that a fishing practice is having an identifiable adverse effect on EFH"); 16 U.S.C. § 1855(b)(1)(A); 16 U.S.C. § 1853(a)(7). While Plaintiffs would have preferred a more detailed analysis of the effects of fishing activities and of the three types of gear addressed, the Secretary did consider the relevant factors in determining that the analysis was adequate based on the best available scientific information, and thus the approval of the Amendment was reasonable and in accordance with law.

In addition, the Secretary's conclusion that the EFH Amendment did not need to adopt new measures to mitigate the adverse effects of fishing, since existing management measures sufficiently mitigated those effects, and since the GMFMC lacked evidence of the adverse effects of a particular fishing practice on EFHs, was reasonable. See 50 C.F.R. § 600.815(a)(3)(iii). While Defendants cannot simply [*33] rely on the fact that management efforts were undertaken prior to passage of the Sustainable Fisheries Act to show compliance with that Act, Defendants can look at such measures in analyzing whether additional ones are necessary to comply with the Act.

Finally, there is no merit to Plaintiffs' argument that the Secretary's failure to give the GMFMC a date certain by which to revise its Amendment to comply with the FCMA constitutes an abuse of discretion. In the first instance, what constitutes a "reasonable" amount of time within which the GMFMC may revise its Amendment is solely within the Secretary's discretion, given the absence of any statutory deadline. Conservation Law

Found. Of New England, Inc. v. Franklin, 989 F.2d 54, 60 (1st Cir. 1993).

Consequently, because the Secretary's partial approval of the GMFMC's Generic EFH Amendment was reasonable, considered all the relevant factors under the FCMA, and was in accordance with that statute, Plaintiffs' motion shall be denied, and the Federal Defendants' motion granted, as to this claim.

2. Did the Secretary's Approval of the NEFMC's EFH Amendment Violate the APA Because It Was Not In Accordance With [*34] the FMCA?

The Secretary approved the NEFMC's Omnibus EFH Amendment, which, like the GMFMC's Amendment, considered the effects of fishing activities and gear on EFHs, but determined that no new management measures were necessary to mitigate any adverse effects. The NEFMC viewed the entire process as a two-step process, with the first step being the identification of EFHs, and the second step being the assessment of the adverse effects of fishing activities and gear, and the adoption of mitigating measures. Plaintiffs maintain that making this a two-step process violates the FCMA. They argue that the statute contemplates a unitary process in which the Amendment includes an assessment of the adverse effects of fishing and adoption of mitigating measures along with identification of EFHs. Plaintiffs also maintain that the NEFMC has postponed indefinitely completion of the task the FCMA requires, namely, assessment of adverse effects and adoption of mitigating measures; therefore, the Secretary's approval of the Amendment violates the FCMA and the APA.

Defendants argue that the NEFMC's Amendment does in fact contain an analysis of the adverse effects of fishing activities and gear [*35] on EFHs, and that the analysis is based on the best scientific evidence available to the NEFMC at that time. As with the GMFMC's Amendment, the fact that Plaintiffs would have preferred a more detailed analysis does not compel the conclusion that the Secretary's action was arbitrary and capricious. Defendants also argue that the NEFMC proposed Amendments to other FMPs, in the past and simultaneously with the EFH Amendment, that had the effect of sufficiently protecting the EFHs identified in the Amendment. Consequently, Defendants argue, there was no need for additional protective measures to be proposed.

For the same reasons that the Secretary's approval of the GMFMC's Amendment was reasonable, his approval of the NEFMC's Omnibus EFH Amendment was also reasonable. The Secretary approved the Amendment after considering whether it complied with the FCMA, given the best scientific information available to it at that time. It was also reasonable for the Secretary to conclude that the NEFMC did not need to adopt additional protective measures, n5 given the measures already in place and the lack of available scientific evidence on the adverse effects of fishing gear. Consequently, because [*36] the Secretary's approval of the NEFMC's Omnibus EFH Amendment was reasonable, considered all the relevant factors under the FCMA, and was in accordance with that statute, Plaintiffs' motion shall be denied, and the Federal Defendants' motion granted, as to this claim.

n5 Plaintiffs are correct that the FCMA prohibits the two-step approach that the NEFMC adopted, where the EFHs are first identified, and protective measures assessed and adopted at a later date. The statute clearly indicates that both these steps were to be taken by the October 1998 deadline. As a practical matter, however, it made no difference that the NEFMC adopted this approach, given that they had very limited scientific information, and protective measures were already in place.

3. Did the Secretary's Approval of the CFMC's EFH Amendment Violate the APA Because It Was Not In Accordance With the FMCA?

The Secretary approved the CFMC's EFH Generic Amendment, which identified EFHs in the Council's jurisdiction, and made several recommendations [*37] to minimize the possible impact of fishing gear on those EFHs. The CFMC did not adopt the Secretary's recommendations as management measures because it noted the lack of scientific information available to it on the adverse effects of fishing, and because it felt that existing management measures (which included restrictions on gear) were sufficient to protect the EFHs.

Plaintiffs argue that the Secretary's approval of the Amendment did not comply with the FCMA because the Amendment's discussion of the adverse effects of fishing gear was brief and inadequate, and because the CFMC only made "recommendations" to mitigate such effects, rather than adopting protective measures.

Defendants argue that the CFMC Amendment was in compliance with the statute because no further actions were needed to be taken in that region to protect EFHs. Defendants also argue that the CFMC had very little scientific information available to it on the impact of fishing gear, and that certain fishing practices and gear are not even used in those waters because of the makeup of the area--the EFHs in need of protection in this area are largely made up of coral reefs.

Defendants defend the adoption of recommendations [*38] for management measures because the CFMC did not believe that any fishing activities were actually affecting the coral reefs in the area. The only fishing gear that might affect the area is fishing nets, which may get entangled in the reefs and damage them. But Defendants point out that no protective measures were needed to mitigate this possible effect for two reasons: first, such measures would not have been practicable (as it is, fishermen have a disincentive to fish coral reefs, because repairing damaged fishing nets is costly); and second, no evidence existed to show that fishing nets were in fact damaging EFHs in that area. Finally, Defendants rely on the fact that management measures (such as equipment restrictions banning or regulating the use of potentially destructive fishing methods) were adopted in other FMPs which would have the effect of protecting the designated EFHs, and thus no further measures were necessary in the EFH Amendment.

The Court concludes that the Secretary's approval of the CFMC's EFH Generic Amendment was reasonable. The Secretary approved the Amendment after considering whether the CFMC's Amendment complied with the FCMA, given how little scientific [*39] information was available at that time. It was also reasonable for the Secretary to conclude that the CFMC did not need to adopt additional protective measures, given the measures already in place and the lack of scientific evidence on the adverse effects of fishing gear available to the CFMC. Consequently, because the Secretary's approval of the CFMC's EFH Generic Amendment was reasonable, considered all the relevant factors under the FCMA, and was in accordance with that statute, Plaintiffs' motion shall be denied, and the Federal Defendants' motion granted, as to this claim.

4. Did the Secretary's Approval of the PFMC's EFH Amendment Violate the APA Because It Was Not In Accordance With the FMCA?

The Secretary approved the PFMC's EFH Amendment, which was largely based on recommendations made to the Council by NMFS. The primary difference between the recommendations made and the final Amendment approved was that the PFMC did not include any of NMFS' suggested measures for protecting the identified EFHs. The PFMC's reason for not adopting NMFS' suggested mitigating measures was the lack of information connecting fishing activities or gear to destruction of EFHs within its [*40] jurisdiction, and lack of information on the efficacy of methods to reduce any adverse effects. Plaintiffs argue that the Secretary's approval of the PFMC's Amendment did not comply with the FCMA because the Amendment failed to adopt NMFS' suggested mitigating measures, or any other mitigating measures, and failed to do so primarily because it was concerned with the controversy that would be created by such action. Defendants respond that the PFMC did in fact lack sufficient scientific evidence to take further measures, and that there were no EFHs that needed protection, because most of them were in any event inaccessible to fishermen.

The Court concludes that the Secretary's approval of the PFMC's EFH Amendment was reasonable. The Secretary approved the Amendment after considering whether it complied with the FCMA, given how little scientific information was available to it at that time. Even though NMFS had suggested some additional protective measures, it was reasonable for the Secretary to conclude that the PFMC did not need to adopt them, given the lack of scientific evidence available to the PFMC on the adverse effects of fishing gear on Pacific Coast EFHs. Consequently, because [*41] the Secretary's approval of the PFMC's EFH Amendment was reasonable, considered all the relevant factors under the FCMA, and was in accordance with that statute, Plaintiffs' motion shall be denied, and the Federal Defendants' motion granted, as to this claim.

5. Did the Secretary's Approval of the NPFMC's EFH Amendment Violate the APA Because It Was Not In Accordance With the FMCA?

The Secretary approved the NPFMC's two EFH Amendments, which modified its FMPs covering the Bering Sea/Aleutian Islands area, and the Gulf of Alaska. The Amendments did not adopt any new measures to mitigate the adverse effects of fishing on EFHs, because of the lack of available information on EFHs within its jurisdiction, because of the controversy that would have resulted from the adoption of new measures, and because it believed that existing measures sufficiently minimized the adverse effects of fishing activities on the relevant EFHs.

Plaintiffs argue that the Secretary did not comply with the FCMA in approving the Amendments, because it does not adequately assess the adverse effects of fishing activities and gear on the EFHs, and because it completely failed to consider any measures that [*42] would protect EFHs from the adverse effects of fishing activities and gear.

Defendants respond that the Amendments in fact contain an extensive discussion of the adverse effects of fishing and gear on Alaskan waters. They argue that any deficiency is due to the lack of scientific studies specific to this region. This lack of information, Defendants argue, is also the reason that the NPFMC was unable to formulate appropriate protective measures. Finally, Defendants argue that actions taken prior to and simultaneously with the creation of the EFH

Amendments sufficiently protected the identified EFHs from the adverse effects of fishing activities and gear.

The Court concludes that the Secretary's approval of the NPFMC's two EFH Amendments was reasonable. The Secretary approved the Amendments after considering whether the Amendments complied with the FCMA, given how little scientific information was available to the NPFMC at that time. It was also reasonable for the Secretary to conclude that the NPFMC did not need to adopt additional protective measures, given the lack of scientific evidence available to it, and the existing protective measures already in place. Consequently, because [*43] the Secretary's approval of the NPFMC's two EFH Amendments was reasonable, considered all the relevant factors under the FCMA, and was in accordance with that statute, Plaintiffs' motion shall be denied, and the Federal Defendants' motion granted, as to this claim.

D. Were the Actions of the Federal Defendants "not in accordance with law" (NEPA) and Therefore In Violation of the APA?

The purpose of NEPA is to establish a "broad national commitment to protecting and promoting environmental quality." Robertson v. Methow Valley Citizens, 490 U.S. 332, 348, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Id. at 349. To fulfill this policy, NEPA requires all federal agencies to prepare an environmental impact statement ("EIS") whenever they propose "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Regulations [*44] promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. § § 1500-1508, provide the agencies guidance in their task of complying with NEPA. Additional information is provided for NMFS' compliance with NEPA in NOAA Administrative Order 216-6 ("AO 216-6").

The NEPA regulations, 40 C.F.R. § 1501.4, provide the following guidance to agencies who must decide whether they need to perform an EIS:

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an [*45] environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement. ...

An Environmental Assessment is defined by the regulations at 40 C.F.R. § 1508.9:

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. ...

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

If an agency first prepares an EA, and after doing so determines that preparing a full EIS is unnecessary, the agency must prepare a finding of no significant impact ("FONSI"), setting forth the reasons why the actions will not have a significant impact on the environment. [*46] 40 C.F.R. § § 1501.4, 1508.13.

The AO 216-6 provides further guidance for NMFS, and requires the preparation of an EIS for an FMP or an FMP Amendment (such as the EFH Amendments in this case) whenever the responsible program manager ("RPM") determines that significant beneficial or adverse impacts may reasonably be expected to result from the implementation of the FMP or FMP Amendment. AO 216-6, at § 6.11, A.R. HQ-1 at 24. This regulation specifically provides that when adverse impacts are possible, the RPM should consider the following five criteria in determining the appropriate course of action:

a. The proposed action may be reasonably expected to jeopardize the long-term productive capability of any stocks that may be affected by the action.

b. The proposed action may be reasonably expected to allow substantial damage to the ocean and coastal habitats.

c. The proposed action may be reasonably expected to have a substantial adverse impact on public health or safety.

d. The proposed action may be reasonably expected to affect adversely any endangered or threatened species or a marine mammal population.

e. The proposed action may be reasonably expected [*47] to result in cumulative adverse effects that could have a substantial effect on the target resource species or any related stocks that may be affected by the action. Two other factors to be considered in any determination of significance are controversy and socio-economic effects. Although no action should be deemed to be significant based solely on its controversial nature, this aspect should be used in weighing the decision on the proper type of analysis needed to ensure full compliance with NEPA. Socio-economic factors related to users of the resource should also be considered in determining controversy and significance. AO 216-6, at § 6.11, A.R. HQ-1 at 24.

The Administrative Order further provides that if none of these five criteria may be reasonably expected to occur, an EA may be prepared instead, in accordance with the requirements specified in the regulations promulgated by the CEQ. AO 216-6 at § § 6.11, 6.05.a.2, A.R. HQ-1 at 19-20, 24.

The District of Columbia Circuit Court of Appeals has ruled that courts must consider four factors in evaluating the legal adequacy of an EA or a FONSI:

(1) whether the agency took a "hard look" at the problem;
(2) whether the [*48] agency identified the relevant areas of environmental concern;
(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and
(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

Humane Soc'y of the U.S. v. Hodel, 268 U.S. App. D.C. 165, 840 F.2d 45, 62 (D.C. Cir. 1988). The Court also ruled that the role of the court "is simply to ensure that the agency took account of these factors and that its decision was not arbitrary and capricious." Id.; Citizens Against Burlington, Inc. v. Busey, 290 U.S. App. D.C. 371, 938 F.2d 190, 194 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 116 L. Ed. 2d 638, 112 S. Ct. 616 (1991).

Plaintiffs make several arguments why the Federal Defendants violated NEPA. First, NMFS did not prepare full EISs, even though the EFH Amendments are sweeping in scope (covering large areas of water around the North American continent, and allowing fishing practices to continue even in areas designated as EFHs). Second, Plaintiffs argue that [*49] the very reasons Defendants give for not doing EISs actually highlight why they were necessary: proximity to ecologically critical areas, likelihood of controversy from the effects on the environment, highly uncertain or unknown risks, and the precedential nature of the decision. Third, Plaintiffs argue that none of the four factors outlined in Humane Soc'y have been adequately considered in this case, and thus each EA and FONSI is legally inadequate. Finally, Plaintiffs argue that NMFS violated NEPA by not considering any alternatives besides maintaining the status quo and accepting the EFH Amendments, when additional feasible alternatives that would better protect EFHs should have been considered.

Defendants argue that they did not need to, and in fact could not, consider additional alternatives besides the status quo and the EFH Amendments, because NEPA requires consideration only of feasible alternatives. Since the EAs were prepared in the context of the FCMA, which does not allow the Secretary to do anything besides approve, disapprove, or partially approve the Amendments, no other alternatives were, therefore, feasible. Defendants also argue that a full EIS was not required [*50] on any of the Amendments, since they took a hard look at each one, considered all the relevant factors, but determined that the risks or impacts were either unknown or insignificant. Finally, Defendants argue that their decision not to conduct a full EIS was reasonable, given how little scientific evidence is available on the adverse effects of fishing on EFHs.

The Court concludes, after reviewing the record, that each of the EAs prepared on the EFH Amendments in this case fails to comply with the requirements of NEPA, and the regulations promulgated by CEQ and NOAA. Several deficiencies appear in all five EAs. None of the EAs considered the five factors outlined in AO 216-6 in deciding whether an EIS was necessary. None included the relevant information required by 40 C.F.R. § 1508.9 in the EAs: there is simply not enough evidence or analysis in any EA to determine whether an EIS is necessary; all the EAs are couched in very general and vague terms, and spend more time describing the

proposed alternative and the requirements of NEPA than they do actually analyzing the proposed alternative and complying with the requirements of NEPA.

Most significantly, none of the EAs discusses [*51] in any convincing or sufficient manner the requirements of 40 C.F.R. § 1508.9(b): they fail to consider all relevant and feasible alternatives, and fail to fully explain the environmental impact of the proposed action and alternatives. All the EAs discuss the environmental impacts of the proposed action and alternative(s) in vague and general terms, without discussing what the impact would be to the specific EFHs that the Amendments are intended to protect. Three of the EAs (the GMFMC's, CFMC's and the PFMC's) do not even consider any alternatives besides the status quo (which would violate the FCMA), and adoption of the Amendment.

Defendants' argument that no other alternatives could have been considered because the EAs were completed in the context of the FCMA, is without merit. The fact that the Secretary can only approve, disapprove, or partially approve the EFH Amendments submitted by a Council does not restrict steps he must take to comply with NEPA and therefore does not restrict the number of alternatives that must be considered under that statute. "While subsequent congressional action does not vitiate the need for an environmental impact statement or a discussion of alternatives [*52] (unless explicitly stated in the statute), such action does have a bearing on what is to be considered a reasonable alternative, and a reasonable discussion." Sierra Club v. Adams, 188 U.S. App. D.C. 147, 578 F.2d 389, 396 (D.C. Cir. 1978). For example, if the Secretary disapproves a Council's EFH Amendment, he may, if the Council fails to act within a reasonable amount of time, prepare an FMP or FMP Amendment himself. 16 U.S.C. § 1854(c). Thus additional alternatives were available, other than simply adopting the Councils' Amendments. However, three of the EAs prepared contained no discussion whatsoever as to why additional alternatives were not considered or not feasible.

In considering, under Humane Soc'y, whether the EAs prepared in this case are legally adequate, the Court is compelled to conclude that they are not. It does not appear that NMFS took a "hard look" at the problem with respect to any of the EAs. There is no substantive discussion of how fishing practices and gear may damage corals, disrupt fish habitat, and destroy benthic life that helps support healthy fish populations. Instead, a great deal of the discussion revolves [*53] around describing the limited number of proposed alternatives and what the agency's statutory obligations are under NEPA. There is only a minimal or vague discussion of the actual environmental consequences and impacts on the designated EFHs. In several of the EAs, NMFS simply states that no data is available, and therefore it cannot assess the environmental impact. Several EAs merely note that further action is deferred to future amendments.

None of the EAs sufficiently identified relevant areas of concern, as required by the second factor of Humane Soc'y. They only discussed fish habitats in general terms, describing the types of EFHs that should be protected, but not specifying which EFHs needed protection and why. None of the EAs convincingly discussed why no significant impact would result from adopting the particular EFH Amendment, as required by the third factor of Humane Soc'y; in fact, that conclusion is not justified given the glaring lack of discussion of the possible impact or lack of impact on the EFHs. Finally, under the fourth factor of Humane Soc'y, none of the EAs discussed any changes that were considered or made to reduce any possible impact to the environment. [*54]

Defendants' EAs are insufficient, and violate the mandates and principles underlying NEPA. Consequently, Plaintiffs' Motion shall be granted, and Federal Defendants' Motion denied, as to this claim. Furthermore, Defendants are ordered to perform a new and thorough EA or EIS as to each EFH Amendment, in compliance with the requirements of NEPA.

E. Should A Permanent Injunction Be Granted?

"When an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance." Realty Income Trust v. Eckerd, 183 U.S. App. D.C. 426, 564 F.2d 447. 456 (D.C. Cir. 1977); see also Izaak Walton League of Am. v. Marsh, 210 U.S. App. D.C. 233, 655 F.2d 346, 364 (D.C. Cir. 1981) (same). In determining whether injunctive relief is appropriate, the Court must consider whether declining to issue an injunction might cause an "irreversible effect on the environment, until the possible adverse consequences are known. . . [The Court should consider whether] if a NEPA analysis were done, it might 'reveal substantial environmental consequences' [*55] which might be critical to further consideration of the propriety of the action." Realty Income Trust, 564 F.2d at 456 (internal citations and quotations omitted). If an injunction is in the public interest and would serve a remedial purpose, it should be granted. Id.

In this case, the Councils' failure to weigh any alternatives other than adoption of the EFH Amendments or taking no action, prevented the Secretary from considering the possible adverse consequences of adopting the Amendments. Because none of the EFH Amendments recommended that any further protective measures be taken, the two alternatives considered by the

Councils were essentially one and the same-that no action be taken. That outcome subverts the very purpose of NEPA, which is to ensure that agencies are fully aware of any adverse environmental effects of their actions, and of all feasible alternatives which may have lesser adverse effects on the environment, so that final decision-making will be informed by a full understanding of relevant environmental impacts. Because the public interest would be served by enjoining the Secretary's actions until such time as he can identify and evaluate all [*56] alternatives to the EFH Amendments, this Court will enter an injunction against the enforcement of those Amendments until the Secretary performs a new, thorough, and legally adequate EA or EIS for each EFH Amendment, in compliance with the requirements of NEPA.

V. Conclusion

For the reasons discussed above, Plaintiffs' Motion for Summary Judgment Against the Federal Defendants [# 22] is **granted in part and denied in part**, the Federal Defendants' Motion for Summary Judgment [# 27] is **granted in part and denied in part**, Plaintiffs' Motion for Summary Judgment Against the Intervenor-Defendants [# 30] is **granted**, and the Intervenor-Defendants' Motion for Summary Judgment [# 26] is **denied**. An Order will issue with this opinion.

Sept 13, 2000
Date

Gladys Kessler

U.S. District Judge

ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment Against the Federal Defendants [# 22], the Federal Defendants' Motion for Summary Judgment [# 27], Plaintiffs' Motion for Summary Judgment Against the Intervenor-Defendants [# 30], and Intervenor-Defendants' Motion for Summary Judgment [# 26]. Upon consideration [*57] of the motions, oppositions, replies, the arguments made at the motions hearing, and the entire record herein, for the reasons discussed in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Plaintiffs' Motion for Summary Judgment Against the Federal Defendants [# 22] is **granted in part and denied in part**; it is further

ORDERED, that the Federal Defendants' Motion for Summary Judgment [# 27] is **granted in part and denied in part**; it is further

ORDERED, that Plaintiffs' Motion for Summary Judgment Against the Intervenor-Defendants [# 30] is **granted**; and it is further

ORDERED, that the Intervenor-Defendants' Motion for Summary Judgment [# 26] is **denied**; it is further

ORDERED, that the Federal Defendants are enjoined from enforcing the EFH Amendments until such time as they perform a new and thorough EA or EIS as to each EFH Amendment, in compliance with the requirements of NEPA.

Sept. 13, 2000
Date

Gladys Kessler

U.S. District Judge

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, MD 20910

THE DIRECTOR

JAN 22 2001

MEMORANDUM FOR: Regional Administrators

FROM: F - William T. Hogarth, Ph.D.

SUBJECT: Guidance for Developing Environmental Impact Statements for Essential Fish Habitat per the AOC v. Daley Court Order

This memorandum provides detailed guidance for developing Environmental Impact Statements (EISs) for the essential fish habitat (EFH) fishery management plan (FMP) amendments affected by the September 14, 2000 AOC v. Daley court order. The guidance addresses major issues related to developing the EISs, but it is not a substitute for other applicable references such as the Council on Environmental Quality (CEQ) regulations for implementing the National Environmental Policy Act (40 CFR 1500-1508), CEQ's Forty Most Asked Questions Concerning the National Environmental Policy Act Regulations (46 FR 18026), and NOAA Administrative Order 216-6 ("Environmental Review Procedures for Implementing the National Environmental Policy Act").

The court order enjoins NMFS from enforcing the EFH FMP amendments until NMFS has completed thorough Environmental Assessments (EAs) or EISs for the amendments. Following advice from NOAA General Counsel and the Department of Justice, NMFS will prepare EISs rather than EAs. To comply with the court order and NEPA, NMFS must ensure that the new EISs include an unbiased evaluation of alternatives, even though the court did not overturn NMFS' approval of the FMP amendments under the Magnuson-Stevens Act. Therefore, NMFS must conduct scoping meetings and consider public comments to ensure that the EISs are comprehensive. Based on the new analyses, NMFS may or may not conclude that an alternative other than the option originally approved by NMFS should be adopted. If an EIS indicates that an alternative other than those included in the original EFH FMP amendments is warranted, NMFS will work with the applicable Council to develop a new FMP amendment consistent with that alternative.

Affected FMPs

The AOC v. Daley court order concerns EFH FMP amendments developed by the Gulf of Mexico, Caribbean, New England, Pacific, and North Pacific Fishery Management Councils. For the Pacific Council, the court order affects only the groundfish FMP since that was the only FMP challenged and it relied on its own EA. The other four Councils developed omnibus FMP amendments and EAs covering multiple FMPs. Although for particular Councils the plaintiffs only challenged some of those FMPs, all of the FMPs covered by the EAs are affected by the court order, because the EAs share the same deficiencies with respect to all of the FMPs. Thus, the EFH provisions of the following 22 FMPs must be addressed in new EISs:

Gulf of Mexico Council:	shrimp, red drum, reef fish, coastal migratory pelagics, stone crab, spiny lobster, coral and coral reefs
Caribbean Council:	reef fish, spiny lobster, queen conch, coral
New England Council:	multispecies, scallops, salmon, monkfish, herring
Pacific Council:	groundfish
North Pacific Council:	Bering Sea and Aleutian Islands groundfish, Gulf of Alaska groundfish, king and tanner crabs, scallops, salmon

General Approach

NMFS' compliance with this court order should be handled in a manner that is compatible with an overall attempt to improve the comprehensiveness of NEPA analyses for FMPs. In some cases it may be most efficient to combine the new EFH NEPA analysis with other EISs that are being developed for specific fisheries. Regional Administrators should evaluate other anticipated NEPA analyses for the affected Councils' FMPs and determine whether to handle the EFH NEPA analysis separately or in combination with another EIS. For any of the affected fisheries, if it is not practicable to combine the EFH NEPA analysis with another EIS in the very near future, the EFH EIS must proceed separately. In such cases, a single EFH EIS should address EFH issues for all affected FMPs for each Council.

Actions that Must Be Addressed in the EISs

The plaintiffs in AOC v. Daley challenged whether, among other things, NMFS had adequately evaluated the effects of fishing on EFH and minimized to the extent practicable the adverse effects of fishing on EFH. The court found that the EAs prepared for the amendments were inadequate and did not restrict its criticism to the portions of the EAs concerning fishing impacts. NOAA General Counsel and the Department of Justice have advised NMFS that the scope of the new EISs must cover all of the required EFH components of FMPs as described in section 303(a)(7) of the Magnuson-Stevens Act. Therefore, the proposed action to be addressed in the EISs is the development of the mandatory EFH provisions of the affected FMPs, and the EISs cannot presuppose what action the agency might ultimately take. The EISs must examine options for designating EFH as well as minimizing the adverse effects of fishing on EFH.

Notice of Intent

NMFS must publish in the Federal Register a notice of intent to prepare each EIS, as required by 40 CFR 1501.7 and NAO 216-6. The notice must describe the proposed action and possible alternatives, summarize the proposed scoping process (including logistics for scoping meetings), and provide the name and address of a person in the agency who can answer questions about the proposed action and EIS.

Scoping Process

NMFS, in cooperation with the affected Council, should conduct one or more public scoping meetings for each EIS to inform interested parties of the proposed action and alternatives, and to

solicit comments on the range and type of analysis to be included in the EIS. NMFS should document for the administrative record all written and verbal comments received during the scoping meetings.

Range of Alternatives

To comply with NEPA and the court order, the EISs must evaluate a reasonable range of alternatives for developing the mandatory EFH provisions of the affected FMPs. These alternatives must include the alternative that was approved in the applicable EFH FMP amendments, the no action alternative (which, according to the Department of Justice, must be no EFH designations), and other reasonable alternatives. The court found that the fact that the Secretary can only approve, disapprove, or partially approve what was submitted by a Council does not restrict the number of alternatives that must be considered under NEPA. The court pointed out that NMFS could develop Secretarial FMP amendments to implement one or more alternatives that have not been adopted by a Council.

For the designation of EFH, the analysis should include alternative ways of identifying EFH, such as alternative sizes, locations, and/or habitat types that could comprise the EFH designation. For the identification of Habitat Areas of Particular Concern (HAPC), the analysis should discuss alternative areas or different approaches that could be used to designate HAPCs. For the minimization of fishing impacts, the alternatives analysis should identify a range of approaches that could be taken to minimize the adverse effects of fishing on EFH. If information is lacking on the effects of specific fishing practices on EFH, the analysis should examine alternatives that could be taken in the face of that uncertainty. For example, the range of alternatives might include extremely precautionary measures (e.g., banning specific gear types), taking no action without more definitive evidence of adverse effects, and two or three intermediate alternatives (i.e., measures that are somewhat precautionary but not draconian). Again, the selected range of alternatives should be informed by comments NMFS receives during the scoping process.

Affected Environment

The section of the EISs describing the affected environment should discuss the physical and biological environment in which the managed species occur and the socioeconomic characteristics of the fisheries. This section should also describe the administrative context, i.e., characterize the way the FMP regulates the fishery, mention that NMFS adopted EFH amendments to the FMPs, and note that this NEPA analysis is supplementing the EAs prepared for those amendments. The description of the affected environment should be no longer than is necessary to understand the effects of the alternatives.

Environmental Consequences

The court's opinion specifically criticized the EAs for describing alternatives but not analyzing them or explaining their environmental impacts. Therefore, for each type of action (designating EFH, designating HAPCs, and minimizing the effects of fishing on EFH) the EISs must identify

a range of alternatives and also provide a comparative evaluation of the effects of those alternatives.

Since the focus of AOC v. Daley was the effects of fishing on EFH, the portion of the EISs dealing with options to address fishing impacts is most important. The EFH regulations state that "Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing practice is having an identifiable adverse effect on EFH" based on the Council's evaluation of potential fishing impacts (50 CFR 600.815(a)(3)(iii)). The preamble to the EFH interim final rule clarifies that in this context, "identifiable" impacts are those that are both more than minimal and not temporary in nature (62 FR 66538). If there is evidence that a fishing practice may be having an identifiable adverse effect on EFH, and/or if the available information is unclear as to whether there may be an adverse impact that is both more than minimal and not temporary in nature, for NEPA purposes the analysis of alternatives needs to consider explicitly a range of management measures for minimizing potential adverse effects, and the practicability and consequences of adopting those measures. In other words, if there is evidence that a fishing practice may be having an identifiable adverse effect on EFH, even if there is no conclusive proof of adverse effects, it is not sufficient to conclude *prima facie* that no new management measures are necessary without first conducting a reasonably detailed alternatives analysis.

Considering New Information

Although the EFH FMP amendments were completed in 1998, the EISs need to evaluate the proposed action in the context of the best scientific information that is available today. Therefore, it may be necessary to update the literature reviews, data analyses, and other syntheses of information that were used to develop the amendments.

Combining the Analysis with Work to Remedy Partially Approved EFH Amendments

NMFS did not approve portions of the EFH FMP amendments submitted by the Gulf of Mexico and Caribbean Councils in 1998. (NMFS also did not approve portions of the Mid-Atlantic Council's EFH FMP amendments, but those are not directly affected by the court order.) To address these partial approvals and take advantage of the new NEPA process, the EISs for those Councils should provide the information necessary to bring the FMPs into compliance with the Magnuson-Stevens Act. Remedying the partial approvals is not required by the court order, but this NEPA analysis provides an efficient and logical avenue to fix the deficiencies in the amendments.

For the Gulf of Mexico Council, the amendment identified EFH based on what the Council deemed to be major or representative species. NMFS disapproved the section of the amendment that failed to provide either explicit EFH designations for the remaining managed species or a clear scientific justification for designating EFH based on species assemblages. NMFS also disapproved the portions of the fishing gear impact assessment that failed to evaluate the effects of fishing gears other than trawls, recreational fishing, and traps.

For the Caribbean Council, the amendment identified EFH based on what the Council deemed to be major or representative species. NMFS disapproved the section of the amendment that failed to provide either explicit EFH designations for the remaining managed species or a clear scientific justification for designating EFH based on species assemblages.

Using the EISs to Review and Revise Information Contained in the EFH Amendments

The EFH regulations at 50 CFR 600.815(a)(11) state that Councils and NMFS should periodically review and revise the EFH components of FMPs, including annual reviews as part of the annual Stock Assessment and Fishery Evaluation report, and a complete review at least once every 5 years. To the extent feasible, NMFS should use the new NEPA process as the vehicle for reviewing and revising the information contained in the original EFH FMP amendments. Such a review should include information regarding the description and identification of EFH, threats to EFH from fishing and non-fishing activities, and measures that could be taken to minimize those threats.

Additional Information and Assistance

Certain sections and information needs for the EISs will be common for the five Councils, so it would be efficient to have these common needs addressed once nationally and shared with the Regions for adaptation and inclusion in the EISs for each Council. Therefore, the Office of Habitat Conservation will draft an updated synopsis of available information regarding the effects of fishing on fish habitat, and will share that narrative with the Regions. Regions can then add regional information on the effects of fishing and tailor the text as needed to fit specific fisheries. The Office of Habitat Conservation also will draft a generic "purpose and need" section explaining the purpose of and need for the EISs, which Regions can adapt as appropriate. If Regions identify other portions of the EISs that will be common to all five Councils and could be written at a national level, they should contact the Office of Habitat Conservation.

Suggested Outline

A suggested outline for the EISs is attached. This outline is intended to convey the scope and content of the required EFH NEPA analyses, but it may need to be adapted to address any unique issues associated with particular Councils or fisheries. If the EFH issues will be handled through a broader NEPA analysis for a given fishery, the information in the outline can be combined with the outline for the broader EIS.

Questions

Please contact Jon Kurland in the Office of Habitat Conservation (301-713-2325) or Mary O'Brien in NOAA General Counsel (301-713-2231) with any questions regarding this guidance or compliance with the court order.

Attachment

SUGGESTED OUTLINE FOR THE NEW EFH EISs

Note: If the EFH information is being combined with a broader NEPA analysis of the fishery, this information could be combined with the outline for the broader EIS.

Executive Summary

1 Purpose and Need for Action

1.1 Specify the purpose and need for the action

1.2 Explain that the proposed action, and thus the scope of the EIS, is the development of the mandatory EFH provisions of the affected FMPs pursuant to section 303(a)(7) of the Magnuson-Stevens Act

1.3 Explain any other EAs/EISs, court orders, etc. influencing the scope

1.4 Explain the decisions that must be made, the organizations (e.g., Councils) involved in the NEPA analysis, and the possibility that FMP revisions could result from the EIS

1.5 Summarize the scoping process and explain the significant issues

- 1.5.1 EFH and HAPC designations
- 1.5.2 Minimizing the effects of fishing on EFH
- 1.5.3 Other issues

1.6 Preview the following chapters

2 Alternatives Including the Proposed Action

2.1 Describe the range of alternatives, including the preferred action, no action, and a reasonable range of other alternatives

- 2.1.1 EFH designations (for each alternative describe the methodology used, geographic scope, habitat types, etc.)
  - 2.1.1.1 Alternative 1
  - 2.1.1.2 Alternative 2
  - 2.1.1.3 Alternative 3
  - 2.1.1.4 Alternative 4
  - 2.1.1.5 Alternative 5
- 2.1.2 HAPC designations (for each alternative describe the methodology used, geographic scope, habitat types, etc.)
  - 2.1.2.1 Alternative 1
  - 2.1.2.2 Alternative 2
  - 2.1.2.3 Alternative 3
  - 2.1.2.4 Alternative 4
- 2.1.3 Minimizing the effects of fishing on EFH
  - 2.1.3.1 Alternative 1
  - 2.1.3.2 Alternative 2
  - 2.1.3.3 Alternative 3
  - 2.1.3.4 Alternative 4
  - 2.1.3.5 Alternative 5
  - 2.1.3.6 Alternative 6

2.2 Describe any other alternatives that were considered but eliminated from detailed study, and explain why they were not evaluated further
- 2.2.1 EFH designations
- 2.2.2 HAPC designations
- 2.2.3 Minimizing the effects of fishing on EFH

3 Affected Environment

3.1 Physical environment

3.2 Biological environment
- 3.2.1 Fishery resources
- 3.2.2 Threatened and endangered species and marine mammals
- 3.2.3 EFH for other fisheries
- 3.2.4 Other biological resources

3.3 Description of the fishery
- 3.3.1 Geographic extent
- 3.3.2 Number of vessels, types of gear used, etc.
- 3.3.3 Socioeconomic characteristics

3.4 Administrative context
- 3.4.1 How the fishery is managed under the FMP
- 3.4.2 Description of the EFH amendment to the FMP

3.5 General analysis of the effects of fishing on fish habitat
- 3.5.1 National and international studies and literature
- 3.5.2 Region-specific and fishery-specific information

4 Environmental Consequences

4.1 Comparison of alternatives for the designation of EFH
- 4.1.1 Alternative 1
  - 4.1.1.1 Description of the alternative
  - 4.1.1.2 Advantages and disadvantages of the alternative
  - 4.1.1.3 Consequences of the alternative
    - 4.1.1.3.1 Effects on the fishery
    - 4.1.1.3.2 Effects on other fisheries
    - 4.1.1.3.3 Effects on protected species
    - 4.1.1.3.4 Effects on non-fishing activities
    - 4.1.1.3.5 Other effects
- 4.1.2 Alternative 2 (with subsections as above)
- 4.1.3 Alternative 3 (with subsections as above)
- 4.1.4 Alternative 4 (with subsections as above)
- 4.1.5 Alternative 5 (with subsections as above)

4.2 Comparison of alternatives for the designation of HAPCs
- 4.2.1 Alternative 1
  - 4.2.1.1 Description of the alternative
  - 4.2.1.2 Advantages and disadvantages of the alternative
  - 4.2.1.3 Consequences of the alternative
    - 4.2.1.3.1 Effects on the fishery
    - 4.2.1.3.2 Effects on other fisheries