

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 648**

[I.D. 011399A]

Fisheries of the Northeastern United States; Northeast Monkfish Fishery; Amendment 1 to the Monkfish Fishery Management Plan (FMP) to Designate Essential Fish Habitat (EFH) for Monkfish

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

ACTION: Approval of Amendment 1 to the Monkfish FMP.

SUMMARY: NMFS announces that the Secretary of Commerce (Secretary) has approved Amendment 1 to the Monkfish FMP. This amendment was prepared jointly by the New England Fishery Management Council (NEFMC) and the Mid-Atlantic Fishery Management Council (MAFMC). This amendment implements the requirements of section 303(a)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The amendment describes and identifies EFH for the monkfish fishery, discusses measures to address the effects of fishing on EFH, and identifies other actions for the conservation and enhancement of EFH.

DATES: Amendment 1 to the Monkfish FMP was approved on April 22, 1999.

ADDRESSES: Copies of the amendment and the Environmental Assessment (EA) are available from the Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906-1036.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:**Background**

Amendment 1 to the Monkfish FMP is part of an omnibus amendment for EFH, which also includes Amendment 11 to the Northeast Multispecies FMP, Amendment 9 to the Atlantic Sea Scallop FMP, and Amendment 1 to the Atlantic Salmon FMP. Because of the additional time required for coordination with MAFMC, the monkfish FMP amendment was considered for Secretarial approval in an action separate from these other

amendments, which were approved on March 3, 1999. The omnibus amendment also includes the EFH components of the Atlantic Herring FMP that is being developed by the NEFMC. The EFH information for Atlantic herring will be incorporated by reference into the Atlantic Herring FMP when that FMP is submitted for Secretarial approval. An EA is also included with the Monkfish Amendment 1.

Monkfish Amendment 1 was prepared by the NEFMC and MAFMC to satisfy the EFH mandates of the Magnuson-Stevens Act. The amendment designates EFH in waters of the United States for monkfish. Public comments were invited on Monkfish Amendment 1 from January 22, 1999 (64 FR 3480), through March 23, 1999. NMFS has determined that the amendment is consistent with the Magnuson-Stevens Act and other applicable laws, and approved it on April 22, 1999. Additional information on this action is contained in the January 22, 1999, Notice of Availability (64 FR 3480).

Upon initial consideration, it appeared that regulations to implement the amendment were not required. However, further consideration identified that implementing regulations are required to codify the framework specifications for designating EFH and Habitat Area of Particular Concern for the Monkfish FMP. A rulemaking to promulgate these regulations will be initiated in the near future.

Comments and Responses

Two letters were received during the comment period.

Comment 1: One commenter provided extensive comments on technical aspects of the amendment's discussion of potential impacts to EFH from oil, gas, and mineral extraction, and the recommended conservation and enhancement measures dealing with these activities.

Response: NMFS appreciates the detailed comments that were provided, and has forwarded them to the Councils for future reference.

Comment 2: Another commenter considered the amendment to be overly broad and exceeding the intent of Congress. The commenter specifically cited the breadth of EFH designation, noting that EFH appeared to be designated over the range of the species, and in estuarine waters. The commenter stated that the Councils' methodology for designating EFH based on the highest relative density of monkfish was arbitrary.

Response: The Magnuson-Stevens Act defines EFH as those waters and

substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. Therefore, the geographic scope of EFH must be sufficiently broad to encompass the biological requirements of the species. The information that the Councils used for EFH designation was primarily species distribution and relative abundance data, which would be classified as "level 2" information under the EFH regulations (50 CFR 600.815). Since the information available was not more specific (e.g., did not show species production by habitat type), the approach prescribed by the regulations led to fairly broad EFH designations. The EFH regulations at 50 CFR 600.10 interpret the statutory definition of EFH to include aquatic areas that are used by fish, including historically used areas, where appropriate, to support a sustainable fishery and the managed species' contribution to a healthy ecosystem, provided that restoration is technologically and economically feasible. The Councils' EFH designation is consistent with these requirements. EFH for monkfish was not designated in estuarine waters.

The specific methodology used by the Councils for designating EFH was based on the highest relative density of monkfish. This methodology was developed by scientists at the NMFS Northeast Fisheries Science Center, and is supported by scientific research and ecological concepts that show that the distribution and abundance of a species or stock are determined by physical and biological variables. The abundance of a species is higher where conditions are more favorable, and this tends to occur near the center of a species' range. As population abundance fluctuates, the area occupied changes. At low levels of abundance, populations are expected to occupy the habitat that maximizes their survival, growth, and reproduction. As population abundance increases, individuals move into other available habitats. NMFS and the Council have developed a management regime designed to increase the population of monkfish. The broad EFH designation for monkfish is intended to include habitat essential for the species' long-term well-being.

Comment 3: A commenter stated that the conservation and enhancement recommendations for non-fishing impacts to EFH that are provided in the amendment are not based on the best available science, nor sufficiently supported. The commenter contends that the recommended measures do not take into consideration current practices, and are likely to be in conflict with measures being pursued under

other regulatory programs. The commenter also stated that the Magnuson-Stevens Act did not empower the Councils to address non-fishing activities.

Response: NMFS disagrees that the conservation and enhancement recommendations for non-fishing impacts to EFH are not based on the best available science. The information presented in this section of the amendment is well researched and substantiated by the best available information. Moreover, the commenter did not provide examples of specific information not considered by the Councils.

Conservation and enhancement recommendations for non-fishing industries were included to satisfy the requirements of section 303(a)(7) of the Magnuson-Stevens Act to "identify other actions to encourage the conservation and enhancement of [EFH]." This information is provided to assist non-fishing industries in avoiding impacts to EFH. The recommendations are neither posed as, nor meant to be, binding in nature. It is up to the discretion of the non-fishing industries and relevant regulatory agencies whether these recommendations are implemented.

Additionally, under section 305(b) of the Magnuson-Stevens Act, NMFS is required and the Councils are authorized to make conservation recommendations to any Federal or state agency regarding any activity that would adversely affect EFH. Moreover, Federal agencies are required to respond to these recommendations in writing.

Comment 4: A commenter stated that the amendment contains no meaningful threshold of significance or likelihood of adverse effect on habitat for non-fishing impacts. The commenter suggested that the consultation and conservation recommendation provisions of the Magnuson-Stevens Act will be burdensome and unworkable. The commenter also contended that the consultation procedures will be redundant with the National Environmental Policy Act (NEPA), costly, and time consuming.

Response: The Magnuson-Stevens Act requires Federal action agencies to consult with NMFS on activities that may adversely affect EFH. Adverse effects, as defined at 50 CFR 600.810(a), means any impact that reduces the quality and/or quantity of EFH. Adverse effects may include, for example, direct effects through contamination or physical disruption, indirect effects such as loss of prey or reduction in species fecundity, and site-specific or habitat-wide impacts, including

individual, cumulative, or synergistic consequences of actions. Only actions that have a reasonably foreseeable adverse effect require consultation.

Consultations are not likely to be redundant or inefficient. The EFH regulations provide for streamlined consultation procedures, such as general concurrences and abbreviated consultations, that may be used when the activities at issue do not have the potential to cause substantial adverse effects on EFH. The EFH consultation requirements will be consolidated with other existing consultation and environmental review procedures wherever appropriate. This approach will ensure that EFH consultations do not duplicate other environmental reviews, yet still fulfill the statutory requirement for Federal actions to consider potential effects on EFH.

Comment 5: A commenter stated that the amendment generally failed to address the potential for significant adverse impacts of this amendment on non-fishing entities, specifically citing the requirements of NEPA and the Regulatory Flexibility Act (RFA).

Response: The conservation and enhancement recommendations outlined in the amendment include a review of suggested measures for municipal, state, and Federal agencies and other organizations for the conservation and enhancement of EFH. As stated earlier, these recommendations are non-binding. Any regulatory action that may reflect these recommendations will be subject to the analysis and public review required by state or Federal law, which will be the appropriate vehicle for consideration of impacts to both fishing and non-fishing entities.

In the EA included with the amendment, the Council found, and NMFS concurs, that there will be no significant impacts on the human environment as a result of this amendment. The EFH regulations and NOAA policy require that NMFS coordinate EFH consultations with other consultation and commenting requirements under environmental review procedures currently in place. This will eliminate duplication and ensure a workable review process. The analytical requirements of the RFA apply only to regulatory actions for which notice and comment rulemaking is required under the Administrative Procedure Act or another statute. The requirements of the RFA do not apply to the approval of this amendment, since a proposed rule has not been developed.

Comment 6: A commenter charged that the amendment does not address

Magnuson-Stevens Act national standards 1 (overfishing), 2 (best available scientific information), and 7 (unnecessary duplication).

Response: As a part of the Council's omnibus EFH amendment, Monkfish Amendment 1 was intended to address only habitat issues, including the EFH mandate of the Magnuson-Stevens Act. The recently approved (March 3, 1999) Monkfish FMP includes the necessary provisions to satisfy national standard 1. Since Amendment 1 does not detract from nor negate the overfishing discussion and measures implemented in the Monkfish FMP, it is consistent with national standard 1.

The amendment was developed with significant input from scientists of the NMFS Northeast Fisheries Science Center and is based upon the best scientific information available. In the strategic plan portion of the amendment, the Councils have clearly stated their commitment to updating the amendment as new information becomes available. NMFS finds the amendment consistent with national standard 2.

The commenter does not elaborate upon its assertion that the amendment violates national standard 7, so NMFS assumes, for the purpose of responding to this comment, that the commenter is alleging that the EFH consultation process is duplicative of other federally required consultation processes. NMFS has determined that the EFH amendment is consistent with the Magnuson-Stevens Act, including national standard 7. Inter-agency consultations on Federal activities that may adversely affect EFH are required by the Magnuson-Stevens Act; they are not optional. Section 305(b)(2) of the Magnuson-Stevens Act states: "Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act."

Existing Federal statutes such as the Fish and Wildlife Coordination Act, the Endangered Species Act, and NEPA already require consultation or coordination between NMFS and other Federal agencies. As explained above, EFH consultations will be conducted to the greatest extent possible under existing review processes and within existing process time frames. NMFS is committed to a consultation process that will be effective, efficient, and non-duplicative. The EFH regulations at 50 CFR Part 600.920 suggest that NMFS be consulted as early as possible in project planning so that appropriate

conservation measures can minimize the potential for adverse effects to EFH. The amendment contains conservation recommendations that are appropriate for many Federal actions, and they can also serve as guidelines that should be considered during project planning.

Comment 7: A commenter stated that the amendment avoided discussion of fishing impacts to EFH.

Response: The Councils approached the evaluation of impacts from fishing gears methodically. It identified the major gears used in the region based on landings; described the major gears; identified that otter trawls and scallop dredges were the most likely to have adverse impacts on habitat; appended a

summary of the literature on fishing gear impacts to habitat; and described other impacts from fishing activities such as the impacts of fishing-related marine debris and lost gear, impacts of aquaculture, and impacts of at-sea fish processing. The Councils also evaluated fisheries management measures currently in place and assessed their impact on EFH. Finally, the Councils identified a number of areas that required further research in order to provide a better basis for determining fishing gear impacts, such as the spatial distribution and extent of fishing effort for gear types; the effects of specific gear types along a gradient of effort on specific habitat types; and recovery rates

of various habitat types following fishing activity. Although the commenter may disagree with the manner in which the information was presented, NMFS concludes that the Councils satisfied the requirements of the Magnuson-Stevens Act and the EFH regulations (50 CFR 600.815(a)(3)) regarding the assessment of fishing gear impacts.

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

Dated: June 11, 1999.

Gary C. Matlock,

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

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