Through this notice, the Coast Guard asks for comments and information related to the following questions:

- What other factors should be considered in determining the amount of potable water that should be available on a vessel?
- What design practices and policies are used for potable water systems on vessels?
- Are periodic water tests conducted on U.S. vessels to determine continued potability?
- What protocols or test methods are being used and who is conducting the testing?
- What industry standards could be applied to the design and testing of potable water systems on vessels?
- Should the Coast Guard consider incorporating the International Organization for Standardization (ISO)standards 15748–1 on Ships and marine technology—Potable water supply on ships and marine structures—Part 1: Planning and Design and 15748–2 on Ships and marine technology—Potable water supply on ships and marine structures—Part 2: Method of calculation?

ISO standards 15748–1 and 15748–2 have not been put into the public docket because they are protected by copyright. These standards are available for purchase through the International Organization for Standardization, 1, rue de Varembé, Case postale 56, CH–1211 Geneva 20, Switzerland. These standards may also be viewed at U.S. Coast Guard Headquarters. Please call or e-mail Mr. Craig Burch, U.S. Coast Guard Office of Design and Engineering Standards, telephone 202–267–2206, e-mail *cburch@comdt.uscg.mil* to schedule an appointment.

Authority: 46 U.S.C. 3305, 46 U.S.C. 3306, Department of Homeland Security Delegation No. 0170.1.

Dated: June 27, 2005.

Howard L. Hime,

Acting Director of Standards, Marine Safety, and Environmental Protection.

[FR Doc. 05–13074 Filed 7–8–05; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 040517149–5173–03; I.D. 050304C]

Petition for Emergency Rulemaking to Protect Deep-Sea Coral and Sponge Habitat from Mobile Bottom-Tending Fishing Gear Under the Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Provisions

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

ACTION: Petition for rulemaking; denial of emergency action.

SUMMARY: NMFS announces its decision on a petition for rulemaking under the Administrative Procedure Act (APA). Oceana, a non-governmental organization (NGO), petitioned the U.S. Department of Commerce to promulgate immediately a rule to protect deep-sea coral and sponge (DSCS) habitat from the impacts of mobile bottom-tending fishing gear. NMFS finds that the petitioned emergency rulemaking is not warranted. NMFS will work actively with each Regional Fishery Management Council (Council) to evaluate, and take action where appropriate to protect DSCS and may pursue future rulemakings to protect DSCS in specific locations based on analyses for specific fisheries. Additionally, NMFS plans to develop a strategy to address research, conservation, and management issues regarding DSCS habitat, which eventually may result in rulemaking for some fisheries.

ADDRESSES: Copies of NMFS decision on the Oceana petition are available from Tom Hourigan, NMFS Coral Reef Coordinator, Office of Habitat Conservation, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301–713–3459 ext. 122. NMFS decision on the Oceana petition is available via internet at: *http://www.nmfs.noaa.gov/habitat/habitatconservation/DSC_petition*.

FOR FURTHER INFORMATION CONTACT: Tom Hourigan, NMFS Coral Reef Coordinator; telephone: 301–713–3459 Ext. 122; e-mail: *Tom.Hourigan@noaa.gov*.

SUPPLEMENTARY INFORMATION: NMFS published a notice of receipt of petition for rulemaking on June 14, 2004 (69 FR 32991) and invited public comments for 60 days ending August 13, 2004. NMFS reopened the comment period on August 31, 2004 (69 FR 53043) to allow for more time to comment. This comment period ran 45 days, concluding on October 15, 2004. NMFS received 16 letters from interest groups including 6 Councils, commercial fishermen, fisheries organizations, a Federal agency, environmental groups, and other interested individuals. NMFS also received more than 32,000 form letters of similar content and two lists of signatures from interested members of the general public. Summaries of and responses to comments are provided under the Public Comments section below.

The Petition

The petition filed by Oceana sought rulemaking to protect DSCS habitat. This petition states that DSCS habitat comprises long-lived, slow-growing organisms that are especially vulnerable to destructive fishing practices, such as the use of mobile bottom-tending fishing gear and claims that without immediate protection, many of these sensitive DSCS habitats will suffer irreparable harm.

The petition cites specific legal responsibilities of NMFS for EFH and HAPCs under the Magnuson-Stevens Act and the EFH regulatory guidelines at 50 CFR 600, subparts J and K, and concludes that NMFS must: identify and describe DSCS habitat as EFH; designate some, if not all, of these habitat types as HAPCs; take appropriate measures to minimize to the extent practicable adverse fishing effects on this EFH; and protect such habitat from other forms of destructive activity. The petition gives a short overview of known DSCS habitat in regions off the mainland United States, including areas known in the North Pacific, Pacific, Northeast and Mid-Atlantic, Southeast, and Gulf of Mexico fishery management regions. The petition asserts that DSCS habitat satisfy the definition of EFH in the Magnuson-Stevens Act and concludes that such areas must be identified and described as EFH under the relevant FMPs. In addition, the petition states that DSCS habitat should be identified as HAPCs because it meets the definition of HAPC and satisfies one or more of the criteria set forth in the EFH guidelines for creating HAPCs. Further, the petition argues that the Magnuson-Stevens Act requires NMFS to protect areas identified as EFH and HAPC and that such protection, as articulated in the petition, is ''practicable.'' Finally, the petition asserts that the Magnuson-Stevens Act requires the Secretary and the Councils to develop FMPs

specifically for the protection of DSCS, if existing FMPs cannot provide the means for protecting such habitats.

The petition specifically requests that NMFS immediately initiate rulemaking to protect DSCS habitats in the U.S. Exclusive Economic Zone (EEZ) by taking the following measures:

1. Identify, map, and list all known deep-sea coral and sponge areas containing high concentrations of deep-sea coral and sponge habitats;

2. Designate all known areas containing high concentrations of deep-sea coral and sponge habitat as both EFH and 'habitat areas of particular concern' (HAPC) and close these HAPC to bottom trawling;

3. Identify all areas not fished within the last three years with bottom-tending mobile fishing gear, and close these areas to bottom trawling;

4. Monitor bycatch to identify areas of deep-sea coral and sponge habitat that are currently fished, establish appropriate limits or caps on bycatch of deep-sea coral and sponge habitat, and immediately close areas to bottom trawling where these limits or caps are reached, until such time as the areas can be mapped, identified as EFH and HAPC, and permanently protected;

5. Establish a program to identify new areas containing high concentrations of deep-sea coral and sponge habitat through bycatch monitoring, surveys, and other methods, designate these newly discovered areas as EFH and HAPC, and close them to bottom trawling;

6. Enhance monitoring infrastructure, including observer coverage, vessel monitoring systems, and electronic logbooks for vessel fishing in areas where they might encounter high concentrations of deep-sea coral and sponge habitat (including encountering HAPC);

7. Increase enforcement and penalties to prevent deliberate destruction of deep-sea coral and sponge habitat and illegal fishing in already closed areas; and

8. Fund and initiate research to identify, protect, and restore damaged deep-sea coral and sponge habitat.

The exact and complete assertions of legal responsibilities under Federal law are contained in the text of Oceana's petition, which is available via internet at the following NMFS web address: *http://www.nmfs.noaa.gov/habitat/habitatconservation/DSC__petition/Oceana/HAPC__Coral__Petition.pdf*. Copies of this petition also may be obtained by contacting NMFS at the address provided above.

Agency Decision

After carefully considering the petition and all public comments, NMFS has determined that the measures requested by the petition do not require specific rulemaking at this time. NMFS has determined that certain fishing practices, especially mobile bottom-tending gear (defined by Oceana as including dredges, beam and otter trawls, and other mobile fishing gear that is dragged along the ocean floor), may adversely affect DSCS and the communities that depend upon them and that this issue is important to address, but that it does not represent an emergency as defined in the Magnuson-Stevens Act 16 U.S.C 1855(c)(1). Absent Council request, the Secretary has the discretion to issue emergency regulations when an ''emergency exists.'' This discretion however is limited to only urgent or special circumstances. DSCS areas within the existing mobile bottom-tending gear footprint, and any areas not impacted or areas threatened by future fishery expansion can be addressed through current or future Council rulemaking processes. Thus, the DSCS conservation issue outlined by the petition is not an immediate and urgent threat to the fishery resource. Furthermore, emergency rulemaking by the Secretary substantially limits the participation of the public and other interested parties in the rulemaking process. In fact, the Magnuson-Stevens Act and the APA make it clear that the full scope of public participation and comment must generally be permitted. As such, even controversial actions with serious economic effects should be conducted through typical notice and comment rulemaking. In this instance, the perceived immediate benefits from emergency action do not outweigh the value of advance notice, public comment and deliberative consideration of the impacts of the requested action on the interested parties (62 FR 44421, *NMFS Policy Guidelines for the Use of Emergency Rules*).

Given the nature of the issues raised by the Oceana and the need for additional information, the agency intends to follow the normal rulemaking process in the event that rulemaking is warranted thereby involving the various stakeholders, providing an open forum for scientific review and addressing the potential impacts on the affected communities. The previous actions undertaken by NOAA, NMFS and the eight Councils have addressed or are in the process of addressing many DSCS protection issues that are covered under the Magnuson-Stevens Act. However, it is unclear whether DSCS qualifies as EFH for Federally managed species in all regions and additional research is needed to determine the connection between DSCS and those species. In addition, other factors besides mobile bottom-tending fishing gear should be evaluated in assessing all impacts on DSCS. DSCS damage may result from other types of fishing gear and/or other natural environmental stressors. DSCS bycatch information also differs amongst regions, and less is known about using bycatch data to indicate the presence of important DSCS communities. DSCS research, conservation, and management issues vary amongst regions, and are best addressed through a regional ecosystem approach to management.

Instead of emergency rulemaking, NMFS will enhance its pursuit of a regional approach working through existing regulatory processes to address the conservation and management of these resources. The effectiveness of this approach has been demonstrated by recent actions of several Councils to protect DSCS resources. In cases where the best available science indicates that action should be taken under the Magnuson-Stevens Act to conserve and enhance DSCS habitat and reduce DSCS bycatch, NMFS will work with the appropriate Council(s) to minimize adverse effects from fishing to the extent practicable.

In addition to the emergency rulemaking aspect of the petition's requests, NMFS has considered the petitioner's eight requested measures as well as other aspects of the petition and has instead adopted an approach to address DSCS issues that will be formalized in a National DSCS Conservation and Management Strategy. A description of the National strategy, the public comments to the petition, and the responses to those comments appear below.

Decision on the Eight Requested Measures

Measure 1. NOAA will continue (and, within budget constraints, expand) research efforts to identify and map the location of areas containing high concentrations of structure-forming deep-sea corals (also known as cold-water or deep-water corals). Known areas will be discussed in the NOAA report, *Status of Deep-Coral Communities of the United States*, which is planned for publication in late 2005 or early 2006. Current mapping and research efforts are being undertaken through partnerships between NOAA and the U.S. Geological Survey (USGS), Minerals Management

Service (MMS), the Councils, and several academic institutions. These mapping efforts are ongoing and involve exploration of new areas and synthesizing existing data for deep-sea coral maps. Information included in these maps, any relevant documents, and the maps themselves, may be found on web pages managed by the participating agencies and Councils. NOAA deep-sea coral maps will be made available to the public. Subsequent mapping activities will expand these efforts to include deep-sea sponges, about which less is currently known.

Measure 2. NOAA will continue to support the Councils by providing information on DSCS location and function as potential habitat for Federally managed species. NMFS will encourage Councils in each region to use all available information to describe and identify such EFH, and to identify specific areas as HAPCs where appropriate. In regions where DSCS are described and identified as EFH/HAPCs, NMFS will work proactively with the appropriate Council(s) to minimize adverse effects from fishing to the extent practicable, including consideration of additional closures to mobile bottom-tending gear and other bottom-tending gear as appropriate.

Measure 3. NMFS will work with each Council, using the best available information, to identify areas that have not been subject to mobile bottom-tending gear in the past 5 to 10 years, and that may therefore include undamaged DSCS communities. NMFS will work with each Council to minimize to the extent practicable adverse fishing effects on DSCS identified and described as EFH, to minimize DSCS bycatch to the extent practicable where bycatch is a concern, and to sustain DSCS that are treated as Federally managed species in FMPs. Furthermore, NMFS will work with each Council to evaluate and take action, where applicable, to prevent or prohibit expansion of mobile bottom-tending gear into new areas that may support substantial DSCS, until NMFS has determined through necessary discovery, mapping, and research that such fishing activities would not be likely to damage major DSCS habitats. NMFS believes taking proactive measures to restrict the mobile bottom-tending gear footprint on a regional basis may be the best way to comprehensively protect DSCS EFH and prevent DSCS bycatch while minimizing adverse economic impacts on the fishing industry.

Measure 4. NMFS will work with the Councils through existing bycatch monitoring and observer programs to increase monitoring of DSCS bycatch. NMFS will recognize DSCS as a specific component of the NMFS National Bycatch Strategy and will need to evaluate current standardized bycatch reporting methodology for inclusion of DSCS bycatch reporting methodologies. NMFS will explore the feasibility of using bycatch as a practical indicator of the presence of important DSCS communities. NMFS is not convinced that deep-sea coral bycatch caps will work to protect deep-sea corals, as fishing would inevitably be allowed to impact deep-sea corals until a certain threshold is met. Specifying a threshold would be difficult to relate to sustainable resource management of deep-sea corals. The bycatch of deep-sea sponges has not been well analyzed and the resilience of their communities to fishing gear impacts is very poorly understood.

Measure 5. NMFS will work with the Councils through existing bycatch monitoring and observer programs to increase monitoring of DSCS bycatch, and encourage Councils to consider whether such information is sufficient to identify closure areas to protect EFH/HAPCs and avoid bycatch if appropriate.

Measure 6. NMFS agrees that enhanced monitoring is beneficial to the fishing community, the fishery, and the marine environment. NMFS will continue to work within budget constraints with other agencies and Councils to enforce existing closure areas and any new closure areas related to DSCS.

Measure 7. NMFS Office for Law Enforcement (OLE) is researching and testing other viable ways (e.g., joint enforcement agreements with state counterparts and satellites) to help enforce fishery compliance with all fisheries regulations, including DSCS closure areas. NMFS OLE will continue to work with various NOAA and NMFS divisions, the Councils, NOAA General Counsel, and the U.S. Attorney's Office to determine the appropriate prosecution method and penalties for any fishery regulation offense.

Measure 8. NOAA will continue to survey, research, and protect DSCS habitat within budget constraints. NOAA currently makes available to the public a detailed description of selected expeditions conducted through NOAA's Ocean Exploration Program on DSCS at the following website: http://oceanexplorer.noaa.gov/. NOAA also has funded a pilot research project to examine the potential for coral restoration in the *Oculina* Research Reserve, one of the shallowest deep-sea coral habitats. However, NOAA is not convinced that restoration of most deep-sea coral and sponge habitats is practical, cost-effective, or possible, and has no plans to fund or initiate restoration research beyond the existing pilot at this time.

National Deep-Sea Coral and Sponge Conservation and Management Strategy

NOAA has determined that an agency strategy is needed to effectively and efficiently address DSCS habitat issues. The primary goal of this strategy would be to improve research, conservation, and management of DSCS communities, while balancing long-term uses of the marine ecosystem with maintenance of biodiversity.

NOAA will continue research and mapping of DSCS and work proactively with the Councils and through the NOAA National Ocean Service (NOS) National Marine Sanctuary Program (NMSP) to take near-term steps to meet this goal while developing the broader strategy. Conservation and management actions should at least address the following two objectives: (1) enhance the long-term sustainability of economic use in areas already impacted by fishing gear or other stressors, and (2) conserve DSCS in habitat areas relatively undisturbed by mobile bottom-tending gear until it is determined that such fishing gear activity will not damage DSCS in those areas.

The NOAA strategy will:

1. Develop measurable objectives to meet the national DSCS conservation goal stated above and assess progress toward meeting the goal.

2. Develop regional implementation plans for mapping, monitoring, research, and management initiatives.

3. Encourage education and outreach efforts among fishery managers, scientists, fishermen, and other stakeholders.

4. Use existing partnerships and develop new international approaches to protect DSCS communities.

5. Identify funding needs to implement short-, mid-, and long-term deliverables in support of a NOAA National Strategy.

Managing bycatch and habitat impacts of existing fisheries: The first component of the NOAA DSCS conservation and management strategy will involve the preparation of a DSCS conservation and management report in consultation with the Councils. This report will use the peer reviewed scientific report, *Status Report of Deep-Coral Communities of the United States*, as well as other appropriate information sources, and include the following information: (1) definitions of DSCS to

encourage consistent use of terminology for management purposes; (2) identification of known DSCS areas/communities of concern within the U.S. EEZ; (3) maps of known DSCS areas, fishing effort, and DSCS bycatch; and (4) characterization of bycatch of DSCS and inclusion of DSCS as a specific component of NMFS National Bycatch Strategy. NOAA will invite public comment on the report. Based on information from this conservation and management report and other appropriate information sources, NMFS will work with each Council to evaluate and take appropriate protective action, if new fishery management actions appear to be warranted under the Magnuson-Stevens Act to address fishing impacts. NOAA will also incorporate information regarding the presence of DSCS areas into its management of the National Marine Sanctuaries. The NMSP will, as appropriate, direct necessary management actions to the increased protection of these areas, including where warranted, issuing additional regulations to enhance that protection.

Managing potential expansion of fisheries using mobile bottom-tending gear beyond current areas: The second component of the NOAA DSCS conservation and management strategy will be to identify areas in each Council region that have not been subject to mobile bottom-tending gear in the past 5 to 10 years and that may be reasonably expected to contain DSCS resources that are vulnerable to impacts by this fishing gear. These areas will be identified in the DSCS conservation and management report if sufficient information is available. Based on this information, NMFS will work with each Council to evaluate and take action, where appropriate, to prevent or prohibit expansion of mobile bottom-tending gear into new areas that may support substantial DSCS, until NOAA has determined through necessary discovery, mapping, and research that such fishing activities would not be likely to damage DSCS habitats in these areas.

Research, monitoring, and additional management activities: The third component of the NOAA DSCS conservation and management strategy will be to identify DSCS research and management gaps and for NOAA and the Councils to develop regional implementation plans for mapping, monitoring, research, and additional management actions, where applicable. Plans will also include recommendations for expanding education and outreach activities. These plans will be integrated as appropriate with current efforts to map, monitor, conduct research, and conserve other NOAA trust living marine resources and their habitats. These plans should carry out the objectives and strategies identified in the above report for addressing the NOAA DSCS conservation and management goal. The timing of the actual implementation of these plans will vary, depending on rulemaking schedules as well as resources.

Additional components of the strategy may address needs and opportunities to expand international conservation partnerships and identify funding needs to implement short-, mid-, and long-term deliverables in support of the strategy.

Accomplishments and Ongoing Activities

Activities currently undertaken by NOS NMSP, NMFS regional offices and science centers, NOAA Oceanic and Atmospheric Research (OAR) Office of Ocean Exploration (OE) and National Undersea Research Program (NURP), and the Councils have addressed or are in the process of addressing many of the petition's requested measures outlined above. These activities promote deep-sea coral conservation, scientific research, technical reports, establishment of marine protect areas, sanctuaries, closed areas, HAPC designations, and prohibitions on gear types used near DSCS.

1. NOAA Activities

Scientific Research

NOAA continues to conduct DSCS research nationally, spanning all coastal regions of the United States (Southeast, Northeast, Southwest, Northwest, Alaska, and Pacific Islands). NOAA recently completed an internal document, *Profiles of NOAA Deep-Sea Coral Activities*, that contains an inventory of recent and upcoming DSCS projects from each program. The NOAA offices and partners involved in the DSCS research effort to date include NMSP, NURP, OE, and the NMFS Science Centers. Most of these programs have completed projects/cruises that include mapping, monitoring and ecological studies of DSCS during FY 2003–2004 and have detailed long-term research plans for the future. These programs have also collaborated with other Federal agencies, state and local territories, private organizations, contractors, institutions, universities, and foreign government agencies to improve coordination of DSCS research efforts. The NOAA profiles document on deep-sea coral research is an evolving document with periodic updates and will be made public at a later date.

International Planning

Scientifically, the United States supports and participates in international efforts to assess and, where appropriate, help conserve vulnerable cold-water ecosystems and habitat. NOAA has worked with Canada, Norway, Sweden, Germany, Belgium, the United Kingdom, and Ireland to convene scientific workshops and conduct DSCS research. These relationships have identified critical research and management needs for DSCS in the Atlantic, led to development of objectives for conducting at-sea investigations, and fostered agreement on objectives for processing and sharing the data collected to meet shared needs. In addition, the workshops provided a platform to begin development of an International, Trans-Atlantic Expedition to explore and research DSCS communities of the Gulf Stream, from the Gulf of Mexico to Northern Europe. OAR OE and NURP currently are conducting several cruises off the U.S. East Coast that involve European partners, primarily in terms of acquiring and sharing data and information to help meet critical deep-sea coral community research objectives outlined during the international workshop in Galway. OE is currently funding several expeditions in international waters that include international partners in the Pacific and Atlantic Oceans. NOAA is also a co-sponsor of the upcoming Third International Symposium on Deep-Sea Corals. NOAA will continue to support these research efforts within budget constraints.

NMFS Observer Program

The NMFS Observer Program currently records most DSCS bycatch landed by U.S. fishing vessels having observer coverage in the EEZ. The degree of DSCS bycatch species identification varies by region, but the weight of DSCS bycatch in sampled tows is recorded in every region where DSCS are caught. In the Alaska region, observers separate coral species in the genus *Primnoa* from the rest of the coral bycatch (a category in the observer database that includes soft and hard corals as well as bryozoans, which are not corals). *Primnoa* species and the remaining coral bycatch are weighed separately and recorded. Deep-sea sponge bycatch is categorized as invertebrate or sponge and weighed. In the Northwest regions, observers identify deep-sea coral species to the

lowest practical taxonomic level, calculate the total weight of deep-sea coral bycatch, and collect specimens for later identification in the laboratory. Deep-sea sponge bycatch is categorized and weighed. DSCS bycatch data is not collected in the U.S. Pacific Islands region because trawls, dredges, and bottom-set longlines and gillnets are not allowed. The Southwest Region does not collect DSCS bycatch because the pelagic fisheries with observer coverage do not use fishing methods that impact bottom habitat. In most observer programs in the Southeast region and all observer programs in the Northeast region, deep-sea coral bycatch is weighed and recorded. Deep-sea sponge bycatch is categorized and the weight is estimated or an actual amount in the Northeast. Deep-sea sponge bycatch in the Southeast is listed as invertebrate when monitoring bycatch reduction devices, and listed as sponge and weighed during bycatch characterization trips.

In summary, the NMFS Observer Program is collecting information on both the presence and weight of most deep-sea coral and some deep-sea sponge bycatch caught by U.S. fishing vessels having observer coverage, but there are regional differences in the level of observer coverage and the level of DSCS species identification conducted by observers. NOAA is evaluating methods to increase the efficiency and effectiveness of DSCS bycatch reporting methodologies.

2. Regional Fishery Management Council Activities

New England Council

On April 28, 2005, (70 FR 21927) NMFS approved the New England and Mid-Atlantic Council actions to close *Lydonia* and Oceanographer Canyon areas off Georges Bank to monkfish days-at-sea vessels. This action was taken to minimize to the extent practicable adverse effects on EFH from monkfish fishing. These protective canyon closures prohibit monkfish bottom trawl and gillnet gear from impacting hard-bottom, deep-water habitat found in the canyons, which is important to many fish species and also home to vulnerable deep-sea corals. The actions, which were effective immediately, also limit monkfish roller trawl gear to 6 inches in the Southern Fishery Management Area to ensure that fishing vessels avoid complex habitat, particularly in other offshore canyons that contain important deep-water habitats.

The New England Council published a Notice of Intent on February 24, 2004, (69 FR 8367) to prepare a programmatic environmental impact statement (EIS) and Omnibus EFH Amendment that will apply to all Council-managed FMPs. The amendment will identify and implement mechanisms to protect, conserve, and enhance the EFH and define metrics for achieving the requirements to minimize adverse impacts to the extent practicable. The Council is reviewing proposals for HAPC and Dedicated Habitat Research Area designations (70 FR 15841). This amendment will holistically address the protection of vulnerable EFH across all New England Council FMPs. The New England Council may evaluate whether protective measures in addition to Monkfish FMP deep-sea coral protection measures are necessary as part of this comprehensive approach.

Mid-Atlantic Council

The Mid-Atlantic Council shares management responsibility for the Monkfish FMP with the New England Council. The gear modification mentioned above ensures that Mid-Atlantic fishing vessels avoid complex habitat, such as offshore canyons that may contain DSCS. These deep areas of the continental shelf and submarine canyons contain DSCS. In addition, the Mid-Atlantic Council has just begun the development of Tilefish Amendment 2. As part of this process, the Council will review any new information related to tilefish EFH and HAPC as well as habitat protection measures.

South Atlantic Council

The South Atlantic Council established a 315–km^2 area, the *Oculina* Habitat of Area of Particular Concern (HAPC), in 1984, and prohibited trawling, bottom longlines, dredges, and fish traps. Further management measures prohibiting anchoring or use of grapples in the *Oculina* HAPC were approved later. A subset of the *Oculina* HAPC was established as a Research Reserve in 1994, known as the *Oculina* Experimental Closed Area (OECA). The OECA was one of the first deep-sea coral banks in the world to receive protection. All restrictions within the larger HAPC apply within the OECA. The area was closed in order to evaluate the effectiveness of the reserve for the management and conservation of reef fish, namely the recovery of their populations and grouper spawning aggregations. The Council designated the *Oculina* HAPC under the Magnuson-Stevens Act EFH provisions in 1999. In 2000 the South Atlantic Council expanded the *Oculina* HAPC to 1029 km^2. In 2003, vessel monitoring systems (VMS) were required for all rock shrimp fishing vessels in the South Atlantic region, to enhance surveillance and enforcement of the *Oculina* HAPC (68 FR 2188).

The South Atlantic Council is developing a regional coral and benthic habitat geographic information system (GIS) of shallow and deep-water areas. This information will support a proposed South Atlantic Council fisheries ecosystem plan (FEP). The South Atlantic FEP may represent a future vehicle for achieving additional protections for DSCS habitat; however, FEP development will take several years. The Council recently proposed 10 deep-water coral HAPC areas, some of which contain deep-water sponges, to be considered in the development of its FEP (69 FR 60363). Action to establish the HAPC designation will be taken through the Comprehensive Fishery Ecosystem Plan Amendment.

Gulf of Mexico Council

The Gulf Council published a record of decision (ROD) on July 29, 2004, (69 FR 45307) to describe and identify coral as EFH for Gulf fisheries; to identify several HAPCs that contain coral; and to identify measures to minimize, to the extent practicable, the adverse effects of fishing on coral EFH. However, the coral areas identified in the EIS mentioned by the ROD do not distinguish DSCS from other coral and sponge habitats.

Caribbean Council

The Caribbean Council published a ROD on May 25, 2004, (69 FR 29693) to describe and identify coral as EFH for Caribbean fisheries; to identify HAPCs that contain coral; and to identify measures to minimize, to the extent practicable, the adverse effects of fishing on coral EFH. However, the coral areas identified in the EIS mentioned by the ROD do not distinguish deep-sea coral and sponge from other coral and sponge habitats.

Pacific Council

Significant research is underway to improve information on the location and abundance of DSCS in the Pacific EEZ and the function of coral in the ecosystem. Several actions being taken or considered by the Council and NOAA may have the benefit of protecting DSCS; however, the extent of the protection is unknown.

The Council has described and identified EFH as biological communities living on substrates along the rocky shelf, non-rocky shelf, and canyon areas between certain depths. Although DSCS are not directly identified as EFH, they can be inferred

to be a representative biological community.

Cow Cod Conservation Areas were implemented in January 2000 off Southern California. Commercial fishing is prohibited within these areas. Recreational fishing was prohibited shoreward of 20 fathoms. Also beginning in 2000, the Pacific Council prohibited large footrope trawls in most of the EEZ. The effect of the prohibition is that many complex, rocky habitats expected to include DSCS are inaccessible to trawlers. The Council also created the Rockfish Conservation Areas in 2003; commercial fishing effort has been significantly curtailed within these areas, which comprise most of the continental shelf.

The Channel Island Marine Reserves were implemented on April 9, 2003. The Pacific Council is discussing expansion of the reserve into Federal waters. In fall 2003, the Monterey Bay, Gulf of the Farallones, and Cordell Bank National Marine Sanctuaries began development of a revised (draft) management plan that may involve marine reserves in state and/or Federal waters. These marine reserves contain DSCS.

The Pacific Council published a notice of availability for the groundfish EFH DEIS on February 11, 2005, (70 FR 7257) to identify and describe EFH, designate HAPCs, and minimize adverse effects of fishing on EFH to the extent practicable. The DEIS contains several alternatives that would identify and describe HAPC areas containing ecologically important habitat such as DSCS, and suggests several alternatives that would prevent fishing in areas containing DSCS. Based on the DEIS information, the Council voted in June 2005 to choose preferred alternatives that would protect about 200,000 square nautical miles of marine habitat on the West Coast between the Canadian and Mexican borders, amounting to over 75% of the ocean within United States jurisdiction off the coast of Washington, Oregon, and California. The Pacific Groundfish EFH Final EIS (FEIS) will be published by December 9, 2005, and the record of decision on this action will be published by February 28, 2006.

Western Pacific Council

The Western Pacific Council developed a Precious Corals FMP in September 1983. The FMP coral beds include deep-sea coral species. The FMP and amendments adopted through 2002 prohibit nonselective gear in the entire Western Pacific region; establish quotas and size limits for pink, black, gold, and bamboo coral; and list other harvest restrictions. No other Council FMPs allow the use of mobile bottom-tending gear within the EEZ around the Hawaiian Islands or other U.S. Pacific islands.

North Pacific Council

The North Pacific Council prohibited trawling in southeast Alaska within a 52,600–square nautical mile area in 1998 as part of a license-limitation program under Gulf of Alaska Groundfish Amendment 41. This measure originally was proposed in 1991 under the rationale to (1) protect deep-sea coral from long-term damage by trawl gear due to conservation concerns for rockfish, and (2) alleviate social disruption to the local fishing industry. Amendment 59 established the 3.1–square nautical mile Sitka Pinnacles Marine Reserve in the Gulf of Alaska in 2000 and prohibited all bottom-fish gear types (except pelagic troll gear for salmon) in the reserve. These pinnacles contain high relief habitat with aggregates of lingcod and several rockfish species. The purpose of the restriction was to protect lingcod concentrations from overfishing. Numerous hydrocorals (*Stylasterids*) and the occasional *Primnoa* colony of deep-sea corals inhabit the pinnacles. The Council also worked in 2002 with the State of Alaska to prohibit the retention of corals and sponges within the State's 3–mile limit.

The North Pacific Council published a notice of availability for the EFH FEIS on May 6, 2005, (70 FR 24038). The FEIS contains an analysis of the effects of fishing on EFH as a whole and does not analyze individual habitat types (such as DSCS) separately. The analysis indicates that fishing has long-term effects on certain habitat features, and acknowledges there is considerable scientific uncertainty about the consequences of such habitat changes for the sustained productivity of managed species. Nevertheless, the analysis concludes that the effects on EFH are minimal, because there is no indication that continuing current fishing activities would alter the capacity of EFH to support healthy populations of managed species over the long term. Due to the uncertainty behind the analysis of the impacts on EFH, the North Pacific Council selected alternative 5(c) to minimize adverse effects of fishing on EFH and within HAPCs. The proposed actions include a 279,114–square nautical mile closure in the Aleutian Islands to protect relatively undisturbed habitats; six DSCS garden closures within the current bottom-trawl foot print measuring 110–square nautical miles; 15 seamount closures measuring 5,329–square nautical miles; 10 Gulf of Alaska slope bottom trawl closures to protect hard-bottom habitats over a 2,086–square nautical mile area; four Gulf of Alaska closures to all bottom-tending fishing gear to protect DSCS totaling 13.5–square nautical miles; and a closure to mobile bottom-tending fishing gear on Bowers Ridge totaling 5,286–square nautical miles. NMFS will complete its record of decision for the EFH EIS by August 13, 2005.

3. National Marine Sanctuary Program Activities

The NOS NMSP has recognized the importance of protecting deep-sea corals in sanctuaries, and is moving toward establishing protection for them under the management authority of the National Marine Sanctuaries Act (NMSA). System-wide, little information is available on the extent and location of significant aggregations of these deep-sea coral communities. Contingent on available funds, the NMSP is incorporating the need to inventory and characterize deep-sea coral assemblages as one of the drivers for prioritizing seabed mapping needs in the sanctuaries. As management plans are reviewed and updated for each site, the issue of deep-sea corals is being integrated. One example of this is the review of Davidson Seamount for possible inclusion in the Monterey Bay NMS, where deep-sea corals are known to occur. Inclusion of the seamount into the sanctuary would provide legal authority, under the NMSA, to protect coral aggregations in this area. Survey work has been conducted for the area of the seamount and coral resources have been identified.

Deep-sea corals are known to exist in a number of other sanctuaries in the NMS System, and NOAA is actively conducting survey and inventory work in these sanctuaries. At the Olympic Coast Sanctuary, several research cruises have been directed at deep-sea coral inventory activities, and last year a species of Lophelia generally associated with the Atlantic was discovered there. Surveys are also being conducted in deep-water areas of the Gulf of Mexico by the Flower Garden Banks staff, and similar work is being conducted off the Florida Keys. Contingent on available funding, the NMSP intends to initiate deep-sea coral surveys at all the national marine sanctuaries, and where appropriate, seek to protect these fragile sanctuary resources through regulation, education, research, monitoring, and enforcement.

4. Endangered Species Act Activities

No DSCS species are listed under the Endangered Species Act (ESA). Therefore, the direct protections and prohibitions for ESA-listed species do not apply to DSCS. However, through the ESA consultation process, the ESA may provide a degree of protection to non-listed species that co-occur with listed species.

For example, Hawaiian monk seals have been observed diving on deep-sea coral in the Northwestern Hawaiian Islands. Because the Hawaiian monk seal is listed as an endangered species under the ESA, any Federal action that may affect Hawaiian monk seals would trigger an ESA consultation to ensure the action would not jeopardize the species. Through the consultation process, a proposed action may be modified to reduce the threat to listed species. If the proposed action would adversely affect both monk seals and deep-sea coral beds, modifications to the action may protect both the seals and corals.

In 1998 NMFS designated critical habitat for the Hawaiian monk seal in 10 areas of the Northwestern Hawaiian Islands, including some areas near known deep-sea coral beds. However, it is unlikely that monk seal critical habitat provides significant protection for these beds. By definition critical habitat is limited to shallow waters less than 20 fathoms (120 feet). The shallowest of deep-sea coral species in the Northwestern Hawaiian Islands is the black coral, with a depth range that begins at 40 m (130 feet). Therefore, critical habitat for the Hawaiian monk seal does not overlap with the distribution of deep-sea corals.

Public Comments on the Need for the Petitioned Regulations, Its Objectives, and Alternative Approaches

More than 32,000 form-letter comments and two lists of signatures were received in favor of the eight measures proposed in the rulemaking petition. These commenters urged NMFS to immediately implement the measures because DSCS habitats are too vulnerable and valuable for ocean health, and potentially for human pharmaceuticals, to allow bottom-trawling fishing vessels to destroy them. They felt that the proposed rulemaking would provide the most reasonable protection from damage to living DSCS while having the least harmful impact on the economic well-being of existing fisheries and fishing communities. Many commenters expressed concern about the effects of bottom trawling on DSCS communities in relation to the entire marine ecosystem, which could affect the sustainability and recovery of the nation's fisheries.

Of the remaining 16 letters, 11 commenters urged that the petition be rejected or denied, one provided mixed comments, and four commenters supported the petition to protect DSCS communities from bottom trawling. Many of the commenters opposed to the petition expressed the belief that the effects of bottom trawling on DSCS communities are minimal, and that Oceana's proposed measures are already being addressed through Council FMPs, HAPC designations, and other regulatory efforts. Those opposed expressed the opinion that there is no ''emergency,'' and Oceana's actions were an attempt to circumvent the public process mandated by the Magnuson-Stevens Act and National Environmental Policy Act (NEPA) that allows for public participation, involvement of stakeholders, and an open forum for scientific review. They stated that this public process is already underway with regard to the preparation of EISs for EFH that satisfies a 2000 court order in *AOC* v. *Daley*, in which Oceana was a plaintiff. Furthermore, many who were opposed to the petition stated that it is uncertain whether DSCS communities serve as EFH for Federally managed species, and additional research must be done to determine the degree of connectivity between DSCS and managed species.

One commenter provided mixed comments in response to the petition, and agreed that DSCS are valuable habitats that promote biodiversity, record climate change, and are potential sources of future medicines. However, the commenter pointed out that bottom-trawling is not the only damaging factor in deep-sea coral environments and that an evaluation on natural and anthropogenic stressors must be undertaken before concentrating on trawling as the only major issue.

Those in favor of the petition urged NMFS to protect DSCS communities from bottom trawling because they provide fish habitat essential for breeding, feeding, resting, and growth until maturity (regardless of status as a Federally-managed species or a commercial species). Many stated that even though DSCS communities can be protected under the EFH/HAPC, bycatch, and the discretionary provisions of Magnuson-Stevens Act, the Coral Reef Protection Executive Order 13089, and NEPA, few Councils have acted to protect these habitats from bottom trawling. These commenters stated in general terms that economic gains from protecting these resources far outweigh allowing bottom trawling to continue, and that immediate protection should be bestowed upon DSCS habitat.

Responses to the specific points of the 16 letters are provided below, organized under the headings corresponding to the proposed measures outlined in the petition.

Emergency Rulemaking Comments

Comment 1: A group of commenters indicated that the petition is a statutorily mandated part of the agency decision-making process that should result in a rulemaking carried out consistent with the requirements of Magnuson-Stevens Act EFH, bycatch, and discretionary provisions, the Coral Reef Protection Executive Order 13089, NEPA, APA, and any other controlling law.

Response: Rulemaking petitions are part of the agency decision-making process under 5 USC 553(e). Agencies have discretion to determine whether rulemaking is necessary, as part of the petition process. If the agency finds that rulemaking is warranted, any measures implemented must be consistent with applicable laws.

Comment 2: Many commenters stated that DOC has responsibility and opportunity to take action immediately to save DSCS.

Response: NMFS, with delegated authority from DOC, has determined that the fishing threat to DSCS is an important issue to address but does not represent an emergency as defined in 16 USC 1855(c)(1). DSCS areas within the existing mobile bottom-tending gear footprint, and any areas not impacted or areas threatened by future fishery expansion can be addressed through current or future Council rulemaking processes.

Comment 3: Another commenter disagreed with Oceana's assertion that the Secretary does not have any discretion or choice but to implement its proposal. NMFS has extensive discretion in making regulatory decisions, and the courts have only overturned decisions if they are ruled arbitrary and capricious.

Response: NMFS agrees that agency does have discretion in making regulatory decisions, and that the courts have only overturned decisions if they are ruled arbitrary and capricious or fail to follow procedural requirements under the Regulatory Flexibility Act or Regulatory Impact Review or other laws as applicable.

Comment 4: One commenter stated that DSCS are not adequately protected under existing FMPs or pending rulemakings, and current efforts proceed too slowly to offer immediate

protection. This petition would provide needed consistency, research priorities, and protection to DSCS.

Response: DSCS themselves may not be adequately protected under existing FMPs. However, potential future rulemakings are appropriate for addressing the threat to DSCS under the Magnuson-Stevens Act, which is not immediate.

Comment 5: One commenter indicated that the North Pacific Draft EIS failed to adequately address impacts on coral and sponge habitat and that the current preferred alternative will result in continued destruction of these habitats. The commenter was also concerned with the Pacific EFH EIS process that has not incorporated all available data into all management alternatives to minimize the adverse effects of fishing on EFH.

Response: The North Pacific EFH DEIS used the best scientific information available to evaluate potential adverse effects on DSCS. NMFS revised and expanded upon that analysis for the EFH FEIS. In addition, the North Pacific Council selected a final preferred alternative 5(c) that includes extensive precautionary management measures to minimize potential adverse effects of fishing on EFH, including large areas that support DSCS. The Pacific Groundfish EFH EIS process has thoroughly examined most facets of information regarding the identification and description of EFH, the designation of HAPCs, and the minimization of adverse fishing impacts. The Pacific Groundfish EFH EIS will contain future environmental analysis of this information related to a reasonable range of management alternatives.

Comment 6: One commenter felt that DSCS closures need to be integrated under one common decision-maker, because implementation of requests without regional consideration of FMPs can lead to harm of managed stocks of fish by displacement and concentration of fishing effort.

Response: DSCS research, conservation, and management issues vary amongst regions, and are best addressed at the regional level. NMFS believes that DSCS management measures need to be examined in the context of existing FMP management measures under each Council's jurisdiction to avoid harm to managed fish stocks, protected species, and other complex habitat by displacement and concentration of fishing effort.

Comment 7: Several commenters felt that DSCS protection best occurs through the existing management framework (Council-led EFH NEPA process), which would address potential social and economic impacts to communities, consider a range of alternatives for EFH designations, allow public participation, involve stakeholders, and provide an open forum for scientific review.

Response: NMFS agrees that DSCS protection best occurs through existing Council Processes to manage through FMPS, consistent with the Magnuson-Stevens Act National Standards. The Magnuson-Stevens Act, NEPA, and other procedures provide for analysis of actions and public participation. NMFS notes, however, that public comment on this rulemaking petition allowed for public participation in the rulemaking petition decision process, and recognizes the value of emergency rulemaking under appropriate circumstances.

Comment 8: One commenter felt that the petition uses inadequate information, assumptions, and a loose interpretation of Magnuson-Stevens Act and regulations to support demand for immediate action, which limits such action to extremely urgent and special circumstances where substantial harm will be caused during the time required to conduct normal rulemaking. The petition did not address whether and how the Magnuson-Stevens Act national standards are met, which are clear requirements for emergency action.

Response: The DSCS rulemaking petition makes a case for the protection of DSCS as EFH and HAPCs, and through bycatch and discretional provisions of Magnuson-Stevens Act. NMFS believes in taking a regional approach to evaluate and take action where appropriate to protect DSCS and may pursue future rulemakings to protect DSCS in specific locations based on analyses for specific fisheries. However, NMFS does not find the information in the petition compelling for nationwide emergency action. In addition, NMFS acknowledges that any action taken under Magnuson-Stevens Act provisions to protect DSCS would need to address National Standards, and other applicable law.

Comment 9: A group of commenters indicated that marine scientists and their research assert DSCS support entire ecosystems of fish and invertebrates, and high biodiversity.

Response: NMFS recognizes the importance of DSCS as living marine resources, and in many cases forming complex structured habitat for fish and invertebrates. NMFS also recognizes the current research indicating the contribution DSCS communities make to high biodiversity in the deep ocean. Currently, Magnuson-Stevens Act requires a link between DSCS and a Federally managed fish species to provide protection to DSCS as EFH. At this time, not all regions have scientific evidence providing a link between managed fish species and DSCS to warrant DSCS description as EFH and HAPCs.

Comment 10: A group of commenters felt there is broad citizen support in place to protect DSCS, as evidenced by the political interest of Senators McCain, Hollings, Biden, and Leahy, and the urging of former Secretary of State Powell to seek a UN resolution prohibiting bottom trawling on the high seas until measures to protect deep-sea ecosystems are in place.

Response: NMFS agrees there is citizen interest in DSCS protection, as indicated by the 32,000–plus comments received in favor of the petition. NMFS also recognizes increased interest from the Councils and several fishery groups regarding DSCS and habitat protection through the Council process. NMFS believes that DSCS should be addressed at a regional level and will work with the Councils to implement measures to protect these habitats, as appropriate.

Comment 11: One commenter stated that overfished species may not be able to recover without their preferred habitats if those habitats are DSCS. Another commenter felt that certain DSCS species are highly vulnerable to physical impacts, including fishing gear, due to long-lived and slow-growing life history.

Response: The Magnuson-Stevens Act 16 U.S.C. 1801(9) states that, ''One of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats.'' DSCS that are EFH for managed species can be important for overfished species recovery. DSCS vulnerability to fishing impacts is evident through research on fishing impacts on deep-sea coral in the *Oculina* HAPC in the Southeast Region and through DSCS bycatch records in the Pacific and North Pacific. Research has aged deep-sea coral reefs up to 8,000 years, and the corals that form them grow at a mere 4 to 25 millimeters per year (whereas shallow tropical corals can grow up to 150–millimeters per year). Therefore, data supports the assertion that DSCS are long-lived and slow-growing.

Comment 12: Several commenters stated that long-term damage to the ecosystem for short-term gain puts unknown stress on an ecosystem that could provide continued income and livelihood for fishing communities if exploited sustainably. Protection of

highly vulnerable habitats should be at the forefront of management until better understood, or legislation to fund research will be for naught if DSCS are destroyed before we know where they are.

Response: NMFS and Councils seek to manage fisheries sustainably and to minimize adverse impacts on EFH that are at least more than minimal and not temporary. NMFS encourages Councils to take protective action where DSCS are identified as EFH due to the uncertainty regarding the degree of impacts to DSCS and their effects on managed species and the marine ecosystem. NMFS also encourages Councils to take actions that address impacts to the marine ecosystem that minimize bycatch of DSCS, where bycatch is a concern, or through the development of DSCS FMPs, where applicable, even when information does not warrant identifying DSCS as EFH.

Comment 13: One commenter pointed out that allowing bottom trawling to expand into new areas without identifying DSCS is a missed chance to protect DSCS and the species that depend on them. The petition urges action to freeze the current trawling footprint to prevent trawling from destroying areas that have not yet been explored and protects a few known coral and sponge areas which are either already closed to bottom trawling or into which large-scale trawling has not yet expanded.

Response: NMFS agrees that allowing bottom trawling to expand into new areas without identifying DSCS could result in adverse effects to DSCS. Consistent with NMFS regional approach, some Councils have taken action to prevent trawling activity to extend into new areas. For example, NMFS acknowledges the North Pacific Council's action to restrict the bottom-trawl fishery footprint in the Aleutian Islands and the Pacific Council's efforts to examine the possibility of similar action.

Comment 14: One commenter stated that although impacts of low-intensity fishing can overwhelm DSCS species recovery, it is doubtful that such declines have significant effects on many managed species. Any established trawling ground will already have been degraded and will not recover within meaningful human time scales.

Response: NMFS believes that more research is needed on DSCS links to managed species populations. Established trawling grounds are most likely degraded in many areas; however, certain areas contain DSCS that could be important for protection.

Comment 15: One commenter stated that fish species only become fisheries resources if they are abundant, and fish species cannot have this abundance by being dependent on rare habitat types. Therefore, DSCS rarity in most regions makes conservation a minor issue for resource production and for fisheries.

Response: DSCS are not necessarily rare in each region or for each managed species. DSCS conservation is still a concern for DSCS themselves, and for unknown importance to resource and fish production.

Comment 16: Three commenters felt other gears and stressors (besides bottom trawling) should be considered in minimizing fishing impacts to DSCS. Only future expansions of intensive bottom-fishing gear in areas of ''high concentrations'' of DSCS habitat pose an immediate and urgent threat, but these expansions do not justify immediate national actions.

Response: NMFS agrees that other gears and stressors should be examined on a region-by-region basis to address all impacts to DSCS. The term ''high concentration'' of DSCS is difficult to define due to lack of research on the extent of DSCS distribution and importance for managed species production. NMFS encourages Councils to take proactive actions to protect DSCS EFH until ''high concentrations'' of DSCS can be identified.

Comment 17: One commenter stated that the petition will drain away valuable NMFS staff time and resources, necessary to meet court-ordered timelines for addressing DSCS issues.

Response: The petition, public comment period, and analysis of petition measures will not drain NMFS staff time and resources. NMFS supports a regional approach to address DSCS conservation and management issues. NMFS staff time and resources will be balanced in addressing various mandated needs in addition to analysis of DSCS issues.

Comment 18: A commenter felt that the petition does not consider the practicability of proposed regulations or economic impacts on fishermen, processors, and communities. Another commenter indicated that the requested petition actions are not the only or best actions to achieve EFH/HAPC goals.

Response: Practicability is mentioned in the petition, but not to the degree of a formal rulemaking process. The requested petition actions would not achieve all EFH/HAPC goals, but they would achieve certain goals related to DSCS protection. NMFS recognizes the importance of practicability in minimizing adverse fishing effects on DSCS through the regional Council process.

Comment 19: One commenter stated that practicability is not defined by all that is possible, but rather allowing for the application of agency expertise and discretion in determining how best to manage fishery resources. To be practicable, EFH protection measures must have proof of benefit to fishery production that is greater than the costs of the measure.

Response: NMFS disagrees that to be practicable EFH protection measures must have proof of benefit to fishery production that is greater than the costs of the measure. Regulatory guidelines on determining practicability state that Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation, consistent with national standard 7. In determining whether management measures are practicable, Councils are not required to perform a formal cost-benefit analysis (50 CFR 600.815(a)(2)(iii)).

Comment 20: A commenter indicated that the North Pacific EFH EIS alternatives consider many of the petition's measures: mapping, bottom trawl prohibition, bycatch limits, research and monitoring, and observer coverage. They also indicated that the North Pacific HAPC Environmental Assessment (EA) will consider prohibiting bottom trawling in certain areas.

Response: NMFS agrees this is a good example of pending regulatory action that will address many of the petition's requested measures within the context of all fishery management issues in a region. This approach may not be appropriate in other regions. Accordingly, NMFS will work with the Councils to evaluate and take action, where applicable, to address DSCS protection issues related to specific fisheries.

Comment 21: A commenter felt petition measures would prevent DSCS destruction without hurting fishers, and allow fishers to continue to receive income from areas already damaged or destroyed. They also felt that overall economic gain from DSCS protection far outweighs the costs of DSCS destruction.

Response: A formal cost-benefit analysis has not been conducted regarding the benefits of DSCS conservation for all NMFS regions. Measures that restrict fishing activities may have socioeconomic impacts to fishing communities, and NMFS would analyze such potential effects for any

proposed measures under Executive Order 12866, the Regulatory Flexibility Act, and other applicable law.

Comments on Specific Measures

Measure 1

Identify, map, and list all known deep-sea coral and sponge areas containing high concentrations of deep-sea coral and sponge habitat.

Comment 22: One commenter felt that the petition did not adequately define DSCS species requiring protection, and therefore a clearer definition of DSCS is needed before the term is introduced to the management regime.

Response: NMFS agrees that the petitioner did not fully define all the DSCS species requiring protection. However, different DSCS species are components of known habitat types found in all NMFS regions, and management measures could be developed for DSCS communities rather than specific DSCS species.

Comment 23: Many commenters cited examples of efforts currently underway to identify and map DSCS areas and disseminate this information.

Response: NMFS agrees that several efforts are currently underway in a number of relevant agencies to identify and map DSCS habitats throughout the U.S. EEZ. Many of these efforts are being undertaken through partnerships between NOAA, USGS, MMS, the Councils, and academic institutions. Exploration, characterization and mapping of deep-sea coral habitats are ongoing in areas such as the Gulf of Mexico, pinnacles adjacent to the *Oculina* HAPC and the deeper Lophelia beds offshore the Southeast U.S., and extensive coral communities in the Aleutian Islands. Mapping and characterization of these areas supports the identification and description of EFH. The information included in these maps, any relevant documents, and the maps themselves may be found on web pages managed by the participating agencies and the Councils.

Comment 24: One commenter stated that high concentration reef areas discovered during mapping could be designated as no-trawling HAPCs, and another stated that any EFH and HAPC designations and regulations must be accompanied by an initial baseline analysis and an on-going monitoring program.

Response: A no-trawling HAPC cannot be designated solely on the basis of exploratory mapping, unless (1) a Federally managed fish species occurs in that area, (2) EFH has been described for that species, (3) the area identified with coral or sponge from these mapping efforts occurs within the area defined as EFH, and (4) rationale exists to determine that adverse fishing effects must be minimized to the extent practicable. The Magnuson-Stevens Act requires regional Councils to describe and identify EFH for each fish stock managed under an FMP, to minimize to the extent practicable adverse effects on such habitat caused by fishing, and to identify other actions to encourage habitat conservation and enhancement.

HAPCs are a specific subset of a much larger area identified as EFH that play a particularly important ecological role in the fish life cycle or are especially sensitive, rare, or vulnerable. Whereas EFH is identified for each species and life stage in an FMP, HAPCs are identified on the basis of one or more of the following considerations: (1) the importance of the ecological function provided by the habitat, (2) the extent to which the habitat is sensitive to human-induced environmental degradation, (3) whether and to what extent development activities are or will be stressing the habitat type, and (4) the rarity of the habitat type. Designated HAPCs are not afforded any additional regulatory protection than EFH, but actions with potential adverse impacts to HAPCs should be more carefully scrutinized. Depending on the conservation needs, an HAPC may have appropriate fishery management measures associated with the HAPC. Designation of HAPCs would require initial baseline information (existing or developing knowledge) of species-habitat associations, the characteristics of a particular habitat type, the threats to sensitive habitats, or the importance of an area to multiple species. Although on-going biological monitoring programs provide useful information for management, EFH regulatory guidelines do not require an on going monitoring program.

Measure 2

Designate all known areas containing high concentrations of deep-sea coral and sponge habitat both as EFH and ''habitat areas of particular concern'' (HAPC) and close these HAPCs to bottom trawling.

Comment 25: Several commenters stated that the South Atlantic Council, North Pacific Council, Pacific Council, and Western Pacific Council have taken measures to protect DSCS directly or indirectly by identifying them as EFH, and the South Atlantic Council has designated a few DSCS as HAPCs. Another commentator stated that DSCS are not described as EFH in New England, therefore DSCS HAPCs cannot be designated.

Response: As indicated by the summary of Council activities, the South Atlantic, North Pacific, Pacific, Western Pacific, New England, and Mid-Atlantic Councils have taken measures that directly protect DSCS or that indirectly provide DSCS protection. The Gulf of Mexico and Caribbean Councils have taken measures to protect hard and soft corals, but have not directly specified actions to protect DSCS. DSCS are not described as EFH in New England or the Mid-Atlantic, but are indicative of hard bottom, which is described as EFH for several managed species in New England and the Mid-Atlantic. New information on DSCS locations and their roles as EFH will support NMFS and Council efforts to examine future actions to protect important DSCS communities from fishing impacts.

Comment 26: A few commenters stated there are significant information gaps in determining the dependence of Federally managed species on marine habitat, and there is little evidence available to support the petition's claim that managed species use DSCS as EFH (besides redfish in New England).

Response: Using the best available scientific information, DSCS were described and identified as EFH for Federally managed species by the North Pacific and Pacific Councils in existing FMPs. The North Pacific Council recently reviewed this information in its EFH FEIS, and the Pacific Council is currently reviewing this information. The South Atlantic Council has identified deep-sea corals as EFH for Federally managed species. Current scientific information regarding DSCS as EFH in the New England, Mid-Atlantic, Gulf, and Caribbean Councils is not as conclusive, thus limiting the use of EFH authority to directly protect DSCS. However, New England established the *Lydonia* and Oceanographer submarine canyon closures to monkfish days-at-sea fishermen to protect hard-bottom, which is indicative of deep-sea corals, as indicated by current scientific research in that area.

Comment 27: Two commenters stated that small DSCS ''hot spots'' may exist but there was no evidence that these areas represent a large or important portion of the overall abundance of DSCS habitat. Another commenter stated the petition does not provide a basis to demonstrate how impacts to DSCS habitat may alter ecosystems and/or affect populations of associated species.

Response: The extent of areas surveyed for DSCS location is limited. On occasion, research has identified areas where more DSCS occur compared

to other areas surveyed. This information does not indicate whether these areas represent a large or important portion of the overall abundance of DSCS habitats. The petition does not directly state how impacts to DSCS habitat may alter ecosystems and/or affect managed species populations. However, the petition does present the case that DSCS represent complex three-dimensional habitat for multiple marine species and are highly vulnerable to bottom-tending mobile gear, thus indicating an impact to the marine ecosystem, but not the degree of impact.

Comment 28: Several commenters noted that deep-sea corals may have a significant presence in selected areas and may play a habitat role that is meaningful for certain species (e.g., rockfish and redfish). Therefore, corals cannot be ruled out as possible important EFH and should be protected to avoid permanent destruction.

Response: Several managed species are known to associate with DSCS, and the best available scientific information has warranted their description and identification as EFH in several FMPs. Deep-sea corals have been identified as EFH for South Atlantic managed species, and deep-sea corals are managed species in the Western Pacific Council areas. In other regions, the scientific connection between managed fish species and DSCS as important habitat has not been clear enough to warrant DSCS identification as EFH, and subsequent protection under Magnuson-Stevens Act, section 303(a)(7).

Comment 29: One commenter stated that to protect DSCS as EFH, these habitats must meet the legal definition of ''waters and substrate necessary to support managed species.''

Response: DSCS must be described and identified as EFH for Federally managed fish species by Councils and NMFS to protect DSCS using Magnuson-Stevens Act EFH provisions at 16 U.S.C. 1853(a)(7). EFH is defined to mean those waters and substrate necessary for fish to spawn, to breed, to feed, or grow to maturity. For the purpose of interpreting the definition of EFH: ''Waters'' include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; ''substrate'' includes sediment, hard-bottom, structures underlying the waters, and associated biological communities; ''necessary'' means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and ''spawning, breeding, feeding, or growth to maturity'' covers a species' full life cycle (50 CFR 600.10). DSCS described as EFH in the Pacific and North Pacific, and deep-sea corals described as EFH in the South Atlantic and Western Pacific, are considered living substrates important for either egg, juvenile, and/or adult life stages of certain managed fish species. The New England Council is evaluating whether new science suggests this connection between managed species and DSCS, as well as many other habitats.

Comment 30: Another commenter noted that the EFH Final Rule and Magnuson-Stevens Act do not preclude Councils from identifying habitat (other than EFH) of a fishery resource under its authority even if the species is not managed under an FMP. However, Council action to protect habitats of managed or non-managed species is limited to protecting habitats from fishing activities.

Response: The preamble to the EFH Final Rule at 67 FR 2348 notes that the Magnuson-Stevens Act does not preclude Councils from identifying habitat (other than EFH) of a fishery resource under its authority even if the species is not managed under an FMP. Council action to protect the habitats of managed or non-managed species is limited to protecting habits from fishing activities. Councils have no authority to protect habitats from other activities, although they may comment to state and Federal agencies on non-fishing activities under section 305(b)(3) of the Magnuson-Stevens Act.

Comment 31: Two commenters stated that HAPCs are not required by the Magnuson-Stevens Act, and are not automatically afforded any additional regulatory protection under the act.

Response: HAPCs are not required by the Magnuson-Stevens Act, but are recommended under EFH regulatory guidelines 50 CFR 600.815(a)(8). HAPCs are useful for helping focus EFH management on habitat areas that provide important ecological functions, are sensitive to human-induced environmental degradation, are stressed by development activities, and/or constitute rare habitat types. However, HAPC designations do not afford any additional regulatory protection under the EFH regulatory guidelines.

Comment 32: One commenter stated that Federal regulations require the Councils to base their recommendations for EFH designation on the ''best scientific information available'' and to interpret available ecological, environmental, and fisheries information ''in a risk-averse fashion to ensure that adequate areas are identified'' and protected. Another commenter indicated that if the best scientific information available does not show DSCS are utilized as EFH, then action needs to wait until congressionally authorized. The petition appears to call for actions that exceed the mandate provided by the Magnuson-Stevens Act legislation.

Response: Magnuson-Stevens Act EFH provisions at 16 U.S.C. 1853(a)(7) require Councils to minimize to the extent practicable adverse effects of fishing on EFH. The EFH regulatory guidelines state that FMPs should minimize those impacts that are more than minimal and not temporary (MMNT) (50 CFR 600.815(a)(2)(ii)). DSCS must first be described and identified as EFH using the best scientific information available, and have adverse affects from fishing that meet the MMNT threshold, before Councils must take action to protect DSCS. Councils can manage fishing activity for habitats that are not EFH but that represent a conservation and management concern for the fishery, for example, where DSCS bycatch is a concern or if DSCS themselves are Federally managed species. The DSCS protection measures requested by the petition are supported by current mandates if the administrative record supports the actions (see response to comment 24 on no trawling HAPCs, and responses to comments 25 and 29 on the description and identification of DSCS as EFH). However, the administrative record does not support taking emergency rulemaking under the Magnuson-Stevens Act.

Comment 33: One commenter indicated that closures to trawling targeting one type of fish and not others does not provide comprehensive protection for DSCS areas and the ecosystems that depend on them.

Response: NMFS agrees that DSCS closures targeting one type of fish and not others do not provide comprehensive protection for DSCS areas. DSCS closures should be implemented based on an evaluation of the need for DSCS closures to all fishing gears that will adversely affect DSCS and an evaluation of any new DSCS closures in connection with existing closure areas in each region.

Comment 34: The term ''high concentrations'' is inherently subjective and needs to be defined and made clear.

Response: NMFS agrees that the term ''high concentrations' of DSCS are difficult to determine without quantitative information on DSCS counts. High concentrations should be evaluated in each region on a case-by-case basis to determine what constitutes

high concentrations for management. Any evaluation must take into account the uncertainties of current DSCS knowledge and the applicability of this information in this management context.

Comment 35: Two commenters believe the pinnacle proposal lacks merit and criteria for defining pinnacles in the North Pacific, and that the petition's listing of all pinnacles as HAPCs masks the importance of some pinnacles. One of the commenters cautioned that the petition's list of DSCS proposed closed areas may be incorrect (e.g. Mednyy Seamount, which is in Russian waters).

Response: NMFS agrees that the petition lacks criteria for identifying specific pinnacles as HAPCs. The North Pacific Council EFH EIS preferred alternative to minimize adverse effects of fishing on EFH includes measures that would protect 16 seamounts. NMFS expects to complete its record of decision for the EFH EIS by August 13, 2005.

Measure 3

Identify all areas not fished within the past 3 years with bottom-tending mobile fishing gear, and close these areas to bottom-trawling.

Comment 36: Two commenters stated this request goes beyond the stated objective of protecting DSCS habitat, and would conflict with the agency's mandate to achieve sustainable and optimal yields related to scallops, flounder, and haddock in New England, and groundfish species in the Pacific.

Response: NMFS encourages Councils to take a proactive approach to address the expansion of trawl or other fisheries using bottom-tending gear to areas that have not yet been fished with such gear and that may contain DSCS communities. However, NMFS agrees that a number of areas may have been closed to mobile bottom-tending gear before the past three years for reasons other than impacts to habitat, and permanent closures of such areas could conflict with regional Council efforts to achieve sustainable and optimal yields. Areas closed to manage fishing mortality could be opened when the fishery is rebuilt. Portions of these areas represent important fishing grounds that would continue to be closed under this proposed Oceana measure until mapped for DSCS, even if any DSCS that might have existed there had been destroyed by fishing that pre-dated the closures. NMFS believes that the Councils should consider proactive DSCS closure measures within the context of past, current, and future management objectives and goals for multiple living marine resources.

Comment 37: Two commenters felt the petition was misleading to conclude that the Secretary has information on where bottom-trawling occurs, because high-precision, accurate information on fishing effort location is currently unavailable. Another commenter felt that 3 years was too short a time frame to distinguish between fished and unfished areas due to the complexity in determining what area was ''fished.'' Others felt that fishing effort must be mapped to determine whether bottom trawling overlaps with DSCS areas and whether that fishing interaction is significant.

Response: NMFS disagrees with the comments that the Secretary does not have information on where bottom trawling is occurring. NMFS has some information, primarily based on log-book data, but also including some VMS and observer information for certain fisheries; however, reporting standards and the precision of the data varies widely among fisheries and regions. NMFS has information regarding fishing effort and deep-sea coral presence in different states that vary region by region. A quantitative analysis of the degree to which mobile bottom-tending gear overlapped with known deep-sea coral communities may not be possible with current information. A single bottom trawl by a commercial fishing vessel may extend for many kilometers. Evidence of DSCS discovered in a trawl net may have been retrieved from any point along the trawl. Thus, with current information, it is not possible to determine specific locations where bottom trawling is encountering DSCS.

NMFS agrees with the comment that restricting the analysis to areas trawled in the past 3-years does not provide a sufficient time period to determine fished and un-fished areas. Each region collects fishery dependent data differently. For instance, the NMFS Southeast Region collect only landing data from shrimp trawlers, not locations of trawls, while the NMFS Alaska and Northwest Regions collect trawl start points in 10–square nautical mile grids. Careful analysis of logbook data combined with observer and VMS data (where available and applicable) using GIS at appropriate scales is needed to accurately address the area of the fishing footprint. This analysis combined with an analysis of current fishery management closures is very complex. Due to this complexity, 3-years may not provide enough data to accurately reflect the historical fishing footprint, which the measure seeks not to close to avoid economic harm to fishermen.

Comment 38: A few commenters felt there is no basis for sweeping closures, which are more remote from the applicable legal standards than the general call to close potential coral areas. *HADAJA, Inc.* v. *Evans* (2003 WL 21190990 (D.R.I.) Smith) was referenced by another commenter stating mitigation measures based on inference, speculation, or surmise were in violation of National Standard 2.

Response: In the event that action is warranted to protect DSCS habitat, NMFS would need to build an adequate administrative record to support this decision. This administrative record would have to demonstrate that the chosen action is in compliance with the Magnuson-Stevens Act and its regulations, as well as the National Standards, including National Standard 2, which calls for the use of the best scientific information available.

Comment 39: Another commenter referenced *NRDC* v. *Evans* (F. Supp. 2d S.D. N.Y. Berman) to indicate that reliance on the best available scientific evidence is sufficient and NMFS had no obligation to impose mitigation measures in absence of demonstrated adverse impacts from fishing. One commenter felt that an adverse effect determination is difficult for fishing impacts on DSCS because the evidence available is limited to connections from managed species, to a demonstrated dependence on habitat, to physical impacts of fishing on those habitat features, and to adverse effects on managed species.

Response: Physical disturbance to DSCS can be observed, but adverse effects to fish populations are more difficult to assess. Nevertheless, it is not appropriate to require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take action to minimize adverse fishing impacts to EFH to the extent practicable (67 FR 2354). EFH regulatory guidelines 50 CFR 600.815(a)(2)(ii) encourage Councils to use the best available science as well as other appropriate information sources when evaluating the impacts of fishing activities on EFH, and to consider different types of information according to its scientific rigor. Through exploratory submersible dives, video footage, and remotely operated vehicles (ROVs), adverse effects on deep-sea coral habitats have been identified in some locations, including trawl tracks. Submersible dives by the Harbor Branch Oceanographic Institute submersible *Clelia* found trawl tracks in *Oculina* HAPC off the Florida's East Coast,

which has been protected since 1984. Approximately 39 percent of the total area of the seafloor observed on 25 NMFS video transects in the Aleutian Islands was disturbed to some degree by fishing gear, and 8.5% of the corals on those transects were damaged or otherwise disturbed. Existing scientific information on the slow growth of many deep-sea corals indicates that damage recovery times will be extremely long.

Coral and sponge bycatch is common in trawl fisheries in some areas of Alaska. NMFS estimates that 81.5–metric tons of mixed soft and hard corals and bryozoans are removed from the sea floor each year as commercial bycatch and that 87 percent of this bycatch is captured in bottom trawls. Under Magnuson-Stevens Act, NMFS is obligated to reduce bycatch associated with Federally managed fisheries. The Magnuson-Stevens Act at 16 U.S.C. 1851(a)(9) states that NMFS must ''include conservation and management measures that, to the extent practicable and in the following priority (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.''

Comment 40: One commenter stated that the request to permanently close all areas to bottom trawling that were not fished within the past 3 years by bottom-tending mobile gear is excessive and unnecessary. It appears to focus on eliminating one fishing sector without any mitigation or alternatives for participants or processing components of the industry. A commenter felt that where there is a high degree of overlap between bottom trawls and DSCS, NMFS should consider buyout programs to recompense fishermen for the loss of their livelihood.

Response: NMFS supports addressing these issues on a regional case by case basis. If NMFS determines that areas not fished by mobile bottom-tending gear within a certain amount of time should be closed to protect DSCS from fishing, NMFS would evaluate appropriate alternatives and mitigation, such as buyout programs for various fishing sectors components.

Comment 41: A few commenters believed that the petition's conclusion that closures will have little economic harm is incorrect due to (1) lost short-term revenue from scallops that would die from starfish predation, disease, and/or old age; (2) costs associated with monitoring, enforcing, and complying with transit provisions; and (3) lost future revenue from closed areas if economic and resource conditions changed and fishermen want to fish these areas in the future.

Response: It is the responsibility of NMFS under the Magnuson-Stevens Act to ''describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.'' If DSCS are found to be EFH, NMFS is mandated to minimize adverse fishing effects on DSCS EFH. The designating Council and NMFS would address short-term losses of revenue in a fishery, through appropriate NEPA analysis. NMFS agrees there are costs associated with monitoring and enforcing restricted areas. However, if the restriction of that habitat is in the best interest of sustaining the fishery, then those costs to both NMFS and the industry are offset by the benefits to all resources.

Comment 42: One commenter felt that the North Pacific Council EFH EIS Alternative 5(b) accomplishes the petition's third measure for the Aleutian Islands, where fish aggregations are determined by DSCS. However, the commenter felt this measure would not be proper for the Bering Sea where fish aggregations are determined by water temperature.

Response: Fish aggregations are determined by a variety of factors, including water temperature and substrate type. The best scientific information available in the North Pacific indicates that fish aggregate around DSCS and pinnacles in the Aleutian Islands, but fish in the Bering Sea aggregate based on water temperature. The preferred alternative 5(c) in the North Pacific Council EFH EIS addresses the commenter's concerns in that it includes new measures to protect DSCS in the Aleutian Islands and Gulf of Alaska, but no new measures in the Bering Sea.

Comment 43: Another commenter stated that non-trawled areas in the Gulf of Mexico between 120 and 1,000 meters should be identified and investigated for coral reef resources. If DSCS exist, amendments to the Shrimp FMP could be added to protect them.

Response: NMFS agrees that further investigations are needed on the locations of DSCS in the Gulf of Mexico. NOAA is collaborating with USGS and the MMS in surveying deep-sea corals in the Gulf of Mexico. However, to justify the protection of these DSCS areas under the Gulf Council's Shrimp FMP as EFH, a strong link must be made that these areas are necessary habitat for Federally managed species life stages in the Gulf of Mexico. Such a link has not yet been identified by the Gulf of Mexico Council.

Measure 4

Monitor bycatch to identify areas of deep-sea coral and sponge habitat that are currently fished, establish appropriate limits or caps on bycatch of deep-sea coral and sponge habitat, and immediately close areas to bottom trawling where these limits or caps are reached, until such time as the areas can be mapped, identified as EFH and HAPC, and permanently protected.

Comment 44: A few commenters noted that the South Atlantic and Gulf of Mexico Councils have taken measures to protect DSCS, prohibit taking of both soft and hard coral species, require fishing vessels to return coral bycatch to the sea, and improve bycatch monitoring and reporting.

Response: NMFS recognizes the efforts by these and other Councils to monitor and control bycatch of corals. Less information is available on deep-sea sponge bycatch. Council activities relating to DSCS were discussed earlier in this notice. The Councils perform an important role in recommending fishery management actions for approval and regulatory implementation by NMFS.

Comment 45: A commenter felt it was premature to regulate bycatch efforts in the Pacific Coast groundfish fishery because the Pacific Council is developing a programmatic bycatch EIS to address West Coast bycatch issues.

Response: In September 2004, NMFS, in cooperation with the Pacific Council, completed a Final EIS (FEIS) on the Pacific Coast Groundfish Fishery Management Plan Bycatch Mitigation Program. However, that FEIS did not specifically address bycatch of corals or sponges in the groundfish fishery.

Comment 46: Another commenter indicated that DSCS bycatch monitored by observers does not constitute a basis for DSCS caps. The extrapolation of past observer data may result in unrealistic caps, especially when combined with a different level of prioritization of DSCS monitoring the future.

Response: Current bycatch of DSCS is neither uniformly collected by observers nor recorded in fishery logbooks maintained by fishermen. The determination of realistic caps based on extrapolation of past observer data or other DSCS data that may exist (e.g., from trawl surveys conducted by NMFS as part of stock assessments) would entail substantial uncertainties. As part of an overall strategy, NMFS will take steps to determine how existing observer information on DSCS bycatch can be standardized or enhanced in each region, and assess the feasibility of

such reporting to inform potential closures. Current regional standardized bycatch reporting methodologies will then be evaluated for including DSCS bycatch reporting methods.

Comment 47: Two commenters supported identifying ongoing and future cases of DSCS removal and taking swift action to halt such damage where and when it occurs. However, they felt that bycatch caps were not useful for several reasons: (1) 100 percent observer coverage cannot be accurately monitored or enforced; (2) DSCS recovery rates are so low that there are no meaningful ''sustainable harvest'' levels; and (3) DSCS bycatch caps are redundant compared to other methods for DSCS protection, and would include potential large costs compared to minimal gain for habitat.

Response: NMFS believes that DSCS should be managed to preserve biodiversity and sustainable use of marine resources. As indicated in its response to Comment 46 above, NMFS will study the applicability of DSCS bycatch monitoring as a mechanism to inform DSCS management action, and believes such studies are necessary before imposition in specific fisheries. NMFS agrees that bycatch monitoring, observer coverage, and enforcement coverage are not at full capacity and that sustainable bycatch levels of DSCS would be difficult to ascertain. Bycatch cap measures could be relatively costly, and there are other management measures that could be employed to protect DSCS.

Comment 48: One commenter recommended that NMFS initiate a pilot observer program to monitor bycatch in the Gulf Council Royal Red Shrimp Fishery to evaluate potential DSCS bycatch.

Response: NMFS is considering ways to monitor bycatch of DSCS in various fisheries and is supportive of cost-effective ways to reduce such bycatch or eliminate it altogether where deemed necessary and appropriate.

Measure 5

Establish a program to identify new areas containing high concentrations of deep-sea coral and sponge habitat through bycatch monitoring, surveys, and other methods, designate these newly discovered areas as EFH and HAPC, and close them to bottom trawling.

Comment 49: Another commenter felt that additional closures based on DSCS bycatch would be difficult to identify.

Response: Because of the lack of data and uniformity problems in data collected on DSCS bycatch, area closures based on DSCS bycatch may be difficult. As with capping fishing based on DSCS bycatch, NMFS will need to evaluate current standardized bycatch reporting methodology to include bycatch reporting methodology for DSCS before NMFS can evaluate the potential use of monitoring bycatch in individual fisheries for the purpose of closing areas to fishing (see response to Comment 47 under Measure 4 above).

Comment 50: One Commenter felt that identifying new areas containing high concentrations of DSCS through bycatch monitoring might be the most economical approach due to the limited amount of bottom trawling occurring in coral areas of the Gulf of Mexico.

Response: NMFS agrees that bycatch monitoring may be an economical method to prioritize a more detailed examination of the benthic community in the Gulf of Mexico. However, trawl and other types of surveys conducted or contracted by NMFS may also prove economical and more expeditious in identifying high concentrations of DSCS for possible designation as EFH and HAPC and potentially closing them to bottom trawling. NMFS will work with the Councils through existing bycatch monitoring and observer programs to increase monitoring of DSCS bycatch, and encourage Councils to consider whether such information is sufficient to identify closure areas to protect EFH/HAPCs and avoid bycatch if appropriate.

Comment 51: A few commenters stated that DSCS knowledge is limited, so establishing a bycatch monitoring research program is reasonable within constraints of budget. When areas are discovered, they should go through the proper NEPA process before adding protection.

Response: NMFS agrees.

Measure 6

Enhance monitoring infrastructure, including observer coverage, vessel monitoring systems, and electronic logbooks for vessels fishing in areas where they might encounter high concentrations of deep-sea coral and sponge habitat (including encountering HAPC).

Comment 52: Several commenters supported enhanced monitoring infrastructure that is more efficient and effective; improves understanding of the ecosystem; and is within constraints of practical fishing operations, reasonable costs, and budget priorities that also include what is necessary for fisheries and endangered species issues.

Response: NMFS agrees that enhanced monitoring is beneficial to the fishing community, the fishery, and DSCS resources. NMFS strives to have effective and efficient monitoring systems in place that are appropriate to the fishery for which they are employed and for the living marine resources NMFS protects. For instance, the rock shrimp fishery in the South Atlantic is required to have vessel monitoring systems (VMS) on all commercially licensed vessels and all shrimp vessels are also required to incorporate turtle excluder devices (TED) into their nets to reduce the mortality of sea turtles in shrimp trawls. As technology develops and as budgets permit, NMFS incorporates technological advances into its monitoring programs.

Comment 53: Two commenters stated that the South Atlantic and the Gulf of Mexico Councils have taken measures to require observers and VMS to monitor DSCS.

Response: The Gulf Council does not require observers on vessels that potentially may impact deep-sea corals. Shrimp vessels in the Gulf of Mexico take observers on a voluntary basis and coral bycatch is not currently recorded specifically as ''coral'' but rather as ''invertebrate unidentified.'' Any coral bycatch is included along with other invertebrate species by weight, which include sponges. The Gulf Council has placed VMS on its vessels fishing with fish traps and all commercial reef fish vessels. The South Atlantic Council requires VMS on its rock shrimp vessels. The rock shrimp fleet fishes close to the *Oculina* HAPC, a known location of deep-sea coral communities. NMFS monitors more than 2,100 fishing vessels using VMS. The following is an approximation of VMS vessels by region: Northwest (380), Alaska (600), Northeast (578), Southeast (260), Pacific Islands (160), and Southwest (190). The following is an approximation of NOAA observers serving annually by region: Northwest (50), Alaska (270), Northeast (75), Southeast (30), Pacific Islands (30), and Southwest (20). NMFS supports the use of VMS systems; these systems should be paired with observers to accurately monitor trawl gear impacts on DSCS.

Comment 54: A commenter questioned the accuracy of electronic logbooks of DSCS bycatch kept by fishermen. The commenter also indicated 100 percent observer coverage of bottom-trawling vessels needs to be balanced against the costs for any vessel smaller than a large factory trawler to carry the observer.

Response: NMFS believes electronic logbooks can be kept accurate with compliance tools such as observers, VMS, for U.S. Coast Guard (USCG) and NMFS enforcement. NMFS encourages the fishing community to understand

the need for accurate log-books to provide the best management for the fishery. In most observer programs, observer coverage ranges from 5 to 20 percent. Currently, in all regions except the Gulf of Mexico, vessels receive observers based on a statistically valid and randomized process. In the Gulf of Mexico, shrimp vessels volunteer for the NMFS observer coverage.

Measure 7

Increase enforcement and penalties to prevent deliberate destruction of deep-sea coral and sponge habitat and illegal fishing in already closed areas.

Comment 55: Three commenters noted that efforts are underway in the South Atlantic, New England, and North Pacific Councils to increase enforcement and penalties for the destruction of DSCS and illegal fishing in DSCS closed areas. Another commenter indicated that the Gulf Council is not an enforcement agency, but is developing Shrimp Amendment 14 to require VMS to aid enforcement.

Response: NMFS OLE, USCG, and deputized agents—not the Councils—are responsible for enforcing marine managed areas. Councils provide recommendations to NMFS after extensive consultation with stakeholders. Several Councils have recommend measures to require fishing fleets under their jurisdiction to carry VMS and observers, which have proved to be effective enforcement tools. NMFS OLE works with various NOAA and NMFS divisions, the Councils, NOAA General Counsel, and the U.S. Attorney's Office to determine the appropriate prosecution method for an offense. For civil violations, these include verbal warnings, fix-it notices, written warnings, summary settlement fines, as well as monetary penalties permit sanctions, permit suspensions, and permit revocations from NOAA General Counsel. For criminal violations, penalties include monetary penalties, home confinement, and/or imprisonment. Criminal investigations and prosecutions are saved for the intentional violators who commit a violation many times, conspire with others, or intentionally commit a serious offense where a civil penalty would not be appropriate or adequate.

Comment 56: One commenter indicated that illegal trawling does occur in the South Atlantic's DSCS *Oculina* HAPC, and another commenter was unsure how deliberate destruction of DSCS could be defined.

Response: The South Atlantic Council has noted that even though the *Oculina* Closed Area has been off-limits to bottom fishing since 1984, there is evidence of subsequent illegal trawling efforts. The South Atlantic Council is working closely with NMFS OLE to address these issues. Based on evidence of damage from illegal trawling, the Council and NMFS have recently mandated VMS on shrimp trawlers to aid enforcement. To prosecute illegal trawling, deliberate destruction of DSCS will require a showing of ''intent'' to destroy DSCS before a violation occurs. NMFS Enforcement encourages anyone who witnesses or has knowledge of a violation to report it via the NMFS Enforcement hotline number at 1–800–853–1964.

Comment 57: Many commenters supported increased enforcement efforts for all aspects of fisheries management to enforce existing closures, and other fishing regulations.

Response: NMFS agrees that effective fishery management requires effective enforcement and cooperation by all parties to obey the regulations. NMFS OLE is also researching and testing other viable ways (e.g., joint enforcement agreements with state counterparts and satellites) to help enforce fishery compliance.

Measure 8

Fund and initiate research to identify, protect, and restore damaged deep-sea coral and sponge habitat.

Comment 58: Many commenters supported increased funding for research, mapping, and monitoring to better manage our nation's oceans, within usual budget constraints. One commenter felt Oceana should match funds for research.

Response: NMFS shares the commenters' recognition of the need for further research and mapping of these communities. A better understanding of where these resources are, how they are impacted by humans, and their ecological role in the deep ocean leads to more informed management decisions. NOAA is working to address research gaps in our understanding of DSCS within current budget constraints (see the previous section on scientific research). Although NOAA encourages joint research with NGOs, academia, and other agencies, it would be both inappropriate and illegal to require an NGO to match federal research dollars.

Comment 59: One commenter felt that establishing a research budget is not appropriate for a rulemaking petition.

Response: NMFS agrees that establishing a research budget through any petition is not appropriate.

Comment 60: A commenter indicated that the South Atlantic Council is currently drafting plans for further research to explore DSCS.

Response: The South Atlantic Council is developing an *Oculina* Research and Monitoring Plan and a Deep Coral Research and Monitoring Plan. The goal of the *Oculina* research plan is to evaluate restoration methods for destroyed and damaged *Oculina* habitat and assess long-term survival of restored colonies.

Deep-Sea Coral and Sponge FMP Development

Comment 61: Several commenters noted that the South Atlantic, Western Pacific, and Gulf of Mexico Councils have already developed Coral FMPs to protect corals from activities such as trawling, anchoring, and placing traps within coral areas.

Response: The South Atlantic and Western Pacific Councils have developed coral FMPs to regulate harvest of species that include deep-sea corals, and that also provide protection from other fishing impacts. The Gulf of Mexico and Caribbean Councils have developed coral FMPs to regulate the harvest and protect warm-water corals from fishing impacts, but do not identify DSCS species for protection. No Council currently has an FMP to manage impacts to deep-sea sponges.

Comment 62: Another commenter stated that DSCS are not currently commercially harvested, managed under FMPs, or identified as EFH in New England. However, they stated that the New England Council is at the forefront for protecting marine habitats through large closure areas for EFH.

Response: DSCS are not harvested, managed under FMPs, or identified as EFH in New England. However, certain areas of DSCS are protected by recent monkfish closure areas to protect hard-bottom identified as EFH. The New England Council has also closed off large areas to protect marine habitats identified as EFH that are vulnerable to fishing. This example is one of many positive examples of Council actions to conserve marine habitat resources.

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Rebecca Lent

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