

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

[Docket No. 240130–0029]

RIN 0648–BM51

Fisheries of the Northeastern United States; Framework Adjustments to Northeast Multispecies, Atlantic Sea Scallop, Monkfish, Northeast Skate Complex, and Atlantic Herring Fisheries; Southern New England Habitat Area of Particular Concern Designation

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

ACTION: Final rule.

SUMMARY: This action implements the New England Fishery Management Council's Framework Adjustment that identifies a Habitat Area of Particular Concern offshore of Southern New England. This rule adjusts the following fishery management plans: Northeast Multispecies; Atlantic Sea Scallop; Monkfish; Northeast Skate Complex; and Atlantic Herring. The Habitat Area of Particular Concern is within and around wind lease areas in Southern New England, including Cox Ledge, to focus conservation recommendations on cod spawning habitats and complex benthic habitats that are known to serve important habitat functions to Council-managed fishery species.

DATES: Effective March 6, 2024.

ADDRESSES: Copies of the Southern New England Habitat Area of Particular Concern Framework and other supporting documents for this action are available upon request from Dr. Cate O'Keefe, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The supporting documents are also accessible via the internet at: <https://d23h0vhsm26o6d.cloudfront.net/230926-SNE-HAPC-Framework-FINAL.pdf>.

FOR FURTHER INFORMATION CONTACT: Sabrina Pereira, Marine Habitat Resource Specialist, email: Sabrina.Pereira@noaa.gov; phone: (978) 675–2178.

SUPPLEMENTARY INFORMATION:**Background**

This action identifies a Habitat Area of Particular Concern (HAPC) in and around offshore wind lease areas in Southern New England, including Cox

Ledge. The New England Fishery Management Council recommended the HAPC designation due to concerns about the potential adverse impact on essential fish habitat (EFH) from the development of offshore wind energy projects. The designation focuses on important cod spawning grounds and areas of complex habitat that are known to serve important habitat functions to federally managed species within and adjacent to offshore wind development areas. Complex benthic habitat provides shelter for certain species during their early life history, refuge from predators, and feeding opportunities. The HAPC designation will be applied during EFH consultation when data indicate that cod spawning and/or complex habitats occur within or near the footprint of a project located within the border of the HAPC area identified in Figure 6 of the Framework document.

HAPCs highlight specific types or areas of habitat within EFH that may be particularly vulnerable to human impacts. HAPC designations should be based on one or more of the following criteria: (1) The importance of the ecological function provided by the habitat, including both the historical and current ecological function; (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 (50 CFR 600.815(a)(8)). As detailed below, the HAPC designated by this action has all four of these attributes.

An area's status as an HAPC is intended to lead to special attention regarding potential adverse effects on habitats within areas of particular concern from various activities (e.g., fishing, offshore wind energy). An HAPC designation does not provide any specific habitat management measures, such as restrictions on gear types, harvest levels, fishing locations, offshore wind survey and construction activities, or other activities with adverse effects on habitat in the area.

The proposed rule for this action was published in the **Federal Register** on September 26, 2023 (88 FR 65944), and comments were accepted through October 26, 2023. NMFS received 14 comments from the public, and no changes were made to the final rule because of those comments (see Comments and Responses for additional detail).

Habitat Area of Particular Concern Designation

This action implements Alternative 5, the Council's preferred alternative for

the Southern New England HAPC designation, which identifies as an HAPC certain habitats in the area overlapping offshore wind lease sites in southern New England. The spatial extent of the HAPC is based on the footprint of the lease areas, buffered by approximately 10 km on all sides, combined with the footprint of the Cox Ledge spawning ground, which is based on recent evidence of cod spawning activity. Figure 6 on page 29 of the Framework document (online at <https://d23h0vhsm26o6d.cloudfront.net/230926-SNE-HAPC-Framework-FINAL.pdf>) contains a map of the HAPC designation area. As noted in the Framework document (at 27), when projects are proposed within this area, "The HAPC designation will be applied during EFH consultation when data indicate that cod spawning and/or complex habitats occur within or near the project footprint."

The HAPC area is located within designated EFH for the following species that occupy complex habitats within the footprint: Atlantic cod egg, larvae, juveniles, and adults; Atlantic herring eggs; Atlantic sea scallop eggs, juveniles, and adults; little skate juveniles and adults; monkfish juveniles and adults; ocean pout eggs, juveniles, and adults; red hake juveniles and adults; winter flounder eggs, juveniles, and adults; and winter skate juveniles and adults.

Complex habitats are defined as hard bottom substrates, defined by the Coastal and Marine Ecological Classification Standard (CMECS) as Substrate Class Rock Substrate, and by the four Substrate Groups: Gravels; gravel mixes; gravelly; and shell. This CMECS modifier was developed by NMFS for habitat mapping recommendations, including both large-grained and small-grained hard habitats. Hard bottom substrates with epifauna or macroalgae cover are also defined as complex habitat.

Evidence of cod spawning activity at a site could be based on: Capture of ripe, running, or spent cod during fishery independent surveys; detections of acoustically tagged fish between November and April; detections of cod grunts in acoustic surveys; capture of cod larvae in ichthyoplankton surveys; and/or evidence of eggs in ichthyoplankton surveys (not species specific but indicative of spawning success).

Designation of this HAPC places a focus on areas that are experiencing current development stresses. The designated area overlaps areas leased for renewable energy development. Some projects are already permitted, others

are currently undergoing environmental review, and others are still within the site assessment phase. The HAPC's spatial footprint closely aligns with the wind lease areas because these areas face differential levels of foreseeable on-going development-related threats compared to surrounding areas. The HAPC boundary includes a buffer of approximately 10 km beyond the leased areas, recognizing that some types of development activities can generate impacts at scales of tens of kilometers beyond the site of construction and operations. For example, acoustic impacts may extend kilometers from a pile driving site. Greater scrutiny would be given to activities within the HAPC designated area when data indicate that cod spawning and/or complex habitats occur within or near a project or activity footprint. An HAPC focused on these conservation objectives is consistent with the Council's Offshore Wind Energy Policy, as well as prior offshore wind project specific comments provided by the Council in recent years.

The cod spawning habitats within the HAPC meet all four of the HAPC criteria identified above, and the complex bottom habitats meet all criteria except for "rarity." The HAPC area is important for current ecological function because it includes spawning sites, juvenile settlement areas, and feeding areas for species with EFH in the area, including various cod stocks. Georges Bank Atlantic cod, which is in poor stock condition (*i.e.*, overfished and experiencing overfishing), spawns in the area, and Southern New England cod represents a genetically distinct subpopulation. The subpopulation also contributes to the Georges Bank cod stock; thus, any impacts to Southern New England cod could also detrimentally impact the Georges Bank stock. With regard to sensitivity to anthropogenic stresses, cod spawning activities are particularly sensitive to adverse impacts from fishing and non-fishing activities, namely from offshore wind development (construction, operations, and maintenance), and complex habitats are susceptible to conversion and sedimentation. The HAPC meets the "extent of current or future development stresses" criterion because this area is facing an existing on-going development-related threat from offshore wind. Finally, regarding "rarity," cod spawning habitats (based on acoustic environment, seafloor and water column setting) are rare with only one known grouping of active sites in Southern New England. On the other hand, complex habitat features alone are

not considered rare (*i.e.*, spatially or temporally very limited).

The HAPC identified herein is a non-regulatory designation. HAPC designations are intended to provide for increased attention when habitat protection measures are considered. HAPCs that are vulnerable to the potential impacts from anthropogenic activities warrant special attention when determining appropriate management measures to minimize, compensate, or mitigate those impacts.

Comments and Responses

The public comment period for the proposed rule ended on October 26, 2023, and NMFS received 14 comments from the public. No changes were made to the final rule as a result of these comments. Eight comments expressed concern over offshore wind development and its impacts on marine life, but they did not address this specific action; therefore, no response is warranted at this time.

Comment 1: Two comments expressed general support for the HAPC designation.

Response: NMFS agrees and is implementing this rule in a timely manner.

Comment 2: Three comments were in support of the HAPC designation and also urged additional habitat protections and considerations for Cox Ledge, sensitive habitats, and protected species.

Response: This action does not add any restrictions on offshore development or fisheries management restrictions related to the HAPC. The Council's problem statement and objectives described in section 3.3 of the framework document (see **ADDRESSES**) focused on the potential for enhancing the EFH consultation process and conservation recommendations; developing new restrictions on fishing were outside the scope for the framework. Neither NMFS nor the Council has the ability to directly restrict offshore development, including offshore wind.

Comment 3: A comment from the American Clean Power Association expressed opposition to the HAPC and support for Alternative 2 identified in the Council's framework document because it includes only those areas for which scientific research has demonstrated the presence of cod spawning. The comment also urged the Council to rely on "the best available sources" when identifying EFH ". . . and not the presence of an offshore wind lease," noted that the "lack of data on cod spawning in southern New England waters does not equate to

actual scientific evidence of rarity," and contended that "wind development has not been directly linked to impacts on cod spawning habitat."

Response: The Council's preferred alternative, Alternative 5, was chosen in part because it identifies a broader area of Southern New England within which the HAPC designation would be applied if additional cod spawning activity is documented by future data/studies and/or complex habitat is identified. Alternative 5 provides NMFS with the opportunity at the time of a project review to use available data that are related to the suitability for cod spawning, or the presence or absence of cod spawning activity, and/or complex habitat in order to determine whether to consult on a project area as an HAPC, without the need for a new designation from the Council. Alternative 2, supported by the commenter, focuses on Atlantic cod habitat, but this designation addresses multiple species and threats to those species. In addition, the preferred alternative designates areas of complex habitat within a broad Southern New England footprint as HAPC for certain life stages of Atlantic cod, Atlantic herring, Atlantic sea scallop, little skate, monkfish, ocean pout, red hake, winter flounder, and winter skate that use these habitats. Habitat for these additional species should also benefit from conservation recommendations based on this HAPC.

The Council and NMFS have utilized the best available data sources to map EFH for multiple federally managed fish species. The presence of offshore wind lease areas is not determinative of what areas are mapped EFH. Federal agencies are required to consult with the Secretary with respect to any action or proposed action authorized, funded, or undertaken that may adversely affect any identified EFH. In establishing HAPC designations, which are a subset of EFH, the Council and NMFS can consider whether, and to what extent, development activities are, or will be, stressing the habitat type. Offshore wind development is a specific stressor within the Southern New England lease areas, and therefore the spatial extent of the HAPC is based on the combined footprint of spawning grounds, complex habitats, and lease areas.

With respect to rarity, as noted above, NMFS concluded that active cod spawning habitats are rare based on information regarding critical ecosystem features such as the acoustic environment, seafloor and water column setting, which is the best scientific information available. Only one known group of active spawning sites exists in Southern New England. They are not

considered rare due to lack of data. EFH for cod spawning that may lead to an active cod spawning habitat is identified in the HAPC, and any updated data may be considered at the time of any action or proposed action to determine whether consultation is necessary. This is consistent with National Standard 2, one of the statutory principles that must be followed in any FMP as per the Magnuson-Stevens Fishery Conservation and Management Act, which recognizes the dynamic nature of the scientific process, the need to evaluate new data and uncertainties in available information, and to identify gaps in available information. Overall, cod is a very well-studied species with a long fishing history, decades of fishery independent surveys, extensive tagging work, and, most recently, acoustic surveys that have been used to document spawning grounds in space and time.

Finally, broad categories of activities that may adversely affect EFH include, but are not limited to: Dredging; filling; excavation; mining; impoundment; discharge; water diversions; thermal additions; actions that contribute to non-point source pollution and sedimentation; introduction of potentially hazardous materials;

introduction of exotic species; and the conversion of aquatic habitat that may eliminate, diminish, or disrupt the functions of EFH.

Changes From the Proposed Rule

There are no substantive changes from the proposed rule.

Classification

Pursuant to section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act, this action is necessary to implement adjustments to fishery management plans as identified below. In a previous action taken pursuant to section 304(b), the Council designed the fishery management plans (FMP) to specify the process for NMFS to take this action pursuant to Magnuson-Stevens Act section 305(d), and this action puts in place administrative designations that are not implementing any associated management measures. The NMFS Assistant Administrator has determined that this rule is consistent with the Northeast Multispecies FMP; Atlantic Sea Scallop FMP; Monkfish FMP; Northeast Skate Complex FMP; and Atlantic Herring FMP, other provisions of the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866, as amended by Executive Order 14094.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification, and the initial certification remains unchanged.

This final rule does not duplicate, conflict, or overlap with any existing Federal rules.

This final rule contains no new information collection requirements under the Paperwork Reduction Act of 1995.

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

Dated: January 30, 2024.

Samuel D. Rauch III,

*Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.*

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