

John K. Bullard, Regional Administrator  
National Marine Fisheries Service  
55 Great Republic Drive  
Gloucester, MA 01930  
*Submitted via: [www.regulations.gov](http://www.regulations.gov)*

**Re: Proposed Framework Adjustment 48 to the Northeast Multispecies Fishery Management Plan; NOAA-NMFS-2013-0050**

Dear Mr. Bullard,

On behalf of The Humane Society of the United States, Center for Biological Diversity, and Whale and Dolphin Conservation, New England Aquarium and Dr. Caroline Good, we wish to submit comments on Proposed Framework Adjustment 48 (FW 48) which would, among other things, authorize “several measures intended to improve the administration of the fishery and enhance fishing opportunities for groundfish vessels to mitigate potential negative economic impacts from reductions in catch limits proposed by impending Framework 50.” [78 Fed. Reg. 18188, March 25, 2013] In particular, we are concerned with the portion of this proposal that would allow groundfish sectors to petition the Regional Administrator for limited access to groundfish mortality closures. Our organizations have previously expressed our concerns with re-opening these long-closed areas for exempted fishing, particularly because the openings are likely to increase protected species mortality and serious injury, the impacts of which we believe have not been sufficiently analyzed [*see* Attachment A, letter of March 28, 2013] For that reason, we support the “no action” option that is presented.

**Background**

In December 2012, the New England Fishery Management Council (NEFMC) selected Option 2 for Framework Adjustment 48, which would allow access to five closed areas, including Cashes Ledge, Closed Area I, Closed Area II, Western Gulf of Maine, and Nantucket Lightship. [*See* Draft FW 48 (Dec. 13, 2012) at 77; 78 Fed. Reg. at 16,231.] These five areas were originally closed to protect critical spawning and nursery grounds for deteriorating groundfish stocks, and most of the closures have been in place since the 1990s.[ *See* 50 C.F.R. § 648.81.] According to its notice in the Federal Register, the National Marine Fisheries Service (NMFS) proposes under FW 48 to amend the Fishery Management Plan (FMP) to allow sectors to submit limited requests for exemption from portions of year-round closure areas. Specifically, sectors could request exemption from the year-round groundfish mortality closures, except where they overlap with current or proposed habitat closed areas. In fact, sectors have already notified NMFS of their

desire to be exempted in some of the currently closed areas; and this was the subject of our March 2013 letter to your office. [See Att. A.]

We appreciate the economic hardship and uncertainty facing fishers in the wake of disappointing findings on the status of groundfish stocks and subsequent moves to cut back allowable catch levels. However, we are not convinced that opening these zones for fishing is an ecologically prudent solution. Some of the closed areas overlap with portions of the Gulf of Maine known to be areas of significant aggregation for a wide variety of marine species. As federally appointed members of NMFS Take Reduction Teams, convened under mandate of the Marine Mammal Protection Act (MMPA), we can attest that the continued closure of these areas has been relied on as an important aspect of protected species bycatch risk reduction. The areas being considered for exempted fishing have long been considered areas where there is *no* fishing effort and thus areas of no risk of entanglement of marine mammals from gillnets or other fixed gear used in groundfish fisheries. Altering the system of closures would alter assumptions of risk and mortality rates.

## **Risk to Marine Mammals May be Increased in Areas Proposed for Exemptions**

### **1. Summary of our Previous Comments**

On January 9, 2013 signatories to this letter wrote to you and the NEFMC stating our concern that the proposed closed area exemptions could substantially increase entanglement risk for Endangered Species Act (“ESA”)-listed large whales and harbor porpoise, as well as other marine mammals and sea turtles. [See Att. B]. In that letter we reminded NMFS that several of the existing closed areas have offered the ancillary benefit of reducing the threat of serious injury and mortality to ESA-listed species by excluding the fisheries from high use habitat and thereby reducing risk of entanglement in vertical lines.

We reiterated our concerns for elevated entanglement risk in our March 28, 2013 letter to your office regarding the Northeast Multispecies Fishery Proposed 2013 Sector Operations Plans [78 Fed. Reg. 16,220 (March 14, 2013)]. At that time, we also expressed concern that your agency has not fully evaluated the impact of the exemptions on the environment, protected species, or the existing regulatory framework. As we will discuss later in these comments, we still find that evaluation deficient.

As we stated in our prior letter, if NMFS opens these areas, fixed gear use and fishing effort will shift into them, increasing entanglement risk and related injuries and mortalities. The NMFS Stock Assessment Report [SAR] for 2011 states that “[r]eported human-caused mortality and serious injury was a minimum of 2.4 right whales per year from 2005 through 2009. Given that the [Potential Biological Removal level] has been set to 0.8, no mortality or serious injury for

this stock can be considered insignificant.” Likewise, the 2011 NMFS SAR for the Gulf of Maine humpback stock reports that U.S. fishery-caused mortality is 3.4 animals per year, while PBR is currently 1.1 animals, and the 2012 Draft NMFS SAR notes that “groundfish gillnets and crab pot lines have been the most common sources of humpback entanglement.” Thus, for the two most endangered species of large whale, fisheries are already exceeding legal bycatch mandates, even with the benefit of existing closures. Allowing for closed area exemptions for fixed fishing gear will only make matters worse and put NMFS further behind in its legal responsibilities to protect these large whale species under the MMPA and the ESA.

## **2. Inadequate NEPA Documentation**

In support of proposed FW 48, the NEFMC prepared an Environmental Analysis (EA). However, this EA almost entirely fails evaluate impacts to protected species, including large whales, other marine mammals, and sea turtles, despite the serious potential for increased entanglement.<sup>1</sup> Further, because the proposed exemption from year round mortality closures will impact ESA-listed species, and because the impacts are unknown, an EIS is required before NMFS approves this action.

First, the EA acknowledges that serious impacts on protected species may result from exemptions from the year-round mortality closures. For example, the NEFMC notes that “[i]mpacts on protected resources will depend greatly on effort shifts that result from access to areas previously closed. Marine mammals and sea turtles can be found in and around all the closed areas.” (NEFMC, 2012). It goes on to state that “[b]ased on data identifying where species occur, it is anticipated that the two areas of most concern would be the WGOMCA and NLCA for both Atlantic sturgeon and harbor porpoise; these areas would also be of concern for endangered large whales and sea turtles. Gillnet gear is primarily responsible for most of the takes of these animals in these areas.”

Further, the NEFMC EA states that “[t]here are some marine mammal concerns with regard to opening some of the year-round closure areas, which can be discussed. The biggest areas of concern are the WGOMCA for harbor porpoises and gillnet gear, and possibly the NLCA. Allowing access to trawl gear in both CA I and CA II could have implications for marine mammals like pilot whales, Atlantic whitesided, common, and bottlenose dolphins. While large whales have been sighted in all of the closed areas, the areas with the highest sightings numbers appear to be WGOMCA and CLCA, and CA I.” (*Id.*)

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<sup>1</sup> We note that it was difficult to access the EA for this proposal. NMFS’s Federal Register notice indicated that an “EA/RIR/IRFA” was available online and provided a link to the NEFMC website, but the appropriate document was not properly labeled as an EA. This type of confusion denies the public a full opportunity to comment.

However, despite acknowledging there may be impacts on protected species, the Council fails to actually evaluate the severity, duration, or cumulative nature of these impacts. In fact, the EA provides almost no analysis whatsoever of impacts to protected species. See NEFMC 2012. The EA notes that there are “some marine mammal concerns” with opening the closed areas and that opening certain closed areas will be “of most concern” to harbor porpoise, turtles, and whales. However, these vague statements that “some impacts” may occur are patently insufficient under NEPA. 42 U.S.C. § 4332(C); *Pac. Rivers Council v. United States Forest Serv.*, 689 F.3d 1012, 1024 (9th Cir. 2012) (“[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.”); *N. Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (“Taking a ‘hard look’ at environmental consequences of major federal actions includes ‘considering all foreseeable direct and indirect impacts’”).

Instead of providing a comprehensive analysis of effects, the EA states that predicting impacts is difficult because effort shift as result of its proposal is difficult to predict. The EA clearly acknowledges that “the sector exemption areas open fishing effort will shift from surrounding areas and increases in total fishing effort are possible.” Further, the EA finds that “[c]onducting analyses of impacts on marine mammals of opening these closure areas largely depends on how effort will shift into these areas and where this effort will shift from (e.g., will effort just be more spread out, will risk increase in these areas and decrease elsewhere, etc.). It also depends on whether overall effort will decrease, remain the same, or increase. Impacts could also arise from changes in effort for other fishing gear currently present within these areas if this gear/effort is expected to shift elsewhere to avoid conflicts with new gear being allowed into these areas (e.g., shifts in lobster gear).” (Id.). However, the EA makes no attempt to project how effort will shift; nor does it attempt to project changes to *overall* level of effort that might affect protected species, both as a result of re-opening closed areas or the likely shifts from targeting cod or other species with highly restrictive quotas into other groundfish including monkfish, dogfish and skate.

Further, the NEFMC suggests that impacts will be further considered in later analyses. The EA states that “This action would allow sectors to request exemptions from the closed areas; the impacts to protected species due to the opening of any of the year round mortality closures will be analyzed in a separate action.” (Id.) However, NMFS is now proposing to amend the current FMP to allow fishing in previously closed areas, and it is reasonable to anticipate that sectors will apply for these exemptions. In fact, sectors have *already* requested exemptions, although NMFS has indicated it will reconsider those requests at a later time. [78 Fed. Reg. 16,220 (March 14,2013)]

NEPA must be conducted at “the earliest possible time” and the agency must consider all “reasonably foreseeable” direct and indirect effects of a proposal. 40 C.F.R. §§ 1501.2; 1508.8; *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir. 2002) (“NEPA is not

designed to postpone analysis of an environmental consequence to the last possible moment” but is “designed to require such analysis as soon as it can reasonably be done.”). It is reasonably foreseeable – and in fact likely – that NMFS will eventually consider or grant exemptions to sectors if the agency finalizes its current FW 48 proposal. Accordingly, full NEPA analysis must be conducted now and may not be delayed.

Further, in a separate section of the EA purportedly evaluating cumulative impacts, the NEFMC assumes that the impact of this action on endangered and protected species will be entirely positive because the NEFMC and NMFS seek to reduce effort on specified groundfish stocks. This analysis appears to ignore statements earlier offered in the text that admit that there may be shifts of effort to target other species (e.g., fishing for lobster, where there is a well-known adverse impact on endangered whales) or into utilizing areas that have been closed and where bycatch has either been non-existent or at least limited because fishing in a close area has been illegal. Once opened, these areas may see increased effort. We question whether the rosy cumulative impact assessment, summarized in table 106, reached a justifiable conclusion.

In addition to its inadequate EA, NMFS and the NEFMC must evaluate any proposed closed area exemptions in an EIS, not an EA. NEPA requires an agency to produce an EIS when an action will have a “significant” effect on the environment. Here, in addition to the loss of biological productivity and effects on ecologically critical areas, the exemptions will significant impacts on critically endangered species such as right whales, triggering the need for an EIS. 40 C.F.R. § 1508.27. Further, the agency admits that impacts to protected species are uncertain, as the agency cannot predict where and how fishing effort will shift. The NEPA regulations require an EIS in these situations, when “the possible effects . . . are highly uncertain or involve . . . unknown risks.” *Id.* Accordingly, an EIS is required and the agency must reject the current closed area proposal until it has completed a full and adequate analysis.

We also note that North Atlantic right whales are not listed in Table 19 as a species with which the Northeast sink gillnet fishery interacts. The northeast sink gillnet fishery has been listed as a Category I fishery since 1996, and does entangle right whales, as is documented in the most recent NMFS stock assessments and List of Fisheries (76 FR 73912; NMFS, 2013). The EA must use the most recent and best available information in its assessment of risk. *Lands Council v. U.S. Forest Serv.*, 395 F.3d 1019, 1031 (9th Cir. 2004) (finding the lack of up-to-date evidence prevented the agency from making an accurate impact assessment and rejecting approval as arbitrary and capricious).

In its discussion of possible mitigating factors for harbor porpoise, the EA states that “fishing vessels would also need to comply, where applicable, with seasonal gillnet requirements of the...Harbor Porpoise Take Reduction Plan (HPTRP) which manages coastal and offshore waters from Maine through North Carolina.” (NEFMC, 2012) It states that “the HPTRP aims to reduce interactions between the harbor porpoise and gillnets in the Gulf of Maine, southern New England, and Mid-Atlantic regions. In New England waters, the HPTRP implements seasonal

area closures and the seasonal use of pingers (acoustic devices that emit a sound) to deter harbor porpoises from approaching the nets.” (Id.)

As members of the harbor porpoise take reduction team (HPTRT) we must point out that, as implemented, the HPTRP imposed requirements for seasonal pinger use and seasonal closures with the understanding that there would also be FMC-based permanent closed areas resulting in areas where there would be no risk, so management measures were not targeted (i.e., “applicable”) to the areas closed under the FMP because they were *closed* areas. Once re-opened, we fear that bycatch will only increase.

In fact, an analysis undertaken by the NMFS Northeast Fishery Science Center that was presented to the HPTRT concluded that significant levels of harbor porpoise mortality are already occurring illegally within the Gulf of Maine Closed Area (Palka, et al., 2012 at 33, illustrating illegal bycatch in the WGOM year-round closed area occurring in all but 3 months of the year). This bycatch in an already closed area, when considered in light of extant patterns of distribution clearly indicates that we may expect the levels of harbor porpoise mortality to increase if portions of the Western Gulf of Maine are opened under FW 48 to exemptions. (Figures 1 and 2)

As we noted in our previous comments, the HPTRT made a consensus recommendation at its December 2007 meeting that NMFS codify the Multispecies Western GOM year-round closure in its MMPA regulations implementing the HPTRP. The rationale was that the HPTRT believed that patterns of porpoise take in the fishery illustrated the potential importance of the closed area to harbor porpoise conservation. Members of the HPTRP agreed that this was necessary “for the protection of harbor porpoises in the event the New England Fishery Management Council considered re-opening the area to gillnet fishing under the Multispecies FMP.” (NMFS, 2009) In the wake of this recommendation, Option 5 in the NMFS EA for the HPTRP would have incorporated the WGOM closure under the MMPA, rather than leaving it solely as part of a FMP. However, the NMFS declined to adopt this consensus recommendation in its final regulations. In its rationale for declining to adopt the HPTRT recommendation NMFS stated that it was unnecessary because “no modifications to the Western GOM Closed Area are being considered under the ongoing deliberations regarding the New England Multispecies FMP.” (Id.). Clearly this was short-sighted. Barely over three years later, both the NEFMC and NMFS are now proposing to eliminate the closed areas, to the likely detriment of harbor porpoise. (See figures 1 and 2)

Figure 1 Proposed Exempted Areas (hatched)

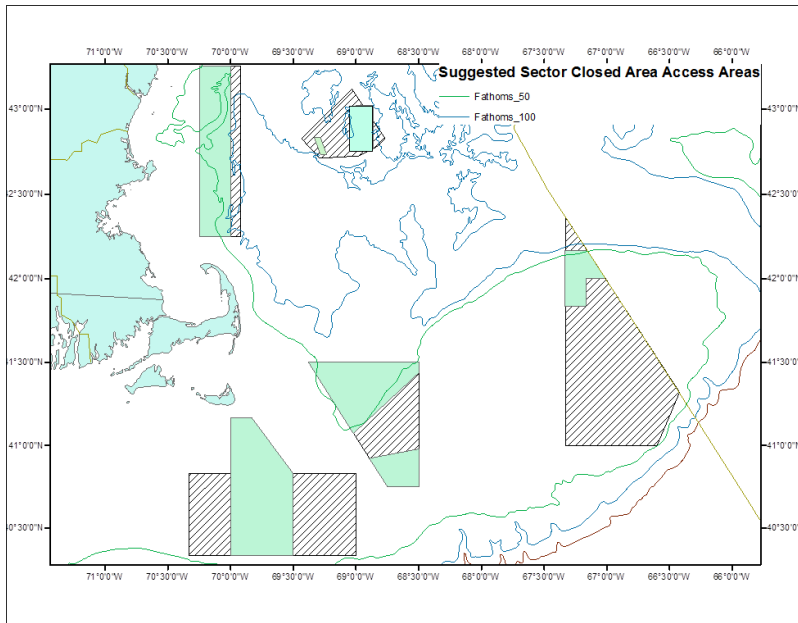
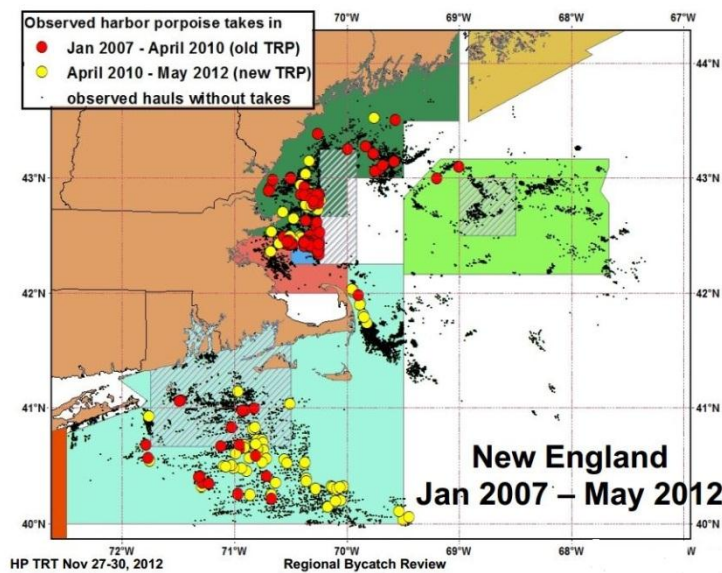


Figure 2. Harbor Porpoise Takes in Gillnets During Limited Seasons Overlaid on HPTRP Closures (hatchmarked) and (Management Areas (colored blocks))



Despite the fact that the gillnet fishery has entangled endangered humpback whales at rates that appear to exceed the PBR, the analysis by the NEFMC concludes that “[t]he Preferred Alternatives cannot be reasonably expected to adversely affect endangered or threatened species.” (NEFMC, 2012 at page 609). We believe that allowing fixed gillnets in previously

closed areas such as the Western Gulf of Maine Closed Area, will have a significant potential to increase entanglement risk for several protected species. As an example, there is substantial overlap in the distribution of North Atlantic right whales with these closed areas (see Attachment B). The co-occurrence of fixed fishing gear and right whales in these areas, if opened to fishing, is of great concern.

In section 8.4, the analysis concludes that, although the proposed changes are “likely to affect [marine mammal] species inhabiting the multispecies management unit, the measures will not alter the effectiveness of existing MMPA measures, such as take reduction plans, to protect those species based on overall reductions in fishing effort that have been implemented through the FMP.” (NEFMC, 2012, at p. 609) This seems disingenuous considering the earlier admission that the effect will depend on where or how effort shifts into newly opened areas or whether fisheries turn to other target species. These potential effort shifts are not sufficiently analyzed in Chapter 7 such that it would be reasonable to conclude that there is no increased risk. And we remind NMFS of the irony that these take reduction plans, on which the EA analysis is relying for mitigation of effects of FW 48, themselves assumed that these areas would remain closed.

### **3. Additional Analysis of Likely Impacts to Protected Species Are Required Before Opening These Proposed Areas for Exempted Fishing**

As we have previously reminded the agency, until a full assessment of the likely impacts on marine mammals is conducted under the ESA and the MMPA, these areas must remain closed. There is no question the exemptions must be evaluated fully through renewed ESA consultations on all potentially affected ESA-listed species. 16 U.S.C. § 1536(a). Further, as we noted in our previous letter, the closed area exemptions may substantially alter assumptions underlying several Take Reduction Plans. For example, the HPTRP was developed with the assumption that no changes were being contemplated to closures adopted under FMPs. Further, in developing amendments to the Atlantic Large Whale TRP, the agency has adopted a co-occurrence model for assessing entanglement risk to large endangered whales that assumes these areas are, and will remain, closed. We are concerned that opening the areas would undermine the existing regulatory framework and further delay the much-needed ALWTRP amendments.

### **4. Additional Concerns**

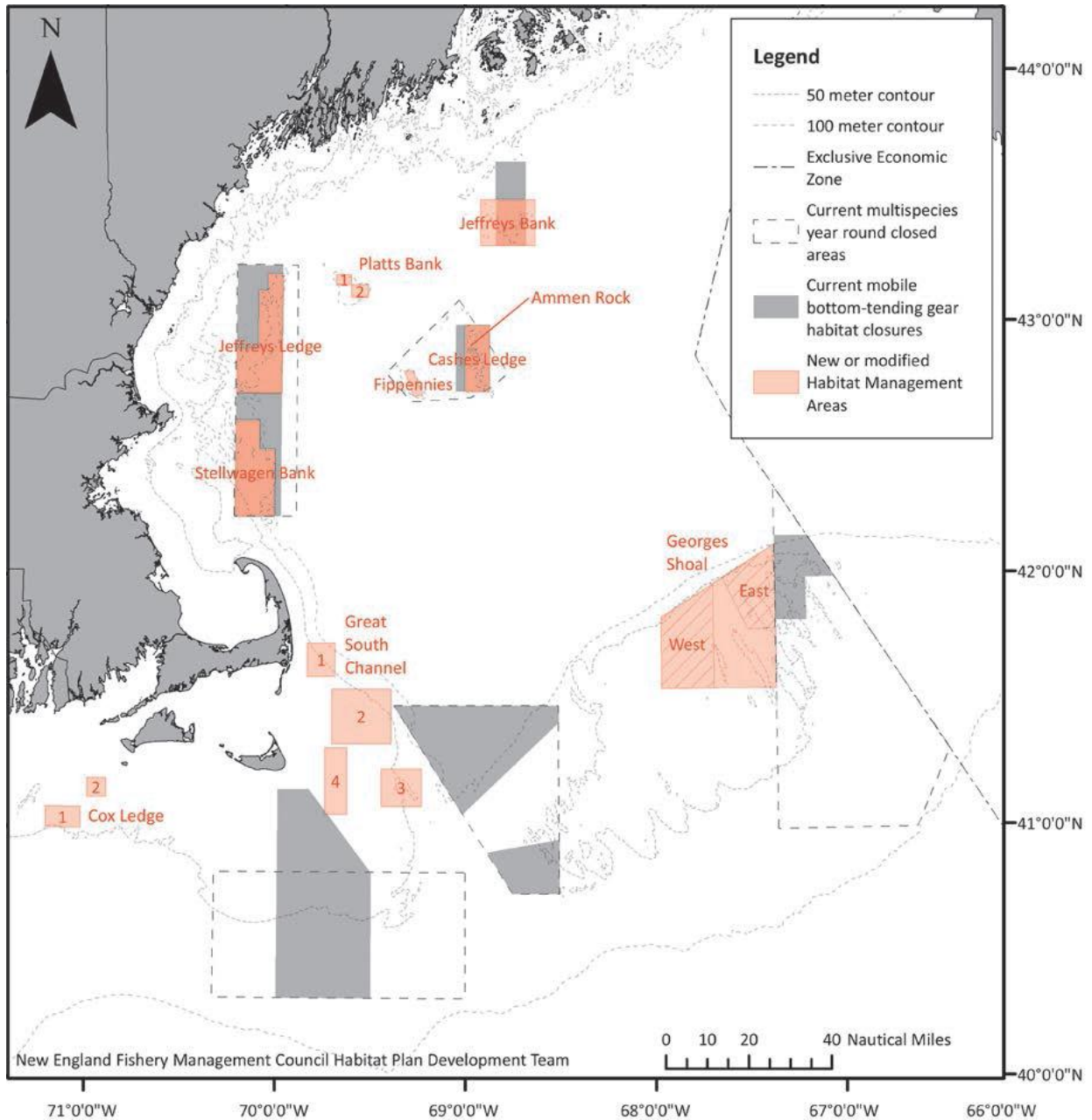
We finally note that these current FW 48 amendments are being proposed in the midst of a rapidly evolving management approaches. In addition to these proposed exemptions, the agency is considering an omnibus amendment that would further open closed areas for fishing or shift quotas and effort to new areas (e.g., Omnibus Amendment 50 as currently proposed). The cumulative impact assessment for FW 48 concludes that any future management actions will simply seek to further reduce fishing effort for overfished stocks, and thus will have only



positive effects until such time as fish stocks recover. As we have noted here, the shift in effort to other areas or species, that NMFS acknowledges may occur, has not been given serious consideration (NEFMC, 2012, at table 105) even as the agency is in process of making even more changes.

Given that the agency is considering, and likely to propose opening additional closed areas to fishing (see Figure 3), we believe that the opening of these areas should be undertaken as a single proposal. Then the agency can properly, at one time, evaluate in a proper context and gestalt which areas should be considered for re-opening, the cumulative impacts of these changes, and whether they should be implemented at one time or sequentially. The current, ad hoc approach has resulted in actions being taken out of sequence or context. For example proposed rule on which we commented in March [78 Fed. Reg. 16,220 (March 14,2013)] sought comments on monitoring closed area exemptions that were not even yet formally proposed under FW 48 and one of the options considered under FW 48 is *not* allowing exemptions. The NMFS is now, after the fact, seeking comments on whether or not or where it should allow exemptions for which is *already* allowed sectors to apply.

Figure 3. Areas Under Consideration in Omnibus Essential Fish Habitat Framework Adjustment (source: [https://fish-news.com/cfn/files/NEFMC\\_insert\\_CFN\\_12\\_12.pdf](https://fish-news.com/cfn/files/NEFMC_insert_CFN_12_12.pdf))



## Conclusion

We believe that the agency must adopt the no action alternative until such time as it has fully evaluated the likely shifts in effort that may significantly affect risk to protected species. Further, because the agency is proposing and making almost simultaneous iterative changes [e.g., in addition to this proposed rulemaking, see 77 FR 64305, October 19, 2012; 78 FR 12708, February 25, 2013; 78 FR 16,220, March 14, 2013; 78 FR 19,368, March 29, 2013], piecemeal analyses hamper both the agency's own and the public's ability to fully understand what is being

proposed and how it will affect both the target species and non-target species, and what cumulative impacts may be predicted. There is an old adage “haste makes waste.” In this case, the haste to do multiple, virtually simultaneous rulemakings that result in major changes to fishery management may waste both resources and the lives of animals that may be adversely affected as a result of incomplete analyses of risk.

Sincerely,



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# Attachment A

## *Via Electronic Submission*

March 28, 2013

Allison Murphy

Sector Policy Analyst

National Marine Fisheries Service

55 Great Republic Drive

Gloucester, MA 01930

**Re: Northeast Multispecies Fishery Proposed 2013 Sector Operations Plans,  
NOAA–NMFS–2013–0007**

Dear Ms. Murphy,

On behalf of the Center for Biological Diversity, The Humane Society of the United States, Whale and Dolphin Conservation, Defenders of Wildlife, The New England Aquarium, and Dr. Caroline Good, we thank you for this opportunity to comment on the National Marine Fisheries Service’s Proposed 2013 Sector Operations Plans. 78 Fed. Reg. 16,220 (March 14, 2013). We write to express our concern regarding the proposals to open five areas currently closed to groundfish fishing. The exemptions will increase entanglement risk for several marine mammals, including right whales, humpback whales, and harbor porpoises, as well as sea turtles. Further, as described below, the agency has not provided sufficient notice or fully evaluated the exemptions’ impacts on the environment, protected species, or the existing regulatory framework. We also express concerns regarding the increased number of gillnets proposed in Exemption 17.

In its proposed rule, NMFS requests comments on 18 sector plans of operations, 25 associated requests for regulatory exemptions, and its Draft Environmental Assessment (“EA”). As the agency describes, the NE Multispecies Fishery Management Plan (“FMP”) currently prohibits sectors from requesting exemptions from year-round mortality closed areas (“CAs”). However, in December, the Council selected Option 2 for Framework Adjustment (“FW”) 48, which would allow access to five closed areas, including Cashes Ledge, Closed Area I, Closed Area II, Western Gulf of Maine, and Nantucket Lightship. *See* Draft FW 48 (Dec. 13, 2012) at 77; 78 Fed. Reg. at 16,231. These five areas were originally closed to protect critical spawning and nursery grounds for deteriorating groundfish stocks, and most of the closures have been in place since the 1990s. *See* 50 C.F.R. § 648.81.

NMFS has not yet finalized Draft FW 48, but indicates it will by May 1, 2013.

Anticipating approval, sectors have requested exemptions from the CAs in their 2013 operation plans. In its proposed rule, NMFS has indicated it will “deny all exemption requests for access to year-round mortality CAs through this rule,” and instead intends to consider the requests subsequently “in a separate action,” after more “rigorous analysis.” 78 Fed. Reg. at 16,231. Unfortunately, and confusingly, NMFS then proceeds to detail and request comments regarding monitoring under these closed area exemptions. *Id.* As it is not entirely clear what NMFS is

proposing at this time, and out of an abundance of caution, we submit these brief comments.

**We strongly urge NMFS to deny the proposed closed area exemptions.** First, the agency has not provided sufficient notice regarding the exemptions to approve them in this rulemaking. The proposed rule contains very little explanation of the exemptions, their purpose, or their effects. As noted above, the rule indicates the agency will evaluate the exemptions in a separate rulemaking, but simultaneously proposes monitoring requirements under the exemptions. The Administrative Procedure Act requires – and the public deserves – clarity in a rulemaking of this significance. *See* 5 U.S.C. §§ 553; 706.

Second, as we explained in our January 9, 2013 letter to Regional Administrator Bullard and the Council, the proposed closed area exemptions could substantially increase entanglement risk for Endangered Species Act (“ESA”)-listed large whales and harbor porpoise, as well as other marine mammals and sea turtles. *See* Att. A. Several of the existing closure areas reduce the threat of serious injury and mortality to these species by excluding the fisheries from high use habitat. *See, e.g.,* Att. B (map overlaying the groundfish closures areas and right whale sighting 2006-2012).

If NMFS opens these areas, fixed gear use and fishing effort will shift into them, increasing entanglement risk and related injuries and mortalities. The NMFS Stock Assessment Report for 2011 states that “[r]eported human-caused mortality and serious injury was a minimum of 2.4 right whales per year from 2005 through 2009. Given that PBR has been set to 0.8, no mortality or serious injury for this stock can be considered insignificant.” Likewise, the 2011 NMFS SAR for the Gulf of Maine humpback stock reports that U.S. fishery-caused mortality is 3.4 animals per year, while PBR is currently 1.1 animals, and the 2012 Draft NMFS SAR notes that “groundfish gillnets and crab pot lines have been the most common sources of humpback entanglement.” Thus, for the two most endangered species of large whale, fisheries are already exceeding legal bycatch mandates, even with closures believed to be beneficial. Closed area exemptions for fixed fishing gear will only make matters worse and put NMFS further behind in its legal responsibilities to protect these large whale species under the Marine Mammal Protection Act (“MMPA”) and the ESA.

Until a full assessment of the likely impacts on marine mammals is conducted under the ESA and the MMPA, these areas must remain closed. There is no question the exemptions must be evaluated fully through renewed ESA consultations on all potentially affected ESA-listed species. 16 U.S.C. § 1536(a). Further, as we noted in our previous letter, the closed area exemptions may substantially alter assumptions underlying several Take Reduction Plans. For example, in 2007 the Harbor Porpoise TRT recommended by consensus that NMFS “codify the Multispecies Western GOM year-round closure” in the TRP regulations to ensure the closure’s benefit to harbor porpoise. *See* March 2009 Draft EIS on Proposed Modifications to the Harbor Porpoise Take Reduction Plan, at 43. NMFS rejected the recommendation only because the agency believed that re-codifying the existing protections would add no benefits. *Id.* Further, in developing amendments to the Atlantic Large Whale TRP, the agency has adopted a co-occurrence model for assessing entanglement risk to large endangered whales that assumes these areas are, and will remain, closed. Opening the areas would undermine the existing regulatory framework and further delay the much-needed ALWTRP amendments.

Further, NMFS has not fully considered the impacts of these exemptions pursuant to NEPA. 42 U.S.C. § 4332(C). While the agency produced a Draft EA for approving the sector plans, it did not evaluate the environmental impacts of the closed area exemptions. *See* Fishing Year 2013 Northeast Multispecies Sector Operations Plans and Contracts, A Draft Environmental Assessment (Feb. 2013), at 40 (describing “Alternatives Considered but Rejected from Further Analysis” to include exemptions prohibited by FMP Amendment 16, including “exemptions from . . . year-round closed areas”). The agency may not approve the exemptions without full NEPA analysis. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1502.14; 1502.16. Additionally, in its future rulemaking regarding these closed areas, we strongly urge NMFS to evaluate any proposed closed area exemptions in an EIS, not an EA. These exemptions will no doubt have a “significant” effect on the environment, including loss of biological productivity, effects on ecologically critical areas, and significant impacts on critically endangered species such as right whales. 40 C.F.R. § 1508.27.

Finally, we raise concerns with proposed Exemption 17. Currently, the NE Multispecies FMP limits the number of gillnets that may be fished each day in groundfish regulated mesh areas (“RMAs”) to between 50 and 100 nets. The proposed exemption would allow sector vessels to fish up to 150 nets in any RMA. 78 Fed. Reg. at 16,227. While NMFS has approved this exemption in the past, the exemption has resulted in “more gear being deployed” but “no corresponding increase in catch efficiency.” *Id.* NMFS has also acknowledged that the increased density of gillnets in the water “could increase interactions with protected resources.” Draft EA at 137. The agency should deny this exemption, as the risks to protected marine mammals outweigh the negligible benefits in flexibility. Further, more gear being deployed increases the risk of gear loss. The National Research Council has recommended that “[m]easures that reduce the loss or abandonment of fishing gear and encourage the retrieval of [derelict fishing gear] should be considered in all future FMPs,” NEPA documents, and ESA consultations. *See* NRC, *Tackling Marine Debris in the 21<sup>st</sup> Century* (2008).

We thank you again for this opportunity to comment and again urge the agency deny the proposed closed area exemptions until NMFS has completed a full analysis of all impacts, as required by law.

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