



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RTID 0648-XD632

Fisheries of the Exclusive Economic Zone off Alaska; Essential Fish Habitat Amendments

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

ACTION: Notice of agency decision.

SUMMARY: NMFS announces the approval of amendment 127 to the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI), amendment 115 to the FMP for Groundfish of the Gulf of Alaska (GOA), amendment 56 to the FMP for BSAI King and Tanner Crabs, amendment 17 to the FMP for the Salmon Fisheries in the exclusive economic zone (EEZ) off Alaska, and amendment 3 to the FMP for Fish Resources of the Arctic Management Area (amendments). These amendments revise the FMPs by updating the description and identification of essential fish habitat (EFH) and updating information on adverse effects on EFH from fishing and non-fishing activities based on the best scientific information available. These amendments are intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the FMPs, and other applicable laws.

DATES: The amendments were approved on July 15, 2024.

ADDRESSES: Electronic copies of the amendments, maps of the EFH areas, and the Environmental Assessment (the analysis) prepared for this action may be obtained from <https://www.regulations.gov> under the docket number NOAA-NMFS-2023-0160.

FOR FURTHER INFORMATION CONTACT: Molly Zaleski, 907-586-7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each regional fishery management council submit any FMP amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce (Secretary). The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment. The North Pacific Fishery Management Council (NPFMC or Council) submitted these amendments to the Secretary for review. The notice of availability (NOA) for the amendments was published in the **Federal Register** on April 23, 2024 (89 FR 30318) with a 60-day comment period that ended on June 24, 2024. NMFS received five comment letters during the public comment period on the NOA. NMFS summarized and responded to these comments under **Comments and Responses**, below.

This notice of decision announces NMFS's approval of amendment 127 to the FMP for Groundfish of the BSAI (BSAI Groundfish FMP); amendment 115 to the FMP for Groundfish of the GOA (GOA Groundfish FMP); amendment 56 to the FMP for BSAI King and Tanner Crabs (Crab FMP); amendment 17 to the FMP for the Salmon Fisheries in the EEZ Off Alaska (Salmon FMP); and amendment 3 to the FMP for Fish Resources of the Arctic Management Area (Arctic FMP).

The Council prepared the FMPs under the authority of the Magnuson-Stevens Act. Regulations governing U.S. fisheries and implementing the FMPs appear at 50 CFR parts 600, 679, and 680. Section 303(a)(7) of the Magnuson-Stevens Act requires that each FMP describe and identify EFH, minimize to the extent practicable the adverse effects of fishing on EFH, and identify other measures to encourage the conservation and enhancement of EFH. Section 3(10) of the Magnuson-Stevens Act defines EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to

maturity.” Implementing regulations at 50 CFR 600.815 list the EFH contents required in each FMP and direct councils to conduct a complete review of all EFH information at least once every 5 years (referred to here as “the 5-year Review”).

The Council developed the amendments as a result of new scientific information made available through the 5-year Review that began in 2019 (2023 5-year Review) and adopted the amendments in December 2023. The 2023 5-year Review is the Council’s fourth review of EFH in the FMPs. Prior 5-year Reviews were completed in 2005, 2012, and 2018. The Council recommended amendments to the description of, information about, and identification of EFH in the FMPs based on the new information and improved mapping as described in the draft EFH 5-year Summary Report for the 2023 5-year Review. The Council recommended updates to EFH for all FMPs except for the Scallop FMP because no new information is available to update EFH descriptions for scallops.

The amendments make the following changes to the FMPs:

- *BSAI Groundfish FMP, GOA Groundfish FMP, Crab FMP, and Arctic FMP:* update EFH descriptions and maps, including up to EFH Level 3 information on habitat-related vital rates (see 50 CFR 600.815(a)(1)(iii)(A)). Add or revise the EFH text descriptions and add or replace the maps for—
 - 41 species or complexes in the BSAI Groundfish FMP;
 - 46 species or complexes in the GOA Groundfish FMP;
 - all five species in the Crab FMP; and
 - all three species in the Arctic FMP.
- *Salmon FMP:* replace the distribution maps for all five species with the EFH maps.
- *BSAI Groundfish FMP, GOA Groundfish FMP, and Crab FMP:* update information for fishing effects (FE) to reflect updates to the FE model, analysis, and

evaluation.

- *BSAI Groundfish FMP, GOA Groundfish FMP, Crab FMP, and Arctic FMP:*

revise the EFH appendices where conservation recommendations for non-fishing activities are described.

- *BSAI Groundfish FMP, GOA Groundfish FMP, and Crab FMP:* revise prey species descriptions for two species of BSAI sharks, BSAI pollock, GOA Pacific cod, and BSAI red king crab.

- *BSAI Groundfish FMP, GOA Groundfish FMP, Crab FMP, and Arctic FMP:*

revise EFH appendices with updated research and information needs.

Comments and Responses

During the public comment period for the NOA for the amendments, NMFS received five comment letters from three individuals, one industry group, and one environmental nongovernmental organization with eight unique comments. NMFS' responses to these comments are presented below.

Comment 1: One commenter expressed general support for this action.

Response: NMFS acknowledges support for this action.

Comment 2: One commenter expressed concerns over salmon bycatch in Federal fisheries and FE to salmon EFH during their marine life history stage.

Response: Comments concerning salmon bycatch are outside the scope of this action. Amendments to the Salmon FMP were corrections to replace the salmon distribution maps with the EFH maps, both originating from the 2017 EFH 5-year Review. NMFS notes that the Council's 2023 EFH 5-year Review Roadmap did not include updates to the FE analysis for Pacific salmon EFH during their marine life history stage because no new information was available.

Comment 3: There was a general concern of FE on benthic habitat.

Response: The 5-year Review evaluated the impacts of all fishing gears on benthic habitat. None of the stock assessment authors concluded that habitat disturbance within the core EFH area for their species was affecting their stocks in ways that were more than minimal or not temporary. None of the authors recommended any change in management with regards to fishing within EFH at this time.

Comment 4: One commenter expressed concerns over pelagic trawl gear contacting benthic habitats in the Bering Sea.

Response: The FE evaluation is a comprehensive evaluation of all gear types on species' core EFH areas. The FE model uses bottom contact adjustments when estimating the impacts of different gear types on benthic habitat. The list of gear types and adjustments is in appendix 2 of the 2022 Evaluation of Fishing Effects on Essential Fish Habitat discussion paper (available on the NPFMC eAgenda for the February 2023 meeting). Pelagic trawl gear was included in the gear types evaluated. The overall conclusion of the FE evaluation was that the impacts to species' core EFH areas were not more than minimal or temporary. Gear-specific impacts are slated for future analyses.

Comment 5: NMFS did not use the best available science when assessing fishing impacts on EFH: they did not account for uncertainty and error; the model was not independently reviewed; impacts to juvenile and subadult EFH; NMFS did not evaluate fishing effects to habitats for non-FMP species, and NMFS also did not address impacts of pelagic trawl fishing in conservation areas closed to bottom trawling.

Response: The Council's Scientific and Statistical Committee (SSC) found that the current EFH fishing FE evaluation methodology is appropriate for the 2023 5-year Review when they reviewed the FE evaluations completed by the stock assessment authors in October 2022. An SSC subcommittee provided guidance in 2016 for the stock assessment authors to evaluate FE model results for their species using three thresholds (if the stock was below minimum stock size threshold, if the estimated disturbance within

the core EFH area was greater than or equal to 10 percent, and/or if data limitation concerns would better suit a qualitative, rather than quantitative, evaluation). The subcommittee also noted that the 10 percent threshold does not preclude stock assessment authors from completing the evaluation for levels of habitat disturbance less than 10 percent, if other data suggest that impacts may be affecting the population.

Uncertainty and Error: Model updates through this iterative process were summarized in the 2022 Evaluation of Fishing Effects on Essential Fish Habitat discussion paper (available on the NPFMC eAgenda for the February 2023 meeting). A sensitivity analysis was performed by running multiple iterations of the model to allow for estimation of uncertainty (section 2.2). The model code correction was explained clearly (section 2.3) and the model code was made available upon request from Alaska Pacific University (APU).

Independent Review: The model used for FE evaluation was developed by scientists at APU and went through peer review prior to publishing in the Canadian Journal of Fisheries and Aquatic Sciences (Smeltz *et al.*, 2019, DOI: 10.1139/cjfas-2018-0243).

Juvenile and Subadult Evaluations: The SSC's guidance focuses the EFH FE evaluation on the adult life stages of groundfish and all life stages combined for crabs. The FE model and evaluation process is an ongoing research priority for future EFH reviews.

Exclusion of Non-FMP Species: EFH is designated for FMP species and evaluation of FE to the EFH of FMP species is directed by the EFH Final Rule (50 CFR 600). The Council's EFH Roadmap did not include updates to the FE analysis for Pacific salmon EFH in the Salmon FMP for this iteration of the 5-year Review. Halibut and State-managed commercial species are not targeted FMP species and do not have designated EFH. Corals, sponges, and other biogenic and long-lived habitat features also

do not have designated EFH, though they are included as habitat covariates in both the species distribution models developed to map EFH for the 2023 EFH 5-year Review and in the FE model as biological features. An update to the FE model for this review included the incorporation of longer recovery times as supported by more recent peer reviewed literature (section 2.1.6 of the 2022 Evaluation of Fishing Effects on Essential Fish Habitat discussion paper).

Pelagic Trawl Impacts: Application of the FE model provided a comprehensive evaluation of all gear types on species' core EFH areas, and while an evaluation of consequences for specific management areas is beyond the scope of this action, NMFS agrees that the Council should consider whether further action is warranted to address bottom contact by pelagic trawls in areas closed to non-pelagic trawls.

Comment 6: NMFS failed to address EFH component 6 and identify actions to conserve and enhance EFH.

Response: NMFS followed the Council's EFH Roadmap and for the 2023 5-year Review, the Council outlined the plan for addressing EFH component 6 (EFH Conservation and Enhancement Recommendations) with the following directive:

Review and revise the EFH conservation recommendations for non-fishing activities in the non-fishing report under EFH component 4. Review new information from the FE evaluation to understand fishing effects on EFH. The Council may wish to identify additional recommendations to minimize effects from fishing based on the FE evaluation.

NMFS completed the tasks set with updates to the Impacts to Essential Fish Habitat from Non-Fishing Activities in Alaska report (Limpinsel *et al.*, 2023, DOI: 10.25923/9z4h-n860) and the 2022 Evaluation of Fishing Effects on Essential Fish Habitat discussion paper. The Council and NMFS have several management measures in place, including habitat area closures and Habitat Areas of Particular Concern (HAPCs), which meet the requirements of EFH component 6. Section 1.3 of the 2023 EFH 5-year

Review Summary Report describes the Council's EFH Roadmap to the 10 EFH components (available on the NPFMC eAgenda for the February 2023 meeting).

Comment 7: NMFS must analyze a reasonable range of alternatives to meet the stated purpose for this action and cannot rely on an outdated Environmental Impact Statement (EIS). NMFS did not consider any alternatives besides maintaining the status quo and accepting the amendments to EFH descriptions when additional reasonable alternatives that would better protect EFH are available. NMFS must take a hard look at the impacts of its actions. The Environmental Assessment (EA) failed to consider important and potentially significant effects, such as juvenile and subadult EFH, or habitats essential to Gulf of Alaska crab, Pacific halibut, lingcod, salmon, Pacific herring, or forage fish, corals, sponges, and sea whips. Further, NMFS improperly tiered to the 2005 EIS and, rather, should have supplemented the 2005 EIS.

Response: NMFS prepared a complete EIS on EFH and any adverse effects from fishing and non-fishing activities to EFH in 2005. Subsequently, NMFS has produced multiple EAs for each subsequent EFH 5-year Review. Under regulation, agencies should tier their EAs when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review (40 CFR 1501.11(a)). This 5-year Review focused on issues ripe for decision during this review period, such as evaluating new environmental and habitat data, improving the models to map EFH, updating the model to evaluate fishery impacts on EFH, updating the assessment of non-fishing impacts on EFH, and assessing information gaps and research needs. The 2023 EFH 5-year Review Summary Report discussed the approach to each of the 10 EFH components in detail. Providing more accurate EFH information is beneficial to species as EFH is considered in the management of those species. A change in the designation of EFH has no direct impact, as there are no management measures or regulations associated with the

designation of EFH, nor are such conservation measures required. While there were changes in environmental conditions, not every change in conditions requires a supplemental EIS; only those changes that cause significantly different effects from those already studied in the initial EIS require supplementary consideration. The Supreme Court directs that “an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision-making intractable” (*Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989)). On the other hand, if a major Federal action remains to occur, and if new information indicates that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Ultimately, an agency is required “to take a ‘hard look’ at the new information to assess whether supplementation might be necessary” (*Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72-73 (2004)). National Environmental Policy Act (NEPA) implementing regulations at 40 CFR 1502.9(d)(4) stipulate that an agency may find that new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement to an EIS. In doing this, an agency should apply a “rule of reason.” “Application of the ‘rule of reason’ turns on the value of the new information to the decision making process. If there remains ‘major Federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared” (*Marsh*, 490 U.S. 372-74 (1989)).

Here, as described above, new information and the EFH amendments do not constitute a “significant change” that was not already considered in the previous EIS. Further, a full EIS was not required, since the Council and NMFS thoroughly reviewed

and considered all the relevant factors as part of the Magnuson-Stevens Act-mandated periodic review of the EFH provisions of the FMPs and revised or amended the EFH provisions as warranted based on available information. NMFS's consideration of alternatives was appropriate here. The stated goal of a project dictates the range of 'reasonable' alternatives and NEPA requires consideration of those which are feasible. NEPA does not require an agency to explicitly consider every possible alternative to a proposed action. Alternatives need not be included ... if they present "unique problems and would not accomplish the [agency's] goal" (*Communities, Inc. v. Busey*, 956 F.2d 619, 627 (6th Cir. 1992)). NMFS is not "required to explore alternatives that, if adopted, would not have fulfilled the project goals" (*Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 546 (8th Cir. 2003)).

Here, NMFS followed the Council's EFH Roadmap and for the 2023 5-year Review and created alternatives to accomplish the Council's and the agency's goals in updating the description and identification of EFH, as required by section 305(b) of the Magnuson-Stevens Act. The EA analyzes the effects of each alternative and the effects of past, present, and reasonably foreseeable future actions (RFFA). There are no RFFAs that are identified as likely to have an impact on habitat based on updating the EFH information for FMP species as a result of the 2023 EFH 5-year Review.

Comment 8: One commenter expressed concerns over the impacts of offshore wind energy development on Endangered Species Act-designated critical habitats.

Response: Comments concerning offshore wind are outside of the scope of this action.

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

Dated: July 15, 2024.

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