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# Habitat Hotline Atlantic

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Issues of Concern for Atlantic Marine Fish Habitat

August 1999, Volume VI, Number 3

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## Lawsuit Charges Council FMP Essential Fish Habitat Provisions Inadequate

Nine organizations have jointly challenged the U.S. Department of Commerce, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service (NMFS), and the New England, Gulf of Mexico, Caribbean, North Pacific and Pacific Fishery Management Councils over essential fish habitat (EFH) provisions. On May 21, 1999, American Oceans Campaign, Cape Cod Commercial Hook Fishermen's Association, Inc., Florida Wildlife Federation, and Reefkeeper International filed suit in U.S. District Court alleging that violations to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) occurred during preparation and approval of several fishery management plan (FMP) amendments. Recently, five other plaintiffs have been added, namely, the Center for Marine Conservation, Institute for Fisheries Resources, National Audubon Society, Natural Resources Defense Council, and Pacific Coast Federation of Fishermen's Associations. More specifically, the groups claim that approved amendments do not satisfy the Act's requirements for FMPs to minimize the adverse effects of fishing on EFH. The suit requests the court to require the councils to revise the EFH amendments so that they comply with the Act's mandate to protect EFH from adverse effects of fishing.

The Magnuson-Stevens Act requires the regional fishery management councils and NMFS to identify and define EFH through FMP amendments for species under their respective jurisdictions. To protect EFH, the Act requires FMPs to "minimize to the extent practicable adverse effects on such habitat caused by fishing." NMFS developed implementing regulations and a Technical Guidance document for use by the councils to assist in fulfilling the Act's requirements. The suit does not challenge the identification of EFH in the FMP amendments, but is solely directed at the provision requiring minimizing adverse fishing impacts to EFH. The remainder of this article will focus on the

specific complaint against the New England Fishery Management Council's (NEFMC) Amendment, as well as the recent disapproval of portions of the Mid-Atlantic Fishery Management Council EFH Amendments.

### *Review of NEFMC's EFH Amendment*

On March 3, 1999, the U.S. Secretary of Commerce approved three components of the New England Fishery Management Council's (NEFMC) omnibus Essential Fish Habitat (EFH) amendment, including Amendment 11 to the Council's Multispecies (Groundfish) FMP, Amendment 9 to the Sea Scallop FMP, and Amendment 1 to the Atlantic Salmon FMP. The NEFMC found that fishing gear impacts to EFH have already been reduced by the severe fishery management restrictions currently in place for other purposes, including closed areas on Georges Banks and in the Gulf of Maine. The Council determined that quantification of the current level of impact or the degree to which impacts have been reduced by current management measures is impossible with the present level of information and data available.

As part of its required effort to assess current and potential adverse impacts to EFH, the NEFMC identified all gears used in New England fisheries; developed a list of all gears based on percentage of landings (where any gear found to be responsible for at least 1% of the landings was considered a primary gear type), and identified habitat impacts of primary gears. Of the 43 different types of fishing gears identified, eighteen are considered primary gears. Based on percentage of landings, bottom otter trawls and sea scallop dredges are identified as the most common gears used in New England region. The EFH amendment states that "bottom-tending mobile gears (otter trawls, scallop dredges, beam trawls, and hydraulic clam dredges) are most likely to be associated with adverse impacts to habitat."

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In its approval letter to the NEFMC, NMFS noted that the NEFMC could have clarified the habitat protection benefits of certain existing and proposed management measures by explicitly stating in the amendments that the measures are intended to promote EFH conservation in addition to other rationales. NMFS stated that such an acknowledgment would clarify that habitat benefits of measures originally developed for other purposes should be considered expressly whenever future management actions are contemplated.

### ***The Challenge to NEFMC's EFH Amendment***

The lawsuit charges that the NEFMC failed to (1) adequately assess adverse effects of fishing gear on EFH in the New England region, and (2) minimize adverse impacts to habitats i.e., inclusion of practicable measures to protect EFH. The complaint specifies examples of bottom otter trawls and scallop dredges as bottom-tending mobile gears known to adversely affect EFH by harming plants, invertebrates and other small sea creatures that are in the gear's path as it is dragged along the bottom, and also by causing problems associated with sediment resuspension. The plaintiffs claim that the NEFMC failed to adequately examine certain fishery management measures to determine that they are practicable. Also, the plaintiffs claim that the EFH Amendment does not identify or contain any practicable measures to protect EFH.

So the contention is not whether or not there are adverse impacts from gears such as otter trawls and sea scallop dredges in this region, but whether such impacts are adequately addressed in the NEFMC's EFH Amendment. Indeed, the groups submitted comments to NMFS during the public comment period on the amendment, charging that the amendment did not meet the Act's requirement to minimize the effects of fishing on EFH to the extent practicable—however the amendment was approved in full. The plaintiffs also claim that NMFS approved the amendment knowing that the NEFMC had not conducted any new assessments of measures to minimize the adverse effects of fishing on EFH, and assured the NEFMC that this could be addressed at a later time. The complaint also challenges the agency's finding that an Environmental Assessment (EA) prepared with the NEFMC's EFH Amendment did not significantly affect the quality of the human environment. Such a finding is significant in that it means there is no need to conduct a more comprehensive, and more time-consuming and expensive, Environment Impact Study (EIS). The EA was conducted to fulfill requirements under the National Environmental Policy Act (NEPA).

### ***What Happens Next?***

The agency's answer to the complaint, including the administrative record, is due to the Court on August 16. The judge will then decide whether the suit will move to trial or not. Settlement is also a possibility, but no specific terms have been offered.

Meanwhile, the NEFMC continues to address EFH issues, and recently approved initiating framework action to

designate a Habitat Area of Particular Concern (HAPC) for juvenile cod along the coastal margin of the Gulf of Maine. The coastal area concerned is approximately 0-10 meters in depth and includes seagrass, cobblestone, and rock reef habitats. After providing some time for review and comments, the Council will likely take a final vote to approve the HAPC designation for juvenile cod in November or January. Such a HAPC designation assigns a higher value to this habitat and provides a higher priority during fisheries consultations.

### ***NMFS Disapproves Fishing Impacts Sections of Mid-Atlantic Council EFH Amendments***

It is interesting to note that on April 28, 1999, NMFS disapproved portions of three Mid-Atlantic Fishery Management Council (MAFMC) FMP Amendments (Summer Flounder/Scup/Black Sea Bass Amendment 12, Surfclam/Ocean Quahog Amendment 12, and Mackerel/Squid/Butterfish Amendment 8) that dealt with fishing impacts to EFH and options for managing adverse effects to EFH from fishing activities. The amendments were found to be deficient in addressing requirements in the Act and EFH regulations for assessing and minimizing adverse fishing gear impacts to EFH. In the letter to the MAFMC, NMFS stated that "the amendments lack a complete assessment of the potential adverse effects of EFH of the gears used in each fishery" and "there is insufficient discussion to justify the Council's conclusion that it is not practicable to take measures to minimize these effects." NMFS provided detailed guidance to the MAFMC for bringing the EFH portions of the amendments into compliance. The MAFMC is working to address the deficiencies.

Most recently, on July 29, 1999, NMFS also disapproved a portion of the Mid-Atlantic Council's Bluefish FMP Amendment dealing with fishing gear impacts to EFH. In a letter to the Council, NMFS stated, "The amendment fails to list and to consider adequately the potential adverse impacts of all fishing gears used in the waters described as EFH, particularly those waters under state jurisdiction." NMFS also specified concern over impacts to submerged aquatic vegetation.

For more information about the EFH Amendments, contact the NMFS Office of Habitat Conservation at 301/713-2325 or the regional fishery management councils (New England Fishery Management Council at 781/231-0422, Mid-Atlantic Fishery Management Council at 302/674-2331, South Atlantic Fishery Management Council at 803/571-4366).

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## **Status of Atlantic Fishery Management Councils' EFH Amendments**

### ***South Atlantic Comprehensive EFH Amendment:***

The Comprehensive Amendment Addressing Essential Fish Habitat in the Fishery Management Plans of the South

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*EFH Amendments (continued from page 2)*

Atlantic Region was approved by NMFS on June 3, 1999. The Amendment can be obtained at [www.safmc.noaa.gov](http://www.safmc.noaa.gov).

***New England Omnibus EFH Amendment:***

Three components of the New England Fishery Management Council omnibus Essential Fish Habitat Amendment were approved by NMFS on March 3, 1999 (Amendment 11 to the Northeast Multispecies FMP, Amendment 9 to the Atlantic Sea Scallop FMP, and Amendment 1 to the Atlantic Salmon FMP). A law suit was filed on May 21, 1999 challenging the three amendments' required measures to minimize adverse effects of fishing on EFH. Amendment 1 to the Monkfish FMP, which is also part of the omnibus EFH Amendment, was approved separately on April 22, 1999. The omnibus EFH Amendment also includes the EFH components of the Atlantic Herring FMP that currently is

being developed by the NEFMC and will be approved at a later date. The Amendment is available at [www.nefmc.org](http://www.nefmc.org).

***Mid-Atlantic EFH Amendments:***

Amendment 12 to the Summer Flounder, Scup, and Black Sea Bass FMP; Amendment 8 to the Atlantic Mackerel, Squids, and Butterfish FMP; and Amendment 12 to the Atlantic Surfclam and Ocean Quahog FMP were partially approved by NMFS on April 28, 1999. Portions approved include measures designating EFH. Portions disapproved include sections dealing with fishing impacts to EFH and options for managing adverse effects to EFH from fishing activities. On July 29, NMFS also disapproved the Bluefish FMP section on fishing gear impacts to EFH. The Amendments can be obtained by contacting the Mid-Atlantic Fishery Management Council (302/674-2331).

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## Florida Forever

State legislators and numerous environmental groups were on hand to unveil the "Florida Forever" Plan, which will replace the highly successful Preservation 2000 program, when it expires. Under the Preservation 2000 program, over one million acres of environmentally sensitive land throughout the state has been set aside. An additional 2.3 million acres needs similar protection, and sponsors of "Florida Forever" are optimistic that another million acres will be protected through this program. "Florida Forever" was signed into law on May 25, 1999, and designates an additional \$3 billion for the next 10 years to protect and preserve the state's environment.

Key features of the new program include:

- The state will provide \$300 million each year, between 2001 and 2011, in bond proceeds to purchase, protect and improve environmentally sensitive lands, urban greenspaces and recreational trails.
- The state will at least double the amount of money currently given to local governments for land purchases.
- The new program will provide the public better access and amenities on acquired lands.
- Greater resources will be dedicated to managing and maintaining properties the state acquires.
- The state will use innovative land acquisition techniques to lower costs.

## Pollution Prevention Toolkit Will Aid Coastal Communities

The Chesapeake Bay Program's Toxics Subcommittee and Local Government Advisory Committee have just published a guide entitled "Local Government Pollution Prevention Toolkit" to help local communities develop their own pollution prevention programs. There are over 1,650 local governments in the Chesapeake Bay watershed, many of which have expressed a need for advice, guidance, and models to help them create these programs.

The guide offers advice on how to prevent pollution at the source, before it is produced. Local governments are ideal for promoting this concept because they can provide initiatives and serve as role models to the community. The handbook is divided into 3 major areas. The first focuses on preventing pollution by local government facilities and operations. Suggestions include offering incentives for environmentally friendly practices, to reducing pesticide use through integrated pest management. The second group focuses on businesses, and offers such suggestions as sponsoring informative workshops and recognition programs, to promoting water-efficient fixtures to reduce consumption. The third section looks at how private citizens can help reduce pollution by doing such things as planting native plants and trees, to composting. The guide also provides an extensive list of technical and financial resources in the three major areas. Examples of pollution prevention ordinances, policies, educational brochures, and other information currently used by local governments are also included. To request a copy of the handbook, call the Chesapeake Bay Program Office at 1-800-968-7229.

*Adapted from Bay Journal, December 1998, pg. 17.*

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## Edwards Dam Breach

On July 1, 1999, demolition began with the first breach in the 157 year-old Edwards Dam located on the Kennebec River in Augusta, Maine. Edwards Dam is the first dam to have its license renewal refused by the Federal Energy Regulatory Commission (FERC), who determined that the power produced by it fell far short of justifying the environmental harm it created. Removal of the 917-foot dam opens up 17 miles of spawning grounds for anadromous fish species and will be a significant step towards restoring habitat for Atlantic salmon, the endangered shortnose sturgeon, and six other anadromous species found in the Kennebec River.

H.E. Sargent, an environmental and general contractor, will breach the dam at a projected cost of \$2.18 million, with funding provided by Bath Iron Works and the Kennebec Hydro Developers Group. Pending approval by the U.S. Army Corps of Engineers, the Maine DEP, and FERC, the company will use an alternative method to explosives, which involves the construction of a cofferdam. A cofferdam provides a temporary watertight barrier that diverts water, while sections of the old dam are removed. The cofferdam is then breached to lower the impoundment water above the dam. H.E. Sargent will also be responsible for remediation and restoration work at the dam site. A Safety Team comprised of various federal and state agencies will assist in the development of a Public Safety Plan, which identifies potential shoreline safety issues and all necessary steps to insure public safety, both up and downstream of the dam, before and after the breach.

Demolition of the dam is expected to continue into the fall, after the river is returned to its natural level. Trust funds

have been established under the Lower Kennebec River Comprehensive Hydropower Settlement Accord to provide restoration and management efforts for Atlantic salmon, American shad, river herring, striped bass, and other migratory fish in the river over the next 15 years. These restoration efforts will be especially significant for Atlantic salmon. The Kennebec River provides the most habitat for Atlantic salmon in Maine, and the second most on the East Coast (second to the Connecticut River). The Kennebec River is the only river in New England that still supports limited reproducing populations of all its historical anadromous species, and there are high hopes that they will be returned to their historic ranges. With the recent improvement in water quality, it may only be a matter of time before these species are thriving again in areas once thought to be devoid of spawning activity.

Elsewhere, two dams in Oregon may be removed within the next year. Dismantling the Little Sandy Dam would open up a 12-mile stretch along the Little Sandy River Basin for salmon and steelhead, and removal of the Marmot Dam would open 10 miles of the Sandy River to salmon and steelhead. The decision has been touted as one that will benefit everyone. Salmon and steelhead will reclaim lost habitat, the city of Portland can draw water from Bull Run during the summer when it dries up because of water held in reserve at two reservoirs, and the dam owners avoid costly renovations necessary to renew their federal licenses.

(Sources: Maine State Planning Office; ASMFC HHA Newsletter June 1998, "Clearing Impediments to Anadromous Fish Spawning Areas"; Jonathan Brinckman)

## Massachusetts Coastal Zone Management to Help North Shore Communities Manage Growth

The North Shore communities of Massachusetts have experienced significant population growth in recent years, with some towns increasing by as much as 20 percent. Most towns do not have the budget to adequately address their planning needs, and there is growing concern over the loss of open space, natural resources, and local character. To help these communities manage growth in an equitable and environmentally sound manner, the MA Coastal Zone Management (MCZM) and the MA Audubon North Shore Conservation Advocacy are working with local towns to promote a plan that may address some of these

problems. The initiative is based on the "Conservation Subdivision Design" that employs the following four-step process:

1. Primary conservation areas that need to be protected are identified
2. The areas to be built upon are sited to maximize views
3. Roads are then laid out to minimize length (thus causing less natural disturbance and cutting down on costs)
4. Actual lot lines are drawn

Unlike other planning designs, all stakeholders are brought into the

management process at the beginning, at which point, environmental concerns are raised. Developers are offered innovative incentives, and the time and cost of the review process associated with residential design is eliminated. For more information on this project, contact Andrea Cooper or Heather Clish at 978-281-3972.

*Adapted from* **OCRM, Coastal Programs Division, Northeast Region Monthly E-Mail, January 1999, Volume 3, No. 1, pp. 3-4.**



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## Nutrient Criteria an Increasing Priority

EPA's Clean Water Act Section 305(b) Reports to Congress identify nutrient loading as one of the chief causes of degradation in lakes, rivers, and estuaries over the last two decades. In response to this problem, the EPA has formed a national team of specialists to develop measures of nutrient over-enrichment of surface waters. Technical guidance is being developed for four sets of nutrient criteria: lakes and reservoirs, rivers and streams, coastal marine waters and estuaries, and wetlands. States and tribes will be able to use this guidance to set nutrient criteria, which are the values of specific nutrients that can exist in a waterbody and still allow it to support its designated use.

Technical assistance groups comprised of experts and scientists will be developed at each of the ten EPA regions to provide technical and financial help to states and tribes to do the following: 1) set nutrient criteria that can be used to identify problems; 2) prioritize restoration efforts; 3) plan management projects; 4) set permit limits and refine TMDLs; 5) evaluate the success of management activities; and 6) help communicate the status of water resources.

The technical assistance groups will also evaluate a draft ecoregion map and select reference conditions for each type of

waterbody in each nutrient ecoregion. These reference conditions will be used to develop the nutrient criteria that can be used to evaluate the conditions of the waterbodies being assessed.

EPA has screened the STORET database for data on total nitrogen, total phosphorus, chlorophyll *a*, and Secchi depth in each of the four waterbody types. They are encouraging states and tribes to take this a step further by including biological data and any other variables that are appropriate, emphasizing inclusion of both causal indicators (e.g., nutrients) and response indicators (e.g., chlorophyll *a* and dissolved oxygen). The criteria should be based on the following: 1) historical records; 2) reference conditions; 3) modeled projections; 4) the technical advisory groups' evaluation of data; and 5) attention to downstream impacts.

The EPA expects to complete a draft technical guidance manual for setting nutrient criteria for lakes by the end of 1999, and manuals for streams and rivers, and coastal waters and estuaries will soon follow. To learn more about this project, contact George Gibson, U.S. EPA Laboratory, 839 Bestgate Rd., Annapolis, MD 21401, E-mail: [gibson.george@epa.gov](mailto:gibson.george@epa.gov).

*Adapted from EPA's News-Notes, February/March 1999, No. 56, pp. 1-2.*

## New York Starts Pilot Project to Help Local Governments Restore Coastal Ecosystems

The New York State Coastal Management Program has initiated a program to address some of the problems faced by local governments and interest groups that are attempting to restore degraded ecosystems in the coastal zone.

Some of the barriers faced by local governments and interest groups include a lack of documentation of certain types of habitat restoration projects, such as submerged aquatic vegetation beds. Without access to well-documented information regarding proper methodology, mistakes are likely to occur, the cost and time frame of projects may be greater than expected, and the success rates may not meet the researchers' expectations.

Another problem encountered in restoration projects is the lack of monitoring to track progress of project goals. Monitoring programs should be designed to measure attributes of project goals, and monitoring should be conducted on a regular basis, using standard, accepted methods. Tracking the progress of a project increases the likelihood that problems can be detected in time to make corrections. It also allows comparisons to be made between projects, which is often crucial in obtaining funding from agencies with limited resources.

The lack of information flow among local governments and groups is often the result of several factors, including a wide range of expertise among them, a low level of coordination, and state government-funded projects that do not always include a budget for providing guidance for the life of the project. Creating a central state repository of information and a database of contacts will improve communication among those groups who have the least amount of expertise. States also have more funds to undertake scientific research and disseminate their results, and have the manpower to develop frameworks and guidelines

for use in restoration projects by local groups.

The lack of guidance from states is at the heart of what the New York State Coastal Management Program is trying to improve. They are currently developing restoration guidelines to be used by state-funded municipal projects, non-governmental interest groups, and other state agencies that will help standardize terminology, success criteria, restoration methodology, and monitoring protocols.

The pilot project is the development of guidelines for salt marsh restoration, which has the greatest information base, and is the most frequently performed type of state-funded restoration in New York. The document will include a review of disturbances, impacts, and appropriate restoration methodologies, including an innovative, GIS-based salt marsh restoration site selection method. This approach is currently being used for a project at the South Shore Estuary of Long Island. A conceptual model of the structure, functions, and controlling factors of the salt marsh habitat will also be included. This may be used as a general framework for use in site-specific restoration plans and monitoring protocols. Finally, a generic monitoring protocol tailored for salt marsh restorations will be documented, as well as a review of other salt marsh monitoring protocols. Together, this conceptual model and the generic monitoring protocol should provide enough information for users to develop their own site-specific protocols for restoration projects.

For more information about this pilot project, contact Nancy Niedowski, NOAA Coastal Management Fellow, NYS Department of State, Division of Coastal Resources, 41 State St., Albany, NY 12231; Phone: 518-473-8359; E-mail: [nniedows@dos.state.ny.us](mailto:nniedows@dos.state.ny.us).

*Adapted from Coastlines, issue 8.4, pp. 12-13.*

## **Saltonstall-Kennedy Grants Available**

Proposals to obtain funding under the Saltonstall-Kennedy (S-K) Grant Program in Fiscal Year 2000 are now being accepted. Approximately \$1.5 million is anticipated to be available nationwide to fund approved proposals addressing the following fisheries priorities: conservation engineering to reduce adverse interactions between fishing operations or upon essential fish habitat, and to reduce bycatch; optimum utilization of currently managed resources, including economic opportunities; fishing community transition, including new employment opportunities; and marine aquaculture in the offshore environment.

The notice, published in the Federal Register on June 21, 1999, provides more details on these topic areas and information required in the proposals. Applications are available via the Internet at [www.nmfs.gov/sfweb/skhome.html](http://www.nmfs.gov/sfweb/skhome.html). The deadline for submitted proposals is Friday, August 20, 1999. For more information contact Alicia Jarboe, S-K Manager, at 301/713-2358.

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