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June 8, 2013

Thomas J. Nies, Executive Director
New England Fisheries Management Council
50 Water Street, Mill 2
Newburyport, MA 01950



Dear Mr. Nies:

We are writing to you to express our serious concerns about the development of the Council's Omnibus Essential Fish Habitat (EFH) Amendment 2 (OHA2 or EFH Amendment) and request that you ensure there is a wide range of alternatives selected that meet the Council's legal obligations to conserve and enhance EFH, to comply with the National Environmental Policy Act (NEPA), and achieve the specific goals and objectives of the EFH Amendment. We represent five regional, national, and/or international organizations that have a long-standing interest in New England fisheries and fishing communities, marine ecosystems and laws intended to protect public trust resources.

The emphasis that the Magnuson-Stevens Fishery Conservation and Management Act (MSA) places upon protecting marine habitat for supporting healthy fisheries has never been more important for New England – many stocks are overfished and their rebuilding delayed, and assessment after assessment is revealing low productivity, poor recruitment, and size/age truncation; the Northeast region is also particularly vulnerable to the stresses brought by climate change.¹ Moreover, even though EFH updates are called for every five years,² New England's EFH program has not been updated since the omnibus amendment of 1998 (i.e., 15 years ago) and that effort was held by a federal court to be legally defective.³

It is critically important that the EFH Amendment substantially improve the Council's EFH program. This will require thorough analysis of all of the available scientific information and careful consideration of a wide range of alternatives, including those based on more protective management of *status quo* areas, augmenting status quo areas based upon the work of the Closed Area Technical Team (CATT) and Habitat Plan Development Team (PDT), and alternative areas based upon the work of the CATT and Habitat PDT. Unfortunately, the Council's Habitat and Groundfish Committees, most recently at their joint meeting on May 17, 2013, have attempted to introduce areas chosen in an *ad hoc* fashion, and to eliminate much of the important biological work of their technical teams including spawning and juvenile areas.

¹ See Union of Concerned Scientists (2007). Northeast Climate Impacts Assessment, including Fogarty M et al (2007) Potential Climate Change Impacts on Marine Resources of the Northeastern United States: www.northeastclimateimpacts.org; Fogarty M et al (2008). Potential climate change impacts on Atlantic cod (*Gadus morhua*) off the northeastern USA. *Mitig Adapt Strat Glob Change* (2008) 13:453–466; Balch WM et al (2012) Step-changes in the physical, chemical and biological characteristics of the Gulf of Maine, as documented by the GNATS time series. *Mar Ecol Prog Ser* 450:11–35.

² 50 CFR § 600.815 (a)(7): (10) Review and revision of EFH components of FMPs.

³ American Oceans Campaign v. Daley, 183 F. Supp. 2d 1, 20-21 (D.D.C. 2000).

NEPA, the Administrative Procedure Act (APA) and the MSA require the Council to approve a range of alternatives for development in the EFH Amendment and Draft Environmental Impact Statement (DEIS) that are rational, accomplish the EFH conservation and management goals of the amendment and are based on scientific information, including:⁴

- Status Quo – five year-round groundfish areas with associated habitat areas (listed below).
- Five year-round groundfish areas, with associated habitat areas, under new management policies including (1) a prohibition on all mobile gear, including mid-water and bottom trawls, and shellfish dredges, (2) a prohibition on all commercial and recreational groundfishing, and any gear capable of catching groundfish, and (3) a prohibition on all fishing in these areas, including fixed gear, such as pots, traps and anchored gillnets.
- Alternatives that combine the recommendations of (1) the Habitat PDT (i.e., the hard bottom areas known as *adverse effects areas*) and (2) recommendations of the CATT on areas supporting critical life history stages, including both juvenile and spawning fish. Each alternative should be an integrated package of areas that meets EFH objectives throughout the region; analyses must include consideration of various management policies as above.
- Alternatives that meet the EFH requirement to conserve forage for managed species.⁵

Our groups have become increasingly concerned that the development of such an appropriate range of alternatives for the EFH Amendment is being short-circuited. The bases for this concern are the following, which we elaborate on further in the body of this letter:

- (1) The effective conservation of EFH is vital to meeting the goals of the MSA, including obtaining optimum yield (National Standard 1), but will not be achieved by the current EFH amendment if the Council continues to substitute its own views and preferences for the best scientific information available that has been provided by its technical committees (National Standard 2).
- (2) To date the Council has not provided an analysis demonstrating which deficiencies of the current EFH areas are to be remedied in the EFH Amendment nor articulated goals that make clear what the EFH Amendment will accomplish that is not already being accomplished by the existing system of groundfish closed areas and habitat closed areas.
- (3) A number of the hard bottom habitat areas identified by the Habitat PDT were arbitrarily modified or eliminated in response to opinions expressed by members of the public at public meetings, and have thus been improperly excluded from the development of EFH alternatives. These decisions were not scientifically-driven nor supported by any technical analysis.
- (4) The methodological approach relied upon by the Habitat PDT identifies just one type of bottom habitat judged to be particularly susceptible to fishing gear. As important as such habitat is, the approach does not directly identify areas known to be essential to fish for feeding, reproduction or growth to maturity, all of which the MSA specifically defines as EFH.⁶ Thus the Habitat PDT approach by itself is not adequate to meet the EFH legal requirements.⁷

⁴ Magnuson-Stevens Fishery Conservation and Management Act, Section 301, National Standard 2: *Conservation and management measures shall be based upon the best scientific information available.*

⁵ 50 CFR § 600.815 (a)(7): Mandatory contents of fishery management plans – EFH.

⁶ *Ibid.*

⁷ The council was advised by the SSC that the SASI approach should not be used as the sole basis for determining which areas should be closed, nor as a basis for deciding which, if any, closed areas should be opened; SSC meeting March 30, 2011, Boston, MA – Peer Review Report, Dr. Patrick Sullivan; Sullivan P, Cournane JM, Holland DS, Langton R, Lipton D (2011) Swept Area Seabed Impact (SASI) Model Peer Review On Behalf of the New England Fisheries Management Council Providence, RI – February 15-17, 2011.

- (5) The Council-convened CATT examined distributions of juvenile and spawning groundfish to further inform the development of the EFH alternatives, adding a crucial dimension that was not formally included in the work of the Habitat PDT. This was particularly important because it established the relationship between the critical life stages and behavior, and places in the ocean. Nevertheless, at the May 17, 2013, joint meeting of the Habitat and Groundfish Committees, Council members made a sequence of *ad hoc* decisions (i.e., motions) that effectively eliminated this biological component of the analysis from further consideration in the development of EFH alternatives.
- (6) The obligation to safeguard spawning areas as EFH was arbitrarily dismissed by Council members such that the EFH Amendment no longer includes any provisions to address this vital component of EFH.
- (7) As specified in the MSA and clarified in the 2002 EFH Rulemaking,⁸ EFH includes feeding (i.e., food sources and the habitats needed by forage species) yet this requirement has not been identified in the goals and objectives for the EFH Amendment nor considered by the technical committees.
- (8) Without analysis or meaningful evaluation, the Council has proposed to arbitrarily eliminate important EFH areas identified in state waters from further consideration in the EFH Amendment, even though NOAA Fisheries advised the Council of its authority under the MSA to address issues in state waters that compromise goals of federal fishery management.⁹

Discussion

The EFH Amendment must achieve its intended objectives and satisfy legal requirements.

In 2004 NOAA Fisheries announced plans for a new Omnibus Essential Fish Habitat (EFH) Amendment 2 in the Federal Register,¹⁰ offering the following explanation:

“The 1996 amendments to the Magnuson-Stevens Act, known as the Sustainable Fisheries Act (SFA), changed the focus of the Magnuson-Stevens Act by emphasizing the importance of habitat protection to healthy fisheries and by strengthening the ability of NMFS and the Councils to better protect, conserve, and enhance the habitat for all species managed by the Council. This habitat is termed EFH, and is broadly defined to include *those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.*” (emphasis added)

Congress retained this definition of EFH during the most recent MSA reauthorization.¹¹ The definition recognizes that the habitat needed for healthy fisheries, and thus fish populations, includes not only what is on the bottom (e.g., sand, gravel, or rocks) but the waters and other habitat features that are needed for successful reproductive behavior, growth of young fish, and feeding. In order to meet the objective of conserving habitat necessary for feeding, fishery management programs must also ensure that the habitats needed for prey species, and the prey themselves, are conserved.

Consistent with the MSA, the primary goals of the EFH Amendment put forth almost a decade ago (2004) were:¹²

1. Meet the legal requirement that “a complete review of all EFH information should be conducted as recommended by the Secretary, but at least once every 5 years.”

⁸ 50 CFR § 600.815 (a)(7): Mandatory contents of fishery management plans - EFH

⁹ Comments of Mitch MacDonald, NOAA Office of General Counsel, to joint meeting of Habitat and Groundfish Committees, May 17, 2013, Portsmouth, NH.

¹⁰ Federal Register 69 (36) Proposed Rules, page 8367, February 24, 2004.

¹¹ MSA Section 3: Definitions 104-297 at number 10

¹² Federal Register 69 (36) Proposed Rules, page 8368, February 24, 2004.

2. “To develop a comprehensive EFH Management Plan that will minimize adverse effects of fishing on EFH to the extent practicable, through actions that will apply to all Council-managed FMPs.”

Although the number of specified goals and objectives has ballooned in the amendment (9 and 12, respectively; EFH Amendment draft dated 10 September 2012), the purpose of the amendment has changed little. The September 2012 draft included these core goals and objectives:

Goal #4

“Identify and implement mechanisms to protect, conserve, and enhance the EFH of those species managed by the Council to the extent practicable;”

Objective C

“Review EFH designations and refine or redefine where appropriate as improved data and analysis become available”

Objective F

“Support restoration and rehabilitation of fish habitat which have already been degraded (by fishing and non-fishing activities)”

Objective K

“Consider modifications to groundfish closed areas”

The MSA itself requires that the EFH Amendment both (1) enhance EFH, based on a review of available data and evaluation of existing EFH management areas, including habitat areas, groundfish closed areas, and Habitat Areas of Particular Concern, and (2) minimize the adverse effects of fishing gear to such habitat to the extent practicable.

The NEPA requires that the EFH Amendment incorporate a comprehensive range of EFH management alternatives. The central purpose of the NEPA is to ensure that both decision-makers and the public are well-informed about the potential adverse environmental effects of proposed actions and the range of available mitigation measures that could reduce those adverse effects.¹³ This is accomplished through the Environmental Impact Statement (EIS). The NEPA requirement that a comprehensive range of the reasonable alternatives be analyzed is “the heart of the [EIS].”¹⁴ The Council and NOAA Fisheries must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”¹⁵ The environmental impacts of the proposed action and any alternatives must be presented in comparative form, “sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.”¹⁶

NOAA Fisheries’ NEPA regulations further underscore the importance of an adequate alternatives analysis: “An EIS must provide a full and fair discussion of significant environmental impacts and inform decision

¹³ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)(NEPA ensures that the agency will “carefully consider detailed information concerning significant environmental impacts” and that such information is available to the public); *accord*, *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983). NOAA Fisheries’ regulations emphasize its duty to prepare an EIS that adequately informs the public of the environmental impacts of the proposed action: “An EIS must provide a full and fair discussion of significant environmental impacts.” (National Oceanic and Atmospheric Administration Administrative Order 216-6, hereafter “AO 216-6”) AO216-6 § 5.04.a.1.

¹⁴ 40 C.F.R. § 1502.14; 42 U.S.C. § 4332(2)(c)(iii).

¹⁵ 42 U.S.C. § 4332(2)(E).

¹⁶ 40 C.F.R. § 1502.14.

makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”¹⁷

The Council, the public and NOAA Fisheries now have before them the evaluations and related information provided by the Habitat PDT, including its identification of “adverse effects areas,” and by the CATT, which focused on identifying areas used by juvenile and spawning groundfish based on biological data. The CATT and Habitat PDT have provided a solid foundation for development of a full range of alternatives based upon the best scientific information available. Most recently, this includes recommendations from a joint meeting of these technical groups held on May 29th. The CATT and the Habitat PDT developed a systematic approach for utilizing the best available scientific information to define sub-regional packages of areas that can meet the objective of enhancing EFH conservation and allow decision-makers to make clear choices from among a range of alternatives. Additional studies of the existing EFH areas are also available, as well as extensive literature on the habitat dependencies of fish (and other animals) and studies from around the world examining biological responses to various kinds of fisheries closures.¹⁸

The EFH Amendment is in danger of (1) not achieving its objectives and (2) failing to satisfy legal requirements.

Given this factual and legal context, we were alarmed by the aggressive elimination of certain alternatives at the joint Habitat/Groundfish Committee meeting on May 17, 2013. The alternatives, which were based upon the scientific work of the CATT, were eliminated in advance of an opportunity for public comment. Despite the MSA’s National Standard 2 that management measures be based upon the best scientific information available and the sound technical work of the Habitat PDT and CATT,¹⁹ the foundation of the draft amendment has been systematically undermined by a series of poorly justified decisions by Council committees – decisions that appear to be irrational and arbitrary in the context of a process the aim of which is to improve conservation of EFH. These decisions have included elimination of portions of adverse effects areas on the basis of *ad hoc* requests by members of the public,²⁰ wholesale elimination of spawning from further consideration in the amendment,²¹ and the excision of alternatives for juvenile groundfish protection with no analysis or formal public comment period. These activities have eroded the public process and thwarted the intent of NEPA and the MSA.

As a result, we are increasingly concerned that the draft amendment will not contain the range of alternatives and related analyses required by NEPA and that this will lead to a failure of the EFH Amendment to achieve its required objectives and further delays in a process that has exceeded its required time frame by a decade already. If we are to fully recover New England’s groundfish populations and ensure the health of the fishery, it is imperative that rapid completion of a strong EFH Amendment be of the highest priority.

The EFH Amendment and DEIS must contain certain key alternatives for purposes of public review and comment.

Consistent with National Standard 2, the Council has an obligation to the public and its fish-dependent communities and business, as well as a clear legal obligation to make a thorough evaluation of all available and

¹⁷ AO 216-6 at § 5.04.a.1.

¹⁸ Multiple studies have been reviewed in discussions by the CATT and included in meeting materials; see also Sciberras M, Jenkins SR, Mant R, Kaiser MJ, Hawkins SJ, Pullin AS (2013) Evaluating the relative conservation value of fully and partially protected marine areas. Fish and Fisheries, DOI: 10.1111/faf.12044

¹⁹ 16 U.S.C. § 1851(a)(2).

²⁰ For example, meeting of NEFMC Habitat Committee March 19, 2013 and joint meeting of Habitat and Groundfish Committee, May 17, 2013.

²¹ May 17, 2013, meeting, Portsmouth, NH, motions 1/1a introduced by Council members Tom Dempsey and David Goethel.

pertinent information in its analysis and preparation of an adequate range of alternatives for meeting the amendment's EFH goals. This should include a thorough evaluation of the status quo, i.e., current areas designated as groundfish closed areas with associated habitat areas, and habitat areas of particular concern, and their management, as well as a full range of alternatives that could better meet the EFH objectives of the amendment and the requirements of the MSA. The range of alternatives included in the EFH Amendment must be based on a systematic evaluation of the available technical information, including a full evaluation of the existing groundfish and habitat closures with respect to the goals for EFH specified in law and in the amendment itself.

It is imperative that the EFH Amendment and Draft EIS include the following alternatives for purposes of public review and comment:

No Action Alternatives – status quo: The Council already has a substantial set of year-round closures that are protected from groundfish trawls and, in some cases, have received this protection for nearly 20 years. These areas include parts commonly identified as “habitat areas” as well as parts referred to as “groundfish areas.” This ensemble of areas is clearly the “no action alternative,” or the status quo alternative, and the performance of this ensemble must be systematically compared with the full range of alternatives so that the costs and benefits for EFH can be determined. The areas include five locations:

- Cashes Ledge Closed Area
- Georges Bank Closed Area I
- Georges Bank Closed Area II
- Western GOM Closed Area
- Nantucket Lightship Closed Area

The analysis of the status quo should consider benthic recovery that has occurred, the presence of older/larger individual cod and other species that may have escaped capture residing in the areas (i.e., *brood-stock*), juvenile fish, and the fact that these areas encompass a diversity of habitats within a range of ecological zones. The demonstrated practicability of closing these areas must also be taken into account when evaluating this no action alternative. In most cases the historical record indicates biological functions for these area (e.g., spawning or juvenile fish), and analysis should ascertain the extent to which these functions persist into the recent time period (e.g., past 10 years).²² The analyses must be sufficient to determine whether or not other alternatives actually offer improved EFH conservation.

Status quo areas with enhanced protection:

Portions of the existing groundfish areas have been subjected to disturbance from some forms of trawling (e.g., mid-water trawls) and recreational fishing. They have also been modified over the years through special access programs (SAPs), such as providing access to some areas for the scallop and longline fisheries. It is reasonable and appropriate to analyze alternatives that consider the potential performance of these closures under management measures that exclude the SAPs and other fishing activities that degrade EFH through impacts to the bottom and/or direct disturbance of fish. The evidence for benthic recovery, the presence of large fish and/or juvenile fish, as well as the demonstrated practicability of these closures, must be seriously considered in evaluating this alternative. The management regimes analyzed should include (1) a prohibition on all mobile gear, including mid-water and bottom trawls, and shellfish dredges, (2) a prohibition on all commercial and recreational gear capable of catching groundfish, (3) a prohibition on all fishing in these areas, including all

²² See Letter with appendix addressed to NOAA Fisheries Regional Administrator John K. Bullard, April 9, 2013 from The Pew Charitable Trusts.

forms of stationary gear, pots and traps. Research shows that both the degree of protection from fishing and area size are factors influencing benefits accrued by fisheries from closures.²³

Alternatives based on work of CATT and Habitat PDT:

At the joint meeting of the Habitat PDT and the groundfish CATT (May 29-30, 2013), juvenile hotspot areas, adverse effects areas, and dedicated habitat research areas were considered methodically by the technical team in terms of their potential contribution to meeting the amendment objective of protecting groundfish habitats based on the distribution of critical life history stages. The technical team included experts on the best available scientific information and some of the region's best marine ecologists and scientists.

The technical team proceeded through four sub-regions developing packages of areas that effectively meet this important objective of the amendment: Western Gulf of Maine, Eastern Gulf of Maine, Georges Bank, and the Great South Channel/Southern New England region. The decision to develop alternatives for each sub-region was intended to ensure that EFH objectives will be met throughout the region with benefits to a wide range of human and ecological communities, to provide some insurance against localized failures (e.g., unanticipated natural or human-induced habitat impact), to safeguard local subpopulation diversity (e.g., meta-populations), and to recognize that the region is not homogenous ecologically.²⁴ These packages for each region are intended to be kept intact as functional units and should be included as alternatives in the DEIS for public comment. Several alternative packages were carefully developed for each region based on the scientific information amassed by the technical teams over the course of months of technical analysis and multiple team meetings. The merits of each alternative relative to status quo were discussed and documented.

Unfortunately, as discussed above, these packages are limited in that they do not include any of the CATT work on fish spawning areas as a result of a specific Council directive (i.e., May 17, 2013 motion), and are based on *ad hoc* modifications to the adverse effects areas developed by the Habitat PDT. Additional alternatives that include the CATT's spawning areas analysis as well as the suite of adverse effects areas presented to the Council by the Habitat PDT in 2011 should be developed and included for public review in the DEIS (see Figure 1, page 9).²⁵

Management of EFH areas:

Those places where a given species lives, reproduces, feeds, and carries out various critical behavior and ecological functions are its *habitat*. Given two otherwise identical habitat areas, one in which the animal is killed off at a higher rate would normally be considered to be poorer habitat. For marine fishes, examples of things that could devalue habitat include the addition of toxins, explosions, gill nets, trawl nets, traps, pots or hooks for fishing. EFH with these interventions will perform more poorly than EFH without them. In a previous letter, one of our groups addressed the issue of EFH conservation and the impacts of gear on habitat quality, including gear that does not contact the bottom.²⁶ The best available scientific information reveals that fishing gear degrades habitat by decreasing the survival and/or reproductive success of fish that interact with gear, even if they are not killed immediately. These scientific issues must be taken into account in the development of management alternatives for EFH areas.

²³ Sciberras M, Jenkins SR, Mant R, Kaiser MJ, Hawkins SJ, Pullin AS (2013) Evaluating the relative conservation value of fully and partially protected marine areas. *Fish and Fisheries*, DOI: 10.1111/faf.12044

²⁴ Robert S. Steneck RS, Wilson JA (2010) A Fisheries Play in an Ecosystem Theater: Challenges of Managing Ecological and Social Drivers of Marine Fisheries at Multiple Spatial Scales. *Bulletin of Marine Science*, 86(2): 387-411, 2010; Presentation to Habitat PDT and CATT on larval dispersal and connectivity within the Gulf of Maine, James Churchill PhD, May 29, 2013.

²⁵ Presentation by Michelle Bachman, Habitat PDT, to Habitat Committee, August 30, 2011: Alternative 1.

²⁶ Letter to NOAA Fisheries Regional Administrator John Bullard, dated May 23, 2013, from Pew Charitable Trusts.

Concluding comments.

Beyond the strict legal requirement for protection of EFH, the overriding social and economic considerations must focus on the stock recovery, protecting ecosystem health and resilience and the prospects for fishing opportunities in the future. The decisions being made now on EFH must not foreclose future opportunity in the interest of short term economic gains. Unfortunately, the decisions being made by the Council's jurisdictional committees (e.g., the Joint Habitat/Groundfish Committee meeting on May 17, 2013) appear to be dominated by near term interest in access to those remaining fish that are essential to future fisheries.

New England has more overfished stocks than any other region in the country, cod and other stocks have been slow to rebuild, and one assessment after the other reveals poor recruitment, population age truncation, decreased size at maturity and other telltale signs of an ecosystem that is in trouble. Enhanced protection of EFH is part of the path forward to recovery and is a requirement under the law. Valuable and carefully developed technical information has been laid before the council for crafting a strong DEIS with a full suite of habitat alternatives for public review. The Council will slip further behind on this critical component of successful fisheries management if it fails to produce a robust DEIS, offering the public an opportunity to review a range of science-based alternatives for improving habitat protection in the region. This is a requirement under NEPA and the MSA, and appropriate for a management body that takes seriously its stewardship responsibilities for fisheries resources.

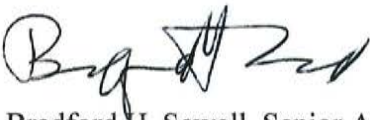
Sincerely,



Peter Shelley, Senior Counsel
Conservation Law Foundation



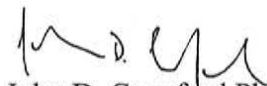
Roger Fleming, Attorney
Earthjustice



Bradford H. Sewell, Senior Attorney
Natural Resources Defense Council



Gib Brogan, Northeast Representative
Oceana



John D. Crawford PhD, Officer - U.S. Oceans, Northeast
The Pew Charitable Trusts

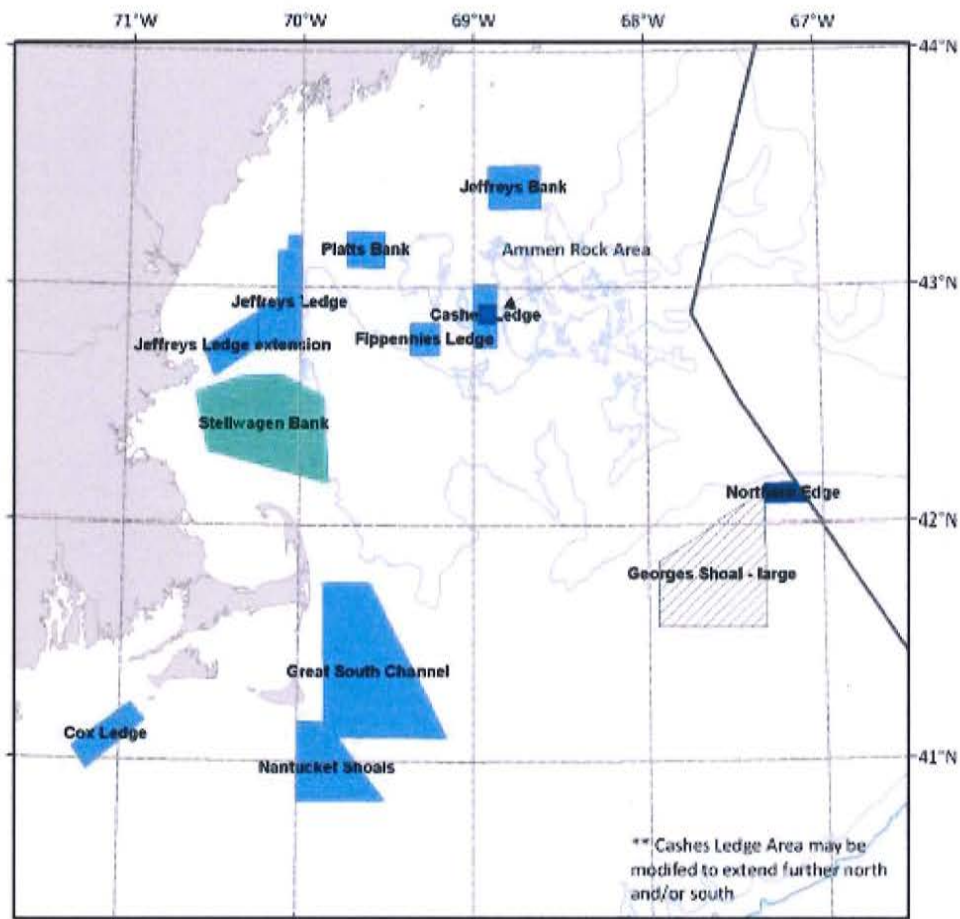


Figure 1. Adverse effects areas developed by the Habitat PDT and presented to the Habitat Committee as Alternative 1, August 30, 2011, Portsmouth, NH.

