

**DRAFT Minutes of the NPFMC EFH Committee**

August 13-14, 2001 Sitka, AK

NSRAA

**Committee:** Linda Behnken (chair), Ben Enticknap, John Gauvin, Michael Payne, Michelle Ridgway, Heather McCarty, Scott Smiley, Glenn Reed.

**Staff:** NMFS- Cindy Hartmann, Lauren Smoker  
NPFMC- Cathy Coon, David Witherell  
Additional participants included Dan Falvey, Lon Hockmeister, and Ellen Hall.

The second meeting of the Essential Fish Habitat (EFH) Committee was held on August 13-14th to address the needs for upcoming work on the EFH EIS. Specific goals of this meeting were to identify significant issues from scoping, and develop alternatives based on these significant issues. A meeting was set for September 18 & 19<sup>th</sup> in Sitka to review the NMFS list of significant issues as well as formulate those of the committee, based on the issues identified from this meeting. Deliver a status report and any alternatives to the Council during the October 2001 meeting. Additionally the committee will want to review the draft EFH EIS prior to public review.

**1. Introduction:** At the onset of this meeting there were the additions of two committee members Glenn Reed and Scott Smiley. Introductions were made of the entire group and a recap of what the committee's role was iterated.

**2. Review of Agenda:** Linda Behnken presented an agenda (*attached*).

**3. Approval of Minutes from last Meeting:** Reviewed on the 13<sup>th</sup> and approved on the 14<sup>th</sup>. The revised final minutes will be posted on the NPFMC website. The chair asked for any opening questions and comments from the committee.

Opening Questions/Comments:

- Questions as to the participation of Atkison and Canter (A&C). Prior to the meeting Heather suggested that the involvement of either of these NEPA experts could be beneficial. However their schedules did not allow their participation. A contract would need to be developed to allow their participation in future committee meetings. Michael Payne would like input on what stage their review should be incorporated into the NMFS timeline.
- John Gauvin requested we get professional advice from NEPA experts on how large the range of alternatives of the analysis should be to meet the NEPA deficiencies identified by the court.
- Cindy Hartmann mentioned that there is a RFQ out for a contractor to aid in preparation of the EFH EIS.
- Scott Smiley commented he was concerned that comments were lacking in scientific input for valid alternatives. He was concerned that the committee might be required to craft alternatives out of the universe of comments made in the scoping session because, in his estimation, the comments received did not adequately reflect the science surrounding what is known about how fishing affects EFH. How to incorporate the lack of information into the policy.
- John Gauvin questioned how the analysis of gear effects within the DRAFT programmatic groundfish SEIS will be incorporated into this document since the previous is still under review (i.e. effects of trawling). John wants the committee to show caution in templating our alternatives based on that uncompleted document.
- Scott Smiley, in regards to the summary of effects of trawling in the programmatic SEIS, noted that most of the studies on effects of trawling were not directly relevant to Alaska waters.

Alaskan cooler temperature water were much more difficult to manage in a 2D or spatial sense in terms of time/area closures. For example EFH could move for a species or species/life stage with changing environmental factors.

- Glenn Reed expressed interest in an inventory of what's been done in the previous EFH draft , what out of that is acceptable and what else needs to be incorporated into the document to make it comply with NEPA and other regulations.
- Gauvin added that an assessment of more current information needs to be incorporated into this coming document.
- Ben Enticknap discussed the need to evaluate the impacts of different gears on sea floor habitats. The committee discussed that there should be cooperation between the different regions/Councils to share information on how to evaluate the effects of fishing gears. Cindy Hartmann was requested to give an agency summary on how the different regions are evaluating gear impacts both through research and incorporation in their EISs. Additionally the committee agreed that it would suit this analysis if we could construct a way to quantitatively analyze gear effects in the North Pacific through new research as well as from the literature.

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#### 4. Discussion of Legal Questions and General Issues

New questions (NQ) and those brought up at the last Council committee meeting

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##### ✓ Agency determination of doing an EIS vs. EA

Lauren Smoker reviewed the agency's decision on completing an EIS rather than an EA for this action. Although the court did not specify that an EIS had to be prepared, NOAA GC advised and the agency determined that preparation of an EIS was prudent given the significance criteria contained in CEQ regulations at 40 C.F.R. 1508.27(b) and NOAA's NAO 216-6. The lack of data and high levels of uncertainty admitted in the original EA undermines a conclusion of no significant impacts, and therefore the use of an EA and the ability to reach a finding of no significant impact. Some of the criteria used to determine significance that appear applicable to this action include:

- whether the action contains highly uncertain impacts or involves unique or unknown risks
- whether the action may affect unique characteristics within the geographic area
- whether the action is likely to be highly controversial from a scientific or socio-economic standpoint
- whether the action may be reasonably expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat

Lauren noted that it would be unlikely for a court to direct an agency into one type of document over another.

Dave Witherell pointed out that in terms of an actual analysis the differences between an EA and an EIS is a formal scoping process.

##### ✓ Is the EFH EIS an action-forcing document?

Yes. CEQ regulations at 40 C.F.R. 1502.1 state that "the primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing program and actions of the Federal government."

##### ✓ What is the interplay between the programmatic SEIS and the EFH EIS?

Lauren Smoker noted that the two documents analyze different actions and while there is some overlap, neither document is looking at the same action. For example, the programmatic SEIS is taking a broad examination of all aspects of the groundfish FMPs, including its impacts on habitat. However, the programmatic SEIS is not looking at all of the various Magnuson-Stevens Act EFH components, such as the description and identification of EFH. In contrast, the EFH EIS will not

be looking at all aspects of the groundfish FMPs, such as impacts on marine mammals, but will focus on the description and identification of EFH and HAPCs, and impacts of fishing.

✓ What is the appropriate scope of the EFH EIS?

The committee discussed several components of this question. First, there was a question on the agency's decision to redefine EFH since the litigation focused on fishing impacts. Second, the lawsuit only challenged the GOA and BSAI groundfish EFH amendments so why is the agency preparing EISs on all of the EFH amendments (groundfish, scallop, salmon and BSAI crab)? Finally, there was a question of whether the committee would look at non-fishing impacts on EFH?

Lauren Smoker explained that the court's decision was not limited to the legal adequacy of the analyses of fishing impacts. The court's decision on the NEPA analyses addressed the analytical and informational deficiencies of the EAs as to the impacts of the proposed action – whether to implement the EFH amendments with all its parts – and the alternatives to the proposed action, not just the impacts of fishing activities. Furthermore, the analyses in the EAs were not limited just to fishing impacts; rather, they purported to analyze all of the impacts of implementing the EFH amendments, including the description and identification of EFH, impacts from non-fishing activities, etc. Finally, because the EA prepared by NMFS and the NPFMC for the EFH Amendments covered all five Alaska FMP amendments, the deficiencies found with the EA concerning the groundfish amendments also extended to the scallop, salmon and BSAI crab EFH amendments. Therefore, NOAA GC advised and the agency determined that the new NEPA documents need to parallel the scope of the old NEPA documents.

The committee noted that clarification is necessary concerning the Council's intent to have the committee look at both fishing and non-fishing impacts. Lauren Smoker noted that cumulative impacts, including those from non-fishing, will be addressed in the EIS.

✓ Can the Secretary take an alternative out of the EIS?

Lauren Smoker noted that it is unlikely that the Secretary would remove an alternative from the analysis. Alternatives examined in an EIS should represent an adequate range of reasonable alternatives. If there are alternatives that were considered but not analyzed further either because they were found to be unreasonable or the impacts of the alternative are encompassed within the range of alternatives, the analysis should contain a discussion that explains why these alternatives were considered but dropped from further consideration.

During this discussion, it became apparent that the question the committee had wanted to pose to NOAA GC was whether the Secretary could select his own alternative and possibly override the alternative identified by the Council as its preferred alternative. Lauren Smoker stated that typically EISs (or SEISs) accompany FMP and regulatory amendments that are subject to the Magnuson-Stevens Act provisions at 16 U.S.C. 1854, meaning that, under the MSA, NMFS is only allowed to approve, disapprove, or partially approve an FMP or regulatory amendment. Because the preferred alternative in the NEPA document is the proposed action in the FMP/regulatory amendment and proposed rule, if NMFS has a consistency problem with the FMP/reg amendment, NMFS disapproves the FMP/reg amendment in whole or in part and remands it back to the Council with recommendations on how the Council can fix the identified problem. NMFS does not substitute its preferred action for that submitted by the Council. Smoker told the committee that she had never before been faced with the question of what NMFS could or would do if it was a purely NEPA process. In other words, if NMFS is not under the approval/disapproval constraints of the MSA, could NMFS substitute the preferred alternative identified by the Council and contained within the final SEIS with another alternative that the

agency believes is more reasonable in the ROD? Smoker told the committee members that she thought that in a purely NEPA action (i.e. no MSA FMP or regulatory amendments involved), NMFS has the authority to make its own decision in the ROD and could select an alternative that was not the alternative preferred by the Council. However, Smoker noted that Council recommendations are not treated lightly and that in examining Council actions, the agency's usual role is to determine whether the action is consistent with applicable law, not to substitute the agency's judgment for that of the Council. Smoker said that she would follow up on this question at the next committee meeting.

- ✓ What is the degree of socio-economic analysis that's needed for the EIS?  
Both Council and agency staff at the meeting stated that the analysis would be the same as an EA (an analysis that satisfies NEPA, E.O. 12866 and Regulatory Flexibility Act requirements).
- ✓ NQ: Do the negotiations between plaintiffs and NMFS affect the process that's going on? What is driving the current time schedule?  
Lauren Smoker stated that the federal government can't discuss the current settlement agreement. However, she stated that the agency cannot circumvent the public process in settlement negotiations. NMFS staff stated that developing an EFH EIS in two years (the current time line) was prudent after a hard look at the facts. Glenn Reed wanted the Committee to convey to the Council that there is concern that this private process (settlement negotiations) may diminish the public process and wanted to keep the plaintiffs informed on the progress the committee is taking.
- ✓ NQ: Does there need to be a separate EIS for each of the 5 FMPs or just 1?  
The January 22, 2001, guidance memo from William Hogarth directs NMFS, Alaska Region, to address the EFH provisions of all 5 of our FMPs. The Agency indicated (M. Payne) that the current intent was for 1 SEIS for all FMPs but that difficulties may arise in preparing one SEIS when you are dealing with such diverse species.
- ✓ NQ: What type of interagency cooperation will there be for EFH designation (Ben Enticknap)?  
NMFS will seek the cooperation of ADF&G and other interested agencies.
- ✓ NQ: Who takes the lead on this document NPFMC or NMFS (Heather McCarty)?  
The Alaska Region currently has the lead in document preparation but intends to have substantial involvement by the Council, including Council staff and the EFH Committee.\_\_\_\_\_

- 5. Summary of actions by other Regional Councils:** Cindy Hartmann  
see attached summary sheets. Actions of all Councils are similar although wording from websites and NOI's may be a little different. (See attachment A)

Tuesday August 14, 2001

**6. Review Mission Statement:**

Revised mission statement for the EFH Committee 8/14/01 as follows:

It is the Council's intent that the EFH Committee act as a steering committee for the EFH EIS process. The Committee's overarching goal is to facilitate input by the industry, conservation community, Council, and general public to the EFH EIS process. More specifically, the Committee will assist in identifying:

1. The ‘significant issues’ used to develop and evaluate proposed alternatives;
2. The alternatives for describing, identifying, and protecting EFH;
3. The means of determining possible fishery impacts on habitat;
4. and Interpreting existing information for development and analysis of alternatives;
5. The alternatives for mitigating fishing gear impacts on habitat;
6. Alternative criteria and approaches that could be used to designate and manage HAPC areas; and
7. Identify and prioritize future research needs.

Additionally, the committee will assist the agency with appointing and working with technical teams.

## **7. Discussion of “Significance”**

Cindy Hartmann distributed a sheet of How to identify significant issues as background material. The following are major categories of the information she distributed:

### Steps in Issue Development

1. Identify Issues
2. Define and Clarify Issues
3. Organize/group issues
4. Identify significant issues
5. Identify units of measure.

Additionally, there were blank worksheets to work through a public comments to pull out significant issues. The committee worked through one example Thorn Smith’s as a group, and were asked to fill out the worksheet for all sets of comments and bring back their identified significant issues for Tuesday’s discussion. We also had a review of NEPA in order to determine how to best have a broad range of alternatives. The group decided to keep track of issues other than those that are formulated as alternatives as an end product i.e.. non-fishing impacts.

## **8. Review scoping comments**

The committee went over each of the scoping comments. Both the worksheets that Cindy Hartmann passed out as well as the original letters were utilized to pick out issues and the group determined that at this time we would only identify the main issues from all of the comments, and come back to them and go through and determine the significance based on EFH and the Magnuson Stevens Act. It was decided that there was insufficient time for the committee to decide which issues were significant from the committee’s perspective among those identified by the public in the ‘scoping’ session. The committee agree to schedule another meeting prior to the October NPFMC meeting to prioritize the issues from the scoping session.

Major issues identified included can be placed into the following broad categories: Each of these need to go through the ‘significance’ criteria test prior to be encapsulated into an alternative.

- \* Process
- \* How to define EFH
- \* How to define HAPC
- \* Socio Economic Impacts
- \* Existing Regulatory Mechanisms
- \* Management Alternatives
- \* Gear Alternatives

- \* NEPA document type
- \* Non-fishing impacts
- \* Research
- \* Subsistence
- \* Comments on Species  
[Scallops, Groundfish, Crabs, Salmon, Other]

### **9. Develop list of Significant Issues identified by scoping process**

The committee decided that during the next 2 day meeting the major issues would be distributed and significant issues identified out of the public scoping comments. The committee would also get advice from GC if the range of the significant issues was broad enough to develop into book ends for alternatives, and what the procedure was to create a broad enough selection of alternatives to meet the mandates of the court.

### **10. Discuss additional Issues or Alternatives to present to Council**

- \*Suggested by NMFS in scoping process
- \*Developed in groundfish SEIS
- \*Based on past management actions
- \*Other

During the discussion of the public comments, a brief discussion arose among committee members of suggested alternatives in the upcoming document.

John Gauvin suggested a two tier approach to determine the range of alternatives. A criteria line would be established and two separate ranges of alternatives would be developed in analysis for each side of the line as follows:

Criterion Line: Is there a:

- A) Problem with a managed species e.g. overfishing or stock decline?
- B) Scientific evidence of an ecosystem problem with stocks related to benthic habitat ?

In the case where there is neither a problem with the managed stocks or with benthic habitat on the ecosystem, then the range of alternatives for analysis would be as follows: Areas open to fishing to include re-opening of areas currently closed to limiting fishing to the areas it is currently allowed. The consideration of re-opening areas currently closed would be based on the rationale that spreading fishing out over a wider area which could reduce intensity of fishing and decrease potential for negative impacts on benthic habitat. Re-analysis of existing closure areas would be based upon the limiting closure areas to the actual types of substrates that the management closure was designed to protect, e.g. crab habitat closures reduced to the subset of substrates that are actually deemed to be vulnerable crab habitat.

In the case where a problem is identified and we are on the other side of the criterion line, then the range of alternatives for the analysis is restricting fishing to the areas where it actually occurs to restricting fishing by full closures around some habitat types or a conservative percentage of representative habitat types closed to fishing.

Linda Behnken suggested an alternative that would follow a habitat based approach for defining EFH additionally a HAPC based approach. This approach could have the following identification of 3 factors: 1) vulnerability 2) ecological function 3) rarity or uniqueness.

Other types of alternative composition included the following.

- ✓ Issue - over capitalized fisheries, create more habitat effect to catch TAC, Alternative

could be to decapitalize fisheries through buy-back equitable rights based. This could be a stand-alone measure or addition to any EFH measure.

- ✓ Consider a species assemblages approach to EFH designations.
- ✓ Look at how other regions approached EFH designation
- ✓ Limit geographic extent of fishing areas beyond current (year\_\_) footprint until spatial habitat are mapped at a sufficiently fine resolution and impacts of fishing methods on habitat ecological functions are known. Expansion of fishing area can occur following implementation of a tier habitat protection prioritization system ( addressing burden of proof), precautionary approach/ mgt. Management data needs and socioeconomic concerns.

## 11. Review Timeline for EFH EIS Process

NMFS handout. The committee has a discussion on difficult it would be to meet the two year timeline for all aspects of a full EIS project. Specifically in light of not completing the task of identifying significant issues it would be difficult to create with draft alternative(s), or review the agency's draft alternatives to present to the Council in October. Components of the timeline would need to be modified.

Draft Agenda  
Essential Fish Habitat Committee  
August 13-14, Sitka

### Monday August 13: 12:30-5:00pm

1. Introductions
2. Approve Minutes from last meeting
3. Scoping Overview/ Background Information if needed
4. Summary of actions by other Regional Councils
5. Review scoping comments

### Tuesday August 14: 8:00am-5:00pm

1. Review Mission Statement
2. Discussion of "Significance"
3. Develop list of Significant Issues identified by scoping process
4. Discuss additional Issues or Alternatives to present to Council
  - \*Suggested by NMFS in scoping process
  - \*Developed in groundfish SEIS
  - \*Based on past management actions
  - \*Other
5. Other Issues/ Questions
  - \*Council vs. Agency lead on EFH EIS
  - \*Appointment of FMP Technical Teams
  - \*Selection of Preferred Alternative - who takes lead??
  - \*Other
6. Review Timeline for EFH EIS Process
7. Schedule next meeting.