

**DRAFT EFH Committee Report**  
**Juneau, Alaska**  
**Room 105 Federal Building**  
**May 5 –6, 2003**

Committee members present: Stosh Anderson (Chair), Linda Behnken, (vice chair), Scott Smiley, Earl Kryger, Ben Enticknap, John Gauvin, Glenn Reed, Gordon Blue, Michele Ridgway

Agency Staff Present: Cathy Coon, John Kurland, and John LePore

Public attendees: Paul MacGregor, Dick Powell, Linda Kozak, Geoff Shester, Brent Paine, Janet Smoker, and Donna Parker

EFH and MPA definitions: (See attached appendix A)

Staff presented a list of terms for the EFH /MPA . Ben Enticknap asked if the Council would take action on adopting these definitions. Stosh Anderson thought the Council would deal with this at the June Council meeting. The Board of Fish will be addressing them in their MPA committee in June and the next Joint Board Protocol Committee meeting this summer. The Committee made slight modifications to the MPA/ EFH definitions to clarify marine research reserves. It was suggested the concept of ecological function and adaptive management be incorporated into these definitions.

Motion: The Committee recommends the Council adopt these definitions as working definitions for EFH and MPA processes. (*passed unanimously*)

EFH/EIS Update and Schedule:

Jon Kurland provided the updated table of contents from the EFH/EIS and a tasking memorandum. Council staff is working with the agency to get the EIS together for publication by August 1<sup>st</sup>. He pointed out with the tight timeline drafts of the chapters will not be available until the entire document is completed.

Options for Handling HAPCs in the EIS:

Jon Kurland stated the existing HAPC alternatives in the EIS do not parallel very well with the HAPC process. The HAPC alternatives right now are a framework for designating HAPCs. It will be difficult to have a substantive analysis in the EIS to distinguish between them to meaningfully describe the environmental consequences of going with one alternative versus another. He suggested that if the Council retains this HAPC process, one way method could be to pull the existing HAPC alternatives out of the EFH/EIS and add in the discussion of process and discussion of reasonably perceived consequences that might come from the implementation of that process. The Committee could recommend pulling HAPCs out of the EIS if the Council proceeds with a separate process for HAPCs. As currently scoped, they went out with a notice of intent and scoping process that envisioned the EIS would identify alternatives for HAPCs. That originally was envisioned as meeting specific types of habitat, or sites, and full analysis of the specifics. Stosh Anderson asked if this was advisable, if they were dealing with an EFH/EIS in August of '03 or August of '04, to make recommendations for either deadline. Jon Kurland thought it advisable, either way, if the Council is going to proceed with a separate HAPC process.

Linda Behnken said her understanding was that the Council would not proceed with a separate HAPC process unless they got the extension. Jon Kurland said that has been implied but he did not know that it was stated as an explicit Council motion. Linda Behnken said her advise would be to only separate it out if the Council decides to proceed with the separate HAPC process so it stays in the EFH/EIS, unless there's this separate process. If there is a separate process then the Committee could discuss it.

Motion: The Committee moved that the HAPC alternatives get removed from the EIS only if there is an identified separate process. (*Passed unanimously*)

Status of existing HAPC: Linda Behnken said there was a lot of interest in the Council moving ahead on some sort of accelerated time frame in coming up with some management measures to address the HAPC types that were identified in the prior EFH EA. She asked what if the Council picks a preferred alternative differing from status quo, what would happen to those HAPC sites that were identified in the last EA.

Jon Kurland gave a background on the five FMPs that were implemented in 1999. There are currently three types of HAPCs designations in the regulations. In the EIS, one of the alternatives they are identifying would be the “no action” alternative, which would mean there are no HAPC identified and the Council and Agency would have to implement an action to revoke an exiting HAPC designation. . If the Council were to choose one of the other alternatives in the EIS besides status quo, like specific sites, the existing HAPC would need to be revoked and then identify a process reinstate these. The status quo alternative in the EIS would reaffirm the existing three designations. FMP amendments will be necessary if the Council does anything other than affirming exactly what was contained in the original EA. Depending on what is selected in the preferred alternative for any of the three actions, EFH designations, HAPC designation, or minimization matters, the amendments would need to try to put into effect what the Council selects as the preferred alternative. He added that it would not foreclose any future options.

John LePore cautioned that if they look at the final ruling, and what the Council should do when it comes to HAPCs, there’s nothing that states that management measures have to necessarily follow the identification of HAPCs.

Linda Behnken encouraged legal council to walk the Council through the implications of status quo alternative and the no action alternative.

Review of Subcommittee’s work on HAPC Process:

Stosh Anderson clarified the task of the subcommittee (Ben Enticknap, Linda Behnken, Heather McCarty, and John Gauvin) was to come up with a template or outline for the Committee to develop a long-term process that would be included in the EFH/ EIS only. His goal for this Committee, as soon as they develop the long-term process, was to make suggestions on how to modify the long-term process if they need a short-term process.

Linda Behnken identified the outline as a starting process for the document. She thought it was important to hand the Council a draft of a process with alternatives under each topic for the Council to deliberate.

Earl Krygier asked if they discussed a cycle when proposals would come up. Linda Behnken said they discussed a cycle of every three years as one alternative, or every five years as another. The other alternative for discussion is whether it should coincide with the regular call for proposals that happens over the summer, or whether it should be in a separate time frame so they are only prioritized against each other.

Review of Science Committee comments on Draft HAPC Process:

Staff gave a brief overview of who from the agency reviewed this information, their comments and suggestions. Scott Smiley asked if he had come across any discussion on the phrase ecological function. John LePore said after a quick review of the preamble and discussions about the HAPC considerations, it did not go into specific detail about ecological function. He thought it was more of a broad consideration of an ecological function of a particular area. Jon Kurland said the idea was that it was suppose to be a consideration that the Council could use if there was good information. It was not meant to be a standard for proof of ecological function or a particular type of function that is highlighted for preference over some other function. Scott Smiley asked how feeding habitat and spawning habitat was different from EFH, which has all of those things already defined in it. Jon Kurland said the Council wanted flexibility in how they go about identifying HAPC.

John LePore said in a Court of Law, the Court usually defers to the Agency and considers the Agency the expert in that field. When the Council is looking at one of those four considerations, as long as they document in the record why they are looking at a particular HAPC, and justify that, the Court would see the basis for the determination.

Scott Smiley could agree with ecological function if it was tied directly to FMP species and directly to a definable geographic area. Then when it is successfully implemented, it is not closing an entire swath or similar habitat all over the place. It is defined and localized and there is some significant scientific information to justify the claim. Gordon Blue agreed it was important to limit the geographic bounds.

#### Committee Discussion and Recommendations on HAPC process:

It was agreed that the Committee would review the 11 items on the Suggested HAPC Process Outline, and incorporate concepts within the text. The draft HAPC process paper is attached in the Council notebooks under agenda item C-3(b), and the outline was incorporated into an executive summary.

The Committee agreed that HAPC sites be defined as specific geographic locations, identified on a chart, that meet the considerations established in the regulations. Management measures would be designated to address identified problems for FMP species and achieve clear, specific management objectives. Additionally, HAPC type designations would be used to focus research priorities, such as ascertaining ecological links between habitat and FMP species, etc. The intent is that the type designation alone would not invoke mitigation measures.

The Committee reiterates whether or not the Council goes with types or sites, management measures are attached only to specific locations.

#### Proposal process:

Earl Krygier asked how HAPC proposals of different subject matters could be packaged to analyze. Jon LePore said that each proposal or similar topics would be a separate federal action. If the Council set up a "problem statement" and set up a specific priority, various proposals responding to a specific problem statement could be looked at as alternatives to address that problem statement. Scott Smiley asked John LePore (NOAA GC) if additional things besides criteria and priorities would narrow the number of proposals. The Council will have to be able to give the reason why each one is moving forward for analysis, and at that point, they would make specific proposals for federal action and would initiate the NEPA process. John LePore responded that the Council had to provide a rationale, on the record, as to why they were not going to move a particular proposal forward. As with any Council action staff time and effort are always considered. If they articulate criteria, then they have to follow those criteria. That does not mean that stakeholders are no longer involved, it just indicates the proposal has moved ahead for analysis.

Scott Smiley asked if the Council feels that there is a specific concern, could Council ask staff to develop a HAPC to deal with a priority up front. Do they have to open it up for everybody and have this welter of varying proposals across a wide range of interests and deal with a "priority". Mr. LePore said it was helpful to put the recommendations down for the Council, but a lot of the decisions would have to be made when they actually see the proposals. They can set up a process that has flexibility in it, but they will not be able to dictate how the analysis will be done. They may be able to fit several proposals under one analysis and the Council may direct staff to take several proposals and develop a HAPC. Jon Kurland suggested that in the language they clarify that it is a range of HAPC alternatives, but ensure that the alternatives are meant to address a common problem, or identified priority of the Council. Michelle Ridgway suggested that if the Council established priorities is an effective means to engage the public in a process that's meaningful and integrated from the beginning of their idea to it becoming an action to protect habitat. The establishment of priorities allows for adequate means for the public to propose topics that may effect a certain region.

Linda Behnken added that if the Council set up priorities for HAPC that any HAPC proposal still had to meet the considerations of the EFH Final Rule. The Committee agreed on three priority options.

#### Request for Proposals:

The format for the request of proposals was created during the EFH Committee meeting in May, 2002 during a Committee meeting in Sitka. Additionally the Northeast Council's format was incorporated for EFH Committee review.

Ben Enticknap suggested that a sub-criteria matrix could be used to help scientists evaluate a HAPC proposal. He suggested that some of these criteria in option 2 could be sub-criteria that help flush out what is an ecologically important area and what is a sensitive habitat. He was putting his list forward as ideas to generate discussion about how to flush out some sub criteria or further develop a criteria so that when the scientists are evaluating the proposals, that they can use, in a methodical way, to evaluate these proposals and objective.

John Gauvin suggested putting this in the instructions for the proposal application. He felt that if he wanted to do a proposal and he knew it was going to be graded by this, he would want to have this material to be really accessible so he could understand it and know how it was being reviewed. Scott Smiley agreed that with removing Option 2 and just letting the scientists do the evaluation. Ben Enticknap did not agree that removing Option 2 because they would be evaluating proposals on ecological importance. Michelle Ridgway also did not concur with striking it. Mr. Gauvin was more comfortable leaving this review for the scientists and not the reviewers. Linda Behnken suggested striking it and noting that some Committee members felt that this would be helpful and they would like to hear more from the SSC on whether they think it should be in there.

Linda Behnken said one comment they heard over and over from other areas was that they want this decision-making process to be as transparent as possible. She thought one benefit to the criteria being published is that the evaluation that the science team uses to guide their decision makes it transparent and people understand what the yardstick is. She was not sure this was the right yardstick and she hoped that when the scientists reviewed this, if they disagreed that they would give ideas on what a better yardstick would be. The Committee requests suggestion from the SSC what criteria they would outline for evaluation in proposals.

#### Review process:

There was discussion among the Committee and the Committee was in concurrence that the Council process would take about 18 months.

If management measures were needed Scott Smiley thought science/technical team should review what the stakeholders propose, but leave the design of the research adaptive management part to scientists. Stosh Anderson thought the SSC should be there to review not design the experimental design and critique it. Jon Kurland suggested that several steps in the outline be merge a joint review committee and science group, in a workshop setting, trying to address both the technical and the other aspects. This would reduce the number of meetings and the time to process HAPC.

John LePore understood that getting as much information to the reviewers was a good thing, but they all need to recall that practicability is used when you are talking about mitigating from fishing impacts, and that is different than HAPC. HAPC had four considerations and they don't necessarily mitigate; all they are doing is designating.

#### Socioeconomic and Ecological criteria:

The Committee agreed that the proposals be evaluated separately for ecological and socioeconomic practicability such that one does not cancel the other out before it's viewed on both merits. The EFH

Committee seeks suggestions on the appropriate development of appropriate ecological and socioeconomic criteria for evaluating HAPC proposals.

Ben Enticknap said he did not want to see proposals be evaluated on meeting the goals and objectives of ecological criteria be toned down because social scientists are saying it is not going to work for the accumulative fishing fleet. If a proposal moves forward that doesn't meet any type of ecological objective it is essentially wasting time, money, and effort to design a proposal that doesn't meet its objectives to protect the habitat adequately.

Michelle Ridgway said the key points are they support potentially concurrent socioeconomic and ecological analysis; that they be concurrent but discreet processes. They are not integrated as one but they're different. She suggested even taking out the term practicability and say practicality. Gordon Blue and Glenn Reed agreed, but both felt the term practicability needed to remain because that was what was in the statute.

#### Stakeholder Process:

The Committee supports the stakeholder process. If a HAPC impacts communities or are in any way affected, that a special effort should be made to go out and engage those communities and affected stakeholders from that region.

John Gauvin thought the MCA letter argued for an integrated science and stakeholder review, but when there are very different types of proposals, it would be hard to determine who those stakeholders would be. He spoke in favor of the EFH alternative where after the proposals is identified, they go into the communities most affected. Scott Smiley said that if they were talking about events that would affect a huge range of area and huge range of people, they would have to have a different kind of stakeholder process then if they have a targeted geographical site. The proposals that make it through the system would dictate the stakeholder process. The Council should charge the EFH Committee with establishing how to form the stakeholder inquiry after the HAPC proposal has been identified. Glenn Reed said another process to be considered could be drawn from comments about an RPA type committee that incorporates lots of different people and goes from region to region to hold meetings and involves people who may be impacted by the proposal. Maybe there could be three different regional groups. John LePore said that followed the model of IFQs.

#### Public Comment: May 5, 2003:

Geoff Shester: representing Oceana. He referred to their letter dated May 2, 2003. He said they would like to have a seat on future EFH or HAPC committee discussions.

Geoff Shester thought it would be worth looking into both options. If the proposer submits a proposal that turns out not to work, that shouldn't mean that they are done. He thought there should be a way to get stakeholders to take up that proposal, if they are interested in what the proposal's intent is, and craft management measures that better meet the goals.

Geoff Shester said the understanding they have from NOAA, and from reading the old Council documents, all living substrate is considered HAPC, including low relief, high relief etc. There are gradations based on recovery time and possibly ecological importance of maybe some of those within that HAPC being more important than others.

Geoff Shester said based on personal experience and trying to get information from NOAA and being denied based on confidentiality issues, it does not seem reasonable to require HAPC proposals to include that information. Rather it should be NOAA because they have access to that data.

Donna Parker: representing Arctic Storm Management Group. She felt this was an opportunity to accomplish two things. By meeting the deadline and focusing staff energy on the EFH/EIS and splitting

forces to take on HAPC and EFH on the same time lines, they would get a better EFH/EIS. She asked that the Committee consider making a recommendation to the Council that now that the deadline can be made, the HAPC process should proceed on a separate rational schedule as was originally determined by this Committee. In trying to do both at the same time, they may come up with HAPCs that don't meet the criteria and options chosen by the Council. She then referred to her letter dated May 4, 2003 and reviewed her points.

Linda Behnken said one comment they got back from the scientific reviewers was that we really don't know much about ecological function. She said requiring proposals to meet every criteria does not seem possible if they don't really know much about one of the criteria. Ms. Parker agreed and said flushing out the meaning of the four criteria in the Final Rule would be time well spent.

Linda Behnken said with regard to the Committee that includes stakeholders, did she envision one committee or would there be a few stakeholders from each area. Ms. Parker said the RPA Committee dealt with just one committee and the different members would caucus if necessary.

Marine Conservation Alliance: Staff passed out a letter received from the dated April 16, 2003.

Public Comment May 6, 2003:

*Geoff Shester (Oceana):* The Final Rule says to place special attention when looking at adverse impacts on HAPCs. Based on that law, looking at the NEPA, what this does is provide a tool for actually looking at how you mitigate based on creating and evaluating management measures for both the public and decision makers to evaluate the measures for their affects on EFH and HAPC in both the environmental and human environment. The best way to do this is to create a range of alternatives from full protections of these identified HAPC and EFH to partial protection from these threats so you can look at the impacts of each of these alternatives to the habitat and to the socioeconomic. What is does is clearly defines a set of choices so that then, after seeing this analysis, the Council can then determine what is practicable based on looking at all the costs and benefits. Without a broad context and without looking at a full range of alternatives, and being able to document the determination of practicability, the Council will not be on solid ground and will have no justifiable basis for making a decision on practicability. He said they do need an EA to make this decision, but if proposals that meet HAPC criteria are denied analysis and consideration based on an uninformed determination of practicability, then what we have done is ignored the law and we have not done what we are here to do today. What's practicable might change depending on the importance or rarity, etc. of the habitat that we're protecting. The Council and public and decision makers need to have that clearly laid out, including alternatives that may not turn out to be practicable because if those don't exist, how can you justify your choice of practicability later in the process.

Geoff Shester said there was no way to determine practicability without doing an analysis in terms of knowing all the costs and benefits. If it's going to cause some pain to an individual fisherman or an individual sector, then maybe that fisherman or individual sector does not think that that's a practicable alternative. But if we can't see the costs and benefits weighed in a formal analysis, then we don't have the ability to justify a decision that has already been made.

## APPENDIX A Suggested Working Definitions for EFH and MPA processes:

Marine: All areas seaward of the mean higher high water line, out to the 200 mile limit of the Exclusive Economic Zone (EEZ).

Marine Protected Area (MPA): Geographically defined areas designated with year round protection to enhance the management of marine resources . This definition includes areas where extraction of certain fishery resources is prohibited, and/or areas where specific gear types are prohibited. NMFS recognizes the definition of a Marine Protected Area as defined by Executive Order 13158: "Any area of the marine environment reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein."

Marine Reserve(MRV): A type of MPA where removal or disturbance of specified resources is prohibited. Marine reserves are also known as "no-take zones"\*. Marine reserves are a restrictive class of MPAs.

\*Marine Research Reserve (MRR): A MRR is an area where all specified marine resources are protected from any disturbance or removal activity, except as necessary for monitoring or research.

Marine managed Area (MMA): A geographically defined area designated with special protections, including seasonal protections, of marine resources. This is similar to a marine protected area (MPA) but without the requirement of year-round protection; hence, an MPA is a restrictive class of MMA.

Other managed areas (OMA): This includes areas that already have a legislative designation and include: state parks, national wildlife refuges, and estuarine reserves.

Essential fish habitat (EFH): Means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. For the purpose of interpreting the definition of essential fish habitat: "Waters" include aquatic areas and their associated physical, chemical, and biological properties that are used by fish and may include aquatic areas historically used by fish where appropriate; "substrate" includes sediment, hard bottom, structures underlying the waters, and associated biological communities; "necessary" means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem; and "spawning, breeding, feeding, or growth to maturity" covers a species' full life cycle. (EFH Final Rule 600.10)

Habitat Areas of particular concern (HAPC): , Subsets of EFH that are identified by a Council under 50 CFR 600.815(a)(8) Councils should identify specific types or areas of habitat within EFH as habitat areas of particular concern-based on one or more of the following considerations:

- (i) The importance of the ecological function provided by the habitat.
- (ii) The extent to which the habitat is sensitive to human-induced environmental degradation.
- (iii) Whether, and to what extent, development activities are, or will be, stressing the habitat type.
- (iv) The rarity of the habitat type.

Note: Geographic areas encompassed by these definitions should be open for appropriate scientific research.

### Sources:

Essential Fish Habitat Final Rule 50 CFR 600

Marine Protected Areas in Alaska: Recommendations for a public process. Regional Information Report 5J02-08, Alaska Department of Fish and Game, Juneau. July, 2002

NRC, 2001. Marine protected areas: tools for sustaining ocean ecosystems. Washington, D.C., National Academy Press. 272p.