



Nantucket Land Council, Inc.

Six Ash Lane
Post Office Box 502
Nantucket, Massachusetts 02554
508 228-2818
Fax 508 228-6456
nlc@nantucketlandcouncil.org
www.nantucketlandcouncil.org

Board of Directors

Lucy S. Dillon
President

Paul A. Bennett
Vice President

William Willet
Vice President

Howard N. Blitman
Treasurer

Neil Marttila
Assistant Treasurer

Susan E. Robinson
Clerk

Matt Anderson
Susan Baer
Larry Breakiron
William S. Brenizer
Karen K. Clark
Christine Donelan
Josh Eldridge
Robert Friedman
Nancy Gillespie
Nathanael Greene
Charles A. Kilvert III
Laurel Ried Langworthy
Matthew B. Liddle
Peter McCausland
Eileen P. McGrath
Paul P. Moran
Carl H. Sjolund
H. Brooks Smith
Lars Soderberg
David Troast
Peter Watrous

Honorary Directors

William M. Crozier, Jr.
Jean Haffenreffer

Scientific Advisor

James W. Sutherland, Ph.D.

Staff

Emily Molden
Executive Director

RJ Turcotte
Resource Ecologist

Meg McNeely Browsers
Development Director

October 15, 2019

Michael Pentony, Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930
michael.pentony@noaa.gov

Submitted via Federal eRulemaking Portal

Re: Comments on the Proposed Rule for Habitat Clam Dredge Exemption Framework (NOAA-NMFS-2019-0043)

Dear Mr. Pentony,

I am writing to provide comments on the Proposed Rule for the Habitat Clam Dredge Exemption Framework Adjustment (“Clam Dredge Framework”) to its Fishery Management Plans.

The Nantucket Land Council (NLC) is a 501 (c)(3) non-profit organization with a mission to protect and preserve Nantucket’s natural resources. We are extremely involved in advocating for sound environmental policies on Nantucket and surrounding waters. We have a membership of over 1500 including both year round and seasonal residents. Our members represent a diverse group of the community, many of whom depend on the health of our fisheries for work or for recreation, and who are all concerned with appropriate management of our marine ecosystems.

We are aware that the Great South Channel Habitat Management Area (the “HMA”) has been identified as an important area for protection because of its benthic habitat and value for juvenile Atlantic cod and other fish species. We are extremely concerned that the proposed Clam Dredge Exemption Framework, which opens portions of the HMA to some of the most destructive gear for this habitat, will undermine the benefits that this area was selected to provide. **The NLC urges NMFS to disapprove the Clam Dredge Framework which establishes three dredge exemption areas (McBlair, Old South, and Fishing Rip) in the newly established GSC HMA to allow fishing for surfclams and blue mussels.**



The Conservation Law Foundation has submitted a comment letter dated October 15, 2019. The NLC fully supports the concerns that were addressed in this letter (attached below) which include: 1) *The proposed exemptions are inconsistent with the purpose and needs of the Framework and poor precedent in the region;* 2) *The environmental analysis contains no practicability analysis;* 3) *Potential impacts on Atlantic cod and other council-managed species;* 4) *The impacts of dredging in North Atlantic right whale critical habitat should be further analyzed.*

Thank you for your time and consideration.

Sincerely,

A handwritten signature in blue ink that reads "Emily Molden". The signature is written in a cursive, flowing style.

Emily Molden
Executive Director

Enclosure

October 15, 2019

Michael Pentony, Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930
michael.pentony@noaa.gov

Submitted via Federal eRulemaking Portal

Re: Comments on the Proposed Rule for Habitat Clam Dredge Exemption Framework (NOAA-NMFS-2019-0043)

Dear Mr. Pentony:

On behalf of Conservation Law Foundation (“CLF”), we are providing comments on the Proposed Rule for the Habitat Clam Dredge Exemption Framework Adjustment (“Clam Dredge Framework”) to its Fishery Management Plans.¹ CLF has had longstanding concerns about the lack of appropriate habitat protections in the Northeast. In replacement of the several thousand square miles of year-round protections eliminated in Southern New England last year, the National Marine Fisheries Service (“NMFS”) implemented the much smaller Great South Channel Habitat Management Area (“GSC HMA”)² to meet its legal requirement to minimize adverse fishing effects on habitat to the extent practicable.³ This area was identified for protection because its complex benthic habitat is important for juvenile Atlantic cod and other fish species. CLF is extremely concerned that exemptions proposed in the Clam Dredge Framework will inevitably increase adverse fishing effects in the region and minimize the habitat protections afforded by the HMA.

Specifically, CLF urges NMFS to disapprove the Clam Dredge Framework which establishes three dredge exemption areas (McBlair, Old South, and Fishing Rip) in the newly established GSC HMA to allow fishing for surfclams and blue mussels. As our prior letters have noted,⁴ this Framework: (1) is inconsistent with the purpose and needs of the Omnibus Essential Fish Habitat Amendment 2 (Habitat Amendment) and the Clam Dredge Framework itself; (2) is poor precedent to allow destructive fishing gear into an HMA designated for its unique habitat value; (3) does not include the legally required practicability analysis; (4) could adversely impact spawning habitat for Atlantic cod; and (5) could adversely affect North

¹ Proposed Rule, 84 Fed. Reg. 48,899 (Sept. 17, 2019).

² Final Rule Omnibus Essential Fish Habitat Amendment 2, 83 Fed. Reg. 15,420 (Apr. 9, 2018) (“Habitat Amendment”).

³ 16 U.S.C. § 1853(a)(7).

⁴ See September 20, 2018 and December 3, 2018 Letters from CLF to NMFS and the New England Fishery Management Council. These letters are attached as exhibits to this letter.

Atlantic right whales and their critical habitat. Our concerns are briefly reiterated below, and we have attached both prior letters for their inclusion in the administrative record for this action.

1. The Proposed Exemptions are Inconsistent with the Purpose and Needs of the Framework and Poor Precedent in the Region

The purpose of the Clam Dredge Framework is “to identify areas where fishing for surfclams with hydraulic dredges would have only *minimal* and *temporary* impacts on habitats in the [GSC] HMA,” while maintaining compliance with the statutory requirement to minimize the adverse effects of fishing on essential fish habitat to the extent practicable.⁵ As the Habitat PDT noted several times during the development of this action, the clearly identified impacts from hydraulic clam dredges are neither minimal nor temporary and the fishery is operating in areas with habitat types that were identified for protection in OHA2.⁶

Hydraulic clam dredging is one of the most destructive forms of fishing and poses a great risk to the habitat value of the GSC HMA. The Habitat PDT has repeatedly stated such in its communications with the Habitat Committee and the Council. Though effects can be more localized compared to other mobile bottom-tending gears, e.g. trawls, “localized effects of dredging on EFH could be very significant if the dredged area is a productive habitat for one or more managed fish resources,”⁷ as is the case for the GSC HMA. Furthermore, “dredges have negative impacts on benthic habitats that are more than minimal and not temporary.”⁸ A single tow can result in 50-75 percent loss in habitat functionality with recovery taking between 1.5 and 4.5, and sometimes up to 10, years depending on habitat type.⁹ In addition to negative effects on substrate, hydraulic clam dredges significantly reduce numbers, biomass, and species diversity of invertebrates.¹⁰

⁵ Clam Dredge Framework Adjustment, Prepared by the New England Fishery Management Council in Consultation with National Marine Fisheries Service and the Mid-Atlantic Fishery Management Council, July 22, 2019, at 3. Available at: <https://s3.amazonaws.com/nefmc.org/190722-Final-Clam-Dredge-Framework-Corrected.pdf> (emphasis added).

⁶ “The PDT ranked the severity of hydraulic clam dredge impacts well above those associated with other types of fishing gear... Impacts from a single dredge tow were estimated to cause, on average across all habitat features, a 50-75% loss in habitat functionality, with recovery times for geological features of 1.5-2.5 years in sand and 2-4 years in gravel, and 3-4.5 years for biological habitat features.” *Id.* at 37.

⁷ Draft Clam Dredge Framework, Appendix B, p. 3. Available at: https://s3.amazonaws.com/nefmc.org/3d-Appendix-B_Hydraulic-dredge-gear-effects-on-habitat.pdf.

⁸ Habitat Plan Development Team Memo to the Habitat Committee regarding “Framing alternative development in the clam dredge framework,” April 24, 2018, at 2. Available at: <https://s3.amazonaws.com/nefmc.org/3.-180423-Hab-PDT-memo-to-CTTE-re-clam-fwk-alt.pdf>.

⁹ See Clam Dredge Framework at 36-37.

¹⁰ *Id.* at 36.

While it may be true that the impacts of hydraulic dredges are less where there are fine grained sediments,¹¹ the same cannot be said of hard bottom habitats. The exemption areas identified by the Council are extremely data poor but appear to have some hard bottom¹² in this important EFH for council managed species.¹³

Further, the Habitat Amendment identified blue mussels themselves as a biological habitat component that provide physical structure for managed species allowing for enhanced growth rates, reproduction, and survivorship.¹⁴ Blue mussels have a multi-year life cycle and sporadic recruitment, thus removal of this complex habitat is neither minimal nor temporary.¹⁵ There is no more obvious adverse impact of fishing on habitat than allowing directed fishing on blue mussels within the GSC HMA or any HMA for that matter.

In addition to disapproving the exemptions, CLF urges NMFS to begin the development of a federal FMP for the blue mussel fishery and to deny Exempted Fishing Permits with compensation fishing in the GSC HMA until more is known about the nature of habitat/gear interactions (susceptibility) and recovery rates via scientific studies *outside* of the HMA. Any management action that allows habitat-destructive gear into an area designated expressly to provide conservation benefits fails to achieve the purpose of the Framework and calls into question NMFS's approach to EFH protection. Further, it sets a poor precedent for the region that will open the door for similar actions in this or other HMAs in the future.

2. The Environmental Analysis Contains No Practicability Analysis.

As NOAA General Counsel and staff, as well as CLF, have noted during the development of the Clam Dredge Framework, another practicability analysis (beyond that in the Habitat Amendment) should be performed for the Southern New England sub-region to evaluate the economic and conservation tradeoffs of the proposed exemptions.¹⁶ However, the Clam Dredge Framework and its associated Environmental Analysis ("EA") contains no such practicability analysis performed by NMFS. Rather, it states: "The *Council* considered the practicability of measures when identifying preferred alternatives, *i.e.* balancing the needs of the fisheries in addition to the benefits of habitat protections for managed species."¹⁷ That is not enough, particularly where the EA reconfirms that: (1) the magnitude of any positive economic impact to the Nantucket Shoals clam fishery is "likely less than the \$3-8 million value of the Nantucket

¹¹ See April 24, 2018 Habitat PDT Memorandum at 2-4.

¹² See Clam Dredge Framework at 30-31 (Maps 8 and 9).

¹³ See April 24, 2018 Habitat PDT Memorandum at 2 ("Those [species] with a moderate or high degree of overlap between their designated EFH and the HMA include Atlantic cod, windowpane flounder juvenile, winter flounder, yellowtail flounder, little skate, winter skate, Atlantic sea scallop, and Atlantic herring.")

¹⁴ See OHA2 FEIS, Appendix D, at 23-24.

¹⁵ See April 23, 2019 Habitat PDT Memorandum at 3.

¹⁶ See Habitat Committee Meeting Summary, August 28, 2018, at 8: <https://s3.amazonaws.com/nefmc.org/180828-Hab-Cte-Summary-FINAL.pdf>; see also Audio of August 28, 2018 Habitat Committee available upon request.

¹⁷ See Clam Dredge Framework at 175 (emphasis added).

Shoals clam fishery over the 2011-2017 period evaluated for this action;” and (2) that there can be no negative economic impact to the commercial mussel fishery because “[t]here has not been an active commercial mussel fishery within the HMA for many years. . .”¹⁸ and “[n]o landings of mussels from the GSC HMA were identified in the federal vessel trip report database between 2011 and 2016.”¹⁹ Prior to NMFS’s approval of any new exemptions in the Clam Dredge Framework, new practicability analysis should be performed for the sub-region.

If NMFS determines that it is more practicable to allow clam and mussel dredging in the GSC HMA than it is to protect this unique and essential fish habitat from destructive fishing gears, then NMFS must identify another area for protection that will provide equal, if not more, habitat conservation benefit.

3. Potential Impacts on Atlantic Cod and Other Council-Managed Species

The EA notes the importance of the GSC HMA as essential fish habitat. The HMA has moderate or high degree of overlap with designated EFH for eight Council-managed species: Atlantic cod, windowpane flounder, winter flounder, yellowtail flounder, little skate, winter skate, Atlantic sea scallop, and Atlantic herring.²⁰ Of these, both Atlantic cod and yellowtail flounder are overfished and subject to overfishing, windowpane flounder and winter flounder are overfished,²¹ and Atlantic herring is approaching an overfished condition.²² The surfclam and blue mussel resource found within the HMA are also a prey source for Council-managed species, including winter flounder.²³

Fishermen have also identified cod spawning grounds in multiple areas in and around the HMA, including in much of the proposed Old South exemption area.²⁴ Given the persistent overfished status of Atlantic cod in New England, allowing habitat destructive gear into areas that can provide refuge for juvenile and spawning cod – even on a seasonal basis – would be inconsistent with the Council’s obligation to sustainably manage this groundfish resource and NMFS’s legal obligations to rebuild this stock in as short a time as possible.

While we understand that the Old South Dredge Exemption Area would be closed for 6 months of the year (November – April), it overlaps with an area identified in the Habitat Amendment as a historical cod spawning area,²⁵ and should be disapproved. The spawning

¹⁸ See Clam Dredge Framework at 5.

¹⁹ See Clam Dredge Framework at 71.

²⁰ See April 24, 2018 Habitat PDT Memo at 2.

²¹ See NOAA Fisheries 2018 Report to Congress on the Status of U.S. Fisheries. Available at: <https://www.fisheries.noaa.gov/national/2018-report-congress-status-us-fisheries>.

²² 84 Fed. Reg. 19,905 (May 7, 2019).

²³ See Omnibus Essential Fish Habitat Amendment 2 FEIS Appendix B, p. 44 and 109. Available at: https://s3.amazonaws.com/nefmc.org/Appendix_B_SuppTables_Prey_Spawning_Revised_160127.pdf.

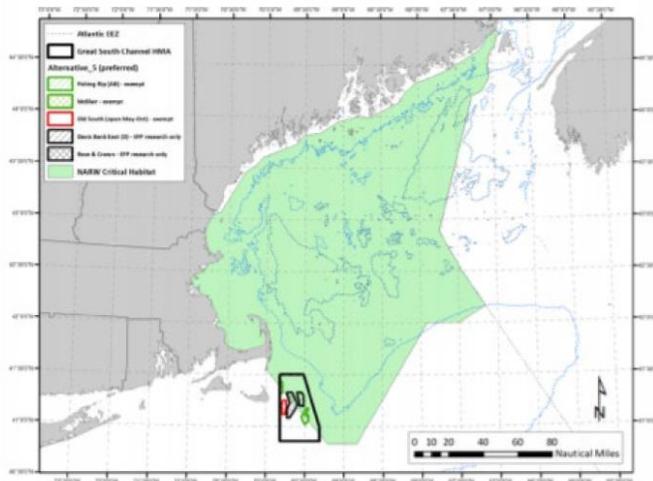
²⁴ See Clam Dredge Framework at 48.

²⁵ 84 Fed. Reg. at 48,900.

habitat itself should be protected in addition to spawning aggregations cod. Further, cod spawning in the face of climate change and shifting environmental conditions is simply not predictable enough to allow an exemption that will increase the potential for dredge fishing to disturb spawning aggregations of cod.

4. The Impacts of Dredging in North Atlantic Right Whale Critical Habitat Should be Analyzed in a Section 7 Consultation.

CLF has previously commented on the potential impacts of increased hydraulic dredging in this area on endangered North Atlantic right whales.²⁶ In 1994, NMFS first designated the Great South Channel as critical habitat for North Atlantic right whales because of its importance as foraging habitat due to concentrated aggregations of copepods.²⁷ The area remains an important foraging ground for right whales as well as a migratory corridor for whales heading in and out of the Cape Cod Bay as well as up and down the Atlantic seaboard to feed and calve.²⁸ Approximately half of the GSC HMA is critical habitat for right whales²⁹ under the most recent critical habitat designation.³⁰



²⁶ See September 20, 2018 Letter from CLF to NMFS and the New England Fishery Management Council.

²⁷ See 59 Fed. Reg. 28,805 (June 3, 1994).

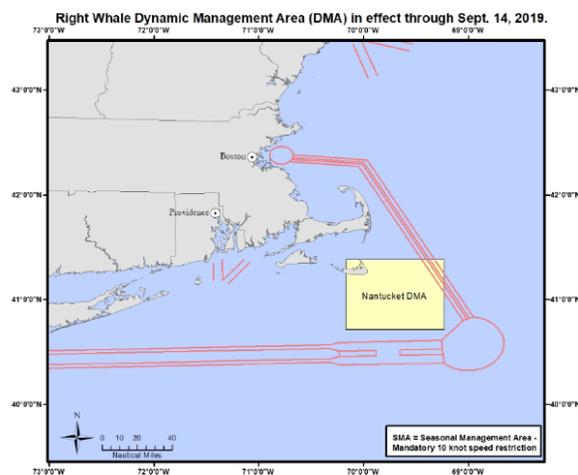
²⁸ See September 18, 2018 Presentation entitled “North Atlantic Right Whales: A Summary of Stock Status and Factors Driving Their Decline,” Slide 10 available at:

https://www.greateratlantic.fisheries.noaa.gov/protected/whaletrp/trt/meetings/September%202018/narw_brief_for_alwtrt_09_18_18.pdf; see also Baumgartner, et al 2017.

²⁹ Clam Dredge Framework at 84.

³⁰ Right whale critical habitat in the Northeast was expanded to include the entire Gulf of Maine and part of Georges Bank. 81 Fed. Reg. 4837 (Jan. 27, 2016).

Although the EA for this action attempts to minimize the size and importance of this particular HMA relative to total critical habitat in the Gulf of Maine,³¹ the best available science demonstrates that right whales use the entire HMA (including that portion not designated as critical habitat). While efforts to detect right whales in this habitat have been inconsistent, available acoustic and sightings data indicate that this habitat is used year-round by the species.³² In fact, portions of the GSC HMA are designated as a permanent Seasonal Management Area for right whales, and NMFS has administered multiple Dynamic Management Area's (DMA) under the Ship Strike Rule in additional portions of the proposed habitat. A recent DMA from last month is shown below.³³



Dredging has been identified as a threat to right whale recovery³⁴ and is known to affect many pelagic organisms by increasing the sediment load and turbidity of the overlying water column.³⁵ As described in our prior letter and the peer-reviewed scientific journal articles attached to that letter, the best scientific and commercial data suggest that dredging could negatively affect the planktonic prey that right whales depend upon for food, as well as foraging success in the GSC HMA.³⁶ While the environmental analysis for this action acknowledges that

³¹ Clam Dredge Framework at 84, 87 (Map 22).

³² <https://www.nefsc.noaa.gov/rcb/interactive-monthly-dma-analyses/>.

³³ <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/25cc400>.

³⁴ NMFS North Atlantic Right Whale (*Eubalaena glacialis*) 5-Year Review: Summary and Evaluation. October 2017.

³⁵ Newcombe and Jensen, 1996; Wilber and Clarke, 2001.

³⁶ In addition to scientific journal articles previously submitted, another open source paper suggests higher rates of mortalities of resting calanoid eggs from bottom gear that may or may not impact hatching/recruitment. Recognizing that the fishing impacts analysed are related to bottom trawls, not dredges, this paper should still be considered as part of the analysis. Drillet G, Hay S, Hansen BW and O'Neill FG (2014) Effects of Demersal Otter Trawls on the Re-suspension of Copepod Resting Eggs and its Potential Effects on Recruitment. *J Fisheries Livest Prod* 2:

dredges may disturb localized copepod aggregations,³⁷ there is no discussion of the effects that increased noise associated with hydraulic dredge gear or increased vessel traffic associated with expanded fishing may have on right whales in this important foraging area.³⁸ We urge NMFS to complete a formal Section 7 consultation under the Endangered Species Act so that it can fully consider the impact of these exemptions on critically endangered right whales and ensure that any exemptions approved are not likely to jeopardize the continued existence of right whales nor result in the destruction or adverse modification of their critical habitat.³⁹

* * *

Thank you for considering these comments as well as the comments submitted by Conservation Law Foundation on June 25, 2018 and December 3, 2018, attached to this letter.

Sincerely,



Erica Fuller
Senior Attorney
Conservation Law Foundation



Allison Lorenc
Policy Analyst
Conservation Law Foundation



Peter Shelley
Senior Counsel
Conservation Law Foundation

1000114. doi:10.4172/2332-2608.1000114 (“Although, the passage of the fishing gear re-suspends resting eggs making them more available for hatching, it may also damage the eggs and reduces their hatching success.”).

³⁷ Clam Dredge Framework at 85.

³⁸ Clam Dredge Framework at 83-87.

³⁹ 16 U.S.C. § 1536 (a).