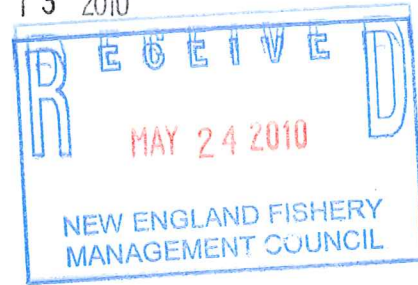




UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

Paul Howard
Executive Director
New England Fisheries Management Council
50 Water Street, Mill 2
The Tannery
Newburyport, MA 01950

MAY 13 2010



Dear Paul,

Over the past 2 years the New England and Mid-Atlantic Fishery Management Councils (Councils) have shown great interest in protecting deep sea corals from current or future fishing activities as exemplified in the establishment of various Habitat Closed Areas and Gear Restricted Areas within the Monkfish; Tilefish; and Squid, Mackerel, Butterfish Fishery Management Plans.

With the 2007 reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Councils now have greater discretionary authority to protect deep sea corals from fishing activities. NOAA's National Marine Fisheries Service Northeast Regional Office is providing this guidance to assist the Councils in their continued deep sea coral protection activities.

Deep Sea Coral Discretionary Provisions:

The Councils can consider measures for deep sea coral areas under deep sea coral discretionary authority if the deep sea coral areas are identified through information provided by the Deep Sea Coral Research and Technology Program set forth under MSA section 408.

In addition, the deep sea coral areas must have a nexus to a fishery managed by the Councils under an FMP. MSA section 303(b) provides that a Council may include deep sea coral measures in "[any] fishery management plan . . . with respect to any fishery." To satisfy this threshold, Councils need to show that the deep sea coral areas are located within the geographical range of the fishery as described in the FMP and are within the U.S. Exclusive Economic Zone (EEZ).

The deep sea coral authority allows Councils to designate deep sea coral zones to protect deep sea corals from physical damage from fishing gear, or to prevent loss or damage to such gear from interactions with deep sea corals. These zones can include additional area beyond the locations of the deep sea corals if necessary to ensure the effectiveness of protective measures for the corals. Four different types of measures may be applied to those zones: Restrictions on the location and time during which fishing may occur within the deep sea coral zones; limits to fishing in the deep sea coral zones to specified types of vessels; restricting fishing in the deep sea



cc: Council, MBCS/25

coral zones to vessels with specified types and quantities of gear; and closing deep sea coral zones to fishing. It is important to note that a closure of an area to all fishing under the deep sea coral authority must comply with MSA section 303(b)(2)(C), which establishes criteria for any closure under the MSA that prohibits all fishing.

Protective measures in an FMP for deep sea corals could apply to any MSA regulated fishing activity that could occur in the geographical range of the fishery managed by that FMP. Such measures could apply to fishing activity or fishing gear even if that activity or gear type is not used in the fishery managed by the FMP that includes the measures.

Before designating protection zones under the deep sea coral authority, Councils must show that it considered the “long-term sustainable uses of fishery resources” in the deep sea coral areas. To satisfy this requirement, Councils should develop a record that shows the existing and probable future uses of fishery resources in the deep sea coral areas and how those uses could impact deep sea corals. Furthermore, Councils could consider how to balance protection of deep sea coral areas from any current or future impacts with sustainable uses of fishery resources in the areas.

Differences Between the EFH and Deep Sea Coral Authorities:

EFH is a mandatory requirement for FMPs. (See MSA section 303(a)(7) and EFH guidelines at 50 CFR part 600, supart J). EFH must be identified and described in FMPs according to the guidelines set forth under 50 CFR 600.815(a)(1). Once EFH is identified and described, FMPs must also contain an evaluation of the potential adverse effects of fishing on EFH. Based on this evaluation, Councils must minimize adverse effects of fishing on EFH to the extent practicable. Guidance on the evaluation, minimization of adverse effects, and the practicability analysis is set forth under 50 CFR 600.815(a)(2). Therefore, if Councils describe deep sea coral as EFH, they must follow the EFH guidelines.

The requirement to minimize the adverse effects of fishing on EFH applies only to habitat designated as EFH. Accordingly, the EFH authority may only be applied to deep sea coral areas identified and described as EFH. In addition, the EFH authority includes a consultation requirement that mandates Federal action agencies to consult with NMFS on activities that may adversely affect EFH (MSA section 305(b) and 50 CFR part 600, subpart K). The deep sea coral discretionary authority does not include a mandatory consultation requirement.

Since the deep sea coral provisions are discretionary, Councils may, but are not required to, create zones and adopt protection measures for areas containing deep sea coral identified and located under the Deep Sea Coral Research and Technology Program. Councils may adopt measures for deep sea coral areas that are not EFH by using the deep sea coral discretionary authority. If deep sea coral areas are identified and described as EFH, Councils may adopt additional discretionary deep sea coral measures for those areas to supplement measures adopted under the mandatory EFH authority.

Overlap in Council Jurisdiction:

Councils with overlapping jurisdiction implement management actions under discretionary authorities in the same manner as mandatory authorities. MSA section 304(f) and the National Standard 3 regulations at 50 CFR 600.320(c) address jurisdictional overlaps.

Jurisdictional overlaps frequently occur for resources managed by the New England and Mid-Atlantic Councils. In some cases, the jurisdictional overlap is handled through a joint FMP, with one Council designated the lead. In other cases, one of the two Councils is designated by the Secretary to manage the fishery, even though the managed resources and fisheries also occur in the geographic area of the other Council. While the non-managing Council members do not vote on the FMP, its members are normally consulted when the FMP is prepared or amended, and members of the non-managing Council may serve on Committees of the managing Council. The non-managing Council may also send members in a liaison capacity to the managing Council's meetings, where they can participate in discussions of management actions that may have implications for their Council and fishermen

Councils may adopt gear restrictions via an omnibus amendment that applies to several FMPs. An omnibus amendment can include gear restrictions that apply to fisheries under other Council's jurisdiction. However, to do so, there must be a sufficient and adequate legal basis for the action. The Council taking the action must ensure that environmental, economic, and social analyses necessary to satisfy applicable legal requirements will be comprehensive, up-to-date, and accurate. In almost all cases this will require the Council taking the action to consult with and obtain information from the other affected Council.

Relationship to the Atlantic Coastal Cooperative Fisheries Management Act (ACA):

The ACA authorizes the Atlantic States Marine Fisheries Commission (ASMFC) to prepare and adopt coastal fishery management plans (CFMPs) for fisheries that are distributed across waters under the jurisdiction of two or more states or under the jurisdiction of one or more states and the EEZ. In developing a CFMP for a fishery that is located in both state waters and the EEZ, the ASMFC must "consult with appropriate Councils [established under the MSA] to determine where the plan may complement" FMPs developed under the MSA. This consultation process permits, but does not require, the ASMFC to develop CFMPs that are consistent with MSA FMPs. This implies that management measures in MSA FMPs do not apply to fisheries that are regulated under ACA unless the ASMFC includes those measures in the relevant CFMPs.

Under section 804 of the ACA, the Councils may develop FMPs for fisheries regulated under the ACA that extend into the EEZ. This is the exclusive means for Council regulation of fisheries that are regulated under the authority of the ACA. That is, management measures in FMPs apply to fisheries regulated under the ACA only if the FMP is for the same fishery managed under ACA. Conversely, consider the lobster fishery in the Northeast Region which is regulated under authority of the ACA. Although the lobster fishery is primarily located in state waters, a portion of the fishery extends into the EEZ but is not regulated under the MSA. Therefore, deep sea

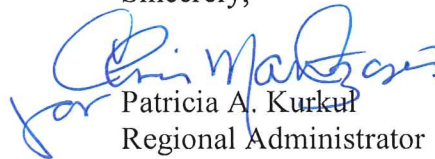
coral protection measures included in an MSA FMP for any other fishery, would not apply to the lobster fishery.

Conclusion:

The Councils have a variety of tools available to them for providing protection to deep sea corals, either through the EFH provisions or discretionary provisions of the MSA. In order to protect deep sea corals under discretionary provisions of the MSA, the areas must be identified through information provided by the Deep Sea Coral Research and Technology Program and there must be a nexus to a fishery managed by the Councils.

Should you have additional questions regarding protection of deep sea corals please contact Lou Chiarella at (978) 281-9277.

Sincerely,


Patricia A. Kurkul
Regional Administrator

cc: George Darcy, SFD
Peter Colosi, HCD
Gene Martin, GCNE