



Dear Deputy Assistant Administrator Rauch,

The American Clean Power Association (ACP)¹ appreciates the opportunity to submit comments on the National Marine Fisheries Service's (NMFS) proposed rule to implement the New England Fishery Management Council's (NEFMC) Framework Adjustment that would identify a Habitat Area of Particular Concern (HAPC) offshore of Southern New England. Essential Fish Habitat (EFH) consultations are a vital step in the offshore wind permitting process and it's critical that this consultation be grounded in the best available science so that potential mitigation measures arising from it are targeted to reasonably foreseeable environmental effects while balancing the technical and economic feasibility of proposed projects.

I. The Council must rely on "the best available sources" when identifying EFH

While the offshore wind industry shares NMFS's goals of protection of marine resources while responsibly developing offshore wind energy, selection of the HAPC area, which will designate EFH for a number of fish species², requires the use of "the best available sources, including peer-reviewed literature, unpublished scientific reports, data files of government resource agencies, fisheries landing report and other sources of information."³ Moreover, "if there is no information on a given species or life stage, and habitat usage cannot be inferred from other means... EFH should not be designated."⁴ However, as noted in the proposed rule, "the spatial extent of the HAPC is based on the footprint of the lease areas, buffered by approximately 10 km on all sides."⁵ The best available information is clear on the lack of data on cod in southern New England waters, specifically a recent study notes that, "compared to the Gulf of Maine and Georges Bank, relatively few data exist regarding the dynamics and structure of cod in southern New England waters. To better understand interactions with OWE development and to support stock rebuilding, a broader understanding of the spatiotemporal spawning dynamics of Atlantic Cod in southern New England is needed."⁶ In fact, the study itself demonstrates that there is very limited evidence of cod spawning within or adjacent to the offshore wind leases areas: "the goal of this comparison was to assess whether the observed dynamics were similar to those of other spawning

¹ ACP is the national trade association representing the renewable energy industry in the United States, including in all aspects of offshore wind energy, bringing together over 1,000 member companies, 120,000 members, and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States.

² 88 Fed. Reg. 65944

³ 50 CFR § 600.815 (a)(ii)(B)

⁴ 50 CFR § 600.815 (a)(iii)(B)

⁵ *Id.*

⁶ Van Hoeck, R.V., Rowell, T.J., Dean, M.J., Rice, A.N. and Van Parijs, S.M. (2023), Comparing Atlantic Cod Temporal Spawning Dynamics across a Biogeographic Boundary: Insights from Passive Acoustic Monitoring. *Mar Coast Fish*, 15: e10226. <https://doi.org/10.1002/mcf2.10226>

groups.” (p.3 second column). The glider data (p.7) across all deployments only 3 grunts were observed within or adjacent to the wind leases (out of a total of 31).” While ACP understands the importance of HAPCs, the designation should be based on the “best available sources” identifying habitat, and not simply the presence of an offshore wind lease, or the potential that information will become available in the future that may or may not support the HAPC designation. As noted in regulation, EFH should not be designated if there is no, or insufficient, information about habitat.⁷ Implementing recommendations that modify EFH designations based on speculation that scientific information might become available in the future to support the designation contradicts National Standard 2, which requires that conservation and management measures be based on the best scientific information available. In addition, rarity of the habitat is a mandatory criterion for all HAPC designations. The lack of data on cod spawning in southern New England waters does not equate to actual scientific evidence of rarity. Finally, the proposed rule itself admits that complex bottom habitats meet all criteria except for “rarity.” The threshold for this criterion, and therefore designation of HAPC, has clearly not been met.

II. Wind Development Has Not Been Directly Linked to Impacts on Cod Spawning Habitat

In designating an HAPC, fishery management plans (FMPs) must account for certain considerations including (i) the extent to which the habitat is sensitive to human induced environmental degradation, and (ii) whether and to what extent development activities are, or will be stressing, the habitat.⁸ In considering these factors, the proposed HAPC was identified as a result of concerns about the impact of offshore wind development on cod spawning habitat.

ACP is concerned about the proposed designation of HAPC for these reasons because there is little, if any, empirical evidence indicating that the development of offshore wind energy on the United States Outer Continental Shelf will have negative impacts on cod spawning habitat. Moreover, there are a number of mitigation measures currently in place to minimize any impacts that may occur to spawning habitats. Commercial scale offshore wind facilities currently under construction provide NMFS the opportunity to better understand potential impacts to this resource and relative efficacy of mitigation measures. The results of studies from the projects currently under construction should be evaluated before an HAPC is identified to determine whether the establishment of one is needed or justified. This process should be integrated into the framework for future EFH and HAPC proposals to fortify management decisions with best science available, streamline agency review processes, and improve predictability for developers, industry partners and resource stakeholders.

Overall, as demonstrated above, ACP believes that the designation of HAPC is not warranted or justified. However, if the decision is made to not wait for studies to better understand the potential impacts of offshore wind and learning from offshore wind farms currently under construction, HAPC designation should be informed by the presence of known habitat. To that end, if NMFS decides to designate HAPC in its final rule, ACP strongly encourages NMFS to select Alternative 2, rather than the preferred alternative, as Alternative 2 includes only those areas for which scientific research has demonstrated the presence of cod spawning. ACP encourages the NEFMC and NMFS to reevaluate the HAPC boundary defined under Alternative 2 if additional information becomes available in the future that suggests cod spawning is occurring across a wider expanse of southern New England.

⁷ 50 CFR § 600.815 (a)(iii)(B)

⁸ Id.

III. Industry Commitment to Responsible Development

The offshore wind industry is committed to avoiding, minimizing, and mitigating impacts to complex benthic habitat and cod spawning aggregations during the buildout of offshore wind in southern New England. For existing projects and those expected to start construction in 2024, developers and regulators have aligned on project designs that minimize habitat impacts to the extent feasible. For future projects, a collaborative approach between the industry and NMFS would be most effective. There are many mitigation options available including selecting wind turbine locations that avoid areas of complex habitat when feasible, sequencing construction timing to minimize disturbance during spawning timeframes, micro-siting approaches for foundations and inter-array cable routing, and scour protection designs to create complex, three-dimensional structure with a diversity of crushed rock sizes and crevice sizes, which can augment existing complex habitat. In addition, the offshore wind industry is actively exploring opportunities for proactive habitat restoration efforts to enhance mitigation efforts, drawing on lessons learned in Europe to support coexistence between offshore wind and fisheries.

Moving forward, ACP encourages NMFS to take a holistic approach when developing mitigation measures for EFH consultations under the Magnuson Stevens Act. NMFS should coordinate internally and with BOEM to ensure that the conservation recommendations developed in EFH consultations do not render a project unviable when combined with mitigation measures developed for Endangered Species Act consultations and Marine Mammal Protection Act authorizations. The offshore wind industry is eager to partner with NMFS on identifying the most appropriate suite of measures that mitigate potential adverse effects on fishery resources and habitats while ensuring the viability of offshore wind projects. A collaborative process both within and outside of the bounds of consultations would allow for more comprehensive protection of fishery resources and habitat while enabling responsible offshore wind development.

IV. Conclusion

Thank you for considering ACP's comments. Based upon the best available science, ACP does not believe the threshold has been met for HAPC designation. However, if the decision is made in the final rule to designate HAPC, we encourage NMFS to follow the best available information and select Alternative 2 as it encompasses the only areas that have been definitively demonstrated to contain cod spawning habitat.

Sincerely,

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