



New England Fishery Management Council

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Eric Reid, *Chair* | Cate O'Keefe, PhD, *Executive Director*

April 1, 2024

Mr. Michael Pentony
GARFO Regional Administrator
NMFS/NOAA Fisheries
55 Great Republic Drive
Gloucester, MA 01930

Re: Coonamessett Farm Foundation Great South Channel Clam EFP

Dear Mike:

Please accept these comments on behalf of the Council in response to the March 13 Federal Register notice regarding the issuance of an Exempted Fishing Permit to Coonamessett Farm Foundation (CFF). CFF and their partner fishing vessels are seeking an exemption from the prohibition on fishing with mobile bottom-tending gear in the Great South Channel Habitat Management Area (HMA). The notice indicates that CFF plans to conduct a multibeam survey of the full area at the beginning and end of the one year project period, in addition to seasonal (quarterly) multibeam and drop camera surveys in the northern half of the area. The EFP indicates that compensation fishing would occur in the southern half of the area. Seasonal surveys in the northern half of the research site are intended to document seafloor characteristics absent fishing, and the surveys at the start and end of the study are intended to show seafloor characteristics before and after fishing.

The Council designated the Great South Channel HMA through Omnibus Habitat Amendment 2¹ and identified discrete exemption areas for clam dredges in a subsequent framework adjustment. ² The framework also identified two areas of the Great South Channel HMA for research, including Davis Bank East, where this project would be located. Following identification of the two research areas, the Council recommended a suite of research objectives for the Great South Channel HMA.³ Using these objectives as a guide, we have commented previously on a specific, related research project and its corresponding Exempted Fishing Permit application (see [letter from February 5, 2020](#)), and more generally on future proposed work, given the findings of this earlier study (see [letter from October 19, 2022](#)).

We offer the following comments as you consider EFP issuance:

1. Broad scale habitat mapping efforts for the entire research area, at start and end of project and seasonally, are aligned with the Council's research objectives for the HMA. Before/after mapping is an especially important element of the study and should not be

¹ <https://www.nefmc.org/library/omnibus-habitat-amendment-2>

² <https://www.nefmc.org/library/clam-dredge-framework>

³ <https://d23h0vhs26o6d.cloudfront.net/190612-GSC-HMA-Research-Planning-Document.pdf>

eliminated in the event that insufficient funds are raised through compensation fishing, or if research costs change. These types of baseline seafloor maps are important to guide further and more detailed sampling of habitats within the HMA.

2. Compensation fishing in a specified portion of the area only is aligned with comments made by the Council in October 2022. At this time, the Council recognized that compensation fishing might be the only available source of funding to support habitat-related research efforts within the HMA. However, it is critical that this area not be expanded or changed once the project has begun, since having fished and unfished sections of the research area is a useful part of the study design.
3. The Council has not identified specific thresholds for either swept area ratio or resulting habitat disturbance that qualifies as adverse, however the number of compensation fishing trips proposed results in a swept area ratio of roughly 25%, which represents a substantial amount of potential impact to habitat. This value is based on the proposed 31 tows per trip, 0.77 km distance per tow, 0.0012 km (48 in) tow width, multiplied by 260 total trips. We acknowledge that the Great South Channel HMA is a large area and the 30 km² fishing area is a relatively small portion of it. The number of trips required to generate the proposed funds to conduct the acoustic and drop camera surveys is directly related to the compensation rate and proportion of funding to the vessel and research team (proposed at 85% to the vessel and 15% to the research team). A proportional compensation at a different level (e.g., 70% to the vessel and 30% to the research team, similar to existing Research Set-Aside Programs) would allow for fewer fishing trips in the HMA and less habitat impact. Ideally, given that this area was designated to promote habitat conservation, the amount of fishing would be reduced while still covering research costs. We understand that compensation rates and proportions are negotiated between fishing and research partners to ensure project objectives and deliverables are met.

Please contact me if you have questions.

Sincerely,



Cate O'Keefe
Executive Director



Mid-Atlantic Fishery Management Council

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P. Weston Townsend, Chairman | Michael P. Luisi, Vice Chairman
Christopher M. Moore, Ph.D., Executive Director

April 3, 2024

Mr. Michael Pentony
GARFO Regional Administrator
NMFS/NOAA Fisheries
55 Great Republic Drive
Gloucester, MA 01930

Dear Mike:

Please accept these comments on behalf of the Mid-Atlantic Fishery Management Council in response to the March 13, 2024, Federal Register notice regarding the potential issuance of an Exempted Fishing Permit by NOAA Fisheries to the Coonamessett Farm Foundation (CFF). CFF and their partner fishing vessels are seeking an exemption from the prohibition on fishing with mobile bottom-tending gear in the Great South Channel Habitat Management Area (HMA).

The New England Fishery Management Council designated the Great South Channel HMA through Omnibus Habitat Amendment 2 and identified discrete exemption areas for clam dredges in a subsequent framework adjustment. The framework also identified two areas of the Great South Channel HMA for research, including Davis Bank East, where this project would be located. Following the identification of the two research areas, the New England Council recommended a suite of research objectives for the Great South Channel HMA.

The notice indicates that CFF plans to conduct a multibeam survey of the full area at the beginning and end of this one-year project period, in addition to seasonal (quarterly) multibeam and drop camera surveys in the northern half of the area. The EFP indicates that compensation fishing would occur in the southern half of the area. Seasonal surveys in the northern half of the research site are intended to document seafloor characteristics absent fishing, and the surveys at the start and end of the study are intended to show seafloor characteristics before and after fishing. This work would support the research objectives for this HMA and enhance our understanding of fishing impacts in these areas. Therefore, the Mid-Atlantic Council supports the issuance of this EFP for the one-year project period.

Please call me or Jessica Coakley of my staff if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "C. Moore".

Christopher M. Moore, Ph.D.
Executive Director

cc: W. Townsend, M. Luisi, D. Potts

April 12, 2024

Via Electronic Mail

Mr. Michael Pentony
GARFO Regional Administrator
NMFS/NOAA Fisheries
55 Great Republic Drive
Gloucester, MA 01930

RE: CFF Great South Channel HMA Clam EFP, RTID 0648-XD656

Dear Mr. Pentony:

This letter is submitted on behalf of Stellwagen Bank Fisheries Corp., a co-applicant, and Intershell International Inc. in support of the Coonamessett Farm Foundation's ("CFF") application for an exempted fishing permit ("EFP") to map and conduct research in the area known as "Davis Bank East," part of the Great South Channel ("GSC") Habitat Management Area ("HMA"). This research is consistent with the New England Fisheries Management Council's ("NEFMC" or "Council") intent when it adopted the Clam Dredge Framework Adjustment and established research priorities in 2019.¹

Specifically, the Council adopted its research priorities to, in part, fulfill its objective of "identify[ing] areas within the Great South Channel and Georges Shoal Habitat Management Areas that are currently fished or contain high energy sand and gravel that could be suitable for a hydraulic clam dredging exemption that balances achieving optimum yield for the surfclam/ocean quahog fishery with the requirement to minimize adverse fishing effects on habitat to the extent practicable" in a manner consistent with the Omnibus Habitat Amendment 2. 85 Fed. Reg. at 29870. Davis Bank East, along with the Rose and Crown, were "prioritized for research" and the Council explicitly developed the research policy "**in response to a general concern that it has been difficult to obtain permits to conduct research inside HMAs**, even if that research was habitat-focused. The thinking was that by specifying habitat research as an appropriate role for HMAs that it **would facilitate approval of these types of permits by NOAA Fisheries.**" (NEFMC 2019 (emphasis added).)

¹ The final rule implementing the Framework published in 2020. See 85 Fed. Reg. 29870 (May 19, 2020). The Council identified its research priorities in June 2019, See NEFMC, *Research Objectives for the Great South Channel Habitat Management Area* (June 12, 2019) ("NEFMC 2019), available at <https://d23h0vhs26o6d.cloudfront.net/190612-GSC-HMA-Research-Planning-Document.pdf>.

The CFF EFP proposal is directly responsive to the Council's priorities. Specifically, the mapping will improve our "understanding of the distribution of living and non-living habitat features within the GSC HMA, including topography, substrate, epifauna, and infauna" and "habitat stability including epifaunal persistence in relation to substrate type, tidal flows and storm events." *Id.* It will also shed light on vulnerability of the habitat to clam dredges, including "both the nature of habitat/gear interactions (susceptibility) and recovery rates." *Id.*

The proposal is also directly responsive to concerns raised by the Greater Atlantic Regional Fisheries Office ("GARFO") in response to CFF's prior EFP application, while also enhancing the research activities which GARFO had previously found "would directly address research priorities set by the Council." GARFO Letter of April 2, 2023. For example, this proposal incorporates drop cameras rather than dredge-mounted cameras and proposes to map the entire area. The mapping will also occur prior to any compensation fishing.

We note also that the NEFMC Habitat Committee, in its draft letter to GARFO related to this project, also agrees that the proposal meets important research objectives and significantly improves on CFF's prior proposal. The Committee's only concern appears to be the percentage of swept area within the 30 sq. km area proposed for compensation fishing. In total, there is a potential for 7.57 sq. km with the proposed area that may be potentially impacted. That is less than 13% of the Davis Bank East area and only 0.2% of the 2,566 sq. km within the GSC HMA. Given that surf clams associate with sandy bottom and compensation fishing will focus on previously productive grounds, it is highly unlikely that complex habitat within this highly dynamic area will be adversely affected.

The Committee's letter suggests "reducing the compensation rate" to reduce habitat fishing. This would be impracticable as the vessels already will be operating at a loss. Part of these costs involve using the vessels' own surf clam individual transferrable quota ("ITQ") or leasing ITQ from other owners. One way that GARFO can mitigate these costs and potentially reduce the number of compensation trips would be to waive the requirement that the cages landed from the compensation trips have tags. As explained below, this is within the Regional Administrator's authority.

However, such reductions in compensation fishing are unnecessary. The Council understood compensation fishing was necessary to conduct the research it found important. "The Council's intent was that both fishermen and scientists will work toward obtaining better information to define where Atlantic surfclams and mussels can be harvested without impacting sensitive fish habitat in those areas." (NEFMC 2019.) To this end, the HMA Research Planning Document, noted that the Council, in the 2018 Surfclam Framework specified "that clam and mussel dredges could be used in these areas under an approved EFP" and that such use was "consistent with underlying Council policy established via Omnibus Habitat Amendment 2 (OHA2) recommending that habitat-related research using fishing gear be allowed within HMAs." *Id.*

Moreover, while minimization of adverse impacts on essential fish habitat ("EFH") is an important Magnuson-Stevens Act objective, it is a duty limited by practicability considerations. 16 U.S.C. § 1853(a)(7). Courts have read the "practicability" language as a limitation, rather than a

requirement to protect EFH no matter the cost. “The upshot of [the MSA’s] structure is that Congress did not intend any of these specified goals — *i.e.*, the ones limited to actions that are ‘practicable’ — to take priority over the others.”² Indeed, “the ‘practicable’ language permits, or perhaps even requires, the Council to weigh social and economic harms to fishers against any conservation value.” *Id.* at 90.

In this case, the proposed research is designed to help identify areas where the surf clam fishery can operate without having an adverse impact on EFH, that is reducing the “quality and/or quantity of EFH.” 50 C.F.R. § 600.810(a). If an adverse effect is found, it must be minimized only if the impact “is more than minimal and not temporary in nature” and only “to the extent practicable.” *Id.* § 600.815(a)(2)(ii),(iii). Identifying such fishing grounds fosters the overarching objective of achieving optimum yield from the surf clam fishery, which is particularly important given that the fishery is currently harvesting less than 50% of the yield determined to be sustainable on an annual basis. Thus, the minimal effects to 0.2% of the HMA’s EFH impacted by fishing are well justified as both a matter of law and science.

Returning to the issue of waiving the cage tag requirement, this is clearly within GARFO’s authority. The EFP regulations state: “A NMFS Regional Administrator or Director may authorize, for limited testing, public display, data collection, exploratory fishing, compensation fishing, conservation engineering, health and safety surveys, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species managed under an FMP or fishery regulations that would otherwise be prohibited.” 50 C.F.R. § 600.745(b)(1). By its terms, this language does not limit the type of otherwise applicable regulation that may be waived by an EFP so long as the activity authorized falls within the enumerated categories. These include data collection and compensation fishing.

The regulations also state: “Compensation fishing must be conducted under an EFP if the activity would otherwise be prohibited by applicable regulations unless the activity is specifically authorized under an FMP or a scientific research permit.” *Id.*

Among the regulations implementing the Atlantic Surfclam and Ocean Quahog individual transferable quota program is a provision that provides “all cages that contain surfclams or ocean quahogs must be tagged with tags acquired annually under provisions of paragraph (b) of this section.” *Id.* § 648.77(a). Furthermore, one may not “[l]and or possess any surfclams or ocean quahogs harvested in or from the [Exclusive Economic Zone] without having been issued, or in excess of, an individual allocation,” nor may one “land or possess, after offloading, any cage holding surfclams or ocean quahogs without a cage tag or tags required by § 648.77.” *Id.* § 648.14(j)(1)(vi), (3)(vi).

Thus, landing or purchasing surfclam without tags or in excess of an individual’s allocation is “prohibited” by the regulations implementing the Atlantic Surfclam and Ocean Quahog Fishery

² *Conservation Law Foundation v. Ross*, 374 F. Supp. 3d 77, 91 (D.D.C. 2019).

Management Plan. Further, the contemplated research activities are not authorized by any scientific research permit.

The question, therefore, is whether applicable provisions of subsections 648.77(a) and 648.14(j) of Title 50, Code of Federal Regulations, are within the scope of the regulations the Regional Administrator for the Greater Atlantic Region may exempt under an EFP.

In our view, the Regional Administrator does have the authority to waive these requirements and prohibitions. As an initial matter, there are no limiting terms in the grant of his authority to “authorize” activities which would otherwise violate the terms of an FMP or regulations. Certainly, the Regional Administrator must consider “the effect of the proposed EFP on the target and incidental species, including the effect on any [total allowable catch or] TAC.” 50 C.F.R. § 600.745(b)(3)(A). However, this requirement tends to reinforce the notion that he has the authority generally waive quota-related regulations. There would be no apparent reason to specify this requirement if all compensation fishing or harvest for data collection purposes were required to be in compliance with TAC-related rules.

We also note that the GARFO Regional Administrator has the explicit authority to allow experimental fishing for Atlantic surfclams and ocean quahogs without “an allocation permit.” *Id.* § 648.12(c). It would be incongruous to interpret the regulations as empowering GARFO to waive the cage tag requirement to allow experimental fishing but find that the Regional Administrator has no authority to do so under the terms of an EFP. This is particularly true given that while experimental fishing is purely a matter of economics, the EFP at issue here are designed to collect data and conduct research explicitly designed to achieve objectives established by the NEFMC and approved by NMFS.

Granting such a waiver in this instance could reduce the necessary number of compensation fishing trips, were such thought to be important.

In conclusion, the proposed EFP application should be approved. It meets the Council’s research objectives for the GSC HMA, will assist GARFO in meeting its statutory duty to achieve optimum yield from the Atlantic surf clam fishery, and will have minimal impact on EFH. We greatly appreciate your close attention to these comments.

Sincerely,

/s/ Shaun M. Gehan

Shaun M. Gehan

*Counsel for Intershell International Inc. and
Stellwagen Bank Fisheries Corp.*



Conservation
Law Foundation



April 12, 2024

Via email to nmfs.gar.efp@noaa.gov

Michael Pentony
Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930

RE: CFF Great South Channel HMA Clam EFP

Dear Mr. Pentony:

Conservation Law Foundation (“CLF”) and Oceana appreciate the opportunity to provide comments on the Exempted Fishing Permit (“EFP”) application submitted by Coonamessett Farm Foundation 89 Fed. Reg. 18376 (March 13, 2024). This EFP requests to conduct multibeam acoustic and drop camera survey trips in the Davis Bank East area which lies within the Great South Channel (“GSC”) Habitat Management Area (“HMA”). The EFP specifies that this survey work will be funded by “compensation fishing” within the HMA that will generate revenue for participating vessels and ultimately fund the survey work. CLF and Oceana have long advocated for improved habitat conservation in the Northeast region including through the Omnibus Essential Fish Habitat Amendment 2 (“OHA2”), the Deep-sea Coral Omnibus Amendment, and other actions that affect Essential Fish Habitat (“EFH”). While we appreciate the interest in habitat research to improve fisheries management in New England’s fisheries and recognize the potential value that habitat research presents to the future of the region’s fisheries, the agency should ensure that any approved research, particularly research that requires exemptions from existing conservation regulations, is well-designed, represents the best available science and will meet the fundamental requirements of fisheries management without jeopardizing protections for legally protected EFH. We are concerned about this project’s design and reliance on compensation trips for funding. Specifically, we believe the number and scale of compensation trips, will result in significant adverse impact to complex and vulnerable habitats in the HMA and the proponents should demonstrate that this funding model is necessary, and the project cannot be funded through other funding mechanisms, including the Saltonstall-Kennedy program. Further, we are concerned about the applicability of data collected under this proposal to future Council discussions since it does not address all four research objectives identified for the area.

Monitoring, Transparency, and Reporting

An EFP is seen as an exchange between the participants and the agency. In exchange for an exemption from existing regulations, the participants provide something of value to improve the fishery, whether it is research, product development or public display. EFPs should also include a robust plan to share and report the findings of the project with a broad range of stakeholders, decision makers and interested parties.

In this instance, the proposed project will collect data on seafloor habitats in the GSC HMA. To maximize the value of the project, Oceana and CLF strongly request that the Fisheries Service explicitly include clear conditions requiring robust at-sea monitoring of catch and high-resolution fishing activity through VMS or AIS, coupled with transparency, and public reporting of the results and findings for consideration by the Council, and stakeholders following completion of the project.

Research Objectives for the Great South Channel Habitat Management Area

In July 2019, the Council submitted a Habitat Clam Dredge Exemption Framework to NMFS for approval as a trailing action to the OHA2.¹ This action considered a range of alternatives that might provide ongoing clam fishing access to the GSC HMA. However, after significant consideration and debate the Council's preferred alternative explicitly did not create exemptions in the Rose and Crown and Davis Bank East areas because they were clearly identified as containing complex and vulnerable habitats does not create exemptions within those areas most clearly identified as containing complex and vulnerable habitats, i.e., the Rose and Crown and to a lesser extent Davis Bank East. However, acknowledging that a more detailed characterization of the effects of fishing on the habitats in the HMA could be obtained through further scientific study, the Council's preferred alternative recommends development of a prioritized list of research needs concerning Rose and Crown and Davis Bank East.² To facilitate future research the New England Fishery Management Council ("NEFMC") developed a memo that clearly articulated research objectives for the area this EFP proposes to access. Specifically, the NEFMC identified the following objectives for focused research in the Rose and Crown and Davis Bank East areas.³

- (1) Improve the Council's understanding of the distribution of living and non-living habitat features within the GSC HMA, including topography, substrate, epifauna, and infauna (i.e., develop habitat maps).

¹ CLF has previously commented on the adverse fishing effects of the Clam Dredge Exemption Framework and the need for a section 7 ESA consultation on December 3, 2018, and October 15, 2019.

² Clam Framework Final Submission Page 4. ([2020-04-21-Final-Clam-Dredge-Framework_signed.pdf](https://www.d23h0vhs26o6d.cloudfront.net/2020-04-21-Final-Clam-Dredge-Framework_signed.pdf) ([d23h0vhs26o6d.cloudfront.net](https://www.d23h0vhs26o6d.cloudfront.net/)))

³ Research Objectives for Great South Channel Habitat Management Area June 12, 2019 [190612-GSC-HMA-Research-Planning-Document.pdf](https://www.d23h0vhs26o6d.cloudfront.net/190612-GSC-HMA-Research-Planning-Document.pdf) ([d23h0vhs26o6d.cloudfront.net](https://www.d23h0vhs26o6d.cloudfront.net/))

- (2) Improve the Council's understanding of habitat stability including epifaunal persistence in relation to substrate type, tidal flows, and storm events.
- (3) Improve the Council's understanding of habitat vulnerability to mussel and clam dredges. Vulnerability includes both the nature of habitat/gear interactions (susceptibility) and recovery rates.
- (4) Improve the Council's understanding of why the GSC HMA is important to manage species, such as Atlantic cod.

This proposal appears to target Objective 1 and Objective 3; however, it will not provide data for the other two Objectives. It is understandable that the methods and study design are optimized for only those two objectives, but it is unacceptable that given the cost and level of impact of compensation fishing more of the objectives are not being addressed. We are particularly concerned that Objective 4 is not included in this proposal. Understanding the importance of GSC HMA to species such as Atlantic Cod will be an important element to any future fishery access discussion at the Council. A thoughtful analysis of the value of data collected under this project to inform future Council actions should be balanced against the potential impact prior to any issuance of an EFP.

Project design, funding mechanisms and value to future management discussions.

There are limited details provided to assure the public that the project will be successful within the time and budget proposed. For instance, multibeam analysis and integration of the acoustic and optical data are complicated tasks and additional detail would be reassuring. Furthermore, during the Phase I EFP work, similar drop camera work had issues with image quality and additional details on contingency plans for poor data would be helpful. Nor is it clear what aspects of this research may be modified or lost if the costs associated with the project increase and/or compensation trips do not produce the necessary revenue for full completion. Finally, if the compensation trips are approved the sampling design under which they are collected should be further considered and explained, to ensure that CPUE can be calculated and mapped in a statistically rigorous fashion. While we appreciate that adjustments may be necessary under any research endeavor such as this, the Agency should work with the project partners to clearly establish parameters that must be met, and that will not be adjusted in the event market conditions or other external factors impact the funding or data analysis proposed prior to any issuance of an EFP.

Conclusion

We recognize the proposal's alignment with some of the council's research objectives. However, we are concerned that the expected data does not justify the potential disruption to complex and vulnerable habitats or that fishing within the HMA is necessary to fund this project. Before granting an Experimental Fishing Permit, the Agency must conduct a thorough impact assessment, weighing the scientific benefits against ecological risk and alternatives to HMA fishing. Further, it is essential that the Agency work with the project participants to explore the viability of enhancing revenue with a higher compensation rate with fewer trips. Finally, it is crucial that the Agency explicitly define the project's essential elements that must be preserved regardless of any changes in research funding or budgetary shifts.

Sincerely,

Elizabeth "Libby" Etrie
Director of Ocean Policy
Conservation Law Foundation

Erica Fuller
Senior Counsel
Conservation Law Foundation

Gib Brogan
Campaign Director
Oceana

Cc: Douglas Potts, Fishery Policy Analyst