

October 13, 2016

*Via email to the Gulf of Mexico Fishery Management Council: [gulfcouncil@gulfcouncil.org](mailto:gulfcouncil@gulfcouncil.org)*

Leann Bosarge  
Chair  
Gulf of Mexico Fishery Management Council  
2203 N. Lois Avenue, Suite 1100  
Tampa, FL 33607

**Re: Deep Sea Coral Amendment 7 Scoping Guide – A Guide to Proposed Coral Protections in the Gulf of Mexico and Scoping Document – Recommended Coral Areas Identified as Priority Habitats for Management Consideration in the Gulf**

Dear Chairman Bosarge:

Oceana, the largest international ocean conservation organization solely focused on protecting the world's oceans, appreciates the opportunity to submit comments on the Deep Sea Coral Amendment 7 Scoping Guide – A Guide to Proposed Coral Protections in the Gulf of Mexico (“GoM”) (“Scoping Guide”)<sup>1</sup> and the Scoping Document – Recommended Coral Areas Identified as Priority Habitats for Management Considerations in the Gulf (“Scoping Document”).<sup>2</sup> Oceana is enthusiastic about the development of Deep Sea Coral Amendment 7 (“Amendment 7”) to identify and conserve corals, especially deep sea corals, in the GoM.

Although deep sea coral inhabit cold, dark, deep water, they are equally as important and complex as their shallow-water counterparts. Deep sea corals offer protection from currents and predators; act as nurseries for juvenile fish, and provide feeding, breeding and spawning areas for numerous fish and shellfish species. Some deep-sea corals may also be sources of compounds for the development of new drugs and medical treatments. As with shallow water coral, deep sea coral is also vulnerable to environmental disturbances such as global warming, ocean acidification and pollution or physical impacts including mineral extraction, cable trenching and fishing activities.

Scoping is a critically important part of the environmental review process under the National Environmental Policy Act (“NEPA”). To comply with NEPA requirements for scoping as well as requirements for conservation and management of deep sea corals under the Magnuson-Stevens

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<sup>1</sup> Gulf Council, *A Guide to Proposed Coral Protections in the Gulf of Mexico* (Sept. 9, 2016), [http://gulfcouncil.org/docs/Public%20Hearing%20Guides/Amendment%207%20Scoping%20Guide\\_09\\_2016.pdf](http://gulfcouncil.org/docs/Public%20Hearing%20Guides/Amendment%207%20Scoping%20Guide_09_2016.pdf).

<sup>2</sup> Gulf Council, *Scoping Document – Recommended Coral Areas Identified as Priority Habitat for Management Consideration in the Gulf of Mexico* (Oct. 2016), [http://gulfcouncil.org/council\\_meetings/BriefingMaterials/BB-10-2016/N%20-%205%20DRAFT%20Coral%207%20scoping.pdf](http://gulfcouncil.org/council_meetings/BriefingMaterials/BB-10-2016/N%20-%205%20DRAFT%20Coral%207%20scoping.pdf).

Fishery Management and Conservation Act (“Magnuson-Stevens Act” or “the Act”), the Gulf of Mexico Fishery Management Council (“Gulf Council”) must significantly amend and improve the Scoping Guide and Scoping Document prior to any public comment period on Amendment 7. Oceana urges the Gulf Council to amend the Scoping Guide and Scoping Document to incorporate the following recommendations:

- Fully discuss the differences between shallow water corals and deep sea corals and the areas in the GoM that fall into each category;
- Separate the management of deep sea corals from shallow water corals and discuss the different authorities in the Magnuson-Stevens Act to conserve these areas;
- Include a call for proposals of other areas in the scoping process; and
- Develop a pathway for new areas to be considered and included in Amendment 7 if and when new science becomes available as well as a mechanism to remove areas if deep sea corals are confirmed not to be present.

Although the Gulf Council’s creation of the Scoping Guide and Scoping Document is a positive step in the right direction, both documents are gravely lacking in detail, contrary to the intent of scoping that NEPA envisions and fail to fully acknowledge or use all of the management tools available under the Magnuson-Stevens Act to protect deep sea corals.

## **BACKGROUND**

### **PROCEDURAL BACKGROUND**

The National Marine Fisheries Service (“Fisheries Service”) and the Gulf Council began managing coral in the GoM jointly with the South Atlantic Fisheries Management Council in 1982. Since then, over 100 species of coral have been added to the Coral Fisheries Management Plan (“FMP”) which is now managed separately by each council. In 2013, a group of coral and fisheries scientists were brought together by the Gulf Council to discuss how coral may be affected by fishing activities. One of the recommendations from this workshop was to reevaluate coral areas in the GoM that might warrant special protection.<sup>3</sup> Methods to protect coral and coral habitat from activities other than direct harvest include Section 303(b)(2)(B) of the Magnuson Stevens Act or designating particular sites within existing coral Essential Fish Habitat (“EFH”) as Habitat Areas of Particular Concern (“HAPC”).

In 2014, the Gulf Council convened a group of scientists who identified 47 areas, including HAPCs that are in need of protection. After reviewing the list, the Gulf Council consulted with user groups who would be affected by potential fishing regulation changes by convening their Shrimp, Reef Fish, Coral and Spiny Lobster Advisory Panels. In August 2016, the Gulf Council’s Scientific Advisors on Coral (“Coral SSC”), the Coral and Shrimp Advisory Panel and

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<sup>3</sup>See, e.g., Gulf Council, *Coral Management Plans*, [https://gulfcouncil.org/fishery\\_management\\_plans/coral\\_management.php](https://gulfcouncil.org/fishery_management_plans/coral_management.php) (last visited Oct. 13, 2016)

a group of longline fishermen further narrowed down the initial 47 areas to 15 priority areas plus 7 additional deep water areas that do not require fishing regulations.<sup>4</sup>

## **LEGAL BACKGROUND**

### **National Environmental Policy Act**

Scoping is “[a]n early and open process for determining the scope of issues to be addressed and identifying the significant issues related to a proposed action.”<sup>5</sup> The purpose of the scoping process is to determine the scope or range of impacts of the proposed action on the human environment. The scoping process determines some of the issues associated with the action and may be used to develop action alternatives as well.<sup>6</sup> NEPA requires federal agencies to consider alternatives to their proposed actions as well as the environmental impacts of the proposed action and its alternatives.<sup>7</sup> The Council on Environmental Quality considers the analysis of alternatives to be the “heart” of the environmental impact statement (“EIS”).<sup>8</sup> An EIS must “rigorously explore[]” “all reasonable alternatives” and the decision maker must consider all such alternatives.<sup>9</sup> Where there are potentially a large number of alternatives, the EIS must analyze and compare “a reasonable number of examples, covering the full spectrum of alternatives.”<sup>10</sup>

### **Magnuson-Stevens Act**

The Magnuson-Stevens Act defines “essential fish habitat” (“EFH”) as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.”<sup>11</sup> Section 303 of the Act sets forth requirements for FMPs, including the requirement to “define and identify essential fish habitat for the fishery based on guidelines established by the [Fisheries Service] under section 305(b)(1)(A), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat.”<sup>12</sup> EFH must be identified and described in FMPs according to the guidelines set forth under 50 C.F.R. 600.815. The guidelines include the requirement that “Amendments to the FMP or its implementing regulations must ensure that the FMP continues to minimize to the extent practicable adverse effects on EFH caused by fishing.”<sup>13</sup> Under these mandatory

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<sup>4</sup> See, e.g., Gulf Council, *Coral Management Plans*,

[https://gulfcouncil.org/fishery\\_management\\_plans/coral\\_management.php](https://gulfcouncil.org/fishery_management_plans/coral_management.php) (last visited Oct. 13, 2016)

<sup>5</sup> Fisheries Service, *NOAA Administrative Series 216-6* § 4.01w; 40 C.F.R. § 1501.7.

<sup>6</sup> Fisheries Service, *The National Oceanic and Atmospheric Administration National Environmental Policy Act Handbook Version 2.3* 32 (May 2009), [http://www.nepa.noaa.gov/NEPA\\_HANDBOOK.pdf](http://www.nepa.noaa.gov/NEPA_HANDBOOK.pdf).

<sup>7</sup> 40 C.F.R. § 1502.14 (stating that “[t]his section[, entitled, Alternatives including the proposed action,] is the heart of the environmental impact statement”).

<sup>8</sup> 40 C.F.R. § 1502.14 (stating that “[t]his section[, entitled, Alternatives including the proposed action,] is the heart of the environmental impact statement”).

<sup>9</sup> 46 Fed. Reg. 18026, 18026 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986), *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, <https://ceq.doe.gov/nepa/regs/40/1-10.HTM#1> (clarifying in the answer to Question 1a what is meant by “range of alternatives” in Section 1505.1(3) of NEPA).

<sup>10</sup> *Id.* at 18027-28 (clarifying in the answer to Question 1b how many alternatives have to be discussed).

<sup>11</sup> 16 U.S.C. § 1802(10).

<sup>12</sup> 16 U.S.C. § 1853(a)(7).

<sup>13</sup> 50 C.F.R. § 600.815(a)(2)(ii).

requirements, the Fisheries Service and fishery management councils have a duty to protect deep sea corals that function as EFH. In addition to conservation of deep sea corals in the context of EFH, Congress amended the Act in 2007 to give the Fisheries Service and fishery management council's explicit authority to conserve and protect deep sea corals. Section 303(b)(2) of the Act provides that any fishery management plan prepared by a council or the Fisheries Service may:

(B) designate such zones in areas where deep sea corals are identified under section 408, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this Act that prohibits all fishing, ensure that such closure—

(i) is based on the best scientific information available;

(ii) includes criteria to assess the conservation benefit of the closed area;

(iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation.<sup>14</sup>

In 2007, Congress also added the Deep Sea Coral Research and Technology Program at Section 408 of the Act to establish a program to identify existing research, map coral locations and monitor activity in known deep sea coral areas.<sup>15</sup> In addition to biennial reporting to Congress,<sup>16</sup> under the Program, the Fisheries Service collaborates on research about deep sea corals with other federal agencies, international partners, and non-governmental and academic scientists.<sup>17</sup>

## DISCUSSION

The Scoping Guide and Scoping Document are lacking information on both the background for the proposed action under Amendment 7 as well as the process to consider alternatives. The Gulf Council should amend the Scoping Guide and the Scoping Document before approving use of these documents in future scoping processes for Amendment 7. In addition, both documents should fully employ all authority available to protect deep sea corals under the Magnuson-Stevens Act. Specifically, the Scoping Guide and Scoping Document should incorporate the following recommendations.

### **I. Fully discuss the differences between shallow water corals and deep sea corals and the areas in the GoM that fall into each category**

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<sup>14</sup> 16 U.S.C. § 1853(b)(2)(A)(B), (C).

<sup>15</sup> 16 U.S.C. § 1884(a).

<sup>16</sup> 16 U.S.C. § 1884(b).

<sup>17</sup> Fisheries Service, *Deep Sea Coral Research and Technology Program – 2016 Report to Congress* (2016), [http://www.habitat.noaa.gov/pdf/NOAA\\_DSC\\_Report\\_2016.pdf](http://www.habitat.noaa.gov/pdf/NOAA_DSC_Report_2016.pdf).

Unlike shallow water corals, deep sea corals do not contain symbiotic zooxanthellae, which require light to photosynthesize and, as a result, can live in deep, dark, cold water. Since deep sea coral inhabit deeper water, they are typically located in the EEZ and fall under the authority of the Fisheries Service and the fishery management councils rather than under State control. There is no mention of these relevant differences in either the Scoping Guide or the Scoping Document.

## **II. Separate the management of deep sea corals from shallow water corals and discuss the different authorities in the Magnuson-Stevens Act to conserve these areas**

The Scoping Guide and Scoping Document discuss using HAPC as the primary mechanism to manage deep sea coral in the GoM. HAPCs are a subset of EFH designated as ecologically important, sensitive to human harm, located in an environmental stressed area, and/or considered rare.<sup>18</sup> Although deep sea coral could fall into one or more of these designations, they must also be included within the EFH of a species managed in a council FMP.<sup>19</sup> HAPC may be appropriate for species included in the Gulf Council's Coral Fishery Management Plan,<sup>20</sup> but if deep sea coral does not provide habitat for a managed species, then it does not have a nexus to a managed species and cannot be conserved through an HAPC. Alternatively, if deep sea coral functions as EFH for a species managed by a council FMP, it could be conserved using this pathway, but whether particular deep sea coral areas are designated as EFH depends on the associated fish and coral assemblages.

In addition to mandatory requirements to protect deep sea corals that function as EFH,<sup>21</sup> the Magnuson-Stevens Act was amended in 2007 to give the Gulf Council explicit authority to conserve deep sea corals. The Mid-Atlantic Fishery Management Council recently employed Section 303(b) of the Act to conserve corals within their jurisdiction.<sup>22</sup> The background of the Scoping Guide and the Scoping Document should fully explore the use of Section 303(b) authority. Additionally, the Scoping Guide and Scoping Document should discuss agency guidance on deep sea coral conservation.<sup>23</sup>

The background sections in each of the two scoping documents should include a full discussion of the 2010 NOAA Strategic Plan for Deep-Sea Coral and Sponge Ecosystems<sup>24</sup> as well as the 2014 guidance memo from NOAA Office of Habitat Conservation to the Executive Directors of

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<sup>18</sup> 50 C.F.R. § 600.815(a)(8).

<sup>19</sup> See, e.g., Gulf Council, *Species Listed in the Fishery Management Plans of the Gulf of Mexico Fishery Management Council* (July 21, 2015), <http://gulfcouncil.org/Beta/GMFMWeb/downloads/species%20managed.pdf>.

<sup>20</sup> Gulf Council, *Coral Management Plans*, [https://gulfcouncil.org/fishery\\_management\\_plans/coral\\_management.php](https://gulfcouncil.org/fishery_management_plans/coral_management.php) (last visited Oct. 11, 2016).

<sup>21</sup> 16 U.S.C. § 1853(a)(7); 50 C.F.R. § 600.815(a).

<sup>22</sup> See *Notice of Availability of Fishery Management Plan Amendment (Amendment 16 to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan)*, 81 Fed. Reg. 60,666 (Sept. 2, 2016).

<sup>23</sup> I would cite to the NOAA Strategic plan, cited in 22.

<sup>24</sup> Fisheries Service, *NOAA Strategic Plan for Deep-Sea Coral and Sponge Ecosystems: Research, Management, and International Cooperation* (2010), [http://www.coris.noaa.gov/activities/deepsea\\_coral/dsc\\_strategicplan.pdf](http://www.coris.noaa.gov/activities/deepsea_coral/dsc_strategicplan.pdf).

the Regional Fishery Management Councils.<sup>25</sup> These important documents should be part of the background for this action and will inform and improve the scoping and development of Amendment 7.

### **III. Include a call for proposals of other areas in the scoping process**

It is contrary to the intent of scoping under NEPA for the Gulf Council to limit the number and size of areas under consideration prior to going out for scoping. Limiting the number and size of areas assumes that the Gulf Council is fully aware of the types, locations and range of deep sea coral areas in the GoM; however, this is not the case as many scientists are currently documenting new areas in the GoM. As many coral inhabit deep, unmapped areas, the Gulf Council should use the scoping process to solicit additional proposals for deep sea coral areas from scientists, NGOs or other offices within the Fisheries Service.

The Gulf Council should also consider using predictive modeling to develop coral conservation areas in locations that have not yet been surveyed for corals but have the physical and oceanographic characteristics to support them. This has been developed and used to inform management in other regions and should be included in the scoping process for this action.<sup>26</sup>

Finally, the Scoping Guide and Scoping Document should reference the information collected and reported under Section 408(a)(b) of the Magnuson-Stevens Act, also known as the Deep Sea Coral Research and Technology Program. The 2010 NOAA Strategic Plan for Deep-Sea Coral and Sponge Ecosystems is also relevant and should be referenced to ensure complete analysis of all potential deep sea coral areas in the GoM.<sup>27</sup> This information about other potential areas of deep sea corals is readily available from the Fisheries Service and should be included among the areas considered in the Gulf Council's scoping process for Amendment 7.

### **IV. Develop a pathway for new areas to be considered and included in the coral amendment if and when new science becomes available as well as a mechanism to remove areas if deep sea corals are confirmed not to be present**

Many areas in the GoM have yet to be mapped; it is therefore important that scoping for Amendment 7 be dynamic and allow for updates to include newly discovered areas. In addition, a mechanism to remove areas previously thought to have deep sea coral, yet later confirmed not to be present, should be created.

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<sup>25</sup> Fisheries Service, *Protection of Deep-Sea Corals from Physical Damage by Fishing Gear under the MSA Deep Sea Coral Discretionary Authority* (June 11, 2014), [https://static1.squarespace.com/static/511cdc7fe4b00307a2628ac6/t/56e1d9d0c6fc086666197a49/1457641937650/140611\\_MSA\\_DSC+DiscrAuth.pdf](https://static1.squarespace.com/static/511cdc7fe4b00307a2628ac6/t/56e1d9d0c6fc086666197a49/1457641937650/140611_MSA_DSC+DiscrAuth.pdf).

<sup>26</sup> Kinlan, B.P. et al., *Predictive models of deep-sea coral habitat suitability in the U.S. Northeast Atlantic and Mid-Atlantic regions* (2013), <http://coastalscience.noaa.gov/projects/detail?key=35>.

<sup>27</sup> Fisheries Service, *NOAA Strategic Plan for Deep-Sea Coral and Sponge Ecosystems: Research, Management, and International Cooperation* (2010), [http://www.coris.noaa.gov/activities/deepsea\\_coral/dsc\\_strategicplan.pdf](http://www.coris.noaa.gov/activities/deepsea_coral/dsc_strategicplan.pdf).

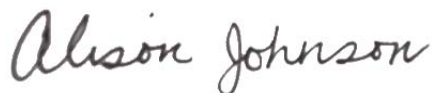
## CONCLUSION

Oceana considers the Gulf Council's creation of the Scoping Guide and Scoping Document for Amendment 7 is a step in the right direction for protecting and managing deep sea coral in the GoM region. As neither scoping document adequately addresses the issues or the intent of the scoping process under NEPA or fully employs all authority available to protect deep sea corals under the Magnuson-Stevens Act, Oceana urges the Gulf Council to amend the Scoping Guide and Scoping Document to incorporate the following recommendations:

- Fully discuss the differences between shallow water corals and deep sea corals and the areas in the GoM that fall into each category;
- Separate the management of deep sea corals from shallow water corals and discuss the different authorities in the Magnuson-Stevens Act to conserve these areas;
- Include a call for proposals of other areas in the scoping process; and
- Develop a pathway for new areas to be considered and included in Amendment 7 if and when new science becomes available as well as a mechanism to remove areas if deep sea corals are confirmed not to be present.

Oceana looks forward to working with and providing additional input to the Gulf Council as the scoping process for Amendment 7 moves forward. We appreciate the chance to provide written comments on this very important issue.

Sincerely,



Alison Johnson  
Southeast Campaign Manager  
Oceana, Inc.

*Oceana is the largest international advocacy organization focused solely on ocean conservation. We run science-based campaigns and seek to win policy victories that can restore ocean biodiversity and ensure that the oceans are abundant and can feed hundreds of millions of people. Oceana victories have already helped to create policies that could increase fish populations in its countries by as much as 40 percent and that have protected more than 1 million square miles of ocean. We have campaign offices in the countries that control close to 40 percent of the world's wild fish catch, including in North, South and Central America, Asia, and Europe. To learn more, please visit [www.oceana.org](http://www.oceana.org).*