

North Pacific Fishery Management Council

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The Honorable Doc Hastings
Chair, Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Hastings:

On behalf of the North Pacific Fishery Management Council (NPFMC) I am submitting comments on your December 2013 Discussion Draft, titled "Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act". The NPFMC discussed this draft bill during its February 2014 Council meeting, and I am providing their specific comments on the provisions of that draft bill, as well as some general, overarching comments relative to reauthorization of the Magnuson-Stevens Act (Act). These positions have also been influenced by the May 2013 Managing our Nation's Fisheries national conference, ongoing dialogue among the eight regional Councils through the Council Coordination Committee (CCC), and our experience with the 2006 MSA reauthorization.

The 2006 amendments to the MSA comprised a very ambitious, comprehensive, and powerful set of new requirements for fisheries management, primarily aimed at rebuilding and conserving fisheries through the mandate of Annual Catch Limits (ACLs) and the reliance on best scientific information in that pursuit. Many of the requirements of the 2006 reauthorization were patterned after practices which have been in place for over 30 years in the North Pacific region, and we believe that these requirements have generally been a great success, as evidenced by significant reductions in the number of overfished stocks across the Nation. However, the 2006 amendments were not without pain and costs to the fishing industry, as is evidenced by the current suite of issues currently being discussed. A primary focus for pending reauthorization appears to be flexibility in the ACL and stock rebuilding requirements implemented through the 2006 reauthorization.

The North Pacific Council believes that the current MSA provides a very successful framework for sustainable fisheries management, and major changes are not necessary at this time. However, we also recognize the need for increased flexibility in some circumstances and we do not oppose amending the Act to provide for such flexibility, with some important cautionary notes. Following are our comments to the specific provisions of the Discussion Draft:

Sections 3, 4, and 5 - Flexibility in Rebuilding; Modifications to Annual Catch Limit Requirements; and, Distinguishing between Overfished and Depleted

Regarding potential changes and increased flexibility for stock rebuilding plans, **our Council supports further flexibility**, particularly in cases where the 10 year rule does not make sense due to the particular aspects of the stock in question. In some cases the somewhat arbitrary 10 year requirement can result in

overly restrictive management measures, with unnecessary, negative economic impacts, with little or no conservation gain. Allowing for rebuilding to occur in as short a time as “practicable”, as opposed to as short a time as “possible”, may be an appropriate mechanism for additional flexibility.

Regarding annual catch limits (ACLs), ACLs have been used in the North Pacific for over 30 years, and we believe that such limits are a cornerstone of sustainable fisheries management. **We also believe there are situations where some flexibility in the establishment of ACLs is warranted, particularly in the case of data poor stocks.** I can cite the North Pacific example two years ago where we were compelled to set an artificially low ACL for Pacific octopus based upon very limited historical information, rather than a robust stock assessment, and this artificially low ACL resulted in closures of fisheries which take octopus incidentally. This example underscores the need for robust stock surveys and assessments, which we believe should be a priority focus of any MSA reauthorization.

Consideration of the economic needs of fishing communities is critical in the ACL setting process, and while the current MSA allows for such consideration, we recognize the desire for a more explicit allowance for these considerations. We must be careful however, not to jeopardize long term fisheries sustainability, and associated community vitality, for the sake of short term job creation. Accounting for uncertainty, articulating policies for acceptable risk, and establishing the necessary precautionary buffers, is an explicit outcome of the ACL process, and we believe that the Councils’ Scientific and Statistical Committees (SSCs) are the appropriate gatekeepers to establish the upper limits of ‘safe’ fishing mortality. In that regard, from a perspective of national public policy, **we are concerned with a potential relaxation of the ACL requirements which would allow Councils to set ACLs at the overfishing level** (rather than the Acceptable Biological Catch, or ABC, level). Setting ACLs at the overfishing level in essence assumes zero uncertainty, and harvesting at the overfishing level will, on average, result in actual overfishing about half of the time. While such a change in the Act would likely not affect how we do business in the North Pacific, where ABC has always represented the upper limit of fishing mortality, we do not believe such a relaxation would be responsible public policy.

Associated with the rebuilding issue is the definition of ‘overfished’. In the North Pacific we have no overfished stocks, with the exception of Pribilof Island Blue King Crab, a fishery for which there has been no allowable fishing for decades, and the species is only occasionally taken as bycatch in other fisheries. Our Council has been faced with development of a rebuilding plan for this species, and the prospect of curtailing certain groundfish fisheries because this is the only source of mortality we can affect, even though our analyses and stock assessment models indicate that the expected bycatch savings will not increase rebuilding success. **This example highlights the need to differentiate stocks for which an “overfished” status has no relation to fishing activities. Replacing the term “overfished” with the term “depleted” or another term which denotes that stock status is not necessarily related to fishing activities may be an effective way to address this problem,** noting however that the term “overfished” has definitive metrics associated with it. While more appropriate, **any new term will need to be explicitly defined in order to be a measurable metric, and in order to avoid diluting the conservation goals associated with stock rebuilding.**

Overall, largely because we have the benefit of healthy stocks and robust stock assessments for most species, we have not experienced the types of negative impacts that other regions appear to be having in complying with ACLs and rebuilding schedules. In that vein, while we understand the need for some flexibility in the application of ACLs and rebuilding requirements, we believe it will be imperative to consider such changes cautiously, to not dilute the basic intent and benefit of ACLs, and to not lose ground in our success at rebuilding overfished stocks where rebuilding is feasible and affected by fisheries management actions.

We would also like to note the potential for unintended consequences when making changes to any of the key provisions of the MSA. Measures intended to address a problem in one area of the country can result in unnecessary, unintended consequences to other regions. An example of general provisions resulting in substantial revisions to North Pacific fishery management (and nationwide), is in fact the implementation of ACLs required under the 2006 MSA reauthorization. Recall that the 2006 additions to the MSA which implemented the ACL requirements were but a few sentences of statutory text (largely patterned after long-standing North Pacific practices), but that the implementation of the ACL requirements resulted in 36 pages of ‘guidelines’, or regulatory text, from the National Marine Fisheries Service. In the case of the North Pacific, we had to undergo significant amendments to our Fishery Management Plans (FMPs) to comply with the letter of the ACL regulations, even though we have been successfully managing fisheries with strict annual catch limits for 30 years. The guidelines as written also require us to develop additional amendments to our FMPs to more explicitly address uncertainty in stock status, even though we have robust stock assessments for most species, and uncertainty levels are incorporated in our stock assessments and setting of ACLs. Finally, despite the lengthy and detailed guidelines which were developed, there is still debate over how to account for fish taken in research, stock assessment, and cooperative research under exempted fishing permits (EFPs).

An example related to the Discussion Draft is that **defining the ‘economic needs of fishing communities’, on an annual basis related to setting ACLs, could be a daunting, resource intensive undertaking.** Many of these issues have the potential to be addressed to some extent through the current initiative by NMFS to revise the guidelines implementing National Standard 1 (i.e., revisions to the ACL and stock rebuilding requirements). While the final rule for these revisions is not scheduled to be complete until late in 2014, it is important that reauthorization language is reflective and responsive to this important effort.

Relative to emergency regulations and interim measures, **the NPFMC supports the proposed language which would extend the duration from 180 days to one year** (with the possibility to extend for an additional year).

Section 6 – Transparency and Public Process for Scientific and Management Actions

The MSA provides for a very transparent and participatory regulatory process. With the current state of technology this is now true more than ever, as evidenced by the following: all NPFMC meetings are Webcast in real time; all of its meeting materials are posted and publicly available; full, easily accessible, searchable audio transcripts are maintained and available to the public for all North Pacific Council meetings; summary minutes are developed for each Council meeting which include key discussion points and all motions adopted by the Council; and, newsletters are developed and publicly available immediately following each Council meeting which provide detailed summaries of all actions taken by the Council. For SSC meetings in the North Pacific, detailed minutes of each meeting are developed and available to the public by the end of the meeting.

Proposed requirements for videotaping all Council and SSC meetings, and for full written transcripts of all Council and SSC meetings (and potentially Advisory Panel meetings as well) are an unnecessary burden with little or no marginal benefit in terms of public access, transparency, or administrative record. In the case of the North Pacific, with five to six meetings per year at seven days each (along with SSC and AP meetings, which expands it to 15 overall meeting days) such a requirement would cost into the hundreds of thousands of dollars, which does not make sense at a time of shrinking Council budgets and overall fiscal constraint. **The current practice of Webcasting, and compiling full, searchable audio transcripts provides the public with a much more useful avenue of access,** and it is unlikely that voluminous written transcripts would be accessed by the public, or provide any additional value to the public. In addition, a requirement for real-time videotaping may require the Council to no

longer meet in remote fishing communities where there may be limited bandwidth available, and thus may be counter to the intent of a videotaping requirement.

Section 315 – Compliance with National Environmental Policy Act (NEPA)

The MSA juxtaposes with several other important Acts, including the Endangered Species Act (ESA), the National Marine Sanctuaries Act (NMSA), the Regulatory Flexibility Act (RFA), and the National Environmental Policy Act (NEPA). Additional clarity and regulatory streamlining can be accomplished through further clarification of the applicability and overlap of these various statutes. In the case of the ESA, the eight regional Councils (through the Council Coordinating Committee), endorsed the report recently developed by the Marine Fisheries Advisory Committee (in consultation with members of the CCC) which contained numerous recommendations to NOAA Fisheries regarding better coordination of that statute with the MSA, and a more robust participatory role for the Councils in the ESA consultation process and development of Biological Opinions affecting fisheries management.

Regarding NEPA, the Councils have a long history of advocating for reconciliation of this Act with the MSA. The MSA is arguably the most transparent, participatory regulatory process in existence, and while the MSA is ostensibly the guiding Act for fisheries management actions in the U.S., in fact it is NEPA which has become the vehicle for development of fishery management plans and associated regulations. **The current application of NEPA results in an unnecessarily burdensome, overly expensive, and redundant, regulatory process. The NEPA process was never intended, and will never fit well, with the unique and dynamic nature of the fisheries management process. The NPFMC supports the Discussion Draft proposal to use sections 303 and 304 of the MSA to constitute NEPA compliance.**

While the Councils are generally doing a good job complying with this process and the requirements of NEPA, and that process is being memorialized within a Policy Directive currently being developed by NMFS, there remain significant opportunities for streamlining and reconciling the Acts as was envisioned in the 2006 reauthorization process. **The current Policy Directive being developed by NOAA simply memorializes the status quo, (over)application of NEPA, and does not address the 2006 MSA mandate to reconcile these two statutes. The NPFMC strongly believes that the process can be much better served by incorporating a few key provisions of NEPA within the MSA (for example, a more explicit requirement for environmental impact analysis, and an explicit requirement for the consideration of a reasonable range of (reasonable) alternatives).** This would allow the MSA to once again be the central, guiding Act for fisheries management in the U.S., without sacrificing the underlying environmental protections intended by NEPA, and without sacrificing the opportunity for public input which is already amply provided for in the MSA and the Administrative Procedure Act.

The starkest specific example of the general over-application of NEPA probably remains that of the Council's programmatic supplemental environmental impact statement (PSEIS), the 7,000 page document underpinning our Bering Sea and Aleutian Islands and Gulf of Alaska fishery management plans. Based on agency guidance for NEPA compliance, we were compelled to analyze and consider a NO FISHING alternative – for a fishery which supplies over half the Nation's seafood harvest, which for 30 years has been considered a model of sustainable management, and where ABCs have totaled over 4 million metric tons for three decades. Regardless of the stated purpose of the Council to conserve and manage fisheries we were forced to spend considerable Council time and resources to analyze an unreasonable, and misleading to the public, 'no fishing' alternative.

While I could cite numerous additional examples of specific management actions unnecessarily hampered by the NEPA process, it may be more useful to focus on the generally pervasive impacts to our fisheries management process. While it is true that the timelines for NEPA and MSA review are not totally inconsistent once a management action is formally transmitted by a Council to the Secretary for review

and approval, it is the effect of NEPA on the process prior to formal submittal of a Council action to the Secretary that is problematic. During development of management actions, Council analyses are subjected to the specific requirements of NEPA, including separate and redundant ‘scoping’ processes, and frequent insistence by NOAA of additional alternatives for analysis, often contrived to simply have additional alternatives (see PSEIS example above). Following Council final action, it is NOAA who determines the ‘adequacy’ of the analytical package prior to allowing formal submittal to the Secretary. This ‘adequacy’ is judged primarily with regard to NEPA compliance, and often results in a lengthy process of review and revision between NOAA and Council staff. This process creates unnecessary waste of valuable resources (personnel and otherwise) and often results in lengthy delays in the implementation of critical management measures.

Section 7 – Limitation on Future Catch Share Programs

Our understanding of this section is that it (a) defines the term ‘catch shares’; and (b) institutes additional referendum requirements for four east coast regional Councils. Regarding (a) above, we understand that while the legislation defines the term ‘catch shares’, it does equate that term with ‘limited access privilege programs’ (LAPPs), which are the subject of numerous specific provisions in the current MSA. Provided that is an accurate interpretation of the intent of the Discussion Draft, and recognizing that the referendum requirements would not apply to North Pacific fisheries, **the NPFMC has no comment on this specific provision of the Discussion Draft.**

As a general comment relative to ‘catch shares’, or LAPPs, we would note that the 2006 amendments to the MSA put in place numerous requirements for the development of Limited Access Privilege Programs (LAPPs), requirements which apply to many of the ‘catch share’ programs being considered, or being developed, by Regional Fishery Management Councils around the U.S. Catch share type programs, including sector allocations, license limitation programs, and individual transferrable quotas (ITQs), while not appropriate for all fisheries, represent a critically important tool for fisheries management and have been used extensively in North Pacific fisheries to reduce bycatch and increase target species landings and value. Most of the fisheries in the Bering Sea operate under some form of ‘catch share’ or LAPP management, and all of these programs have been developed through an extensive, and inclusive, transparent public process. We do not want to lose catch shares as a management option in our tool box, and we believe that maximum flexibility in program design is essential to tailor these programs to the specific characteristics of various fisheries. The current MSA contains extensive provisions for the design and analysis of LAPP programs, and we do not support additional requirements for referendums in the North Pacific, nor do we support automatic sunset dates as these can be counter to the basic premise of these programs, can be disruptive to both the design and implementation of such programs, and may weaken the achievement of long-term conservation benefits.

Section 8 - Data Collection and Confidentiality

Electronic Monitoring

The use of Electronic Monitoring (EM), particularly the use of video cameras in lieu of human observers, continues to be a high priority for the North Pacific Council and the North Pacific fishing industry, and an EM strategic plan was developed in the past year to guide those efforts. This is especially true for the small boat, fixed gear fleet, many of whom are now subject to partial observer coverage requirements under the Council’s restructured groundfish and halibut observer program. The North Pacific Council is working diligently with the Alaska Region of NMFS, the Alaska Fisheries Science Center, and the small boat fishing sector to expedite the implementation of EM in our fisheries. In addition to a number of EM pilot projects and collaborative research ongoing in 2014 (some of which are funded through grants from the National Fish and Wildlife Foundation), the Council is forming an EM Workgroup to provide a forum

for the development of performance standards, and for the design and testing of alternative EM systems for various applications. While EM will never be a full substitute for human observers, there are numerous potential applications, including discard monitoring as a primary first goal, and ultimately as an integral part of the overall catch accounting system.

EM development is also a high priority at the National level, with NOAA Fisheries in the midst of developing both a National EM policy as well as regional implementation plans. With the collective, ongoing efforts relative to EM, it is unclear that additional statutory provisions are necessary at this time to move forward. **However, the North Pacific Council does not oppose provisions that would enhance EM development and implementation, if such provisions are posed as optional tools, with realistic timelines, as opposed to specific mandates with unrealistic timelines. Finally, our Council would be opposed to any statutory requirements which prohibit the use of EM for law enforcement or compliance purposes** (which could, for example, preclude compliance monitoring for retention/discard requirements, one of the current uses of EM in the North Pacific on large trawl vessels and likely a more cost-effective means of monitoring for other fisheries in the future, particularly the small boat, fixed gear fleet). The NPFMC is concerned that the 6-month timeline proposed in the Discussion Draft, to develop objectives, performance standards, and regulations for EM is unrealistic, particularly if it is intended to also encompass public comment on proposed rulemaking.

Confidentiality of Information

As a general comment, this section of the Discussion Draft contains numerous provisions related to data collection and confidentiality, and it is difficult to discern the overall intent of the collective provisions.

Overall, the NPFMC believes that the current data collection and confidentiality provisions in the MSA are working quite well. The North Pacific Council has numerous data collection initiatives (in addition to observer information or other routinely collected fisheries information) associated primarily with the implementation of catch share programs in our fisheries. Information from these data collection programs is essential to program reviews and to our ongoing management, but it also contains sensitive cost and other operational information from the fleet, much of which must be aggregated (up to three entities) before public release. NMFS is also currently in the process of final rulemaking (pending publication) related to currently existing confidentiality provisions. In a recent letter to the NMFS Assistant Administrator, the NPFMC stressed the importance of maintaining these provisions in order to prevent the erosion of the cooperation and goodwill of the fishing industry and to ensure we can continue to use the North Pacific data collection system developed and maintained with the State of Alaska, which requires similar aggregation rules to maintain confidentiality. In summary, we stressed the need to maintain appropriate confidentiality measures, except where Congress has expressly intended otherwise.

Conversely, there are provisions specific to the North Pacific in the current MSA which do allow otherwise confidential observer information to be made public. For example, section 402(b)(2)(A) specifically allows the Council to disclose weekly summary bycatch information identified by vessel, or haul-specific information without vessel identification. Such information allows us to identify ‘poor performers’ related to salmon bycatch in Bering Sea trawl fisheries, for example. **The NPFMC does not support removal of section 402(b)(2)(A), as is proposed in the Discussion Draft, as this would be counter to the Council’s policy intent and goals with regard to transparency, accountability, and minimizing bycatch to the extent practicable.**

Additional NPFMC comments on this section of the Discussion Draft include:

-The NPFMC is concerned that the proposed modification to Section 402(b)(1)(F) could be interpreted to prevent disclosure of observer information to anyone other than the Council or State (such as to SeaState

or other private management entities, which are essential to manage salmon bycatch at the cooperative and individual vessel levels).

-The NPFMC has previously voiced its concerns with regard to the coastal and marine spatial planning initiative; however, we are concerned that the Discussion Draft's proposed prohibition on providing information to any person for the purposes of coastal and marine spatial planning may reach too broadly and may have unintentional adverse consequences. For example, there are many activities and management actions that could be construed to relate to coastal and marine spatial planning, and we caution against the possibility of these actions being caught in the CMSP net, contrary to the specific intent of the Discussion Draft.

-In attempting to define the term 'confidential information', we note that the phrase "*likely to result in harm to the competitive position of the person...*" may be a subjective determination and will be difficult to quantify.

Data Poor Fisheries and the Asset Forfeiture Fund

The NPFMC supports the proposed definition of 'data-poor fishery', and supports increased stock assessments for data-poor fisheries, particularly involving State and/or cooperative research structures. However, we note the tradeoffs inherent in the diversion of Asset Forfeiture funds to support this goal. Funds from this source are critical to various enforcement and investigative activities of the NOAA Office of Law Enforcement. Reductions in these activities could be detrimental to the Council's overall management objectives. It is unclear who will make the determination of the amount (up to 80%) of the funds to be used for data-poor stock assessment, and how that determination will be made. Clarification of this aspect may inform additional comment on this provision. In any case, it is imperative that any amount of funds diverted from the Asset Forfeiture Fund for these purposes **only be used in the region in which they were collected**, and that nothing in this section detracts from ongoing, critical stock assessments for other species.

Section 11 - North Pacific Management Clarification

Section 306(a)(3)(C) contains provisions related to State jurisdiction to manage fishing activity in the absence of a federal fishery management plan. Removal of the August 1, 1996 date in this paragraph would close a potential loophole which could theoretically allow unrestricted fishing for salmon in EEZ areas off Alaska by vessels not registered with the State of Alaska, due to the removal of these areas from the Council's overarching salmon fishery management plan. **The Council strongly supports this change, thereby allowing regulation of fishing in these areas by the State of Alaska, as intended.**

General comments

I would like to close by providing you with some summary thoughts regarding the reauthorization process. These represent some general tenets which we believe should be considered relative to any change in the MSA:

- Avoid across the board mandates which could negatively affect one region in order to address a problem in another region. Make provisions region-specific where necessary, or couch them as optional tools in the management toolbox rather than mandates.
- Legislation should allow for flexibility in achieving conservation objectives, but be specific enough to avoid lengthy, complex implementing regulations or 'guidelines'.

- Legislation should be in the form of intended outcomes, rather than prescriptive management or scientific parameters.
- Legislation should avoid unrealistic/expensive analytical mandates relative to implementing fishery closures or other management actions.
- Legislation should avoid constraints that limit the flexibility of Councils and NMFS to respond to changing climates and shifting ecosystems.
- Avoid unfunded mandates, and/or ensure that Councils and NMFS have the resources to respond to provisions of legislation.
- Preservation and enhancement of stock assessments and surveys should be among the highest priorities when considering any changes to the Act.

Once again, thank you for the opportunity to review the Discussion Draft, and to provide these comments to you on behalf of the North Pacific Fishery Management Council. We look forward to our continued dialogue on these critically important issues.

Sincerely,



Chris Oliver
Executive Director

CC: Dave Whaley

Jeff Lewis

Eileen Sobeck

Regional Fishery Management Councils