



New England Fishery Management Council

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Eric Reid., Acting *Chairman* | Thomas A. Nies, *Executive Director*

DRAFT

The Honorable Jared Huffman
1527 Longworth House Office Building
Washington, DC, 20515-0502

The Honorable Ed Case
2210 Rayburn House Office Building
Washington, DC, 20515-1101

Dear Mr. Huffman and Case:

Thank you for requesting feedback from the New England Fishery Management Council (Council) on H.R. 4690, the “Sustaining America’s Fisheries for the Future Act of 2021.” This bill would reauthorize the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and would also address other issues. The Council carefully reviewed the bill’s language and the enclosure provides our comments on specific sections. Please note that because of limitations on our grant, our comments focus on the impacts of the legislation. We do not express support or opposition to any element of the bill. In addition to the attachment, we would like to offer a general comment.

Our Council – along with the other Councils – are experiencing increasing challenges in managing fisheries because of climate change. We are seeing changes in both fish productivity and fish distribution. In addition, the rapid development of offshore wind will affect both the areas that can be fished and the ability of the National Marine Fisheries Service to conduct research surveys that are essential to assessing fish stocks. These changes are stressing the management system – not just for the Councils, but for the agency as well.

Because of that, one of the impacts of H.R. 4690 that deserves careful consideration is the addition of approximately 25 periodic reports. While many of these reports are the responsibility of the Secretary and not the Council, each report increases the workload on an already stressed system. They consume valuable staff time at every level of the process and reduce the ability of staff to work on other management issues. The addition of so many reports – combined with the number of reports that are already required – will make it far more difficult to manage our fisheries. We do not expect a benefit from imposing these requirements.

We look forward to the reauthorization of the MSA, which is the foundation for the world’s premier fishery management system. As always, we are willing to clarify our comments, or provide additional information, at any time. Please contact Executive Director Tom Nies should you have questions.

New England Fishery Management Council

Feedback on H.R. 4690

9/24/2021

Title I – CLIMATE READY FISHERIES

Section 102. Promoting Climate Resilience in Fisheries Management

This section would amend section 303 of the MSA by adding a number of requirements that must be included in an FMP. These requirements are all related to climate change. Many of the requirements – for example, assessing and specifying the current and probable future condition of the fishery under prevailing and anticipated future environmental conditions – will create a large workload for the Council that will be difficult to accomplish. In many cases, estimating MSY under current conditions alone is difficult for a variety of reasons; extending that requirement to future conditions is problematic, and may not be possible. It is not clear that the information is available to meet these requirements. It is also not clear if estimates of future MSY/OY are supposed to be used as a basis for current management.

A new section 322 requires Councils to publish plans to prioritize management actions to increase resilience of fish stocks that are most vulnerable to climate change, and begin implementing the plans, within one year of a notification received from the Secretary. This requirement will compete for resources with scheduled management actions necessary to manage fisheries, such as the setting of ABCs/ACLs. This would certainly be a problem without additional resources provided to the Council, and perhaps the agency.

Section 104. Climate-Ready Fisheries Innovation Program

By establishing a Climate-Ready Fisheries Innovation Program, this section aims to develop additional tools for adapting fisheries management to the impacts of climate change. It is not clear how the development of research priorities for this program will be coordinated with the research priorities that Councils identify as required by Section 302(h)(7) of the MSA. Close coordination with the Council would be necessary to make sure the tools developed address regional issues and can be actually be used.

Section 105. Managing Shifting Stocks

This section would clarify a process for evaluating a change in stock distribution to determine whether management authority should be revised. Requiring this review every five years may be too frequent given the time scale of management actions, particularly if not identified as an issue by a Council. For example, if the Councils already manage the stock through a joint FMP, this review seems unnecessary unless requested by one of the Councils. It is also not clear which Council can request a review: is it either affected Council, the Council with current authority, or the Council that the stock has shifted into? The process outlined to determine management responsibility if the Secretary identifies a shift is also convoluted. If the review was not initiated

by the request of a Council, that suggests the current management approach is accepted and reconsideration is unnecessary. If that is not the case, it will be difficult for the Councils to agree on who should have management authority. This section also ignores that in an extreme case, the problem may extend across the boundaries of more than two Councils.

Section 106. Emerging Fisheries

This section would modify Section 305 of the MSA, specifying a more rigorous process for adopting new fisheries and gear in the EEZ. Some of the requirements in this section are already addressed in 50 CFR 600.747, but this section would modify the process for administering the list. The requirement for a periodic review of the list by the Council and the agency increases workload on both. This section also appears to constrain the ability of a Council to request a change to the list to this periodic review process. This would inhibit the development of new fisheries or gear, which may constrain the ability of fisheries to adapt to environmental change. This could be an issue for recreational fisheries – shifting stocks are being encountered in new areas.

The process proposed for approving a new gear is not consistent with the current way Experimental Fishing Permits (EFPs) are managed in our region. The EFP program is managed by the agency at present, whereas this section imposes a requirement on the Council to collect, evaluate, and make public data generated by the EFP. This is a new responsibility that may require additional Council resources. It is not clear if the requirement to make these data public overrides the confidentiality provisions of Section 402(b) of the MSA.

Title II—SUPPORTING FISHING COMMUNITIES

Section 202. Subsistence Fishing.

The proposed definition of subsistence fishing includes fishing where the fish harvested are intended “...for direct personal consumption as food...” This broad statement would appear to include recreational fishing activity, both by private anglers and the for-hire fleet. It is not clear if this is intended.

Title III—STRENGTHENING PUBLIC PROCESS AND TRANSPARENCY

Section 303. Atlantic Councils

Providing the NEFMC a voting seat on the MAFMC (and vice versa) would formalize and strengthen the longstanding process of the two Councils to share a liaison. It is unlikely to affect Council decisions, which rarely hinge on one vote. The statutory language that the new seat would “act as a liaison to represent the interests of the fisheries” may be problematic, as appointed Council members take an oath to make decisions to “...conserve and manage the living marine resources of the United States of America by carrying out the business of the Council for the greatest overall benefit of the Nation.” It is possible the interests of a particular fishery (a definition which includes fishing for stocks) may not always coincide with the greatest benefits to the Nation.

At present, the Councils assign liaisons based in part on the specific issues that will be discussed at a meeting. If the Secretary appoints the representative as proposed, this will no longer be possible. This also would mean that the Secretary would have to make sure that at least one appointed Council member has expertise in both jurisdictions, and would need to make sure governors nominate Council member candidates that possess this qualification.

Section 305. Council Accountability and Membership

This section makes a number of changes to provisions that apply to Council members, Advisory Panel members, and staff. The provisions that expand the qualifications considered for Council membership, and to require each Council have at least one individual that does not have a financial interest in matters before the Council, would not affect Council operations. There may need to be a clarification as to what constitutes a financial interest (for example, does a private angler have a financial interest?).

Section 302(f) for the MSA would be amended to deem Council employees as Federal employees with respect to any requirement that applies to Federal employees. This is a broad statement and its potential impacts are large. For well over 40 years, Council employees, in most cases, are not considered Federal employees. It is not clear if this language is meant to refer only to ethics provisions, or the entire range of regulations that apply to Federal employees. For example, does this provision subject Council employees to all personnel management requirements (work hours, travel, evaluations, training, etc.) that apply to Federal employees? Does this provision entitle Council employees to all Federal benefits? If there is a government shutdown, must Council employees comply with restrictions on working? This statement is unclear and will cause confusion if adopted.

Section 302(f) would be modified to make it clear that Council, committee, and advisory panel members are subject to all laws, rules, and policies regarding ethics and sexual harassment that apply to Federal employees. While this will provide additional protections to potential victims, it is not clear how this will be enforced on advisory panel members, who are essentially volunteers. This will also create a need for periodic training to make sure participants are aware of their responsibilities. It is possible this may discourage some stakeholders from participating in these processes since they may not be familiar with the Federal regulations or do not trust their application, and may be concerned about their personal liability.

This section incorporates current restrictions on lobbying that apply to the Councils. However, it extends the prohibition to attempting to influence certain Presidential actions. This latter addition may inhibit the ability of the Council to provide its perspective on the arguments for or against the Presidential action. In addition, the enforcement mechanism proposed requires the Secretary to investigate any complaint or a potential violation received from any entity. This has the potential to encourage frivolous complaints that will burden the agency. One possible penalty for a violation of lobbying restrictions is a prohibition on employment by a Council. It is unclear how this will be implemented, since Council employees are not Federal employees and are not subject to Federal hiring practices. Further, the requirements of this section for extensive documentation and public availability of all communications with Federal or State officials on

“subjects other than routine fishery management in the region” creates an unmanageable record-keeping burden with little apparent purpose except to discourage freely exchanging information.

Section 307. NOAA Sexual Harassment and Assault Prevention

While this section adds Council members and Council staff to the individuals covered by NOAA’s Sexual harassment Policy, it seems inconsistent with Section 302(f) of this bill in that it does not include Advisory Panel members.

Section 308. S-K Reform

The Council provides limited support to the S-K program at present, and this section would have limited impacts on the Council. Increased S-K funding, however, may benefit the fisheries managed by the Council. The establishment of an American Fisheries Advisory Committee with regional subdivisions that do not match either the Council or NMFS regional organization may complicate administration of the program.

TITLE IV—MODERNIZING FISHERIES SCIENCE AND DATA

Section 402. Expanding and Improving Electronic Technologies.

The Council is already expanding the use of electronic technologies in several of its fisheries. It is not clear this statutory requirement will accelerate that process.

Section 404. Cooperative Research and Management

This section would place added emphasis on the research priorities developed by the Council, which would increase the utility of cooperative research projects for management. It is not clear, however, how the critical needs identified by the Council for this program relate to the research needs identified by the Council in response to other MSA requirements. The requirement that the Council publish the results and data generated by these projects is not consistent with the current research process. These programs are administered and monitored by the Agency, not the Council. This would be a significant change in responsibility for this program, and would tax Council resources.

Section 405. Northeast Regional Pilot Research Trawl Survey and Study

This pilot study could help increase confidence in survey results and may serve as a supplement when federal surveys are interrupted. It would, however, require adequate funding to be successful. Focusing on a trawl survey may also limit investigation of alternative survey techniques (autonomous vessels, other gear, etc.) that may be a better way to develop fishery independent indices.

Section 409. Offshore Wind Collaboration

The extensive development of offshore wind facilities off the east coast of the United States will affect fisheries in numerous ways. One of the major impacts is that it will disrupt the collection of fishery dependent and independent data. A cooperative agreement between the Secretary of Commerce and the Secretary of Interior to fund stock assessment and wildlife research will help

to provide the science needed to manage fisheries in this changing environment. This section, however, would not include fishing industry or Council input on the elements of the agreement.

TITLE V—SUSTAINING FISHERIES THROUGH HEALTHY ECOSYSTEMS AND IMPROVED MANAGEMENT

Section 502. Essential Fish Habitat Consultations

The provisions in this section that strengthen the Secretary’s ability to require that federal actions avoid adverse effects to EFH will provide additional protection to EFH identified by the Council. This will strengthen the ability of the Secretary to ensure that federal actions (presumably including permitting activities for major projects, such as offshore wind development) do not adversely affect EFH. Requiring the Council to comment on federal and state agency actions that are likely to adversely affect habitat will increase Council workload, but will also ensure that Council interests are described and considered. The requirement that agencies respond to the Council comments are a key feature that will promote a dialog between the Council and the agencies.

This section would modify the MSA required elements of FMPs to “minimize adverse effects on essential fish habitat.” This would remove the current phrase “to the extent practicable.” This is a significant change that would change the way measures to minimize adverse effects are evaluated. In the extreme, the only way to minimize adverse effects is to prohibit fishing, or at least prohibit certain gears. Removing the practicability language creates an opportunity to litigate any FMP that allows any adverse effects whatsoever to continue in order to comply with the goals of the MSA and its National Standards. Any plaintiff need only show that some additional measure would further reduce any effects, regardless of whether the measure is practicable or conflicts with one of the National Standards. Similar language would be added for HAPCs, and could have similar impacts.

This section also defines “Habitat Area of Particular Concern” in terms that are different than the current definition in 50 CFR 600.815(a)(8). For example, it includes a criteria that says an area that “may become important to the health of managed species” due to anticipate future environmental conditions. This is a standard that will be difficult, if not impossible, to apply. It could also dramatically increase the extent of HAPCs, since both current areas and possible future areas may be identified as HAPCs, and adverse effects must be minimized in both. This will make it difficult for fisheries to adapt to climate change.

Section 503. Reducing Bycatch.

This section would revise National Standard 9 by requiring Councils to minimize bycatch, without regard to practicability. This could lead to changing the way bycatch minimization is evaluated, and could lead to extensive litigation over bycatch measures. A similar change is made to the required elements of fishery management plans, imposing a requirement that bycatch be minimized without regard to other impacts, and without regard to the effect on fisheries. This

could be seen as effectively elevating National Standard 9 to take precedence over other National Standards.

In addition, removing the language “to the extent practicable” could have significant impacts on recreational fisheries. Some recreational fisheries do not have catch and release programs, and size restrictions can lead to a high percentage of discards. In those cases the only way to minimize discards of one species may be to impose seasonal closures on all recreational fishing.

The requirement for the Secretary to establish a national Standardized Bycatch Reporting Program (SBRM) is difficult to evaluate. 50 CFR 600, Subpart R, already specifies requirements for regional SBRM programs. It is not clear whether the proposed statutory changes are intended to replace this guidance. Given the differences between regional fisheries, it may prove difficult to design a national program and it is not clear this would be an improvement over the current approach.

Section 504. Improving Rebuilding Outcomes.

This section would modify the MSA to clarify the difference between a stock that is depleted (at a low level of biomass) and a stock subject to overfishing. This distinction is made in the National Standard guidelines, but not in the MSA; this change would align the two.

The definition of the term depleted clarifies that this may not be due solely to overfishing, but still requires Council action. This has the potential to be problematic, as the Council only has the ability to influence fishing mortality. In the case of a depleted status that is not due to overfishing as a primary cause, the Councils are still charged with developing a rebuilding plan that makes adequate progress - something that may be beyond its ability to do if the cause of the depletion is ecosystem changes or habitat loss, for example. No allowance is made for such a situation when the agency evaluates adequate progress, or when establishing a rebuilding period. It is theoretically possible that a depleted status that is not caused by overfishing could not be addressed even if fishing mortality is eliminated, yet this section does not address that possibility.

The MSA would be amended to revise the time period for rebuilding to be based on the time to rebuild in the absence of fishing plus one mean generation. This revision addresses a discontinuity in the rebuilding period that exists at present because of the ten-year maximum period. It is possible that in the case of a fast-growing stock, this change will result in a rebuilding period of less than ten years. It also prevents the Council from explicitly considering the needs of fishing communities and interactions within the ecosystem when establishing a rebuilding plan. This effectively removes consideration of National Standard 8 when rebuilding plans are developed. This will remove the flexibility Councils currently have to design rebuilding plans that balance the needs of communities with the requirement to rebuild. By removing the consideration of interactions within the ecosystem, this change inhibits the use of Ecosystem-Based Fisheries Management Approaches when developing a rebuilding plan.

The MSA would be further revised to clarify Council actions if there is a determination that adequate progress is not being made. This section is unclear. It states that a Council must make

revisions necessary to “achieve adequate progress toward rebuilding by the established rebuilding deadline.” Does this mean that measures must be designed to achieve the rebuilding target by the original end date? This may be impossible – particularly if the lack of progress is due to new scientific information that is received late in the original period. In this case, the plan may have been on track and may not have failed, but will now not reach the rebuilding target. Or does the proposed language mean that by the end date, adequate progress must be demonstrated?

In the case of a failed rebuilding plan, requiring the Council to take action within nine months of notification will create a very short timeline. If the new plan requires an EIS, this is insufficient time to comply with NEPA requirements for scoping and other hearings and still take Council action within the nine month period. If an EIS is not required, this is still an aggressive timeline for developing a new rebuilding plan, given the requirement for the Councils to conduct an open and transparent process as the plan is developed.

Section 505. Depleted Fisheries and Preventing Overfishing

This section would amend the MSA by adding a definition for “depleted.” As previously mentioned, this would align the statute with the National Standard guidelines by making it clear that depleted refers to a biomass level, while overfishing refers to a rate of removals. Confusion is caused by the reference that the term “depleted” has the meaning previously given by the statute to the term “overfished.” The MSA at present says that “The terms “overfishing” and “overfished” mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” It is unclear how the term depleted can refer to a biomass level and a rate of level of fishing mortality at the same time.

Section 302(g)(1) of the MSA would be amended to expand the duties of the scientific and statistical committee. Of most concern is the requirement for the SSC to provide the Council “...reports on stock status and health, sources of mortality, bycatch, habitat status, social, ecological, and economic impacts of management measures, and sustainability of fishing practices, and prevailing and anticipated impacts of climate change on fish stocks, fishing communities, and fishing sectors.” The SSC is not staffed or funded to provide this extensive series of reports. SSC members are essentially volunteers who provide advice on the interpretation of work prepared by others. The SSC is not a research body and does not routinely perform analyses. This tasking would require a significant reorganization of the SSC, including dedicated staff and funding, if they are to meet these requirements.

Section 303(a)(1) of the MSA would be amended to require that objective and measureable criteria for determining when a fishery is depleted¹ may not be less precautionary than the recommendations of the SSC. This text is confusing, as the definition of depleted that would be adopted by H.R. 4690 does not refer to fisheries, but stocks or stock complexes; there is no definition of when a fishery (which may consist of more than one stock) is overfished. This section also puts the SSC in a policy role, as opposed to an advisory role. The setting of

¹ The current text uses the term overfished, which would presumably be replaced by the term depleted if H.R. 4690 is adopted.

reference points involves a balancing of risks and benefits, which is the purview of the Council. These elements have both a biological and social/economic component.

Section 302(h) of the MSA would be amended to (among other things) require Councils to develop a plan to protect EFH in the region from adverse effects caused by fishing. As previously noted, the elimination of a requirement that measures such measures be practicable will open the door to litigation over any measure that allows fishing. In addition, while a Council can regulate fishing, there is no authority to regulate other activities that may adversely affect EFH. This severely limits the Councils ability to implement a plan to increase the quality, quantity, or representativeness of EFH. It is also not clear that data are available to measure changes in EFH over a short time scale in order to measure the effectiveness of any plan. Collecting such data is expensive, and the agency would probably need additional funding in order to meet these requirements.

Section 508. Forage Fish Conservation

The requirement to assess, specify and reduce catch limits for forage fish by the diet needs of other species will be difficult, if not impossible, to accomplish. In most instances, accurate estimates of the amount of forage fish needed by predators is not known. Such estimates are limited by available data, and complicated by the opportunistic feeding habits of most predators. The NEFMC established an ABC control rule for Atlantic herring that considered the needs of predators, but even this effort was hampered by a lack of data and difficulty understanding the impact of predators on forage species.

The proposed statutory language on the management of river herring and shad is confusing. The language directs the Secretary of Commerce to amend two fishery management plans, presumably through a Secretarial Amendment, and then to follow with additional amendments to adopt measures needed for their conservation and management. How this will be coordinated with Council management of these two FMPs is unclear.

The requirement to reallocate existing resources to provide a minimum observer or electronic coverage of 60 percent of mid-water trawl trips will reduce coverage in other fisheries unless additional funding is provided. It is not clear how this requirement will interface with the industry-funded monitoring program implemented for vessels in the Atlantic herring fishery. Does this requirement reduce the requirement for industry funding?