

DRAFT COUNCIL STAFF NOTES ON LEGISLATIVE COMMITTEE COMMENTS ON
HR 5018 - THE AMERICAN FISHERIES MANAGEMENT AND
MARINE LIFE ENHANCEMENT ACT

The Legislative Committee (LC) met April 28, 2006 at the office of the Pacific Fishery Management Council (Council) in Portland, Oregon. The LC focused discussions on proposed legislation pertaining to the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), particularly H.R. 5018 the *American Fisheries Management and Marine Life Enhancement Act*. LC comments were conveyed in a letter (Agenda Item B.3.a, Attachment 3) sent to Congressman Pombo and the cosponsors of H.R. 5018, other key members of Congress working on MSA reauthorization, as well as staff members of the U. S. Senate Committee on Commerce, Science, and Transportation and the U.S. House Subcommittee for Fisheries, Conservation, Wildlife, and Oceans in advance of a May 17, 2006 work session of the U.S. House Committee on Resources to review and revise the bill. One result of the May 17 work session was an amended version of HR 5018 dated May 26, 2006 (Agenda Item B.3.a, Supplemental Attachment 5).

This report is intended as a review of HR. 5018, as amended, to note significant changes in the bill. The report has not been reviewed by the LC or the Council.

The amended version of HR 5018 no longer contains language regarding the competing statutes of MSA and the National Marine Sanctuaries Act (NMSA). Under Section 10 of the bill as introduced, fishing regulations promulgated under the NMSA would be required to meet provisions of the MSA, including national standards under MSA Section 301(a). This section has been removed from HR 5018 as amended.

Six sections were added to HR 5018:

- **Section 17 - Amendment Regarding Definitions of Fishing Community and Recreational Fishing Industry.** Adds “recreational participants, marina owners and operators, for-hire vessel owners and operators, bait and tackle shop owners and operators” to the definition of ‘Fishing Community’. Also adds a new term, ‘recreational fishing industry’ defined as “individual anglers, boat builders, fishing tackle manufacturers, for-hire vessel owners and operators, bait and tackle shop owners and operators, and recreational marina owners and operators.”
- **Section 18 - Consideration of Economic Impacts** - Adds economic impact analyses to the required provision of fishery management plans.
- **Section 19 - Regional Coastal Disaster Assistance, Transition, and Recovery Program** - Creates a program to “provide immediate disaster relief assistance to the fishermen, charter fishing operators, United States fish processors, and owners of related fishery infrastructure affected by the disaster.”
- **Section 21 - Review and Report Regarding Violation of Disclosure, Conflict of Interest, and Recusal Provisions** - Requires the Secretary of Commerce to review all Regional Fishery Management Council votes that have occurred since the passage of the Sustainable Fisheries Act in 1996 and report, within six months, any violations and proposed changes of existing MSA provisions on disclosure, conflict of interest, or recusal.

- **Section 22 - Report on Effects of Hurricanes** - Requires the National Oceanic and Atmospheric Administration to report to Congress on the effect of 2005 hurricanes on fisheries and fish habitat.
- **Section 23 - Study of the Acidification of the Oceans and Effect on Fisheries** - Requires the Secretary to report on this process and its effect on fisheries.

Council staff notes have been added to the original LC comments below to reflect where changes recommended by the LC were made in the May 26, 2006 Committee Amendment of H.R. 5018.

H.R. 5018, Section 3. Science-Based Improvements to Management

(a) Harvest Level Caps

The Pacific Council is supportive of H.R. 5018's proposed language to ensure catch limits are based on the best available science and do not exceed acceptable biological catch levels as recommended by the Scientific and Statistical Committee (SSC). The Pacific Council already implements this sound resource management approach. Further, the Pacific Council effectively utilizes in-season management mechanisms to ensure the adopted acceptable biological catch levels are not exceeded whenever possible.

Unlike H.R. 5018, other bills call for a "penalty" provision in instances where the catch inadvertently exceeds adopted catch levels, the penalty being a commensurate deduction from the following year's harvest allowance. Some call for a policy to carry both overages and underages into the following year. The Pacific Council disagrees with both of these potential provisions.

Overages should not be deducted from the next year's harvest because the overage could have a minor biological effect if the overage is minimal under an in-season management policy and a new stock assessment or new management measures take the overage into account. It can be risky to rollover uncaught harvest allowance to the next year because one possible reason for the underage is an inaccurate stock assessment, a result that is not often discovered within one year. Further, Pacific Council-managed groundfish fisheries operate under a biennial management process that is not amenable to such mechanisms. Additionally, catch data is often not timely enough for such a management response. Therefore, the Pacific Council is supportive of the absence of such requirements in H.R. 5018.

To ensure full participation of the public and Pacific Council advisory bodies in setting catch limits without exceeding the SSC's recommendations for acceptable biological catch, the Pacific Council recommends the H.R. 5018 Sec 3(a)(2) recommended language for MSA Section 302(h)(7) read, "(7) adopt a total allowable catch limit or other annual harvest effort control limit for each of the fisheries for which such a limit can be established, after considering the recommendation of the SSC and other advisory bodies of the Council having jurisdiction over the fishery, which shall not exceed the recommendation for the acceptable biological catch as recommended by such SSC; and".

Section 3(a) remains the same as introduced and the recommended text change was not included.

(f) Regional Stock Assessments and Peer Review

The Pacific Council concurs with the proposed language in this section and notes the Pacific Council currently utilizes Stock Assessment Review Panels and its SSC to create a strong scientific peer review process.

H.R. 5018, Section 4. Data Collection

(c) Confidentiality of Information

In the interest of the specific need for increased socioeconomic data collection for improved fisheries management (H.R. 5018, Section 4(d)), the Pacific Council recommends an additional conforming amendment under H.R. 5018, Section 4(c)(2) as follows, “Section 303(b)(7) is amended by striking ‘(other than economic data)’ and inserting in lieu thereof ‘(other than confidential information)’”.

The recommended amendment not included in the bill. This could continue to be a conflict between HR 5018 Sections 4(d) and 18 and MSA Section 303(b)(7).

(e) Need for More Frequent Stock Surveys

The Pacific Council along with its SSC and other advisory bodies currently coordinates with the National Marine Fisheries Service on a regular basis in reviewing stock assessment priorities and data needs. The Pacific Council recommends H.R. 5018, Section 4(e)(1) be amended to include the phrase “in consultation with Regional Fishery Management Councils” after “shall determine”.

Recommended amendment not included in HR 5018.

H.R. 5018, Section 5. Council Operations and Authorities

(a) Council Appointments

Regarding the Pacific Council’s Tribal Obligatory seat, tribal representation plays a vital role in the Pacific Council process and the tribal seat functions in a similar capacity as the official Washington, Oregon, and California state representatives. The Council recommends that, like the State government seats, the Tribal Obligatory seat should not be limited by term limits. The Council recommends MSA Section 302(b)(3) (16 U.S.C. 1852 (b)(3)), be amended by striking “paragraphs (2) and (5)” and inserting in lieu thereof, “paragraph (2)”.

Recommended amendment not included in HR 5018.

(b) Council Training

To clarify that the required training is intended for appointees new to the Regional Fishery Management Council (RFMC) process, the Pacific Council recommends the language proposed for MSA Section 302(k)(3) be amended to include the word “first” after the phrase “Council members”.

Recommended amendment not included in HR 5018.

(e) Observer Funding Clarification

The Pacific Council is unclear of the intent of the proposed language for MSA Section 303(e)(1)(A) which requires observer programs be paid for by the Secretary. This provision seems to preclude the use of any other funds, including the use of non-federal funds to reduce federal costs related to observer programs.

No change to this section.

(g) Habitat Areas of Particular Concern

The Pacific Council has been working in coordination with the National Marine Sanctuary Program in the establishment of fishing regulations within National Marine Sanctuaries and has identified habitat areas of particular concern in these waters. To help clarify jurisdictional authority for these areas the Pacific Council recommends language proposed for MSA Section 303(b)(18) be amended to add the phrase “including the water column” after the phrase “ or other methods for limiting impacts on habitat”.

This section was renamed “Marine Protected Area Authority” and does not include the recommended amendatory language.

H.R. 5018, Section 6. Ecosystem-Based Fishery Management

The Pacific Council is supportive of efforts to increase the application of ecosystem-based principles into fishery management. Pacific Council efforts to prohibit krill harvest, protect essential groundfish habitats, and provide adequate abundance of forage species are reflective of our increasing knowledge of the role of fishery management in the overall health of West Coast ecosystems. The balance between recovering populations of marine mammals and ongoing efforts to recover depressed fish populations is a major issue the Pacific Council feels needs addressing under any ecosystem-based approach to fishery management.

No change to this section.

H.R. 5018, Section 7. Limited Access Privilege Programs

(a) In General

The Pacific Council is currently in the process of developing an individual quota program for the trawl sector of the groundfish fishery. The Pacific Council strongly recommends that nothing in any MSA reauthorization legislation apply to, or disrupt the ongoing development of potential future amendment of its groundfish trawl individual quota program. Therefore the Pacific Council is supportive of H.R. 5018 proposed language for MSA Section 303A(h) which protects programs under development before the date of the bill’s enactment.

This provision remains in HR 5018.

In general, the Pacific Council notes inconsistent use of terms in this section of H.R. 5018. Terms such as limited access privilege, limited access system, shares, and allocation are not clearly defined and seem to have inconsistent application. The Pacific Council recommends a careful review of these terms and their definition as well as consideration of new terms to clearly

separate “privilege” programs, which allocate individual quotas, from “limited entry” programs, which also allocate privileges albeit in the form of licenses.

Terminology appears to be unchanged.

The Pacific Council believes “limited access privilege” or individual quota programs have primarily economic benefits with secondary biological benefits through improved catch accounting and reduced bycatch. Therefore, the Pacific Council recommends the proposed language under MSA Section 303A(c)(1)(A) be amended by striking “assist in” and inserting in lieu thereof “is not detrimental to”.

Recommended amendatory language not included in HR 5018.

Recognizing the growing technology of remote sensors, onboard cameras, and other electronic monitoring devices, the Pacific Council recommends MSA Section 303A(c)(1)(G) be amended to include the phrase “or appropriate electronic monitoring” after the phrase “use of observers”.

Recommended amendatory language not included in HR 5018.

To avoid potential increased workload and program delays, the Pacific Council would like to clarify that the provisions for the eligibility requirements for fishing communities under MSA Section 303A(c)(2)(A)(i) or regional fishery associations under MSA Section 303A(c)(3)(A) apply only to an initial distribution of quota shares and not to any subsequent purchases of quota shares by fishing communities or regional fishery associations.

Recommended amendatory language not included in HR 5018.

The Pacific Council understands the list of entities who substantially participate in the fishery under MSA Section 303A(c)(4)(F) is intended to be representative rather than comprehensive. To clarify this point, the Pacific Council recommends the phrase “but not limited to” be inserted after the phrase “as appropriate”.

Recommended amendatory language not included in HR 5018.

The Pacific Council believes RFMC processes represent the appropriate mechanism for initiating a limited access privilege program and does not see the utility of the petition process.

Provisions for a petition process remain in HR 5018 and appear unchanged.

(b) Fees

The Pacific Council believes the appropriate RFMCs should be closely involved with the determination of appropriate fees and the use of those fees. These fees should be collected and used for support of the entire program, including requisite observer coverage but, these federal fees should not be considered the sole funding source. Therefore, the Pacific Council recommends MSA Section 304(d)(2)(C) be amended to include the phrase “in consultation with the appropriate RFMCs” after “the Secretary shall”, insertion of the word “federal” prior to the first occurrence of the word “cost”, and insertion of “observer coverage,” after “data analysis”.

Recommended amendatory language not included in HR 5018.

H.R. 5018, Section 8. Joint Enforcement Agreements

The Pacific Council relies on effective collaboration between state and federal entities to enforce the increasing complex fishery regulations on the West Coast. This enforcement effort is greatly enhanced by the use of vessel monitoring systems. The sharing of data from these systems between state and federal enforcement personnel is critical. The Pacific Council would like to clarify that the improved data sharing provisions under MSA Section 311(i)(1) is not tied to an allocation of funds but rather to the establishment of a Joint Enforcement Agreement as described under MSA Section 311(i)(2).

To clarify allowable uses of vessel monitoring data in law enforcement, the Pacific Council recommends that MSA Section 311(i)(A) be changed to read “directly accessible on a real-time basis and available for the prosecution of State laws in State courts involving federally managed species, by State enforcement officers authorized under subsection (a) of this section.”

Recommended amendatory language not included in HR 5018.

H.R. 5018, Section 9. Funding for Fishery Observer Programs

(b) Observer Program Funding Mechanism

In keeping with previously established caps on fees, the Pacific Council recommends amending MSA Section 403(d)(2)(A) by adding the phrase “which shall not exceed 3 percent” after the phrase “ which may include a system of fees”. Additionally, as previously mentioned, the Pacific Council recognizes the increasing importance of electronic monitoring technology in fishery observation and recommends including a new category under MSA Section 403(d)(2)(A) that states “(iii) the cost of buying or leasing electronic monitoring equipment including, but not limited to, video equipment and satellite transponders”.

Recommended amendatory language not included in HR 5018.

The Pacific Council believes fees collected for general fishery observer programs should not be in addition to fees collected under a limited access privilege program. Therefore, it is recommended that a new section be included under MSA Section 403(d)(2) stating “(C) Fees collected under this subsection are not in addition to those collected under Section 304(d)(2)(B)(ii).

Recommended amendatory language not included in HR 5018.

H.R. 5018, Section 10. Competing Statutes

(c) Compliance with National Environmental Policy Act of 1969

The Pacific Council would like to reiterate that integrating any essential principles of the National Environmental Policy Act (NEPA) into the MSA and providing a technical exemption of the MSA from NEPA would be an important improvement in a reauthorized MSA. Such provisions can create great efficiencies in the public process without losing the intent of NEPA while minimizing superfluous litigation opportunities and conflicting time lines.

Section 10(c) was amended to require the Secretary of Commerce publish a determination that the provisions under MSA sections 303 and 304 are “substantially equivalent” to NEPA provisions.

(d) Review of Fishery Regulations in National Marine Sanctuaries

The Pacific Council has worked closely with the five National Marine Sanctuaries (NMS) on the West Coast on a variety of issues. Recent Pacific Council actions to establish areas closed to bottom-tending fishing gear in the Cordell Bank and Monterey Bay National Marine Sanctuary areas, and the ban on the harvest of krill to ensure the vital role krill play in the West Coast ecosystem are examples of effective collaboration between the Pacific Council, the National Ocean Service (NOS), the National Marine Sanctuary Program (NMSP), and the West Coast Sanctuaries. However, these regulatory actions were accomplished under the existing authorities of the MSA.

Existing language in H.R. 5018 is commendable in its recognition that fishing regulations promulgated under the National Marine Sanctuaries Act (NMSA) are not currently required to conform to national standards under MSA Section 301(a). Neither does the NMSA bring to bear the scientific and fishing industry expertise that exists in RFMC processes. However, H.R. 5018 does not go far enough in achieving the kind of clarity on fishery management the public expects.

HR 5018 Section 10(d) was removed from the bill.

The Pacific Council continues to support implementation of the April 2005 positions of the RFMC Chairs calling for changes to MSA as well as the NMSA to clarify the issue of fishery management authority as follows:

MSA and National Marine Sanctuary Act

Fishery management authority in NMS, for all species of fish as defined in the current MSA, shall be under the jurisdiction of the RFMCs and the Secretarial approval process described in the current MSA. This authority shall not be limited to species of fish covered by approved FMPs, but shall include all species of fish as defined in the current MSA and shall cover the full range of the species in the marine environment. Prior to reaching decisions on the management regulations affecting fishing in NMS waters, an RFMC shall give full consideration of the responsibilities, goals, and objectives of individual NMS and any specific recommendations of the NMS.

In addition to the proposed changes in the MSA above, the RFMCs also recommend the NMSA be amended to achieve jurisdictional clarity as follows:

NATIONAL MARINE SANCTUARIES ACT

SEC. 302. [16 U.S.C. § 1432] DEFINITIONS

As used in this chapter, the term-

...

(8)"sanctuary resource" means any living or nonliving resource of a national marine sanctuary, **excluding fish and Continental Shelf fishery resources under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1811)**, that contributes to the conservation, recreational, ecological, historical, education, cultural, archaeological, scientific, or aesthetic value of the sanctuary; and

SEC. 304. [16 U.S.C. § 1434] PROCEDURES FOR DESIGNATION AND IMPLEMENTATION.

(a) Sanctuary Proposal

...

(5) FISHING REGULATIONS-**The appropriate Regional Fishery Management Council shall prepare fishing regulations for any fish and Continental Shelf fishery resources within a sanctuary in accordance with Section 302 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1852). The Secretary shall review the proposed fishing regulations in accordance with Section 304 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1854), and other applicable statutes. Regional Fishery Management Councils shall cooperate with the Secretary and other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practical stage in drafting any sanctuary fishing regulations. Preparation of fishing regulations under this section shall constitute compliance with Section 304(d) of this Act. Fishing in compliance with regulations prepared under this section shall not constitute a violation of this Act.**

H.R. 5018, Section 11. Diminished Fisheries

(b) Duration of Measure to Rebuild Diminished Fisheries

The Pacific Council appreciates the effort to clarify the intent of the 10-year requirement for rebuilding diminished fisheries but recommends MSA Section 304(e)(4)(A)(i) be amended by striking the word "possible" and inserting in lieu thereof "practicable".

Recommended amendment to MSA not included in HR 5018. The definition of 'diminished' was changed from "with respect to a stock of fish, that the stock is of a size that is below the natural range of fluctuation associated with the production of maximum sustainable yield" to the definition in the Administration Bill on MSA reauthorization, "a fishery whose abundance is at or below a level that jeopardizes the capacity of the fishery to produce maximum sustainable yield on a continuing basis."
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H.R. 5018 Omissions

The Pacific Council notes the following issues have been raised in comparable bills on reauthorization of MSA in the United States Senate and encourages their consideration for inclusion in H.R. 5018 or subsequent federal legislation regarding MSA reauthorization.

State Authority for Dungeness Crab Fishery Management

The Pacific Council believes the current management and assessment of the Dungeness crab resource on the West Coast is adequate under State authority and recommends removing the sunset clause as the law already contains provisions for the termination of State authority upon completion of a fishery management plan under MSA.

Recommendation not included in HR 5018.

Western and Central Pacific Fisheries Convention Appointments

The Pacific Council is concerned with those provisions in S. 2012 , the *Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2005*, Title V, the *Western and Central Pacific Fisheries Convention Implementation Act* which add a Western Pacific Fishery Management Council (WPFMC) member as a United States Commissioner and add the chair of the WPFMC's Advisory Committee to the WCPFC Advisory Commission. The Pacific Council believes this action would give undue influence to the WPFMC and undermine West Coast interests in Western and Central Pacific Fisheries. The Pacific Council notes that many of the vessel owners, fisherman, and processors who participate in these fisheries or who maintain fishery support facilities in the Western Pacific are based on the West Coast. The Pacific Council would support the removal of the proposed WPFMC representation or the addition of similar representation for the Pacific Council.

Recommendation not included in HR 5018.