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April 1, 2009

Mr. Donald K. Hansen, Chair  
Pacific Fishery Management Council  
7700 NE Ambassador Place, Suite 101  
Portland, Oregon 97220-1384

RE: Agenda Item D.3 –FMP Amendments to Implement Annual Catch Limit (ACL)  
Requirements

Dear Mr. Hansen and Council members:

On behalf of Ocean Conservancy and our nearly 200,000 members and activists nationwide, we respectfully submit the following comments regarding the revisions to the Highly Migratory Species (HMS) Fishery Management Plan (FMP) to address the annual catch limit (ACL) and accountability measure (AM) requirements of the reauthorized Magnuson-Stevens Fishery Conservation and Management Act (MSA). While we look forward to working with the Council as it moves forward with an HMS FMP amendment to implement new MSA requirements and management guidelines, these comments specifically relate to the application of the ACL and AM requirements to “international fisheries.” Despite agency assertions to the contrary, Congress did not intend to exempt “international fisheries” from the ACL and AM requirements. As such, we recommend that the Council amend the HMS FMP to reflect these statutory requirements, as well as key components of management guidelines.

The flagship conservation requirement of the MSA, National Standard One, states that “conservation and management measures shall *prevent* overfishing.” 16 U.S.C. §1851(a)(1) (emphasis added). Yet, twelve years after passage of the Sustainable Fisheries Act, which was *also* supposed to prevent overfishing for *all* managed stocks, overfishing continues to plague fisheries across the United States and abroad. As you know, the MSA, as amended in 2007 by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA), includes new fishery management provisions designed to end overfishing in all fisheries and help ensure that it does not reoccur, including a requirement that FMPs include annual catch limits for all fisheries and accountability measures to ensure limits are not exceeded. 16 U.S.C. §1853(a)(15). In January, the National Marine Fisheries Service (NMFS) finalized revisions to the National Standard One (NS 1) guidelines that will help guide this Council in effectively and fully implementing important MSA provisions. While the Pacific Council has been largely

supportive of domestic and international efforts to end overfishing of highly migratory species in the Pacific region, implementation of the new MSA provisions and the NS1 guidelines is critical to ensuring that measures truly end and prevent overfishing, that catch stays within prescribed catch limits, that rebuilding goals are met, and that optimum yield (OY) is achieved.

We urge the Council to thoroughly analyze the HMS FMP to determine the specific changes that must be made in order to comply with the MSA and the NS1 guidelines. We look forward to working with you to ensure that the key components of the NS1 guidelines are included in the FMP. We are immediately concerned, however, that the Council may be moving forward with an HMS FMP amendment under the assumption that all “international fisheries” are exempted from the ACL and AM requirements of the MSA.

We believe the NS1 guidelines fundamentally misinterpret section 104(b) of the MSRA as exempting stocks managed under an international agreement in which the United States participates (“international fisheries”) from the MSRA’s ACL and AM requirements. See §600.310(h)(2)(ii). Congress included a provision in the MSRA that exempted species with a life cycle of approximately one year or less from ACL and AM requirements of the MSA (MSRA §104(b)(2)), and set out effective dates for implementing the ACL and AM requirements (MSRA §104(b)(1)). Regarding international fisheries, this provision merely allows for different effective dates for ACLs and AMs than those for domestic fisheries, and was not intended to exempt international fisheries from ACL and AM requirements.

Section 104(b) of the MSRA states:

(b)The amendment made by subsection (a)(10) [which created section 303(a)(15) of the MSA, the ACL/AM provision]—

(1) shall, unless otherwise provided for under an international agreement, take effect—

(A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and

(B) in fishery year 2011 for all other fisheries; and

(2) shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species; and

(3) shall not limit or otherwise affect the requirements of section 301(a)(1) or 304(e) of the MSA.

Paragraph (1) refers to the effective dates of the provision. Paragraph (2), on the other hand, is a clear exemption for fisheries with an annual life cycle. Had Congress intended to exempt international fisheries, it would have included that exception in paragraph (2) along with the one-year life cycle species, or created an additional paragraph for international fisheries. The correct interpretation is that paragraph (1) refers to the timing of implementation of the new ACL/AM requirements while paragraph two addresses exemptions. In other words, the ACL requirements of the MSA shall take effect in 2010 or 2011, unless an international agreement to which the U.S. is a party provides for another effective date.

Assuming for purposes of argument that the agency's faulty legal interpretation is maintained, the provision at the very least must be interpreted to apply only to those stocks that are *actively* managed by international commissions to which the U.S. is a party AND when the RFMO with jurisdiction over the stock or stock complex has established annual catch limits that are consistent, at a minimum, with the conservation objectives outlined in the MSA, including ending overfishing immediately and rebuilding overfished stocks in as short as time as possible. In many instances, RFMOs are unable to reach an agreement on conservation and management measures. For example, there are currently no internationally agreed upon conservation measures for bigeye or yellowfin tuna in the eastern Pacific Ocean. As such, it would be contrary to the intent of the law to exempt bigeye and yellowfin from the ACL requirements where no international management exists.

Moreover, there still remains substantial ambiguity as to what constitutes a stock or stock complex "subject to management under an international agreement" and would therefore be "exempt" from the ACL and AM requirements. For instance, the Antigua Convention for the IATTC defines "[f]ish stocks covered by this Convention" as "stocks of tunas and tuna-like species and other species of fish taken by vessels fishing for tunas and tuna-like species in the Convention Area." Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica ("Antigua Convention"), Section I, Article I(1). We are concerned that the agency's interpretation of the MSRA, coupled with a lack of definitional specificity could mean that anything and everything that is caught by vessels subject to IATTC management jurisdiction may be excluded from the ACL requirement. Likewise, the Western and Central Pacific Fisheries Commission (WCPFC) Convention defines HMS as those species listed in Annex I to the United Nations Convention on the Law of the Sea (UNCLOS). If Annex I were used as the basis for determining the applicability of the "international exception", then all HMS FMP management unit species would be exempted from the ACL and AM requirements. This overly broad exemption is contrary to both the letter and spirit of the law.

Already, U.S. fishermen targeting HMS off the west coast are arguing that "non-target fish" (i.e., opah and dorado) that are often caught and retained for sale should be exempt from the ACL and AM requirements because even though they are not *actively* managed by the IATTC, they are *subject to* the management of the IATTC as defined in the Convention. This interpretation represents a significant loophole and potential avenue by which those seeking relief from regulations and constraints on catch can argue that individual stocks are exempt from the ACL and AM requirements.

Application of the alleged exemption notwithstanding, it is also worth noting that stocks managed under an international agreement are not exempt from compliance with other management requirements, including the establishment of allowable biological catch (ABC).

Once again, we look forward to working with the Council to develop and implement measures that are consistent with the ACL and AM requirements of the MSRA. As part of this initial scoping period, we hope that the Council will take a broad and inclusive view of which HMS MUS are to subject to these statutory requirements to ensure that the HMS FMP complies with both the spirit and the letter of the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Meghan Jeans". The signature is written in a cursive, flowing style.

Meghan Jeans  
Pacific Fish Conservation Manager