



June 10, 2015

Ms. Dorothy Lowman, Chair
Pacific Fishery Management Council
1100 NE Ambassador Place, #101
Portland, Oregon 97220

RE: Agenda Item D.6.a. NMFS Report

Dear Chair Lowman and Council Members:

We write to clarify the Pacific Fishery Management Council's ("PFMC's") authority under the Magnuson Stevens Fishery Conservation and Management Act ("MSA") to protect habitat in the Exclusive Economic Zone ("EEZ"), regardless of the relationship of that habitat to managed species. Councils have multiple sources of authority under the MSA to incorporate habitat protections into FMPs, including but not limited to protections for deep sea corals ("DSC"). As explained below, NMFS's suggestion that the Council's authority to protect marine habitats, with the exception of the Council's specific DSC authority, "requires a relationship to the managed fishery" does not have a sound basis in the plain language of the MSA and contradicts Congressional intent. Cf. NMFS Report to Council, Agenda Item D.6.a., June 2015, p.1 http://www.pcouncil.org/wp-content/uploads/2015/05/D6a_NMFS_Report_AuthoritiesEFHandRCA_JUN2015BB.pdf. In reality, the PFMC has clear authority to close waters beyond 3,500 meters to bottom trawling.

The MSA Gives the Council Broad Authority to Protect Habitat

The MSA provides broad authority to manage and conserve marine habitats within the U.S. EEZ. The notion that discretionary conservation and management measures under the MSA must have a direct link to a currently exploited fishery ignores the findings and purposes of the Act. A primary purpose of the MSA is "to conserve and manage the *fishery resources* found off the coasts of the United States, and the anadromous species and Continental Shelf *fishery resources* of the United States, by exercising . . . sovereign rights for the purposes of exploring, exploiting, *conserving*, and managing *all fish* within the exclusive economic zone. . . ." 16 U.S.C. § 1801(b)(1) (emphasis added). The MSA defines "fishery resources" to mean "any

fishery, any stock of fish, any species of fish, and any habitat of fish.” *Id.* § 1802(15). Recognizing that habitat loss posed one of the greatest long-term threats to fisheries, Congress also emphasized that “[h]abitat considerations should receive increased attention for the conservation and management of fishery resources of the United States.” 16 U.S.C. § 1801(a)(9).

The MSA definition of “fishery resources” is thus substantially broader than the definition of “fishery,” which is “one of more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and any fishing for such stocks.” *Id.* § 1802(13). Notably, even the term “fishery” encompasses more than a particular stock of fish; it also encompasses the activity of attempting to catch those fish, including the methods and gear used to catch them.

The statutory definition of “conservation and management” also underscores the broad scope of MSA authority. “Conservation and management” refers to legal measures “required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource *and* the marine environment; and . . . which are designed to assure that . . . irreversible or long-term adverse effects on fishery resources *and* the marine environment are avoided.” *Id.* § 1802(5) (emphasis). This definition makes clear that “conservation and management” measures authorized by the MSA are intended to benefit not just current or future fisheries, but the marine environment as a whole. All of these provisions reflect Congress’s intent to foster forward-looking measures to protect marine habitats.

These longstanding legal authorities for habitat protection were bolstered and emphasized in the 2007 re-authorization of the MSA, which reinforced existing authority by adding new provisions for ecosystem protections. The authority for Councils to implement ecosystem protections was specifically referenced in the Senate Report on the 2007 reauthorization of the MSA, noting that,

A number of the Councils have already demonstrated progress in implementing ecosystem approaches to fisheries management using existing Magnuson-Stevens Act authorities. In recognition of these achievements, and *to clarify existing statutory authority to incorporate ecosystem considerations in FMPs*, section 105 includes a provision that would expressly authorize FMPs to contain management measures for the conservation of non-target species and habitat.

S. Rep. 109-229, 109th Cong. 2nd Sess. 2006, 2006 WL 861883 *23 (emphasis added).

In sum, the Council has the authority under the MSA to close waters beyond 3,500 meters to bottom trawling to protect the marine ecosystem. As discussed in more detail below, multiple MSA provisions give the Council authority to conserve and manage marine habitats by prohibiting certain types of fishing or gear, regardless whether that habitat area has a relationship to a currently managed fishery.

MSA Section 303(b) Does Not Require that Habitat Protections Be Related to the Managed Fishery

MSA section 303(b) provides that the Council may include a number of discretionary provisions in any FMP prepared for any fishery. 16 U.S.C. § 1853(b). Plainly read, this section of the statute simply authorizes Councils to undertake certain types of measures – many of which are expressly oriented toward conserving the marine environment – and include them in their FMPs. NMFS notes that it disapproved a similar deepwater closure in 2006 based on the notion that such measures must be “necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery” and suggests that the same standard applies here. NMFS Report to Council, Agenda Item D.6.a., June 2015, p.1 http://www.pcouncil.org/wp-content/uploads/2015/05/D6a_NMFS_Rpt_AuthoritiesEFHandRCA_JUN2015BB.pdf (“Two of these authorities, §303(b)(2)(A) and §303(b)(12) require a relationship to the managed fishery.”). NMFS’s argument was incorrect in 2006 and it remains incorrect now.

The “necessary and appropriate” language NMFS relies on is found in section 303(a)(1), which sets forth measures that Councils are “required” to include in every FMP. 16 U.S.C. § 1853(a)(1). The same language does *not* appear at the beginning of section 303(b).

One of the most basic rules of statutory interpretation dictates that where particular language appears in one section of a statute but not in the other, Congress only intended that language to apply to the section where the language explicitly appears. “When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded.” *Arizona Elec. Power Co-op. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987). NMFS’s superimposition of language from section 303(a)(1) onto section 303(b) violates this basic principle and would inappropriately limit the Council’s discretionary authority.

In fact, the phrases “necessary for the conservation and management of the fishery” and “necessary and appropriate for the conservation and management of the fishery” appear in only three discrete places in 303(b) – 303(b)(3), 303(b)(8), and 303(b)(14), none of which is at issue here. 16 U.S.C. §§ 1853(b)(3), (8), (14). Here again, basic rules of statutory interpretation require that we assume that Congress acted knowingly and intentionally when it included that

language in one subsection but omitted it in the others. The fact that the “necessary and appropriate” language appears only in those particular subsections and not at the beginning of 303(b) indicates that the requirement only applies to those subsections.

To the extent NMFS assumes that some “relationship to the managed fishery” is required by the language in subsections 303(b)(2)(A) and 303(b)(12) themselves, that assumption lacks any clear basis in the statute. Section 303(b)(2)(A) simply allows the Council to designate zones where and time periods when fishing will be limited or prohibited, or only specified types of gear will be permitted. 16 U.S.C. § 1853(b)(2)(A). The plain language of this provision does not require that the area to be regulated be subject to any current fishing activity or that it even support a currently managed fishery. Indeed, the provision does not specify any criteria for selecting a zone in which to restrict fishing. Rather, the most rational, obvious reading of the provision is that it allows the Council to prospectively regulate fishing activity in order to *prevent* adverse impacts to zones where the Council chooses to do so.

Section 303(b)(12) is similarly broad, allowing the Council to “include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations.” 16 U.S.C. § 1853(b)(12). The provision’s requirement for the Council to “consider” such ecological factors affecting fishery populations does not translate to a requirement that management measures to conserve non-target species and habitats have a direct relationship to a managed fishery. The Senate Committee on Commerce, Science, and Transportation characterized the purpose of this provision, which was added in the 2007 Magnuson Act amendments, as “to allow an FMP to include management measures that consider a variety of ecological factors affecting fishery populations, including the conservation of target and non-target species. This provision is intended to encourage Councils to continue to include ecosystem considerations in FMPs.” S. Rep. 109-229, 109th Cong. 2nd Sess. 2006, 2006 WL 861883 *24. Far from requiring the Council to focus narrowly on the needs of the managed fishery, this provision is meant to foster broader efforts to address the needs of the ecosystem, recognizing that healthy fishery populations depend on healthy ecosystems.

In sum, the Council has the authority under the MSA’s discretionary 303(b) provisions to close waters beyond 3,500m to bottom trawling to protect the marine ecosystem regardless whether such a closure is considered “necessary and appropriate for the conservation and management” of the groundfish fishery. In fact, NMFS’s own regulatory guidelines specify that

“[a]n FMP may describe, identify, and protect the habitat of species not in [a fishery management unit].” 50 C.F.R. § 600.805(b)(1).¹

Even if NMFS could identify a rational basis for requiring the Council to demonstrate that the proposed closure has a “relationship to managed fishery,” such a relationship does exist. The potentially harmful gear that would be prohibited in waters deeper than 3,500m is the gear used in the groundfish fishery. That gear is an essential element of the groundfish fishery because it is the means by which stocks in the fishery are caught – *i.e.* trawling is how the fishing is accomplished. That gear is known to cause damage to seafloor habitats. The deepwater closure seeks to prevent such damage, thereby conserving habitat for the broader array of fish stocks within Council jurisdiction, prey for managed species, and the marine environment as a whole. As discussed above, however, the Council need not establish these connections in order to use its clear, discretionary authorities under MSA section 303(b).

Conclusion

Congress gave the Councils ample authority to enact forward-looking, precautionary measures to protect all fish stocks and habitats in the United States EEZ, regardless whether such protections have a direct relationship with a currently managed fishery. We encourage the PFMC to exercise this authority as Congress intended. Thank you for your time and consideration of this issue. Please do not hesitate to contact me with any questions.

Sincerely,



Andrea A. Treece
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¹ It is worth noting that prey species eaten by fish species within the groundfish FMU likely occur within the proposed deepwater closure area. Because food sources are part of essential fish habitat, the likely presence of prey species makes this area appropriate for designation as essential fish habitat pursuant to MSA section 303(a)(7) and 305(b).