



June 2013

Fwd: H.1 - Congressional Research Service response to questions regarding List of Fisheries

10 messages

Mike Burner <mike.burner@noaa.gov>
To: Jennifer Gilden <jennifer.gilden@noaa.gov>

Fri, Jun 21, 2013 at 3:42 PM

Begin forwarded message:

From: Steve Marx <SMarx@pewtrusts.org>
Date: June 21, 2013, 2:32:45 PM PDT
To: "pfmc.comments@noaa.gov" <pfmc.comments@noaa.gov>
Cc: "mike.burner@noaa.gov" <mike.burner@noaa.gov>
Subject: H.1 - Congressional Research Service response to questions regarding List of Fisheries

Hi Mike and others,

Marci Yaremko requested that I submit the attached document for the record, under agenda item H.1. We submitted two questions to the Congressional Research Service regarding the item C from the Council's motion on forage fish from June 2012 (Agenda Item G.1.d, also attached). The document attached here includes the questions submitted and the response we received from the Congressional Research Service.

Thanks very much,

Steve

Steve Marx

Senior Associate, US Oceans, Pacific

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2 attachments

 **CRS response re List of Fisheries.pdf**
180K

 **June 2012 Forage Motion.pdf**
76K

Jennifer Gilden - NOAA Affiliate <jennifer.gilden@noaa.gov>
To: Chuck Tracy - NOAA Affiliate <Chuck.Tracy@noaa.gov>

Fri, Jun 21, 2013 at 4:19 PM

Chuck, what do you think is the best way to deal with these? Label them as supplemental attachments?

It is the Council's intent to recognize the importance of forage fish to the marine ecosystem off our coast, and to provide adequate protection for forage fish. We declare that our objective is to prohibit the development of new directed fisheries on forage species that are not currently managed by our Council, or the States, until we have an adequate opportunity to assess the science relating to the fishery and any potential impacts to our existing fisheries and communities.

The Council directs the Ecosystem Plan Development Team (EPDT) to proceed with Option 2 as detailed in Agenda Item G.1.b, EPDT Report, and schedule a progress report on its work to update and revise the List of Fisheries (LOF), to be made to the Council as soon as possible after completion of the fishery ecosystem plan (FEP). The Council further directs that:

- A. Regarding the LOF, all Council advisory bodies shall be tasked with identifying fisheries and authorized gears for Federal fisheries operating in the U.S. Exclusive Economic Zone (EEZ) off each state in the most specific and narrow terms possible, for incorporation into the updated List. This exercise shall be completed by the advisory bodies and provided to the EPDT as soon as possible after completion of the FEP.
- B. For state-managed fisheries, the states shall be responsible, through their EPDT representatives, for preparing the list of state-managed fisheries which have a nexus with Federal waters, for inclusion in the updated List.
- C. The EPDT's progress report shall include any analysis on the possible effectiveness of the LOF application process in meeting the goal of preventing development of non-existent fisheries.
- D. The report shall also include, to the extent possible, any new information or analysis regarding the application of Section 600.747 of the Federal rules, including whether there is a possibility of amending these regulations for the West Coast such that additional requirements and specifications regarding the Council's review of applications could be formally incorporated into Federal regulations.
- E. Regarding the Council's standards which would be used in assessing whether a proposed new fishery could compromise conservation and management measures within the West Coast EEZ, the EPDT progress report shall provide full detail of the proposed standards and process, in order to make the procedural and content requirements clear and transparent to both applicants and the public, consistent with the recommendations outlined in Option 2 of the EPDT Report.
- F. As soon as possible after completion of the FEP and upon receipt of the Progress Report, the Council shall review and provide guidance so that the standards (for assessing new fisheries) can be finalized for incorporation into the FEP.

After completion of the FEP, the Council will proceed to incorporate any needed protections into our current suite of Fishery Management Plans through an amendment process.

Congressional Research Service (CRS) Response Regarding Federal List of Fisheries

Questions Submitted to CRS

- 1) The provisions at 50 CFR 600.725(v) describe and implement the notification requirement referred to in Section 305(a) of the Act. Could the agency (NMFS) change the provisions at 50 CFR 600.725(v) so that more than just notification and a 90 day waiting period were required for a new fishery? For example, could the provisions be changed so that a prospective fishermen would have to submit notification and wait until receiving explicit approval before fishing, rather than just have to wait 90 days? Or conversely, would changing this provision not be possible because it may conflict with section 305 (a) of the Act?
- 2) Can the “List of Fisheries” described in section 305(a) of the act be used to “reverse the burden of proof” on how new fisheries are developed. Currently, it is our understanding that if someone wants to try to catch and sell something that isn’t currently being managed or fished, they may do so without any regulation until the agency decides that it wants to manage it. We are trying to figure out if the regulations around this “List of Fisheries” can be tweaked – absent an act of congress – to say that someone has to provide notification and then wait until they get approval before fishing an unmanaged fish.

Response from CRS

These questions basically address the same issue, which is: can the provision governing the 90 day waiting period and approval be changed by agency action, or must the legislation be amended by an act of Congress? Three CRS analysts (one who deals with fisheries management, one who deals with legislative and legal issues, and one who specializes in administrative law issues) examined this issue independently and all agreed that the legislative intent of this provision seems to indicate that this provision must be changed by legislative action (i.e. an act of Congress), and cannot be changed by agency rulemaking. This issue is not clearly spelled out in the statute, and the issue has not been addressed by any court, so it isn’t entirely clear that legislative action is necessary. But, all CRS analysts agree that it appears very likely that the legislative intent was that this provision could only be changed through legislation, and not by agency action.