

## Detailed Comments from the North Pacific Fishery Management Council on the Commerce Committee MSA draft:

### Section 102 – Regional Fishery Management Councils

p. 7-9: We support the additional language regarding the use of SSCs, and making the SSC process satisfy the requirements of the Information (Data) Quality Act. It would be very helpful to clarify that federal employees (some of whom are critical members of the NPFMC SSC) can participate in this SSC review process (contrary to some provisions of the Data Quality Act).

**Regarding the establishment of TACs, it is probably more appropriate to reference ABCs as the limit point** (we often set TACs below ABC, in some cases equal to ABC, but at times the TAC may be slightly exceeded due to management realities, such as estimation of amounts of a particular species necessary as bycatch in other directed fisheries).

Regarding pay for SSC members, there remain concerns that (1) fairness with regard to agency SSC members, and (2) overall perception possibly created by paying SSC members for scientific advice. Also, it is unclear who makes the determination as to whether such a stipend will be paid.

Regarding Council training, we generally support development of a more specific Council training program, but not as a condition of voting.

p. 10: Regarding notice of meetings, we support the proposed changes (notification of meetings via means that will result in wide publicity, not newspaper), but also encourage language that will no longer require publication in the Federal Register of meeting notices (very few people read the Federal Register for notice of Council and committee meetings – our web-site and newsletters are the primary source for public to track council meeting notices and other council related information).

p. 11-13: Council coordination committee – looks great, but please make sure the language allows that coordination committee to close portions of their meetings (as each Council can now do individually) to discuss administrative or legal (litigation) matters. That is found in part 3 of section 302(i).

### Section 103 – Environmental review

The proposed language, under which the Secretary and CEQ would establish an integrated process for NEPA compliance, may allow for an improvement in the current process; however, it may not. If this approach is taken, it is critical that the Councils also be involved in developing this process. **We believe this is one of the most critical aspects of the pending MSA reauthorization, and we continue to strongly support**

the language as adopted by the 2005 national fisheries conference and by all eight of the Regional Councils, which adds critical NEPA aspects to the MSA, and thereby makes the MSA serve as the functional equivalent with regard to NEPA requirements. Suggested language in this regard has been previously provided.

#### Section 104 - Provisions affecting limited access privileges

Generally, the Council believes this is a necessary tool for fisheries management, including the authority to allocate privileges to a wide variety of stakeholders. We further believe many of the specifics (including initial allocations and other key program elements) need to be left to the discretion of the regional councils to address unique aspects of the fisheries and regions in which the fisheries occur.

More specific comments, section by section, follow:

p. 16 – Sec. 106(1) – although this provision deletes the provision that expressly prohibits collection of economic data from processors, those data may only be collected for conservation and management purposes, which is typically a limited purpose (not usually including the social issues that the Council is interested in). **Generally we support collection of economic and other information, but stress the need for clear confidentiality restrictions on that information.**

p. 19 – Sec. 303(b)(2) – this provision and others authorize community participation (suggesting the community government) – nothing is provided for an *entity that represents* one or more communities (see more detailed comments in community section below).

p. 19 – Sec. 303(b)(2)(A)(iii) – this seems to require current subsistence or commercial fishing to be eligible as a fishing community (see more detailed comments in community section below).

pp. 18-19 – Sec. 303(b)(2)(A)(ii) – requires submission of a community sustainability plan – *probably need more definition on what is a sustainability plan.*

p. 19 – Sec. 303(b)(2)(B) – This suggests that historic participation is what is important in including communities in the program – *not clear if it is current or historic participation or both that matter when including communities in programs.*

p. 20 - Sec. 303(b)(3)(A) – One issue with this section is whether harvest shares can be allocated to processors - allocation of fishing privileges needs to consider processing employment, historic harvesting, investments in and dependence on the fishery, and historic community participation. *Should be clear as to whether harvest shares can be allocated to processors.*

p. 20 – Sec. 303(b)(3)(B) – set asides of initial and secondary allocations for “entry level” and small scale fishing permitted – *need to clarify definition of “secondary allocation”.*

p. 21 – Sec. 303(b)(3)(D)(i) – caps must be set as percent of “total limited access privileges” under the program – *this appears to be a bit different from what we do in most cases (often is percent of sector or percent of the species), though it is not entirely clear what is meant by ‘total access privileges’, and we would rather maintain our current practice of setting caps with greater Council flexibility.*

p. 21 – Sec. 303(b)(3)(E) – a program is required to “minimize geographic consolidation of processing” – *at an extreme, this could imply many more locations for processing than is practicable.*

p. 21 – Sec. 303(b)(3)(F) – according to this all programs must authorize “vessels owners, fishermen, crewmembers, communities and others that substantially participate in the fishery” to hold or be issued privileges” – ***Two critical issues here (a) difficult to determine what is meant by ‘substantially participate’, and (b) Councils should have discretion to allocate to all these sectors – suggest changing ‘must’ to ‘may’.***

p. 22-3 – Sec. 303(b)(4)(D) – these provisions require a petition of “a group of fishermen, constituting at least a third of those actively engaged in participation in fishery” for the Council to initiate a plan amendment for a rationalization program – *this is a pretty steep standard, especially considering that “fishermen,” “actively engaged in participation in,” and “fishery” would need to be specifically defined. In any case, we do not support requirement for petition, or referendum, for Council to initiate a limited access program.*

p. 26– Sec. 303(c)(1) – *it is not clear what is authorized here – using the definition of limited access privilege, it appears to authorize only programs that create privilege to process specific poundages of fish – this is different from the associations created by the Gulf of Alaska rockfish program and Gulf rationalization program. Also, fishery associations are not defined – it is assumed these are AFA and rockfish type processor/cooperative associations, but it is not clear.*

p. 26-7 – Sec. 303(c)(1)(B) – *to establish processor privileges we must meet a very high threshold – the privileges must (under (ii)) be “necessary to protect fishing communities, maintain historic harvester and processor balance in the fishery, and ensure economic stability in the harvesting and processing sectors. Also, (under (iii)) the privileges must not result in “price-fixing or any other anticompetitive practices” – by their nature these privileges may be construed as anticompetitive – they reduce competition for landings. We must also have (under (iv)) sufficient economic data to develop such a program”. The hurdle we may never be able to get over is that (under (v)) the program must be “necessary to address impacts to the processing sector that cannot be mitigated by other means.” This could be very difficult to ‘prove’.*

p. 27 - Sec. 303(c)(1)(G) – *a requirement for inclusion of waste reduction and increased utilization could be problematic, particularly if fisheries have already been addressed with previous requirements.*

p. 29 - Sec. 303(c)(3)(E) - all programs must authorize “communities, processors and others that substantially participate in the fishing and processing sectors” to hold or be issued privileges – *again, this is a broad list of recipients, will be difficult to define, and Councils should be given the option to allocate to each of these sectors.*

p. 30 - Sec. 303(c)(3)(F) – this provision excludes foreign processors from holding privileges – uses AFA ownership and control standard. *This could be a problem in fisheries where major, long-standing processing capacity has foreign ownership.*

P. 34 – Cost Recovery – we support cost recovery for limited access programs; *however, the current language in the draft is very open-ended and we recommend consideration of some cap level (currently it is 3%).*

### Provisions specifically related to community aspects

Throughout, the Act references that access privileges can be acquired by ‘fishing communities’. It may be necessary to specify that privileges can be allocated to ‘an entity representing a fishing community’. All of our current and proposed programs allocate to an entity representing a community that is specified in regulation. Language in the draft could be construed such that the privileges can only be given to the community itself—which could be interpreted as limited to the ‘government’ of that community, and not a non-profit or fishing association, etc. set up for that specific program purpose. Adding ‘entity’ broadens it sufficiently. There are several places where this occurs in the draft.

P. 19 - Provisions (i) – (iv) seem to specify minimum criteria for communities participating in a limited access privilege program, and then (ii) allows the Councils to develop even more restrictive criteria. But my interpretation is that communities would at LEAST have to meet (i) – (iv). In specific, (ii) appears to limit the Councils to create criteria for eligible communities—you could not just pick community X and Y and Z to be part of a program.

(iii) appears to mean Councils could only allow communities in a program that had commercial or subsistence fishing within the Council’s management area. It doesn’t seem to limit it to communities with commercial fishing in the management area relevant to the specific limited access privilege program being created, however, you would just have to have some fishing in the BSAI or GOA.

Subsistence fishing is not defined; in the Act or in Federal regulations, with the exception of the halibut subsistence definition in 50 CFR 300.61.<sup>1</sup> Subsistence fishing is commonly defined differently from ‘personal use’ fishing (as defined in salmon) and definitely from ‘recreational’ fishing. So I would make sure that the intent was to constrict the Council to create programs for only those communities with commercial or subsistence fishing. (e.g., If we create a charter halibut IFQ program and include a community set-aside program – to be eligible a community would have to have commercial or subsistence fishing?)

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<sup>1</sup> *Subsistence halibut* means halibut caught by a rural resident or a member of an Alaska Native tribe for direct personal or family consumption as food, sharing for personal or family consumption as food, or customary trade.

In addition, under (iii), it says 'consist of residents who conduct commercial or subsistence fishing.' It seems this could be interpreted as communities with residents who are currently conducting fishing operations as of the date of the program....This may be limiting to very small communities in AK whose resident fishing activity is dependent on 2 or 3 people, weather, an open processor—they may not have any residents fishing this year, but they fished the last ten.

As far as (iv)—probably need to define what a 'community sustainability plan' is. It doesn't seem to necessarily have to be about fishing. I would interpret this as a plan that must be submitted by a community, after it has been determined eligible for some specific program at final action. It would be another part of an entity's 'application for qualification' that is submitted to NMFS to represent a specific community.

(B) mandates what the participation criteria for communities can be based on. On one hand, it seems broad enough that the Council could justify almost any set of criteria used. We consider all those things when we develop a program in general. On the other hand, NMFS encourages the use of objective criteria as much as possible, in order to be able to apply it correctly and have it hold up to appeals. Thus, we commonly use population and proximity to the fishery as our main, if not only criteria, with some landings threshold to show 'dependence' or 'use' of the fishery at issue. The criteria above is mandated, and yet very subjective. Even NOAA HQ social science program has spent years and hasn't yet defined what 'dependence on the fishery' means and how to determine it in each region. I'm not sure we could create objective criteria that would meet (B). We took this out of several analyses (most recently, Gulf rationalization) because of this issue.

P. 20 – It is unclear what is meant by a 'secondary harvesting privilege'.

Section 107: The provisions in Section 107 could be construed as very broad and not requiring more than we currently do. Generally, these provisions give more weight to communities to receive initial allocations, and emphasize 'historic participation', 'sustained participation', and 'dependence on the fishery' by eligible communities to a much greater extent than the current MSA. This could be narrowly construed as limiting Councils to only making communities eligible that have historic and sustained participation in the same (usually recent) time period that is being used to make the initial allocations to individuals. However, I think that there continues to be room for interpretation, and that the time period considered to determine 'historic participation', 'sustained participation', and 'dependence on the fishery' could legitimately be a longer duration and meet the letter of the Act. For instance, to some, historic participation for a community could mean they harvested cod heavily 50 years ago, even if more recently they've harvested only salmon and halibut. The time period considered continues to drive the meaning and effect of all of the limited access privilege programs.

Section 112, P. 43 – Western Alaska CDQ Program: While the recently passed transportation bill (*Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for User, H.R.3, 109th Cong., Title X, Subtitle B, Sec. 10206 (2005) (enacted)*) included provisions clarifying the communities eligible for the CDQ Program that are effectively the same as the language under (i) and (ii) above, I think there are reasons to include a specific MSA amendment to add this clarification. Otherwise it won't be obvious when reading the MSA, since it would only be in a stand alone transportation bill.

**However, the language above seems to only ADD the clarifying language, and does not remove the eligibility criteria currently in the MSA under 305 (i)(1)(B)(i) – (vi). I don't know why we wouldn't want to be as clear as possible, by striking the eligibility criteria currently in the MSA and using only (i) and (ii) above to designate eligible communities. By**

continuing to have the eligibility criteria in the MSA, it looks as if you could be eligible by meeting the criteria OR by being on the lists identified in (i) and (ii). **This is not consistent with the transportation bill, which said that you are only eligible if you are on the lists; effectively, no new communities could enter the program at a later date.**

Other sections of the draft bill:

We have no specific comments on other sections of the draft bill at this time.