March 7, 2018

Mr. David Hanson, Chair
Legislative Committee
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220

RE: Pacific Council Comments on H.R. 200 and Related Bills

Dear Chair and Members of the Legislative Committee:

We write with comments and suggestions regarding several Magnuson-Stevens Act (MSA) reauthorization issues. The Pacific Council recently issued letters to Senator Cantwell and Representative Schrader with views on H.R. 200 and other MSA-related bills,[1] but the MSA reauthorization process will be underway for some time yet, and the Council will have an opportunity to comment on legislative proposals again in the future. We recommend that the Legislative Committee take time now—away from the pressures of any specific deadline—to consider some of the MSA reauthorization issues in more detail and potentially update its positions.

We highlight four key issues below:

1. "Alternative" management for recreational fisheries,
2. The ecosystem component species exemption to annual catch limits (ACLs),
3. Rebuilding timeframes, and
4. The rebuilding standard.

Within each issue, we address the proposals contained in H.R. 200, the "Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act" sponsored by Rep. Don Young (R-AK), S. 1520, the "Modernizing Recreational Fisheries Management Act of 2017"

[1] March 2018 Briefing Book Agenda Item C.4, Attachment 2.

sponsored by Sen. Roger Wicker (R-MS), and a Magnuson reauthorization discussion draft proposed by Rep. Jared Huffman (D-CA). As the Council likely knows, H.R. 200, as amended by a substitute, was ordered to be favorably reported from the House Natural Resources Committee late last year. All citations to H.R. 200 in this letter refer to the bill as amended.[2] Similarly, S. 1520, as amended by a substitute, was ordered to be favorably reported from the Senate Commerce, Science, & Transportation Committee last week. All citations to S. 1520 in this letter refer to the bill as amended.[3] And while Rep. Huffman has yet to introduce a bill, a discussion draft version is publicly available and was considered by the House Natural Resources Committee at a prior hearing.[4]

1. "Alternative" Management for Recreational Fisheries

H.R. 200 proposes to add language to the Act at 16 U.S.C. 1852(h) stating that councils shall "have the authority to use alternative fishery management measures in a recreational fishery . . . including extraction rates, fishing mortality targets, and harvest control rules." See H.R. 200 (ANS) Sec. 203.

On the surface, the proposed language appears to grant councils authority to use management methods that are already available or in use. Councils currently have the authority to use a broad range of management methods—any number of approaches to organizing and managing a fishery are permissible, so long as the fishery stays under the annual catch limit. And the specific techniques mentioned in this provision (extraction/exploitation rates, F-targets, and harvest control rules) are already widely used around the country as ways of managing mortality to stay under the relevant ACL.

However, adding this language to the statute could end up doing far more than just reaffirm existing council authority. The language easily could be interpreted as indicating that councils are being granted new authority they currently do not possess—specifically, authority to manage recreational fisheries without hard catch limits and accountability measures. The word "alternative" suggests the newly-granted authority is a substitute for ACLs, and the examples of management techniques (particularly exploitation rates and F-targets) suggest that the defining characteristic of this grant of authority is a lack of hard catch caps. The language also could create unintended consequences by defining techniques like harvest control rules, which are commonly used by the Pacific Council, as "alternative" management.

[2] The amendment in the nature of a substitute (ANS) for H.R. 200 is available at: https://naturalresources.house.gov/uploadedfiles/hr_200_ans_young_002.pdf.
[3] The amendment in the nature of a substitute (ANS) for S. 1520 is available at: https://www.commerce.senate.gov/public/_cache/files/b7385da2-2005-4d23-ad8e-24ee4c07f92c/92AA29141AEB77919E80E15D5C3CB7CE.s.-1520-wicker-substitute-modified-.pdf.
[4] The Huffman discussion draft, as considered by the House Natural Resources Committee, is available at: https://naturalresources.house.gov/uploadedfiles/full_text_discussion_draft_to_amend_and_reauthorize_the_magnuson_stevens_fishery_c..._.pdf.

The Pacific Council to date has tended to read the "alternative" management authority proposals in the former manner—as simply reiterating existing authority.[5] We strongly encourage the Council consider the potential for the "alternative" management authority proposals to be used in the latter manner—as granting authority to manage recreational fisheries without hard catch limits and accountability measures. This interpretation is clearly intended by some proponents of the "alternative" management authority proposals,[6] and is at risk of becoming the accepted meaning.

Allowing soft harvest limits and weakened accountability for recreational fisheries is a bad idea. Catch limits and accountability are what has allowed our country to approach the end of overfishing. "Alternative" management threatens to establish different, reduced criteria for conservation and management in recreational fisheries, as compared to commercial fisheries. Accountability is particularly necessary in the Southeast—the region from which these "alternative" management proposals are coming—given that recreational fishery management remains a challenge there, and recreational sectors chronically exceed their annual catch limits. Vague language, such as that proposed by H.R. 200, could do real harm and undermine the integrity of the ACL and accountability mandate.

The Huffman discussion draft includes a section on "alternative" management, as does S. 1520 as amended. Both are similar to H.R. 200, but have a few important changes. The Huffman discussion draft and S. 1520 as amended both remove the actual word "alternative." See Huffman discussion draft Sec. 201; S. 1520 (ANS) Sec. 102(a). The Huffman version also adds introductory framing language ("in implementing [] annual catch limits . . ."), and changes the operative verb (from "have the authority to use" to "consider,"). See Huffman discussion draft Sec. 201. And S. 1520 adds a rule of construction stating that the National Standards and annual catch limit provisions have not been modified. See S. 1520 (ANS) Sec. 301. The redrafting of "alternative" management language in both bills is oriented around reducing the chances that it would be interpreted as granting a direct exemption from ACLs and accountability.

Even if the Huffman and S. 1520 versions lessen the risk of creating a direct exemption from catch limits, they still would create a general level of confusion regarding the ACL and accountability structure in the Act. The only way to avoid potentially opening loopholes and increasing confusion in the implementation of catch limits is to drop the proposals for "alternative" management entirely.

Because all of the proposals for "alternative" management risk weakening the ACL and accountability mandate, and potentially would allow some sectors to fish with less

[5] See Letter from Mr. Philip Anderson to Sen. Maria Cantwell, Feb. 2, 2018 ("These alternative management measures are already available, and being used in both recreational and commercial fisheries; however, including their acceptable use in the MSA is not objectionable.").
[6] See, e.g., Testimony from James A. Donofrio, Executive Director of the Recreational Fishing Alliance, at 4 (Sept. 12, 2017), available at: https://www.joinrfa.org/wp-content/uploads/2017/09/Jim-Donofrio-9-12-17-Congressional-Hearing-Written-Testimony-final-1.pdf.

accountability than others, these proposals should be taken seriously and viewed with concern. Overall, "alternative" management is not a useful idea, and risks returning certain regions of the country to the days of chronic overfishing.

We urge the Pacific Council in future comment letters to strengthen its position and indicate clearly that "alternative" management proposals are not useful or appropriate. The Council should explain the risk created by these proposals for weakening accountability in recreational fisheries, and should underscore that the law currently is flexible and adaptable to a wide range of fisheries—using the Council's successful management of West Coast recreational fisheries as an example. This position would be consistent with and simply a strengthening of prior statements by the Council on the issue; in its letters to Sen. Cantwell and Rep. Schrader, the Council noted with respect to "alternative" management that "these measures should not be used to avoid using assessment-based reference points and associated catch limits or quotas, rebuilding requirements, or overfishing restrictions."

2. The Ecosystem Component Species Exemption to ACLs

There are a number of proposed exemptions to ACLs in the various legislative proposals before Congress. This section will focus on the "ecosystem component species" exemption, because the two formulations of this exemption differ significantly from each other, and one of them is quite far-reaching.

Under the current National Standard 1 Guidelines, "ecosystem component species" are species that do not require conservation and management (determined via the framework at 50 C.F.R. 600.305) but that a council decides to include in a FMP for ecosystem management or monitoring reasons. Because ecosystem component species do not require conservation and management, ACLs are not required.

H.R. 200 takes the concept of "ecosystem component species" and turns it into something else entirely. Specifically, H.R. 200 defines ecosystem component species as either (1) a non-target, incidentally harvested stock that is "in a fishery"; or (2) a non-target, incidentally harvested stock that is not subject to overfishing, depleted/overfished, or likely to become so. H.R. 200 then states that "ecosystem component species" do not require ACLs. See H.R. 200 (ANS) Sec. 204(a).

As defined in H.R. 200, the "ecosystem component species" exemption would cover a potentially large set of stocks that currently have ACLs—roughly 80 percent of PFMC-managed stocks, by our calculations. The term "non-target" is difficult to apply in practice (target/non-target is more of a spectrum, rather than a binary distinction), but if applied liberally, this exemption could cover the vast majority of species in FMPs.

Note also that this proposal uses terminology from the old (2009) version of the National Standard 1 Guidelines, which used a framework of "in the fishery"/ "out of the fishery" as a way of determining which stocks needed ACLs. That framework no longer exists in the regulations, and amending the statute to add an explicit reference to it would create a substantial amount of confusion (including potentially calling into question the current conservation and management framework in the Guidelines).

Our organizations strongly oppose the H.R. 200 formulation of the "ecosystem component species" exemption. The removal of ACLs from a broad swath of our nation's fish stocks could be very damaging. NOAA Fisheries generally credits the ACL requirement for helping to end overfishing, and overfishing would likely increase after such a widespread exemption—especially in regions with traditionally high-risk catch policies. Moreover, using language from the outdated National Standard 1 Guidelines would create confusion for councils and NOAA Fisheries.

The Huffman discussion draft also addresses "ecosystem component species," but approaches the issue from a different angle than H.R. 200. Rather than the two-part definition in H.R. 200, the Huffman discussion draft would define ecosystem component species as a stock that does not require "conservation and management." See Huffman discussion draft Sec. 202.

By defining an ecosystem component species in this way, the Huffman discussion draft provides a direct link to the current National Standard Guidelines and the "conservation and management" framework located there. See 50 C.F.R. 600.305(c)(5). Because the Huffman discussion draft version restates current practice, it would not be expected to result in any significant changes on the water. The main function of the Huffman version of "ecosystem component species" would be to integrate the National Standard Guidelines with the statute more thoroughly, and to reinforce the conservation and management framework.

Our organizations are neutral with respect to the Huffman proposal; it is narrowly tailored and incorporates the NS1 Guidelines, rather than creating a wholly new concept and exempting large numbers of stocks from ACLs.

We recommend the Pacific Council clarify its position to say explicitly that the H.R. 200 version of the ecosystem component species exemption is not necessary or useful and would create substantial confusion. We also recommend the Council explain the difference between the H.R. 200 version and the Huffman version, particularly in that the latter does not create a sweeping ACL exemption and is consistent with the current National Standard Guidelines. This would be consistent with the Council's previous statements on the topic; in its recent letters to Sen. Cantwell and Rep. Schrader, the Council noted the confusing wording in H.R. 200, and in its letter dated April 18, 2017, the Council noted that the National Standard Guidelines already "address ACL exceptions for ecosystem component species."

3. Timeframes for Rebuilding

The Magnuson-Stevens Act currently requires overfished stocks to be rebuilt within 10 years, unless the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise. See 16 U.S.C. 1854(e)(4)(A)(ii). A number of legislative proposals would change this timeframe.

The Huffman discussion draft and S. 1520 (as amended) would replace the 10-year timeframe with the formula currently located in the National Standard 1 Guidelines—the minimum time for rebuilding (Tmin) plus one mean generation. These bills would allow an exception for stocks for which management measures under an international agreement dictate otherwise. See Huffman discussion draft Sec. 206(a)(1)(A); S. 1520 (ANS) Sec. 104(1).

Currently the Tmin + 1 mean generation formula applies in situations where 10 years is not possible due to the biology of the stock or other environmental conditions. While the numbers vary slightly, most reviews have concluded that around half to two-thirds of all stocks subject to the rebuilding requirement of the Act have used the Tmin + 1 mean generation formula, because they were unable to rebuild within the existing 10-year statutory timeline.[7]

The net effect of the Huffman and S. 1520 (ANS) proposal would be that rebuilding timeframes would increase for a subset of stocks currently subject to the 10-year requirement. Specifically, stocks that can rebuild within 10 years, but for which Tmin + 1 mean generation is longer than 10 years, would end up with a longer rebuilding timeframe than they currently have. The reverse would be true for stocks for which Tmin + 1 mean generation is less than 10 years; these stocks would end up with shorter rebuilding timeframes.

Note that the exception in the Huffman and S. 1520 (ANS) proposal for when "international management measures dictate otherwise" is already in the law and does not represent a change from status quo. In those situations, the stock still gets a rebuilding timeframe; the timeframe simply is provided by international management measures rather than by federal law.

While it does not create extensive exceptions the way that other proposals would, the Huffman/S. 1520 (ANS) version would still result in riskier rebuilding plans in some instances. Management strategy evaluations have demonstrated that the Tmin + 1 mean generation formula is less precautionary than the 10-year requirement,[8] and the 10-year requirement has played an important action-forcing role in many regions. Removing it would slow rebuilding progress, particularly in the regions that need it most.

---

[7] See, e.g., Natural Resources Defense Council, Bringing Back the Fish: An Evaluation of U.S. Fisheries Rebuilding Under the Magnuson-Stevens Fishery Conservation and Management Act (2013); Lenfest Ocean Program, Rebuilding U.S. Fisheries: A Summary of New Scientific Analysis (2006).

[8] See, e.g., Benson et al., An Evaluation of Rebuilding Policies for U.S. Fisheries, 11 PLoS ONE e0146278 (2016) (showing that the current rebuilding mandate results in faster rebuilding than 0.75Fmsy in situations where the 10-year timeframe applies, and slower rebuilding in situations where the Tmin + 1 mean generation formula applies).

H.R. 200, like the other bills, would remove the 10-year timeframe and replace it with a uniform Tmin + 1 mean generation approach. But H.R. 200 would add a number of wholesale exceptions, applying to:

- stocks for which the biology of the stock or environmental conditions dictate otherwise;
- stocks for which the Secretary determines the cause of depletion is outside the jurisdiction of the council;
- stocks in a mixed-stock fishery if the Secretary determines they cannot be rebuilt without "significant harm" to fishing communities;
- stocks that the Secretary determines are affected by informal transboundary agreements and activity outside the U.S. EEZ may hinder conservation efforts;
- stocks that have been affected by "unusual events" that make rebuilding within Tmin + 1 mean generation "improbable without significant harm to fishing communities"; and
- stocks for which management measures under an international agreement dictate otherwise.

See H.R. 200 (ANS) Sec. 303(a)(1)(B). As noted above, the last exception—stocks for which international management measures dictate otherwise—reflects the current status quo. The rest of the exceptions in H.R. 200 represent new loopholes.

Some of the timeframe exceptions in H.R. 200 do not make sense conceptually. For example, H.R. 200 contains an exception for stocks when "the biology of the stock of fish, [or] other environmental conditions . . . dictate otherwise." This exception makes sense in the current Act, because it provides an escape hatch to deal with situations where rebuilding is not possible within 10 years. Yet when the default rule is the Tmin + 1 mean generation formula, this exception makes no sense—because Tmin + 1 mean generation already accounts for biology and environmental conditions. If a stock is long-lived and slow-growing, Tmin + 1 mean generation will yield a large number of years for rebuilding; there is no need for an exception.

Other timeframe exceptions in H.R. 200 represent a significant weakening of the rebuilding requirement. For example, the exceptions for "significant harm" and "unusual events" are very broad, and NOAA Fisheries would come under heavy pressure to apply these to key stocks like Atlantic cod and red snapper. Removing timelines for these stocks would encourage less precautionary rebuilding plans than already exist, running the risk of further declines in the health of these stocks.

Finally, because this proposal takes the current regulatory formula and brings it up to the statute, nothing would be left in the regulations to cover the statutory gaps. This makes it likely that no timeframe at all would apply to stocks that meet one of these many exceptions.

Our organizations strongly oppose the H.R. 200 proposal on rebuilding timeframes. The sweeping exceptions from a rebuilding timeline are particularly troubling. Rebuilding without timelines was attempted in the early decades of Magnuson management, and routinely failed to improve the health of the stock. These changes could significantly undermine rebuilding progress in many regions of the country.

We urge the Pacific Council to strengthen its position and state clearly in future letters that changes to the rebuilding timeframe that create new exceptions, like those proposed by H.R. 200, are unhelpful and inappropriate. This position would be consistent with the Council's statements to date. The Council's recent letters to Sen. Cantwell and Rep. Schrader identified the problematic nature of some of the H.R. 200 rebuilding exceptions, and in the Council's letter dated April 18, 2017, stated that "the Council does not believe broad exceptions that might be exercised frequently or that might weaken incentives to conserve stocks are in the best interest of sustainable fisheries management."

4. The Rebuilding Standard

In addition to the specific timeframe provided for rebuilding, the Magnuson-Stevens Act currently requires rebuilding to be accomplished in a time that is "as short as possible, taking into account the status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem." 16 U.S.C. 1854(e)(4)(A)(i).

The phrase "as short as possible" in this context has been interpreted to refer to where, within the allowable time window, a council must set its target date for rebuilding. In the terminology of the NS1 Guidelines, the "as short as possible" phrase constrains where the target time for rebuilding (Ttarget) may be set, between Tmin and Tmax. In particular, it requires that Ttarget be set on the lower end of the time range (closer to Tmin), and that increases in Ttarget be justified by pointing to specific economic needs of fishing communities. The "as short as possible" language also has been interpreted to prohibit a council from increasing harvest rates, when a rebuilding stock is worse off than previously believed.

H.R. 200 proposes to change the words "as short as possible" to "as short as practicable." See H.R. 200 (ANS) Sec. 303(a)(1)(A). By contrast, S. 1520 and the Huffman discussion draft contain no change to the "as short as possible" language in the Act.

The H.R. 200 proposal would directly weaken the rebuilding mandate in the Act. The term "practicable" is widely understood to indicate a soft directive from Congress, and in this context it would represent a significant weakening of the rebuilding standard from the current NOAA Fisheries and court interpretation of "possible."

More specifically, given the current meaning of "as short as possible," the proposal in H.R. 200 to replace it with "as short as practicable" can be understood as a proposal to allow councils to (1) increase harvest rates when new information shows a rebuilding stock is worse off than previously believed, and (2) set Ttarget close to or at Tmax with no particular justification or showing that a shorter time frame is not workable.

Our organizations strongly oppose H.R. 200's proposal to weaken the rebuilding mandate. We support the S. 1520 and Huffman discussion draft position that the rebuilding mandate should be retained in its current form.

The rebuilding mandate was based on decades of experience showing that managers needed a strong directive to reduce harvest rates on overfished stocks and allow them to rebuild. Moving back in the direction of risk-prone management for overfished stocks would be repeating the mistakes of the past. Moreover, it should be considered standard operating procedure ("Fishery Management 101") for managers to set conservative Ttargets, and to not increase harvest rates when stocks are found to be worse off than previously believed. These things should not be in question at this point, much less weakened or undermined.

Furthermore, on the West Coast the "as soon as practicable" change is quickly becoming an issue of the past. The Pacific Council's efforts with rebuilding are paying off, and only a few species remain subject to rebuilding plans. Moreover, because of improved science and good annual catch limit compliance in this region, it is not likely that other stocks will be found to be deeply overfished in the way that certain rockfish species were.

In other regions, though, weakening the rebuilding standard would be very harmful. Managers in some regions routinely set Ttarget equal to Tmax, and, unsurprisingly, fail to effectively rebuild their stocks. Overfished species languish at low levels, and many stocks are on their second or third rebuilding plans. Loosening the statutory language to "as soon as practicable" would effectively sanction current practices in these regions, and potentially worsen things to the point where overfished stocks get no meaningful help at all.

We urge the Pacific Council to reconsider its position that the "as soon as practicable" change would be helpful. The Council should instead build on its prior statement of April 18, 2017, that amendments to the Act that "might weaken incentives to conserve stocks are [not] in the best interest of sustainable fisheries management," and take the position that the "as soon as practicable" change is not necessary in the Pacific region.

* * *

Finally, we wish to return to the theme that while the Pacific Council has a largely successful track record with ACL management and rebuilding depleted stocks, not all councils have had similar success. Many regions continue to struggle with basic precautionary fishery management. Changes to the Magnuson-Stevens Act are nationwide, and they will affect all eight councils. Changes that might make sense in the Pacific region, given the generally high standard of management here, could lead to significant backsliding in other regions of the country. We urge the Pacific Council to bear this in mind when formulating its comments on legislative proposals, and to take this opportunity to reinforce the Pacific region's role as a leader in conservation and best practices.

We hope these comments are helpful, and thank you for your consideration.

Sincerely,

Corey Ridings
Fish Conservation Manager
Ocean Conservancy
725 Front Street, Suite 201
Santa Cruz, CA 95060
(831) 440-7956

Seth Atkinson
Oceans Program Attorney
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6133

CC: Ms. Jennifer Gilden
Mr. Chuck Tracy