



Pacific Fishery Management Council

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Marc Gorelnik, Chair | Charles A. Tracy, Executive Director

September 30, 2021

The Honorable Jared Huffman
1527 Longworth House Office Building
Washington, D.C. 20515

The Honorable Ed Case
2210 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives Huffman and Case:

Thank you for your August 25, 2021 request for comments by the Pacific Fishery Management Council (Pacific Council or Council) on the *Sustaining America's Fisheries for the Future Act of 2021*. The Council and its Legislative Committee reviewed the bill at its September meetings and have the following remarks.

The Pacific Council has held several discussions over the years on bills to amend or reauthorize the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In general, the Pacific Council believes that the MSA has worked well to ensure a transparent, public, science-based management process that promotes sustainable harvests while preventing overfishing and rebuilding depleted stocks. The Pacific Council believes large-scale changes to the MSA are not warranted, and any changes made should be carefully considered. Legislation should be focused on intended outcomes, rather than prescriptive management or scientific parameters, and should allow for flexibility in achieving intended objectives while being specific enough to avoid lengthy, complex implementing regulations or "guidelines."

General comments

Emphasis on climate change: As we noted in a May 2021 letter to NOAA on Executive Order 14008, reduction of greenhouse gas emissions is the most direct way to increase the resilience of U.S. fisheries and ecosystems. In addition, there are a growing number of innovative and science-based tools and approaches to help fisheries, communities, and management entities adapt to the effects of climate change, and thereby increase resilience.

The Pacific Council has long taken an interest in ecosystem-based fisheries management and, by extension, climate change. We believe that it is important that climate change be incorporated into fishery management by all Councils. The Pacific Council has expressed this commitment through the adoption of an Fishery Ecosystem Plan (FEP) in 2013. The FEP serves as a basis for the Council to consider the effects of climate change on the fisheries it manages and, by extension, West Coast fishing communities that depend on those fisheries. The FEP also identifies initiatives that help the Council focus on ecosystem issues across its fishery management plans (FMPs).

Through this initiative process, the Council has been considering the implications of climate change on its managed fisheries and related West Coast fishing communities since September 2017, and just completed its climate and communities initiative scenario planning exercise.

Mandates, workload and funding: The *Sustaining America's Fisheries for the Future Act* includes several new mandates and requirements for both Councils and NOAA. As we noted above, the Pacific Council strives to meet the challenge of managing fisheries in a changing climate; however, if this bill becomes law all Councils will need considerably more funds, staffing, and access to scientific data. Currently the Pacific Council has five six-day meetings per year, which is barely enough to sufficiently address the mandates that we are currently required to meet. At a certain point, the Council process itself will simply become unsustainable. Councils were designed to include the voices of those directly interested in the Councils' management but as the number and complexity of issues increase, the burden of being involved in management increases, and it will be increasingly difficult to find people who are willing to participate in such a process.

The *Sustaining America's Fisheries for the Future Act* adds many additional reports and consultation requirements for both the Councils and the NOAA Administrator. While we understand the need for accountability with respect to meeting the intent of Congress, we also note that developing reports takes time and diverts resources from core management functions. With the increasing pace of climate change, climate change adaptation, and offshore wind energy development, workload for the Pacific Council has increased considerably. The funding increase contained within the bill is a welcome addition; however, it is not guaranteed that Congress will increase Council funding to the extent requested, which would be necessary to meet the new requirements contained in the bill.

The Pacific Council's specific comments are attached below. Thank you for your interest in the Pacific Council's comments and for your consideration of our responses. We would like to note that the Pacific Council, as well as the Council Coordination Committee, will continue to deliberate this and other reauthorization bills in the future. We would be happy to answer any questions or provide further thoughts as reauthorization moves forward.

Sincerely,



Marc Gorelnik
Pacific Council Chair

JDG:kma

cc: Pacific Council Members
RFMC Executive Directors
Ms. Janet Coit
Mr. Randy Fisher
Mr. Dave Whaley
Ms. Jennifer Gilden

Attachment: Specific comments on H.R. 4690

Title I: Climate-Ready Fisheries

This section mostly integrates climate change concerns into the MSA. As noted above, the Pacific Council has a longstanding interest in and commitment to addressing and responding to climate change, and has no concerns related to most of the provisions in this section, including the findings, purposes, and policy (Sec. 101), other than a general concern about increasing workload on the part of both the Councils and the U.S. Secretary of Commerce (Secretary).

Sec. 102, “Promoting Climate Resilience in Fisheries Management” (p. 8)

This section adds a number of new climate change-related requirements for any new FMP or FMP amendment submitted to the Secretary after January 1, 2021 and would require that any changes to FMPs required by this section be implemented for all FMPs within four years after the date of enactment of this bill.

Section 102(a) would require fishery management plans to contain conservation and management measures which “promote the resilience of fish stocks to cumulative stressors, including cumulative stressors associated with climate change.” (p. 8)

Council comments: This section requires prescriptive amendments to fishery management plan; however, the language is difficult to interpret. Councils have some influence on making fisheries, including affected communities and the regulatory environment more resilient to climate change, but less so making fish stocks more resilient. Councils’ influence on fish stocks are limited to harvest management and habitat protection. The MSA already requires stocks to be managed for optimum yield, regardless of environmental stressors, and the Pacific Council takes into account ecosystem impacts from climate change through its Fishery Ecosystem Plan and other avenues. Keeping fish stocks at target biomass levels will promote resilience through conserving genetic diversity within populations. The greatest threat to fish stocks is from habitat degradation, but the Councils’ only real authority over habitat is from fishing impacts in Federal waters. Unfortunately, many habitat problems are in the terrestrial/freshwater and nearshore/estuary environments where the Councils have little influence. The Council recommends clarification on the intent, relative to Council authority, of this provision. We are also concerned with the increased workload and lack of data surrounding this issue.

Section 102 adds a new MSA Section (322), “Vulnerability Assessment,” that requires the Secretary, within three years and every five years thereafter, to assess the vulnerability to climate change of fish stocks within each Council’s geographical area of authority, notify the Councils of such vulnerability, and recommend conservation and management measures. Within one year, Councils must then plan to prioritize management actions to increase resilience of the most vulnerable fish stocks and begin implementing the plans. This section also adds new requirements for secretarial reports and guidelines.

Sec. 102 also amends MSA Sec. 303 to require FMPs to include the impacts of climate change, including present and anticipated future conditions, on stocks, maximum sustainable yield, on

fishery participants, and requires Councils to explain how management measures account for the impacts of climate change and what data were used in the analyses.

Having information and data to develop models of climate change vulnerability will be necessary to meet the intent of this provision, and the current lack of such data and models may delay compliance. The changes to MSA Section 303 also raise concerns about the considerable workload impacts of this section.

Sec. 103, “Incorporating Climate Science” (p. 13)

This section adds climate change and ecosystem-based management as topics for the Council Training Program. This section also amends **Section 404** of the MSA to add a new area of research “on changes in geographic range and spatial distribution, and productivity of a fishery or interrelated fisheries.”

The Council believes this is a reasonable addition to the Council Training Program. Ecosystem-based management and climate change are relatively new and rapidly evolving concepts in fishery management. It will be important for all Council members, but especially new members, to be familiar with those issues.

The Council has no concerns regarding the change to MSA Sec. 404 provided new funding is authorized and core fishery surveys and research are not compromised.

Section 104, Climate-Ready Fisheries Innovation Program (p. 14)

This section requires the Secretary to establish the above-named program (including a new grant program) to develop innovative tools and approaches to increase the adaptive capacity of fisheries management to the impacts of climate change.

Again, the Council has no concerns about the content of this section but does harbor concerns about the workload and funding impacts, which in this case would mainly fall upon the Secretary. We also seek clarity on how the Councils would be expected to react to the innovations funded through this program.

Section 105, Managing Shifting Stocks (p. 17)

This section requires the Secretary to review the geographical authority of the Councils at the request of a Council *or* at least every five years to determine whether a substantial portion of a fishery is located in the geographical jurisdiction of more than one Council and requires the Secretary to designate one of the Councils to prepare an FMP or FMP amendment.

This section also requires the Secretary, in coordination with the Secretary of State and Administrator of the Agency for International Development where necessary to develop a strategy for coordinated research and management with nations that share a fish stock with the U.S. that currently is, or is expected to, see shifts in geographic range or spatial distribution or will span international boundaries within a life stage or across life stages.

We have no concerns regarding these provisions, which largely do not affect Pacific Council operations, but we believe the Secretary should regularly consult with the Councils during these processes.

Section 106, Emerging Fisheries (p. 23)

This section requires Councils to develop a list of unmanaged forage fish and prohibit the development of any new directed forage fish fishery until the Council has conducted a review of conservation needs.

We have no concerns with this section. We identified such species in 2013 and amended all of our FMPs accordingly, including prohibitions on the development of new fisheries.

Title II: Supporting Fishing Communities

Section 201, “Fishery Resource Disaster Relief” (p. 29)

This section substantially amends Section 312 of the Act (Fisheries Disaster Assistance) by adding a series of new definitions for types of disasters (including disasters caused by climate change impacts). This section also clarifies timelines, data requirements, metrics to estimate revenue losses, eligible uses, and requirements for allocation and disbursement of Federal fishery disaster assistance funding. This section clarifies that certain anthropogenic causes can qualify for disaster relief. Any fishery subject to overfishing in any of the three years preceding the date of a determination is not eligible for a determination of whether a fishery resource disaster has occurred unless the Secretary determines that overfishing was not a contributing factor.

This section clarifies disaster relief rules and should be beneficial to the process.

Sections 202, “Subsistence Fishing,” 203, “Working Waterfronts Grant Program,” 204, “Seafood Marketing,” and 205, “Community Participation in Limited Access Privilege Programs”

The Council has no concerns about these sections.

Title III: Strengthening Public Process and Transparency

Section 301. Tribal Representation At the Pacific Fishery Management Council (p. 88)

This section removes the requirement for tribal governments to submit “not less than three individuals” for consideration as Pacific Council members, as well as the term limit for the Tribal representative.

The Council believes these changes will be beneficial in terms of tribal representation on the Council.

Sections 302 and 303

These sections do not apply to the Pacific Council, and we have no comments.

Section 304. Council Procedures and Participation (p. 92)

304(a) requires Councils to hold roll call votes on all nonprocedural matters.

The Pacific Council does not believe it is necessary to conduct a recorded vote for each nonprocedural action, since the results of each vote are included in the meeting record. We also record the name of each non-unanimous vote on all matters. In addition, Pacific Council draft motions in writing, including the voting record, are posted on the Pacific Council's website in less than 24 hours (usually within four hours) after the vote. We believe this would burden the Council without any meaningful benefit.

304(a) also adds "To the extent possible, each Council shall seek to hold meetings in person; and ensure the availability of remote meeting participation and voting."

The Council has no concern with this change, as it reflects our current practice.

304(b) requires Councils, to the extent practicable, to make a webcast, live audio, or video broadcast of each meeting of the Council and the Council Coordination Committee meetings available on the Council's website with certain exceptions. Each Council would also be required to post on its website audio or video recording, searchable audio recording, or written transcript of each Council meeting and each meeting of the Scientific and Statistical Committee (SSC). The Secretary would be required to maintain a public archive.

The Pacific Council already fulfills most of these requirements. However, we are concerned about the costs and workload associated with requiring audio recordings, videos, or transcripts of SSC activities. These provisions seem unnecessary since the SSC is an advisory body to the Pacific Council, which makes the final decisions. All Pacific Council SSC meetings are publicly noticed and open to the public, and almost always occur at Pacific Council meetings or online. In addition, minutes of SSC meetings are included as part of the Council's administrative record and are available online. No further administrative record should be necessary.

Section 305. Council Accountability and Membership (p. 93)

Under **305(a)**, all Council employees are to be "deemed" to be Federal employees with respect to any requirements that apply to Federal employees. In addition, all Council, committee, and advisory panel members shall be subject to all laws, rules and policies regarding ethics and sexual harassment or assault that apply to Federal employees.

The Council has no concern about the sexual harassment and ethics provisions of this section. However, we are concerned about the implications of deeming any Council employee to be a Federal employee. The purpose and potential implications of this provision are unclear.

(305)(b) relates to disclosure of financial interest and recusal, amending Section 302(j) of the MSA. Among other minor changes, this action adds a requirement that those who are required to disclose financial interest must also disclose any financial interest held by any organization in which they are serving as a contractor.

The Council has no concerns about this.

305(c) adds detailed requirements regarding the prohibition on lobbying by Council members, advisory body members, employees, and contractors.

Council members, advisory body members, employees and contractors are prohibited from using Federal funds to attempt to influence Federal or State legislation, executive orders, Presidential proclamation, or similar Presidential directives. However, they *may* provide a technical and factual presentation directly related to the performance of a Council's duties, if in response to a documented request and it is made available.

The Secretary may begin investigations of this section on his/her own and must investigate complaints submitted by any person or government entity. Individuals found in violation are subject to civil penalties, including suspension or expulsion from Council activity.

This section also adds a new reporting requirement for Councils to post on their websites copies of all relevant documents and communication, including meeting minutes, briefing materials, and correspondence, including with NOAA general counsel; copies of all communication with legislators and executive branch officials on subjects other than routine fishery management in the region; and documentation of verbal communication with Federal or State legislators or with executive branch officials on subjects other than routine fishery management in the region.

This section requires the Secretary to provide training on these rules, and to submit an annual report to Congress.

The reporting requirements here are new, and there are potential concerns related to the requirement to post copies of all communication with a host of entities "on subjects other than routine fishery management in the region" on the Council website.

- *The requirement to document requests for input is vague and may be overly constraining. The bill should clarify if the request must be "made available" prior to presentation. Posting such documented requests to a Council's website may delay the presentation, and documenting verbal (in person or by phone) requests would be problematic to verify. Council members may be invited to speak directly with legislative staff or members of Congress while on other Council business, such as the annual Council Coordination Committee meeting in Washington D.C.; it is not clear if these types of interactions would be subject to this provision.*
- *The bill should make clear that Council members can still discuss such matters as private citizens, as long as they are not representing their Council.*
- *Prohibiting Councils from commenting on executive branch policies without a request for a presentation is overly constraining, since the Councils are part of the executive branch, and should be allowed to provide their input freely to their parent agency, department, and Chief Executive. Prohibiting such exchanges would be counterproductive to effective and efficient governance and would be analogous to preventing an employee from discussing policy matters with their supervisor.*

- *Constraining undocumented exchanges to “routine fishery management in the region” is both vague and overly constraining. For example, routine might be interpreted as anything covered in the MSA, or only implementing existing provisions of FMPs, excluding amendments intended to improve management; and “in the region” could be interpreted to preclude discussion of national or multi-region issues, which the Council Coordination Committee is charged with.*
- *Extending these provisions to State legislative issues is also problematic as those bodies have no legal oversight of Council authority, yet may potentially interfere with the Councils’ ability to carry out their mandates under Federal law.*
- *Extending these provisions to NOAA General Counsel (GC) would potentially violate attorney-client privilege; NOAA GC are the Councils’ legal counsel, and conversations should not have to be made public. This would also remove the Councils as a resource for NOAA GC and Department of Justice attorneys in litigation.*
- *The Council is unaware of similar constraints on any other executive branch advisory committee or body.*

305(d)(1)(A) adds the requirement that in making appointments to the Council, the Secretary appoint individuals with expertise in fisheries (including a new addition, subsistence harvest) or in ecosystem-based management or climate science. (p. 98)

The Council has no concerns about this addition.

305(d)(3) amends MSA Section 302(b)(2)(C) (appointments by Governor) to remove the requirement that the governor consult with representatives of the commercial and recreational fishing interests of the state when making appointments to the Council.

The purpose of this deletion is unclear, unless it relates to the inclusion of nonconsumptive users on the Council. Not consulting with fishing interests about the people that will be responsible for managing their fisheries is counter to the precepts of the MSA, which is intended to be an open, science-based, stakeholder-driven process. Rather than removing the requirement to consult with commercial and recreational fishing interests, it may be more appropriate to broaden the consultation requirement to include other interested stakeholder groups.

305(d)(1)(B) requires the Secretary, in making appointments, to consider several new categories when making appointments and in ensuring a balanced apportionment on each Council – participants in subsistence fisheries, members of the conservation community, scientists, non-consumptive users, and members of indigenous and tribal communities. (p. 98)

The Council has no concerns about this change.

305(d)(3) requires the Secretary to appoint at least one individual to each Council who does not have a financial interest in matters before the Council.

It is not clear what is meant by no financial interest; for example, would this include private recreational fishermen, paid consultants or officers of trade associations? Or is the intent that Council seats would be reserved for specific interests such as environmental NGO

representatives? If it is the latter, there may be issues with balancing interests within and among states unless additional at-large seats were added to each Council.

Section 306. Council Accountability and Membership (p. 93)

The Council has no concerns regarding Sec. 306, which does not apply to the Pacific Council.

Sec. 307, National Oceanic and Atmospheric Administration Sexual Harassment and Assault Prevention, and Sec. 308, Saltonstall-Kennedy Act Reform.

The Council has no concerns about the content of these sections.

Title IV: Modernizing Fisheries Science and Data

Section 401. Data Modernization (p. 131)

This section requires the Secretary, through NOAA, to provide Congress with an implementation plan for a Fisheries Information Management Modernization initiative within 180 days after the enactment of this legislation.

The Council has no concerns about the content of this section, other than the workload and funding impacts, which in this case would mainly fall upon the Secretary.

Section 402. Expanding and Improving Electronic Technologies (p. 132)

This section includes a Sense of the Congress statement regarding the use of electronic technologies and the need of fishery managers to have timely and accurate data. It amends the MSA to allow Councils to require electronic monitoring or similar technology for data collection purposes; requires Councils and the Secretary to consider the use of electronic monitoring, reporting or other electronic technology as a part of the information collection program; requires the Comptroller General to review NMFS' ability to develop, deploy, and use electronic data collection and monitoring tools and to take into account cost and efficiency; requires the Secretary to establish an advisory panel to inform the Administrator and Councils on developments in electronic technologies; and establishes an "Electronic Technologies Innovation Prize" to catalyze rapid development and deployment of the technology.

This section contemplates improving monitoring and observer coverage through electronic monitoring devices. The Pacific Council notes that there is a possibility of the opposite effect on human observer coverage resulting from Electronic Monitoring (EM) use. The advent of electronic monitoring systems was intended to make monitoring requirements less expensive and provide more flexibility to fishermen, but it may also make human observer coverage more expensive and less flexible. While the Pacific Council supports, and has led, development of regulatory programs for electronic monitoring systems, some fisheries (such as the bottom trawl sector in our groundfish catch share fishery) may not be able to take full advantage of these systems while still having 100 percent monitoring requirements. We are already seeing small ports having difficulty with observer availability, and if electronic monitoring reduces the demand for observers in those ports, observer provider companies are likely to reduce staff and have remaining staff cover a larger geographic area. This leads to loss of flexibility for fishermen and processors to plan trips, and to avoid bad weather windows. In addition to recognizing the benefits of expanding use of electronic technologies, it is important to recognize and address the potential negative effects and

consider ways to keep human observer options available to meet the needs of small ports and fishermen for whom electronic monitoring is not feasible.

The Council is currently struggling with implementing its trawl catch share fishery electronic monitoring in regulations due to, inter alia, cost concerns. The Pacific Council notes that MSA §313(a-e) allows the North Pacific Fishery Management Council to establish a fee program to fund observer coverage, including electronic monitoring. The Pacific Council is interested in exploring the potential for a similar, dedicated funding mechanism to offset the cost of video review under the Pacific Council's third-party review model or to solve other cost-prohibitive funding issues under the new electronic monitoring program. The fee program should not be mandatory but having the flexibility to develop and implement such a program could make electronic monitoring programs more cost-efficient and easier to implement.

[Section 403. Stock Assessments \(p. 139\)](#)

This section requires the Secretary to report to Congress within one year and annually thereafter on NMFS progress to prioritize and improve stock assessments.

The Council is concerned about the workload associated with this requirement. While the Secretary is responsible for compliance with this provision, this represents a significant effort on an annual basis, and NMFS often seeks input from the Councils on their reports to Congress. A less frequent reporting requirement would seem adequate, especially given that assessments are often longer on multi-year cycles.

[Section 404. Cooperative Research and Management \(p 141\)](#)

This section clarifies that fishing communities can be included in partnerships under the cooperative research and management authority in the Act. It requires the Secretary to award funding on a competitive basis and based on regional needs, and to select programs that prioritize Council needs. This section also adds a qualifier that no exempted fishing permit (EFP) shall allow catch in excess of an annual catch limit (ACL) or bycatch in excess of a bycatch cap/limit. Councils must publish a report on the results of all approved EFPs.

The Council has no concerns about this requirement and believes allowing communities to be included in cooperative research partnerships could contribute to coastal community resilience.

Section 404(a) requires Councils to provide a list of critical research needs to the Secretary on an annual basis.

The Pacific Council currently maintains a list of research and data needs which it updates periodically, at least every five years. The Council is in the process of changing the reporting format to a publicly accessible database as a way to make updates easier and improve accessibility. Providing a list annually is not difficult; however, the expectation that the list be updated annually would represent a considerable increase in workload. In terms of cooperative research, the Council supports cooperative research as long as it does not weaken the definition and use of "best available science."

*The Council has no concerns regarding **Sec. 405**, which does not apply to the Pacific Council.*

Section 406. Recreational Data Consistency and Recreational Data Improvement Program (p. 147) .

This section requires the Secretary, within two years, to establish guidelines to improve recreational catch data, and to within one year develop a strategic plan for recreational data improvements, and revise the plan every five years thereafter.

The Council believes this provision could provide potential benefits to recreational fishery sampling programs; however, development of a strategic plan within one year, including necessary outreach and coordination, is probably not practicable.

Section 407. Emergency Operating Plans (p. 152)

This section requires the Administrator, within one year of the date of the enactment of this legislation (and in consultation with Councils, tribes, agencies, and stakeholders), to develop a contingency plan for circumstances that would make fisheries monitoring and stock assessments impracticable.

The Council believes that one year is not enough time to develop such a plan, but has no concerns related to the subject of the plan.

Section 408. Zeke Grader Fisheries Conservation and Management Fund (p. 152)

This section renames the Fisheries Conservation and Management Fund after Zeke Grader and allows the fund to address climate change research and adaptation.

The Council believes this is a fitting tribute to a man who devoted his life to fisheries conservation.

Section 409. Offshore Wind Collaboration (p. 155)

This section requires the Secretary and the Secretary of the Interior (acting through the Bureau of Ocean Energy Management, BOEM) to enter into a cooperative agreement to fund additional stock assessments and fisheries and marine wildlife research which may be necessary due to actions taken by BOEM for the development of offshore wind energy.

The Council believes that fisheries science related to offshore wind development will benefit from this endeavor.

Title V: Sustaining Fisheries Through Healthy Ecosystems and Improved Management

Sec. 501. Sense of Congress (p. 156)

The bill adds a new sense of Congress related to consistent application of the essential fish habitat provisions of the MSA.

The Council has no concerns about this section and welcomes the increased emphasis on the importance of essential fish habitat.

Section 502. Essential Fish Habitat Consultation (p. 156)

This section makes substantial changes to provisions regarding essential fish habitat (EFH) and habitat areas of particular concern (HAPCs). Councils are currently required to identify actions to encourage the conservation and enhancement of EFH, including recommendations to avoid, minimize, or compensate for adverse effects on EFH and HAPCs (50 CFR 600.815). This is replaced with a requirement that if any action by a Federal agency may adversely affect EFH, the action agency itself is required to avoid adverse effects. For any action by a Federal agency that may adversely affect a HAPC, that agency would be required to *minimize, monitor, and mitigate* any adverse effect on the HAPC and on the species for which the HAPC is designated. This section also adds a new definition of the term “adverse effect” to mean “any impact that reduces the quality or quantity of EFH.”

If the Secretary receives information from any source that an action or proposed action by a Federal or state agency may adversely impact EFH, the Secretary must recommend measures to avoid the adverse effects. If the adverse effects could not be avoided, the Secretary would be required to recommend measures to minimize and mitigate the adverse effects, and the agency would be required to provide a detailed response to the Secretary and the appropriate Council within 30 days.

This section requires each Council to avoid adverse effects on HAPCs caused by fishing, to *monitor* the efficacy of actions to avoid adverse effects and identify other actions to encourage the conservation and enhancement of HAPCs.

The Council believes that the EFH and HAPC provisions in the MSA are vitally important to protecting fish habitat and promoting resilience of fisheries. The changes in this bill strengthen these provisions. Requiring mitigation for damage to HAPCs could have a substantial impact particularly in regard to land-based actions that affect anadromous species, as well as offshore wind projects.

Although the Pacific Council already puts substantial effort into protecting EFH and HAPCs (for example through our Essential Fish Habitat Conservation Areas), we would like additional clarity on how these provisions might affect fishing activities. We also observe that the requirement to monitor the effectiveness of actions to avoid adverse effects on HAPCs will require additional funding and workload, probably on the part of NMFS and state agencies.

Section 503. Reducing Bycatch (p. 164)

503(a)(1) amends National Standard 9 regarding the minimization of bycatch to remove the words “to the extent practicable.” This section also removes the term “to the extent practicable” from the requirement to assess the amount and type of bycatch occurring in the fishery and management measures that minimize bycatch and minimize the mortality of bycatch that cannot be avoided.

The Council is concerned about the removal of the term ‘to the extent practicable’ in NS9. The intent of NS9 is to minimize bycatch while allowing fishing to achieve optimum yield. Removal of the phrase could lead to the literal interpretation that the only way to minimize bycatch is to minimize fishing, which conflicts with achieving optimum yield under NS1. Furthermore, removal could effectively negate decades of case law, leading to re-litigating countless issues. It is also

worth noting that the definition of bycatch in the MSA is restricted to “fish”; however, Councils are also responsible for ensuring bycatch of marine mammals, seabirds, and turtles are kept within statutory limits set under other applicable law, and often manage to protect other species such as corals, sponges, and other biogenic habitat.

503(a)(2) Regarding the provision that FMPs may “consider full retention requirements for species with high catch mortality rates,” the Council would like clarification if the intent was to consider retention of high **bycatch** mortality rates.

503(a)(3) requires the Secretary to establish a national standardized bycatch reporting program to assess the amount and type of bycatch occurring in each fishery and across fisheries and to determine the contributions of bycatch to the total fishing-related mortality of each fishery. (p. 165)

The Pacific Council currently includes such a bycatch reduction plan for all of its Fishery Management Plans. The effects of bycatch are included in its periodic SAFE documents, and bycatch projections are included in the assessed impacts of annual or biennial management measures. This section appears to incorporate current regulations under 50 CFR Subpart R into the Act; we have no concerns with this section.

503(b) amends the Bycatch Reduction Engineering Program.

The Council has no concerns about this subsection (1). The extension of the reporting period should provide some workload relief without affecting the implementation timeframe of typical bycatch reduction technologies.

Subsection (2)(D) requires extensive reporting and historical recordkeeping for bycatch technologies and methods that could have substantive workload impacts and may have little added benefit over the triennial report.

Section 504. Improving Rebuilding Plan Outcomes (p. 168)

This section makes two main changes. First, it involves the Secretary in ensuring that rebuilding plans are effective, and that Councils are meeting their rebuilding requirements, and sets out provisions for when multiple failures of rebuilding plans have occurred.

The Council generally sees benefits to fishery resources in this section.

This section also removes (p. 171) the 10-year limit on the period for rebuilding a depleted stock [section 302(a)(4)(A)(ii)] and replaces it with a requirement that the rebuilding timeframe “not exceed the time the stock of fish would be rebuilt without fishing occurring plus one mean generation unless management measures under an international agreement dictate otherwise.”

The Pacific Council generally supports changing the arbitrary 10-year rebuilding requirement to something based on the life history of the stock in question. As this change would result in more consistent application of rebuilding timeframes and better balance between conservation and the economic objectives of rebuilding strategies. The 10-year rule can lead to a discontinuous policy

that disrupts fisheries for little conservation gain. For example, if a stock can rebuild in nine years at the cost of closing all fisheries, this becomes a mandate. Paradoxically, the requirements for rebuilding a fish stock in worse condition, e.g., one that requires 11 or more years to rebuild with no fishing, provides for more than 11 years to rebuild (11 years plus the length of one generation of the species), with obviously less economic disruption. This is illogical and potentially disastrous for some fishing-dependent communities.

However, we do have some concerns associated with this change. Although removing the 10-year cap puts all stocks on the same maximum timeline to rebuild, it doesn't specify where the rebuilding target should be set within that timeline. Instead, the key phrase remains: "as short as possible ... taking into account the needs of fishing communities." These two phrases have been a major source of friction in our rebuilding plans for rockfish. Thankfully, the Council avoided the more drastic results that are theoretically possible under the 10-year cap; however, it would be helpful to have guidance in how to take into account the needs of fishing communities.

The term "as short as possible" sets a presumption that rebuilding should always be shorter unless justification can be provided that a longer time frame is needed. It is unclear what type of justification is required under this language. For example, it has been relatively easy to show that some fishing should be allowed, yet when it comes to a decades-long rebuilding timeframe, it's unclear how to choose between a 14 mt vs. 17 mt annual catch limit when the difference in expected rebuilding time is 10 years (for example, 2055 vs. 2065). This question is essentially what led to NMFS disapproving the Council's rebuilding plan for yelloweye rockfish in 2010.

Section 505. Depleted Fisheries and Preventing Overfishing (p. 176)

505(a) adds a definition of "depleted," and replaces the current definition of "overfishing" and "overfished" with a single definition of "overfishing" to mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce maximum sustainable yield on a continuing basis. This section also replaces the term "overfished" with "depleted" wherever it occurs.

Using the term "depleted" provides a better understanding of stock status and avoids biased interpretations of the cause(s) of low stock abundance. Clarifying the distinction between "overfished" and "overfishing" is important to making the MSA more comprehensible and recognizes the different management responses to crossing differently defined threshold levels.

505(b) requires each SSC to provide the appropriate Council with ongoing scientific advice for fishery management decisions, including (i) recommendations for accounting for all sources of mortality in establishing management measures, for the acceptable biological catch levels, for preventing overfishing, for maximum sustainable yield, and for achieving rebuilding targets and promoting resilience of fish stocks to climate change; (ii) objective and measurable criteria for determining whether a stock is depleted or experiencing overfishing; and (iii) reports on stock status and health, sources of mortality, bycatch, habitat status, social, ecological, and economic impacts of management measures, and sustainability of fishing practices, and prevailing and **anticipated future impacts of climate change on fish stocks**, fishing communities, and fishery sectors.

Regarding anticipated future impacts of climate change on fish stocks, although the Council agrees that this level of scientific knowledge would be desirable, we are concerned about the lack

of data to carry out this section, as well as the very considerable workload impacts to the SSC. The Pacific Council already considers ecosystem impacts from climate change through our Fishery Ecosystem Plan, and the SSC is required to use the Best Scientific Information Available. The Council is confident that those considerations will be reflected in advice from the SSC and is concerned that a statutory reporting requirement could result in dissemination of highly uncertain projections based on inadequate data and models. It is also worth noting that such data and models would likely not be available for all managed stocks.

Section 506: Preparation and Review of Secretarial Plans

Requires (currently law only authorizes) the Secretary to prepare a fishery management plan if a Council fails to submit such a plan, if the plan fails, etc.

The Council has no issues with this.

Section 507. Councils (p. 180)

This section amends the MSA to require Councils (with their SSCs) to prioritize fisheries and habitats experiencing or expected to experience a shift in geographic range, spatial distribution, or productivity within the next five-year period. Councils would also be required to approve, for each managed stock, objective and measurable criteria for identifying whether a stock is depleted or experiencing overfishing.

This section also requires Councils to develop and implement a plan to protect EFH from adverse effects caused by fishing, including quantitative and measurable targets and goals for increasing the quality, quantity, and representativeness of EFH, as well as conservation and management measures to implement the plan. At least every seven years, Councils would also be required to review the habitat protection plans, the designations of EFH, the designations of HAPCs, and amend each FMP as necessary and appropriate.

Again, the Council agrees with the intention of this section but is concerned about the workload impacts of such requirements, the lack of data to support such mandates, and the cumulative impact of all of the reporting requirements included in the bill. The Pacific Council already reviews EFH for each FMP every five years.

Sec. 508 Forage fish provisions (p. 182)

This section includes elements of the Forage Fish Conservation Act.

The Pacific Council has a long history of protecting forage species and generally believes that changes to the Magnuson-Stevens Fishery Conservation and Management Act are not necessary for this Council to protect and to sustainably manage forage fish. However, we recognize that the Pacific Council's practices regarding forage fish are not universal among the other fishery management councils.

We have the following responses to the bill's provisions:

Sec. 508(a) and (b) relate to the requirement for the Secretary to define “forage fish,” considering whether such species are at a low trophic level, are generally small- to intermediate-sized, occur

in schools or other dense aggregations, contribute significantly to the diets of other fish, marine mammals, or birds; and serve as a conduit for energy transfer to species at a higher trophic level.” (p. 183). **Sec. 508(b)** also changes the definition of optimum yield, adding “in the case of a forage fish, is reduced, pursuant to subparagraph (B), to provide for the diet needs of fish species and other marine wildlife, including marine mammals and birds, for which forage fish is a significant dietary component” (p. 183)

We have no issue with the provisions relating to the definition of forage fish. However, quantifying the dietary needs of forage-dependent predators is extremely challenging, is difficult to accurately estimate, and represents a significant workload and financial burden on the Council, State, and Federal agencies. Regional planning through the Council process is our preferred way to balance these efforts with other priority research activities.

Sec. 508(c) Requires SSCs to make recommendations regarding “maintaining a sufficient abundance, diversity, and localized distribution of forage fish populations to support the role of such populations in marine ecosystems” (p. 183).

Our concerns with this section are shared above.

Sec. 508(d) requires each Council, in developing its research priorities, to include forage fish populations and distributions and echoes the requirement in Section 106 to develop a list of unmanaged forage fish and to prohibit the development of new directed forage fish fisheries until sufficient research has been undertaken.

The Council has no concerns with this section; we already identified such species in 2013 and amended all of our FMPs accordingly, including prohibitions on the development of new fisheries.

508(e) requires each FMP to assess, specify, and reduce annual catch limits for forage fish fisheries by the diet needs of fish species and other marine wildlife, including marine mammals and birds for those marine species for which forage fish are a significant part of their diet. (p. 185)

Quantifying the dietary needs of forage-dependent predators is extremely challenging, is difficult to accurately estimate, and represents a significant workload and financial burden on the Council, State, and Federal agencies. Further, the dynamic populations of forage species make it difficult to assess the abundance of one, let alone multiple, often mixed stocks, making implementation of this provision impractical.

The Pacific Council already considers the impact of forage fish to the ecosystem and fishing communities to inform optimum yield (OY) and annual catch limit (ACL) decisions for managed forage species in our Coastal Pelagic Species Fishery Management Plan. For example, one of the 11 goals and objectives in the plan is to “Provide adequate forage for dependent species.” In addition, our harvest control rules for coastal pelagic species include built-in reductions in allowable harvest as biomass estimates and ecosystem indicators point to declining stock status. This harvest control rule closed the directed sardine fishery in 2015, four years before the stock reached its current overfished status.

For example, our harvest policy for Pacific sardine maintains a directed fishery cutoff that is three times the stock's overfished threshold as a conservative measure intended to maintain an adequate forage base and minimize fishery impacts at lower stock size. Our Coastal Pelagic Species (CPS) FMP and Fishery Ecosystem Plan strive to better understand ecological interactions and predator-prey relations.

508(f) requires the Secretary to develop guidelines to assist the Council in implementing this section.

This is an important step; for example, the requirements of Section 7 would benefit from additional detail. Under one interpretation, our current practices could meet the requirements of this section, but whether this is true in practice depends on how NMFS interprets the requirements of the bill in its guidelines. Under another interpretation, this section could have a significant impact on Council-managed CPS fisheries, given (among other things) the increased research that would be required to determine the dietary needs of fish species and other marine wildlife. Our main concern is that any legislation or resulting guidelines should not impose additional or unnecessary burdens on our management of forage stocks.

*The Council has no concerns regarding **Sec. 509**, which does not apply to the Pacific Council.*

[Sec. 510. Authorization of Appropriations. \(p. 188\)](#)

The funding increase included in the bill is important, given the additional mandates that the bill proposes.