

Council Coordination Committee

Legislative Work Group

Draft Consensus Statements

10/26/2021

Section A. Science and Data Issues

Topic 2: Climate Change and Regional Action Plans for Climate Science

Add at end of current text

The ability of Councils to successfully manage fisheries in the face of climate change will require the ability to adapt to changing species distributions and productivity. However, many regions currently lack the robust baseline of fish and habitat surveys necessary to understand and quantify changes in abundance, distribution, diversity, and status clearly attributable to climate change. It will also make it more difficult to comply with new legislative requirements, such as determining the impacts of climate change on future conditions of stocks and fishery participants. It will also be more difficult to account for the impacts of climate change in analyses. As the Councils continue to balance increasing competition for the ocean space – whether from protected areas, offshore energy development, or other users – these conflicts will inhibit the ability of fishermen and the Councils to be flexible.

Section B Fishery Management Issues

New Section 6 - Bycatch

With very limited exceptions, all commercial and recreational fisheries in the U.S. have bycatch, which is defined by the MSA as “those fish which are harvested in a fishery, but which are not sold or kept for personal use”, i.e., fish that are discarded. All recreational and commercial fisheries discard fish that are of not of the preferred species or size, or are required by regulation to be discarded.

National Standard 9 of the MSA requires that “conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” The word “practicable” includes social and economic tradeoffs in policy decision making regarding management measures to reduce bycatch. Without the practicability clause, the level of bycatch that could be considered to be minimized is very subjective with wide extremes, and thus open to litigation as to what is an acceptable level of bycatch. A practicability clause can be particularly important for minimizing bycatch in recreational fisheries, which are typically managed with size and bag limits, and as a result tend to have high rates of regulatory discard (i.e., bycatch). The RMC’s

think the inclusion of the phrase “to the extent practicable” provides the appropriate threshold for achieving the optimal degree of bycatch minimization.

The amount and type of bycatch in each fishery is monitored and assessed using a standardized bycatch methodology established within each region of the U.S. in compliance with 50 CFR 600.1600-1610 (82 FR 6317). The regulation requires that each Fishery Management Plan describe the standardized reporting methodology for each fishery, including procedures used to collect, record, and report bycatch data in a fishery. Consistent data reporting, collection and assessment across fisheries is not possible given the differences between recreational and commercial fisheries, and the types of gear used in the fisheries. Additionally, data collection, reporting, and recording procedures can be expensive, logistically challenging to design and implement, involve new and cutting-edge technologies, and necessitate the consideration of the safety of human life at sea. Thus, flexibility is needed the implementation of a standardized bycatch reporting methodology for each fishery, as well as across fisheries and regions of the country.

Bycatch estimates for U.S. fisheries are compiled and reported and regularly updated in the NMFS National Bycatch Reports, which are publicly available on the agency’s website. While improvements are being made across the country to improve the accuracy and precision of these bycatch estimates, generating statistically accurate and precise information regarding bycatch in each fishery may be cost prohibitive in many fisheries, as it may require that all fish caught and discarded would need to be observed and monitored. Although many U.S. commercial fisheries have human observers or cameras on vessels to monitor and collect discard information, this would not be cost effective or technically feasible for small commercial fisheries or socially acceptable aboard recreational fishing boats.

New Topic 7 - Council Jurisdiction

Regional Fishery Management Councils (RFMCs) are facing unprecedented management issues as a result of climate change. The changing environment is affecting the productivity, abundance, and distribution of some fish stocks, and it is becoming increasingly clear that all those involved in fisheries need to prepare for different, unpredictable futures. As stocks move, the RFMCs are grappling with how to adapt their management approaches to ensure fair and effective management of the stocks under their authority. Many regional Councils lack a robust baseline index of fish and habitat distribution, with rigorous temporal and spatial monitoring and surveys to assess the changes in abundance, diversity, and health to quantitatively attribute these fluctuations to climate change. Without this spatial survey data, the Council actions may result in limiting harvest opportunities due to these uncertainties in assessment of climate impacts on stocks.

While a need to formalize a process for revising Council authority as a result of changes in fishery distribution may seem necessary, many of these issues are already addressed by the Councils themselves. This has been a particular area of focus on the Atlantic coast, where fisheries management authority in federal waters is divided between the New England, Mid-Atlantic, and South Atlantic Councils. These Councils have recognized this challenge and are working closely with each other to adapt to changing conditions. For example, the three East coast Councils are currently collaborating with the Atlantic States Marine Fisheries Commission and NOAA Fisheries on a climate change scenario planning initiative. Through this structured process, fishery scientists and managers are exploring how to best adapt and respond to jurisdictional and governance issues related to shifting fishery stocks.

A number of fishery management plans already account for overlap between Council management areas. For example, the New England Fishery Management Council and Mid-Atlantic Fishery Management Council manage two fisheries under joint fishery management plans and cooperate on the management of several other fisheries that overlap the geographic areas of both Councils. Similar arrangements exist between the Mid-Atlantic and South Atlantic Councils and the South Atlantic and Gulf Councils.

Frequent reassignments of management authority could cause disruptions in Council operations, duplications of effort, Science Center workload bottlenecks, and losses of institutional knowledge among the staff, Council and SSC members, and others who have acquired specialized knowledge about the management or biology of a stock through years of involvement with the fishery. While major changes in management regimes may be warranted in certain cases, the CCC believes that less disruptive methods of adapting to climate change should be pursued first.

New Topic 8 - Essential Fish Habitat

The CCC believes that Essential Fish Habitat (EFH) can be a useful tool for fishery management and provides protection for the habitat of Council-managed fisheries. However, changes to EFH that remove practicability standards, include arbitrary terms such as “adverse effects,” and mandate Council inclusion on all consultations may be impractical. MSA’s current use of “to the extent practicable” allows the Councils the flexibility to define EFH and HAPC as necessary. A requirement to define EFH and HAPC without that flexibility may result in broad definitions that have unintended consequences such as designation of harbors and marinas that may not be essential. Using terms such as “adverse effects” can have similar negative consequences without further guidance on what constitutes adverse effects. This may result in unnecessary mitigation requirement for fisheries. The Councils currently work with NMFS and are included on consultations as necessary but inclusion in all consultations would be a burden on the Council’s time and resources and potentially delay the completion of the consultations.

Section C: Council Process and Authority Issues

2 Transparency Requirements

(Replace existing statement with the following)

The CCC thinks that a transparent public process is critical to maintaining public trust, so that decisions of the Council and the SSC are clearly documented. This need can be met in a variety of ways, such as by webcasting meetings, audio recording of meetings, or detailed minutes of meeting discussions. However, budget problems are very real, and written transcripts are costly. Video recordings of large meetings may not add substantive content, as they may not capture presentations and motions, which are the most critical visual aspects of meetings. While the technology for webcasts is rapidly evolving, live broadcasts generally require strong Internet connections to be effective. In the context of Council meetings, which are often held in remote locations near fishing ports, the Councils have little ability to predict or control the quality and cost of the Internet connection. Consequently, requiring the use of webcasts “to the extent practicable” will allow Councils to achieve greater transparency within budget and operational constraints.

With respect to proposed requirements related to meeting recordings, the CCC notes that audio and video files are typically very large and that requiring all Council and SSC meeting recordings to be available indefinitely on Council websites would pose some technological challenges. Requiring the Councils to make meeting recordings available on the website for a limited window of time (e.g., six months after the date of recording) and thereafter upon request would be easier to implement. The CCC also notes that requiring the Councils and the Secretary to maintain public archives of all meeting recordings seems like an unnecessary duplication of effort and resources.

The CCC believes that requiring roll call votes on all non-procedural matters is unnecessary and would be time consuming and disruptive to the Council process. The MSA already requires the Councils to hold roll call votes at the request of any voting Council member (a much lower threshold than the one fifth of a quorum required for roll call votes in the U.S. House or Senate). While the CCC does not believe that changes to voting requirements are warranted, the CCC notes that a less disruptive alternative would be to require roll call votes only on final approval of any fishery management plan or amendment to be submitted to the Secretary.

New Section 9 - Ethics/Standards of Behavior

Council staff are subject to Rules of Conduct established by the Department of Commerce. In addition, Councils expand on those requirements through their SOPPs and Operations Handbooks. Legislative initiatives to deem Council employees as Federal employees with respect to “any requirement that applies to federal employees”, is a broad action with potential consequences reaching far beyond ethics to every facet of Council operations. Currently, Council employees are non-federal employees; thus, without access to all of the information available to federal employees and agencies, it is impossible for the Councils to anticipate the magnitude of impacts these changes would cascade throughout the current administrative and operations practices and procedures. Administrative costs may increase due to the need to monitor compliance with requirements and provide staff benefits and training. SOPPS will likely need to be updated and expanded. It will likely become difficult for Councils to hire and retain staff who are subject to all of the requirements of Federal employees when those staff do not also receive all of the benefits of Federal employees. The broad language in such proposals could be viewed as an effort to make staff Federal employees, which is counter to a basic tenet of the MSA and the federal fisheries management system.

Many Councils already have policies, regarding harassment in their Handbooks or SOPPs. To fully evaluate proposals to subject Councils to agency policies additional information is needed to clarify how the Secretary of Commerce will investigate allegations to determine if violations have occurred and impose the penalties if necessary. The SOC would need also make available to Council, Committee, and advisory panel members annual training that is consistent with the training provided to federal employees.

Councils currently adhere to 15 CFR Part 28, “New Restrictions on Lobbying” and are currently prohibited from use of federal funds for lobbying activities. Additional specifications for lobbying prohibitions, including prohibition from overturning any Presidential order, proclamation, or similar Presidential decree, are sometimes suggested. Because these existing regulations often lead to questions about the ability of Council and AP Members to communicate with officials when not in any official Council capacity and not using any Council funds, clarifying language will be required in guidelines supporting any regulatory changes addressing indicating that Council members and advisors are not prohibited from communicating with elected and executive branch officials as private citizens not using federal funds.

New reporting requirements for documenting all discussions of Council members, Council staff, and members of Council advisory bodies with federal or state legislators and Federal executive branch officials will likely add costs and time burdens to Council staff, especially the requirements to document all verbal communication and maintain all copies of this documentation on the Council website. Specific guidance would be needed on the types of communication are allowed, what should be documented, and when information must be made available. Posting such documented requests to a Council’s website may delay the response, 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 CCC meeting in Washington D.C.; it is not clear if these types of interactions would be subject to this provision. The term "routine fishery management" is vague and may not provide enough guidance to ensure Councils and their members comply with the intent of these provisions. 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 CCC is charged with. Extending these provisions to NOAA 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.

DRAFT

New Section 10 - Secretarial Plans

The MSA currently authorizes the Secretary to prepare FMPs or amendments for stocks requiring conservation and management if the appropriate Council fails to do so in a reasonable period of time or if the Council fails to submit the necessary revisions after an FMP has been disapproved or partially approved. Proposals have been suggested to modify this language to specify that the Secretary must prepare such plans or amendments if the Councils do not submit the required FMPs or amendments “after a reasonable period of time **not to exceed 180 days.**” (emphasis added)

The 180-day timeframe suggested is unrealistic and likely could not be met while complying with the rigorous and time-consuming requirements of the MSA, the National Environmental Policy Act (NEPA), and other applicable laws (ESA, MMPA, etc.). It generally takes at least two years (but often longer) to develop and approve an FMP or major amendment. Most Councils meet 4-6 times per year, meaning that the proposed 180-day timeframe may only encompass two Council meetings. This does not allow nearly enough time to initiate an amendment, conduct scoping, form plan teams (varies by region), collect and analyze data, develop and refine alternatives, solicit input from scientific and statistical committees or other advisory bodies, draft decision documents, conduct public hearings, review public comments, take final action, and prepare the required documents for submission to NMFS.

The MSA already provides the Secretary appropriate discretion to assess whether a Council is making reasonable progress toward development of the required FMP or amendment. This flexibility is necessary to account for the variability in time needed to complete a management action, which can vary greatly depending on the complexity of the issue, availability of scientific information, Council workload on competing priorities, and other factors. The CCC is concerned that creating deadlines the Councils likely cannot meet will shift responsibility for development of FMPs from the Councils to the Secretary, thus undermining the deliberative and transparent council process that was created by the MSA.

Any specific time requirements should be crafted carefully and should be based on a detailed understanding of the Councils’ responsibilities and procedural requirements under the MSA, NEPA, and other applicable laws. Several Councils have developed fact sheets summarizing the process and timelines associated with development of an FMP or amendment.^[1]

Establishing a time requirement without taking steps to streamline the process is unlikely to produce meaningful change. If the intent is to improve the timeliness of Council actions, this could be accomplished by improving alignment between NEPA and the MSA. Compliance with NEPA requirements is often the most time-consuming aspect of FMP or amendment

development. MSA Section 304(i), included as part of the 2007 Magnuson-Stevens Reauthorized Act, was intended to more closely align the requirements of the MSA and NEPA within NMFS’s NEPA procedures. The resulting policy directive issued by NMFS on “National Environmental Policy Act Compliance for Council-initiated Fishery Management Actions under the Magnuson-Stevens Act,” has not, in the opinion of the CCC, provided for a more timely alignment of MSA and NEPA processes, reduced extraneous paperwork, or streamlined the environmental review process. It has, however, shifted an increasing portion of the NEPA-related workload on to the Councils. The CCC’s white paper on “Integrating National Environmental Policy Act Compliance into a Reauthorized Magnuson-Stevens Act”^[2] explores this issue and discusses potential areas for improvement.

^[1] <https://www.fisherycouncils.org/fact-sheets>

^[2] Integrating National Environmental Policy Act Compliance into a Reauthorized Magnuson-Stevens Act – A Council Coordination Committee Concept White Paper (February 2015), http://www.fisherycouncils.org/s/CCC_2015-02_022_nh_msa_reconciling_statutory_inconsistency.pdf

New Section 11- Areas Beyond National Jurisdiction

The Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ Agreement) under the United Nations Convention on the Law of the Sea (UNCLOS) is currently being pursued as an independent and legally binding instrument that would address sustainable management of marine resources in Areas Beyond National Jurisdiction (ABNJ). The conservation approach of the BBNJ Agreement is to create area-based fishing closure zones within the ABNJ.

The CCC recognizes that a successful international fishery management platform already exists and is currently managing fishery resources in the ABNJ. Regional Fishery Management Organizations (RFMOs) are tasked to ensure sustainable management of fish resources within their designated convention areas. In contrast to the BBNJ Agreement where closed area-based management measures are only being discussed, RFMOs pursue sustainable fishing goals by considering a myriad of available management tools and choosing the one that addresses the specific management challenge. The BBNJ Agreement also is developed in a political process with the input from ENGOs where the RFMOs develop recommendation in a science-based process in a public, transparent process similar to the Councils. The CCC is concerned that the development of the convention such that high seas closures could be imposed, overrides the existing RFMO authority, and unfairly impact US fisheries under FMC management.

In general, the CCC believes the existing RFMO instrumentalities are wholly sufficient to manage living resources outside of national jurisdictions, of which the United States is a part. Furthermore, the CCC supports the RFMO platform and believes it should not be subjugated by the BBNJ through implementation of a redundant management program.

Based on past and long-term involvement of CCC members in various RFMOs, the CCC believes the BBNJ Agreement, as currently presented, will likely undermine the ability of RFMOs to properly manage the fisheries in their convention area, negatively affect RFMO credibility, and potentially create animosity among RFMO memberships with the UN.

The CCC believes that ultimate fishery management authority in the ABNJ should remain with the RFMO platform. The BBNJ program should be incorporated into the existing regulatory framework of the RFMOs and under no circumstances should the BBNJ become a legally binding instrument that would work in conjunction with the RFMOs.