

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE REPORT ON STOCK DEFINITIONS

We write to express concern that the stock definitions discussion has overemphasized questions of jurisdiction while so far underemphasizing how the West Coast has worked cooperatively and collaboratively on the management of groundfish and on the science and data collection that supports it. Based on this concern, we recommend that the Council:

1. **Amend the FMP to reflect the state-federal cooperation that has been occurring:**
 - Those stocks where the proportion of catch in state versus federal waters is raising concern over satisfying the 10-factor analysis would be designated in the FMP as interrelated to fisheries in federal waters. The amendment to make this happen would be considered in the next phase of the Council's stock definitions consideration, together with the possibility of delegating certain management functions to the states.
2. **Request the analysis recommended by the National Standard 3 Guidelines**
 - Any stock for which something less than 100 percent of the catch occurs in federal waters can benefit from transboundary cooperation.
 - The Council should understand its discretion to encourage state coordination and cooperation in achieving FMP objectives.
 - The analysis would include consideration of delegation of certain functions to states and the efficiencies that might gain.
3. **Request a briefing paper describing the fishery-dependent and fishery-independent data collection programs for groundfish on the West Coast**
 - The Council should understand how state and federal fishery monitoring programs integrate to support stock assessment and management under the FMP and how changing the stocks listed in the FMP may or may not affect them.
 - Fisheries are public resources with the science needed to keep them sustainable supported by public dollars. It is difficult for those wishing to participate in public policy decisions to understand where in the budget funding comes from and where decisions on how the funding is allocated are made.

Rationale

We are concerned that Council has proceeded to this stage without a hard look at the role state-federal cooperation has played on the West Coast, in management and science, and without being advised on how the Magnuson-Stevens Fishery Conservation and Management Act state-federal cooperation can be encouraged. The Council is at risk of taking action without understanding the costs and consequences. We emphasize the following points:

- The Council's Groundfish Fishery Management Plan ("the FMP") has been successful. It has brought the fisheries through a period of overcapacity and overfishing. The Council is now

wishing to turn more attention toward the National Standard 8 objective of providing for the sustained participation of fishing communities, the National Standard 7 objective of not imposing unnecessary burdens, and considering less disruptive ways of preventing overfishing and achieving optimum yield under National Standard 1.

- The Magnuson-Stevens Act did not grant the Council jurisdiction in state waters. Success has depended on the states and tribes to regulate fisheries using their respective authorities to advance the FMP's goals as well. This is not just true of the Groundfish FMP. The state-federal cooperation is also integral to the Salmon and Coastal Pelagic Species FMPs.
- Any jurisdictional concerns with the FMP are addressable while maintaining this cooperative approach. The Magnuson-Stevens Act cannot compel the states to participate, but it does encourage the Council to pursue cooperation and provides ways for the FMP to encourage it. Of note, the federal government used the state conforming action model used in the Council's Salmon FMP to defend an action the agency took on Alaska salmon in a case, a case that turned on a question of state versus federal jurisdiction. The court agreed with the position that the Magnuson-Stevens Act made room for cooperation from the states but did not require it (discussed below).
- We have long been concerned that the Magnuson-Stevens overfishing provisions have been interpreted in a manner that is out-of-step with international best practices and potentially more reactive than necessary to achieve optimum yield. The three state agencies highlighted that they are not bound by these policies in state waters and can choose other approaches over 10 years ago.¹ The Council has long supported advancing transboundary management with Canada and Mexico and across the North Pacific. It would be highly unfortunate for the FMP to discourage transboundary cooperation among the West Coast states.
- For Washington, we are concerned that even the PPA would create unnecessary fragmentation if the cooperative approach is not given due attention. The state's recreational fishery, and our co-management with the treaty tribes would be most directly affected.² While key stocks targeted by the recreational fishery would remain in the FMP, others that are managed under the same set of rules would not. Even for a stock like Black Rockfish where fishing predominates in federal water, a substantial percentage of the catch can be taken in WA state waters and requires state authority to regulate. If 51% of the catch comes in federal waters, then 49% requires state jurisdiction to manage.
- Even those stocks that are caught mainly in state waters can be highly connected between state and federal waters, as well as across state boundaries, through the fisheries operating across jurisdictional lines. The [ODFW Report](#) nicely describes how regulations can shift more effort into federal waters and vice versa. This is also the case in our recreational fishery. As an example, Figure 1 displays the 20-fm contour compared to the 3 nautical mile state-federal boundary. We

¹ <https://www.pcouncil.org/documents/2014/03/d-groundfish-management-march-2014.pdf/#page=328>

² Sec. 3.6 of the analysis provided as [Attachment 1](#) contemplates the possibility of the state and tribes establishing entirely new efforts to co-manage nearshore stocks. Why this would need to happen when it occurs now with minimal effort and in an efficient manner, addressing the management of state and tribal fisheries that fish in both state and federal waters underscores some of the fundamental questions we and others have raised about the focus of this agenda item.

have used that line at certain times of the year to keep recreational fisheries from going deeper, into federal waters and because of concerns about bycatch of yelloweye rockfish.

- We do not collect data on the percentage of catch occurring in state versus federal waters. There is little benefit to doing so. Figure 1 provides some indication of Black Rockfish habitat off our state. It is likely that catch predominates in federal waters in some years and in state waters in others, and the split clearly differs between the northern and southern areas of the state. It does not benefit conservation or our state's fishing communities to worry about this question. It is more efficient and cost-effective to use state authority to manage cooperatively with the Council.
- The Council has used state specific stocks because they are convenient management units and not based on the belief that the state borders are biological boundaries. Keeping the WA stock in the FMP while removing the OR stock would be inefficient and contrary to the goal of National Standard 3 (discussed in detail below).
- The FMP's success is likewise founded on state-federal-tribal cooperation on science and monitoring. Pulling these integrated programs apart would be more likely to increase costs and reduce capacity overall. Likewise, it would be prohibitively costly in the current budget climate for the federal government to replace the state programs. These programs are already stressed by many years of federal contributions to state data collection programs not keeping up with inflation. State staff spend considerable time supporting the Council's stock assessment process.
- Concerns that the FMP having too many species and hopes that removing some will save costs have not been addressed by analysis. Scientific and administrative resources have always been limited. The Council has addressed the matter of limited resources through stock assessment and workload prioritization. If the concern is that too much time is spent on state water issues, this can be discussed as part of priority setting.
- The integrated data collection programs on the West Coast collect data are all multispecies in their focus. It is necessary to give priority to some species over others based on stock assessment and management need. However, the programs will not experience cost saving from removal of species from the FMP. As long as the programs continue, there will be potential for collecting data for many more species. For example, the NMFS bottom trawl survey catches were classified into an average of 489 species or species groups 2019-2024 (no survey was conducted in 2020).
- We do see the promise of delegating certain functions to the states for improving efficiencies.

The Magnuson-Stevens Act encourages cooperation and coordination

Again, the recommendation we make is for the Council to be more fully briefed on the authorities and guidelines that are relevant to state-federal cooperation of interrelated stocks. We briefly outline some of the highlights that stand out in our initial review here.

We begin with Section 303(b)(5) of the MSA, found within the section laying out what the Councils have discretion to include in FMPs. It says that FMPs may:

incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of

the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

This is clear indication that Congress contemplated that regulation by the states could be important to achieving FMP conservation and management goals and recognized the interrelated effects of state and federal regulation on where fishing effort occurs.

We next highlight National Standard 3 (NS3). It requires that stocks be managed throughout their range, and interrelated stocks to be managed as a unit or in close coordination. The Council is required to follow this standard to “the extent practicable.” A federal district court decision from Alaska, issued on June 30, was decided, in part, on this issue of practicability.³ Of note, the court highlighted how the federal attorneys arguing the case used the Council’s Salmon FMP to defend NMFS’ action, noting that the FMP:

has a long and successful practice of managing federal and state waters fisheries collaboratively with Washington, Oregon, and California, with agreement from the States to take conforming measures.

The court agreed that Alaska not willing to cooperate to the same degree or to accept delegated authority meant that it wasn’t practicable for NMFS to follow NS3 in full. The court added this:

While the MSA contemplates cooperation between state and federal fisheries managers and permits the delegation of management pursuant to an FMP to state authorities, nothing in the MSA requires such an arrangement.

The NS3 Guidelines were also part of the court’s consideration, including the provision identifying the purpose of NS3 as “induc[ing] a comprehensive approach to fishery management” and one in which the “geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries.”⁴ That the NS3 Guidelines recommends the Council’s look beyond the fisheries for which it can regulate direction is furthered by this recommendation on what type of discussion FMPs should include:

Management activities and habitat programs of adjacent states and their effects on the FMP’s objectives and management measures. Where state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations. The FMP should also discuss the impact that Federal regulations will have on state management activities.⁵

³ [UNITED COOK INLET DRIFT ASSOCIATION v. National Marine Fisheries Service](#)

⁴ [50 CFR 600.320\(b\)](#).

⁵ [50 CFR 600.320\(e\)\(3\)](#).

The “unity of management” section also recommends looking beyond just those fisheries occurring within the waters under the Council’s jurisdiction:

Cooperation and understanding among entities concerned with the fishery (*e.g.*, Councils, states, Federal Government, international commissions, foreign nations) are vital to effective management. Where management of a fishery involves multiple jurisdictions, coordination among the several entities should be sought in the development of an FMP.⁶

The NS3 Guidelines also describe the identification of “management units” as a “choice” that “depends on the focus of the FMP’s objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives.”⁷ We do not see why the Council could not make the objective of state-tribal-federal cooperation an explicit objective of the FMP and define “management units” on technical type grounds like those highlighted by ODFW in their report.⁸ The Magnuson-Stevens Act defines a fishery as “one or more stocks of fish which can be treated as a unit for purposes of conservation and management” and “any fishing for such stocks” with the unit being defined “on the basis of geographical, scientific, technical, recreational, and economic characteristics.”⁹ Using the WA and OR recreational fisheries as an example, they are natural management units and they are interrelated to one another and to other federal fisheries by “technical” interactions, like for example, through catch of canary rockfish and need to share the ACL among sectors.¹⁰

In sum, we see management under the Council’s Groundfish FMP as having been consistent with NS3 in practice and for many years. We are concerned that the changes to the FMP are being made in a manner that is inconsistent with the NS3 purpose of inducing a comprehensive approach to fisheries management.

Integrated state-federal fishery monitoring

The NS1 Guidelines are as equally strong on the need for transboundary cooperation:

When stocks are co-managed by Federal, state, tribal, and/or territorial fishery managers, the goal should be to develop collaborative conservation and management strategies, and scientific capacity to support such strategies (including AMs for state or territorial and Federal waters), to prevent overfishing of shared stocks and ensure their sustainability.¹¹

The West Coast has long worked collaboratively on the conservation and management strategies and on the scientific capacity to support them. This is the goal the Council should continue to support and should not lose sight of in making recommendations under this action.

On that, we have been concerned by a lack of awareness around the Council in how all the state, federal, and tribal fishery monitoring programs fit together. And we have been concerned by statements that

⁶ [50 CFR 600.320\(c\)](#).

⁷ [50 CFR 600.320\(d\)\(1\)](#).

⁸ We would presume the statute and NS3 Guidelines use the term “technical” as the peer reviewed literature to refer to the issues involved in multi-species and multi-fleet fisheries.

⁹ Section 3(13).

¹⁰ We detail the particular challenges of canary allocation in [our report submitted under Agenda Item G.6](#).

¹¹ [50 CFR 600.310\(f\)\(4\)\(iii\)](#)

removing species from the FMP will reduce monitoring costs without any assessment of how that will occur.

Again, we believe there would be great benefit to the briefing paper describing how the West Coast fisheries monitoring programs serve the Groundfish FMP. We can show how the federal contribution to our agency's commercial sampling and recreational survey programs has not kept up with costs and how those programs support the Council's fisheries almost exclusively. For example, the PacFIN grant provided by NMFS to PSMFC and shared among the states once supported our age reading lab and fish ticket system. It now only supports port sampling staff, and a smaller portion of the time. A similar situation is occurring with the RecFIN grant and our Ocean Sampling Program for estimating recreational catch.

We have also heard concern that the federal government is being asked to survey non-trawlable habitats and in nearshore waters. We agree that this would be a legitimate activity for Congress to consider funding as their geographic scope of what they choose to fund is only limited by the Constitution. It was Congress that decided to create the Council system and to encourage but not require the states to follow the Magnuson-Stevens Act within state waters. At the same time, we have not seen recognition that Washington uses state dollars to conduct the hook and line survey off our state. This survey covers both state and federal waters, nor have we seen recognition that state dollars that long-supported the rockfish stations added to the International Pacific Halibut Commission's survey to improve fishery-independent data for yelloweye, and are now considering shifting those resources to add deeper stations to our survey. Our state committed to this long ago, through agency leadership and action by our Legislature, because our fisheries and fishing communities do not depend on the difference between state and federal waters.

Conclusion

We are again concerned that the Council is looking to recommend a FPA at this meeting without the benefit of having discussion of state-federal cooperation recommended by the NS3 Guidelines and elsewhere. The 10-factor analysis is incomplete without bringing the NS3 purpose of a comprehensive approach and full geographic scope into fuller consideration. Factor 10 and others should call for bringing NS3 into the mix.

In creating the Magnuson-Stevens Act, Congress intended the Councils as the primary means of setting conservation and management policies. The Council has discretion to choose management units, to determine which stocks are in need of conservation and management, and to attempt to induce cooperation with other jurisdictions. NMFS reviews Council recommendations for consistency with the Magnuson-Stevens Act, its National Standards, and other applicable laws. If NMFS finds issues with consistency, the Magnuson-Stevens Act limits the agency's recourse to returning to the Council to explain the nature of the inconsistency and offer recommendations for how the Council could address them.

As noted in the court decision cited above, the primary legal standard that NMFS is held to when approving Council actions is deferential and one of reasonableness:

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that

the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.¹²

It would therefore follow that NMFS should approach the Council's recommendations with a similar mindset. Except for recommending regulations that apply in state waters without state conforming action, the Council maintaining the long-standing cooperative approach would be more than reasonable and can be reasonably explained.

To be clear, we understand that NMFS is experiencing budget pressures, and we are not of the mind that things do not need to change at all or that change would not be beneficial. However, as this Council's track record shows, difficult conversations about limited resources can be had in an open and transparent manner and this should be the path forward.

¹² The court was citing to a U.S. Supreme Court decision from 2021, [FCC v. Prometheus Radio Project, 592 U.S. 414, page 423.](#)

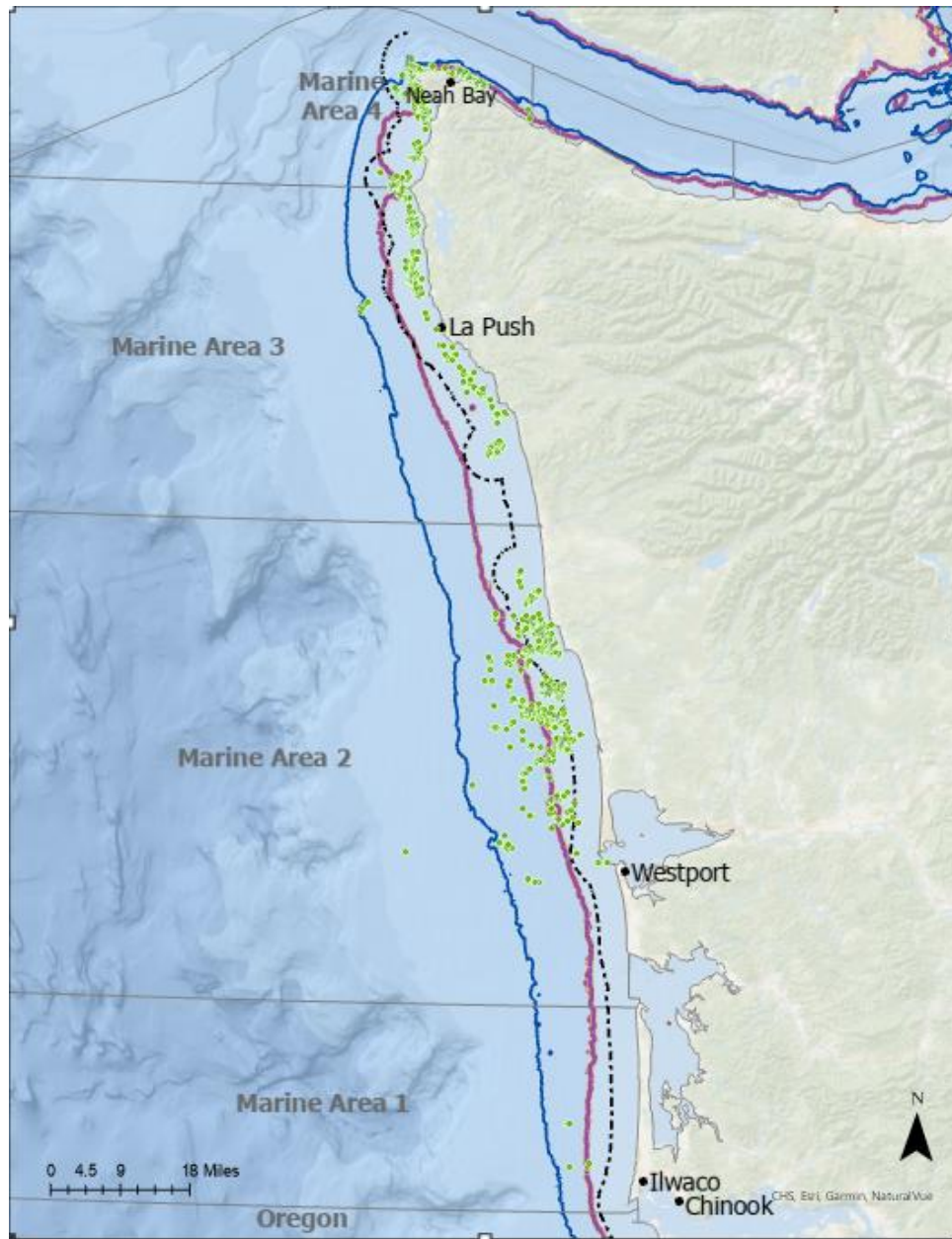


Figure 1. This map shows the marine areas used to manage the recreational fishery, and the ports from which boats operate, and displays the 3 nautical mile state-federal boundary (black dashed line) together with the 20 fm (purple) and 40 fm (dark blue) depth contours. It can be seen how the 20 fm restriction, requiring people to fish shoreward of that line when in effect, keeps fishing in state waters in many areas of the coast. The points highlighted in yellow-green show the location of where Black Rockfish have been caught in WDFW's hook and line survey, in its previous and current design, 1998-2024. The survey was designed to provide an index of relative abundance for Black Rockfish and other stocks, and not to be representative of the split between catch between state and federal waters in the recreational fishery.