

Initial NPFMC staff comments on Senate discussion draft: *Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2014*

Draft 5/7/14

Section numbers refer to the sections in the MSA, unless noted.

Italics represent staff comments/recommendations. Additional comments from staff and/or NPFMC may be forthcoming

Subsistence definition (section 2):

- Consider whether the definition of subsistence needs to include the words ‘non-commercial’ such that the proposed definition would be revised as follows: *“The term subsistence fishing means fishing in which the fish harvested are intended for noncommercial, customary and traditional uses...” This would be consistent with the State of Alaska definition, in which this phrase is a core part.*
- Uncertain whether the subsistence definition intended to omit the use of resources for *shelter, fuel, tools, or transportation*. Both the State of Alaska definition (AS 16.05) and the federal definition in ANILCA include those types of uses as subsistence. If a revision is made to include those uses, it could be as follows: *“...including for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making or selling of...”*

Ecosystem Management (sections 303B and 304):

- New section 303B provides for Fishery Ecosystem Planning Authority. Provides **discretionary authority** for Councils to develop and submit Fishery Ecosystem Plans and amendments to the Secretary. Also provides for SOC authority to do so. Adds ‘fishery ecosystem plan’ each place it says fishery management plan (Section 304, Action by the Secretary). *The effect would be to make fishery ecosystem plans the same status as FMPs, including the same review and approval process required for FMPs (and amendments) including review under NEPA and other applicable laws and inclusion of implementing regulations. It is therefore not clear how an FEP would interact with an existing FMP – would it subsume the FMP? Language denoting that FEPs are to be submitted to and approved by the Secretary should be removed, such that an FEP remains an overarching strategic planning document, rather than a regulatory implementation vehicle.*
- Provides substantial detail (under Required Provisions) on the required elements of an FEP, if undertaken, including prescriptive monitoring and measurement requirements, and regulatory forcing requirements to amend FMPs to achieve specified goals and objectives (including protection of species diversity, habitat, food web structure and function, etc). This only applies to FEPs developed after passage of this Act. *This section establishes numerous specific requirements if a Council undertakes an FEP, which is a vehicle for ecosystem planning that Councils already have the authority to use. Concern would be, as was experienced with LAPP provisions in the 2006 MSA amendments, in that providing explicit, comprehensive requirements for something a Council is already authorized to develop will actually deter Councils from undertaking these efforts, due to significant workload requirements and/or unforeseeable, unintended consequences. Based on the plain language of the bill, it appears that Councils may be able to develop FEPs to their own standards, and not submit them for Secretarial review.*
- **Specific suggested revisions are provided in Attachment 1 to this document.**

Annual Catch Limits/Stock Assessments/Improving Science:

- Requirement to set ACLs are in 303(a)(17). New provisions in 303(d) state that ACLs are not required for species that have a life cycle of ≤ 18 months. Separate ACLs are also not required for each individual species of non-target fish. *The latter provision may cause significant confusion, as species may be a non-target in one fishery, but a target in another fishery (in the North Pacific, target and non-target species designation are often based upon the percentage of species composition caught, and 'non-targets' often include major commercial species which are landed in conjunction with the target). It is counter to precautionary management to not set ACLs for these major species. This provision may also be unnecessary due to recent case law involving 'minor species' caught in association with major (target) fisheries. If this language is intended to address situations of data poor stocks and/or lack of stock assessments, or minor species, there are likely more direct solutions that avoid reference to 'non-target' fish.*
- A new Section 404(e) would define a process for conducting stock assessments and coordinating those actions nationally. This section requires the Secretary to publish a plan to conduct stock assessments for all fisheries, including to "establish a schedule for updating the stock assessment that is reasonable given the biology and characteristics of the stock". There is no mention of consideration of the **economic value** of the stock. Given the potential national level trade-offs inherent in this section (increasing certain stock assessment may require reducing other, existing stock assessments), we believe it is imperative to also consider the economic value of each stock in determining a schedule for future assessments. *We recommend inclusion of the term "economic value", in addition to the biology and characteristics of the stock.*
- A new Section 404(f) is added which requires the SOC, in consultation with the SSC(s), to develop and publish guidelines that will 'facilitate greater incorporation of data, analysis, and stock assessments from **nongovernmental sources**, including fishermen, fishing communities, universities, and research institutions, into fisheries management decisions.' Any information meeting the guidelines would be considered 'best scientific information available', and the SOC and Councils would have to use all data that meet the guidelines or explain in the rulemaking process why the data were not used. *The intent and effect of this addition are unclear, but could create significant debate over how the guidelines are crafted, and what information a Council would be forced to consider as 'best scientific information available'. This decision appears to rest with SSC rather than Council. It is also unclear whether these would be regionally developed vs. nationally (per reference to consultation with SSCs). Significant new workload for SSC(s) to address this provision, even though the role of our SSC in each review of a stock assessment or FMP amendment analysis is to ensure the analysis is robust and the best scientific information available is being used. Creates controversy and legal vulnerability over whether NGO or stakeholder research and publications should (or must) be included and could significantly lower the quality of the information that is used for decision making.*
- **Recommend deleting this new section**, recognizing Councils can already develop regionally-specific solutions to data-poor situations. *Alternately, if this new section is retained, the legislation could require preparation of a report rather than NOAA guidelines (perhaps regionally, rather than national level) and development of plans to address deficiencies where necessary. Specific revisions to that end are suggested in **Attachment 2**. Section 404(f)(3) is the most problematic and should be removed under any approach.*

Forage fish species:

- **Suggest removing the new definition and sections on forage fish to avoid unintended consequences. Details below.**
- The definition of forage fish specifies that forage fish are those that contribute to the diets of other fish, and more generally have a role in energy transfer from lower to higher trophic levels throughout its life cycle. *The forage fish complex in the BSAI FMP consists of several species including eulachon, capelin, sand lance, sand fish, euphausiids, myctophids, pholids, gonostomatids. Currently, forage fish and prohibited species are subcategories of the 'ecosystem component' in the FMP. These species cannot be targeted, and lower maximum retainable amounts have typically been used for forage fish to discourage any targeted fishing of these ecologically important species. However, the proposed definition could be construed to include additional fish species; for example, juvenile pollock, which contributes to the diets of other fish in early life cycles, and is important to higher trophic levels of marine mammals in its adult life stage. This was likely not the intent, but we need to ensure this definition achieves its intent and does not create unintended consequences. Need to ensure that Councils continue to have the discretion to define forage fish included in the FMPs.*
- Adds a requirement for SSCs to develop a control rule to derive annual recommendations for ABCs for a forage fishery and a minimum reference point to determine when a forage fishery should close (Section 302(g)). *This should only affect regions in which forage fish are allowed as a directed fishery. Currently, the forage fish species in the NPFMC's FMPs are included as an ecosystem component and cannot be targeted.*
- Specifies considerations for setting ACLs for a fishery for forage fish (Section 303(a)(14)). *The NPFMC has forage fish in the ecosystem component, and so ACLs are presumably not required. Need to ensure nothing in the Act changes the ability for Councils to both define forage fish and put forage fish in the ecosystem component; does not appear so, as long as it is not a 'fishery' for forage fish.*

New definitions of bycatch and non-target fish:

- The definition of **bycatch** would now include 'fish harvested in a fishery and retained but not landed, and non-target fish that are harvested in a fishery and retained.' *This definition does not work well for mixed stock fisheries, which are common in the North Pacific and several other regions. The result is what is counted as 'bycatch' in the North Pacific will increase significantly, because it will include those fish that are commercial valuable, retained, landed, and sold, even if they were not the target species based on the proportion of the species in the haul or trip. Suggest maintaining the existing definition.*
- A definition was added for **non-target fish** which includes fish that are caught incidentally during pursuit of a target fishery, including regulatory discards which may or may not be retained for sale or personal use. *This definition could be construed as inconsistent with the standing definition of regulatory discards in the MSA, which cannot be sold. They are either required by regulation to be discarded, or required to be retained but not sold. Suggest adding a comma after the words 'regulatory discards' to be clear.*

Electronic Monitoring:

Overall recommendation is to consider removal of new language in Section 303(a)(15) and (e), and rely on new Section 201 to accomplish same overall goal. Section 202 may not be necessary, given Section 201. If Section 303 (a)(15) and (e) are retained, recommend lengthening the timelines to be more realistic. Details follow.

Section 303 -

- Section 303(a)(15) gives the Council one year to comply with a new requirement to assess the fishery dependent data needs of the fishery and **if determined necessary**, establish an integrated data collection program. *Criteria for determination are not specified; therefore it would appear to be judgment call for the Council. It is also not clear what is intended by the term "of the fishery" (Species specific? Groundfish complexes? Would not compel inclusion of halibut, because it is not managed under an FMP, and this requirement is in the 'required provisions' section of 303 (Contents of FMPs).)*
- Integrated data collection requirements are provided in a new section (Section 303(e)) and **FMPs must be amended within one year** to comply. This program must give first consideration and priority to EM, and provide for fees on a fishery specific basis to be collected from those participants (directed users and bycatch users). Very specific language that the data collection system must include performance standards, field support systems, data review procedures, and implementation strategies. Specifically calls out EM, dockside monitoring, and observers as possibilities, to better comply with NS 8. *Not clear whether it requires Councils to re-assess data needs of each existing fishery that is being monitored, or only those for which a monitoring system is not yet in place. FMPs must be amended within one year, which is an unrealistic timeline to conduct the legally required analyses of changing the FMPs and associated regulations, and complete Council action, much less actually have an amendment approved by the Secretary and implemented. Concept of assessing fee on 'bycatch harvesters' does not make sense given definitions of 'bycatch' and 'harvest', and reference to 'fishery specific basis'.*

Sections 201 and 202 of Senate draft -

- Adds a requirement (section 201 of Senate draft) for the SOC in consultation with the eight regional Councils, within 180 days, to complete and submit to Congress a review of all federal FMPs to: identify those FMPs that can incorporate EM to reduce costs; and specify which types of EM will achieve cost efficiencies. Within one year of the review, Councils must develop a plan to adopt and implement EM in each of their FMPs identified in the review; numerous, detailed elements of the plan are specified, including cost effectiveness, prioritizing implementation of EM, and specifying implementation schedules. The Councils/SOC would have 4 years from the date of implementation of the Act to complete implementation. *The two timelines for the SOC assessment (6 months) and plan development by the Council (one year) are very short, and we suggest changing these to one year for the initial assessment, and two years for development of Council plans to adopt and implement EM in the specified fisheries. Four years for complete implementation is an acceptable timeline.*
- Adds a requirement (section 202 of Senate draft) for the SOC in consultation with the eight regional Councils, to submit a report to Congress **within one year** for each fishery under an FMP that identifies the goals of the monitoring and enforcement of each fishery, methods to accomplish those goals (EM, observers, VMS), and certifies that those are the most cost-effective for fishing under each FMP, or explain why the most cost effective measures are not

required. *This is an additional, likely significant requirement for agency and Council resources, and appears redundant to the requirements spelled out in Section 201, and would be required on the same timeline as the assessments required under Section 201.*

Explanation of suggestions -

- *Section 303 revisions are highly duplicative with the new requirements under Sections 201 and 202 of Senate draft. While the new sections 201 and 202 are focused on cost efficiencies, assessing those will by necessity also require Councils to address the scientific data collection aspects referred to under 'Integrated Data Collection' (i.e., performance standards, field support systems, data review, implementation strategies, etc), but under a much more realistic timeframe. Sections 201 and 202 place clear emphasis on EM development, but do so without automatically assigning first priority to EM for any monitoring program.*
- *The primary concern is that taken collectively, the multiple, overlapping EM requirements in this draft, and the associated timelines, would divert and delay ongoing efforts for specific EM applications in each region (as well as delay progress on many other unrelated Council priorities). The NPFMC has prioritized EM development and implementation in the small boat longline (halibut and sablefish) sector; we need to be careful to not divert Council and agency resources from ongoing progress for EM implementation which can be effected through relatively simple regulatory amendments. **It appears that the overall intent of these collective provisions can be accomplished within the provisions of proposed Section 201.***
- *If sections 303(a)(15) and 303(e) are not removed, we recommend deletion of Senate draft subsection (b) which requires FMPs to be amended within one year (which is unrealistic), and the following specific changes to 303(e), to be consistent with Section 313 and address other factors:*

(e) INTEGRATED DATA COLLECTION.

(1) IN GENERAL.—Any integrated data collection required by subsection (a)(15) shall—

(A) have scientific data collection as its principal purpose;

(B) specifically consider the requirements of section 301(a)(8);

(C) with respect to any data to be collected from a fishing vessel while that vessel is at-sea, give first consideration and priority to the utilization of electronic monitoring;

(D) subject to paragraph (3), provide for a system of fees, that may be on a fishery specific basis, to be collected from participants in the fishery, including those persons whose participation is as direct harvesters or bycatch users harvesters;

(E) be developed in consultation with stakeholders, including fishery participants, equipment providers in the case of electronic monitoring systems, and contractors in the case of human observers; and

(F) include—

(i) initial performance standards for the fishery;

(ii) field support systems;

(iii) data review procedures; and

(iv) implementation strategies.

Section 313 -

- Explicitly adds EM to Section 313 (Research Plan authority specific to the NPFMC), which allows EM to be part of our monitoring system and to use the fees authorized under this section for both observers and EM. *NOAA GC has already concluded that EM is included under Section 313 and the fees can cover EM; this makes it explicit. **NOTE: If Section 303(e) is deleted above, then also need to remove the changes made to Section 313(a)(2). They would be inconsistent at that point, and are already unnecessary given the addition of Section 313(b)(3).***

Cost Recovery Fees:

- The SOC authority to collect a fee to recover agency costs related to management, data collection, and enforcement is currently limited to LAPs and CDQ. New section extends cost recovery to 'management programs that allocate a percentage of the TAC to individuals who have formed a sector' (Section 304(d)(2)(A)(iii)). *We have no specific recommendation on this section, but note that the NPFMC would likely need legal review to determine which sectors would fall under this new authority, for example, a voluntary cooperative. Sectors are defined differently in various regions. The way we commonly define a sector is any gear or operating type that receives an exclusive allocation of the TAC, even if the fishery operates under limited access. This language may be unnecessarily broad.*

Sustainability labeling authority (Section 305(k):

- Creates a voluntary sustainability labeling authority, which would allow producers, processors, importers, exporters, distributors, or sellers of fish to determine and label their product 'sustainably caught', if the product meets the sustainability standards provided in the Act. The sustainability standards are relatively general (fish must be harvested under an FMP, with equivalent state, tribal or foreign conservation and management measures as determined by the SOC, the fishery is not overfished or depleted and is not in an overfishing condition). *This may benefit other states/Councils, but it is not clear whether this provides any new advantage for Alaska fisheries. Such program would result in providing credibility to fisheries that are not equal to the standards set in Alaska under third party certification.*

NEPA/MSA reconciliation:

- Adds requirement for SOC (within 90 days of enactment of the Act) to publish proposed rulemaking to update and revise procedures under the 2006 section 304(i) mandate to reconcile MSA and NEPA process. *This provision directs the SOC to follow through on the 2006 mandate. The agency is currently developing a Policy Directive that they assert will fulfill that mandate; therefore, this added provision may have no practical effect. The Council Coordination Committee (CCC) is developing a more specific proposal for this issue, which will include incorporating specific NEPA requirements directly into the MSA. Specific recommendations are therefore forthcoming.*

State Jurisdiction (Section 306):

Request that the changes below be accommodated in the next version. It relates to state jurisdiction and would fix a small loophole in federal waters off Alaska related to the Salmon FMP. The revisions would essentially ensure all vessels fishing salmon in the EEZ would be under state jurisdiction, as intended by the Council, regardless of whether they ever entered state waters. The risk of someone

taking advantage of this loophole is very small, but it is important to close the possibility entirely if we have the opportunity.

SEC. 306. STATE JURISDICTION

(a) In General —

....

(3) A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances:

(C) The fishing vessel is not registered under the law of the State of Alaska and is operating in a fishery in the exclusive economic zone off Alaska for which there ~~is was~~ no fishery management plan in place ~~on~~ ~~August 1, 1996~~, and the Secretary and the North Pacific Council find that there is a legitimate interest of the State of Alaska in the conservation and management of such fishery. The authority provided under this subparagraph shall terminate ~~while when~~ a fishery management plan under this Act is approved and implemented for such fishery.

Attachment 1: Suggested revisions to Section 303B and Section 304

SEC. 303B. FISHERY ECOSYSTEM PLANNING AUTHORITY

(a) DISCRETIONARY PLANNING AUTHORITY

(1) COUNCIL AUTHORITY.— For a fishery or fisheries for which a fishery management plan has been prepared by a Regional Fishery Management Council and approved by the Secretary, the Council may, at the Council's discretion and in accordance with the provisions of this Act, prepare ~~and submit to the Secretary~~ a fishery ecosystem plan and amendments to such plan as are necessary from time to time or required under subsection (c).

~~(2) SECRETARIAL AUTHORITY.— For a fishery or fisheries for which a fishery management plan has been prepared and approved by the Secretary, the Secretary may, at the Secretary's discretion and in accordance with the provisions of this Act, prepare a fishery ecosystem plan and amendments to such plan as are necessary from time to time or required under subsection (c).~~

(b) **REQUIRED** PROVISIONS.—A fishery ecosystem plan that is prepared at the discretion of a Council or the Secretary on or after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2014 ~~shall~~ may—

(1) contain a description of the fishery ecosystem and fishery ecosystem context, including—

- (A) the geographical extent of the fishery ecosystem;
- (B) the biological, physical, chemical, and socioeconomic aspects of the fishery ecosystem;
- (C) the goods and services provided by the fishery ecosystem;
- (D) the structure and function of the food web, including key predator-prey relationships and the habitat needs of different life history stages of key species that make up the food web;
- (E) the indicators of fishery ecosystem health; and
- (F) the impacts of activities on the fishery ecosystem and on indicators of fishery ecosystem health, including direct, indirect, and cumulative impacts of activities under the Council's jurisdiction and outside the Council's jurisdiction;

(2) specify fishery ecosystem-level goals and objectives for management, including—

- (A) identifying and preventing fishing rates or exploitation patterns that jeopardize the maintenance or recovery of the fishery ecosystem or biological community structure, function, stability, or resilience;
- (B) protecting and restoring species diversity;
- (C) protecting and restoring habitat diversity and integrity;
- (D) protecting and restoring food web structure and function; and
- (E) optimizing economic output;

(3) assess the level of uncertainty in fishery ecosystem structure, function, data, and reasonably

foreseeable responses to management action;

(4) specify how the uncertainty under paragraph (3) is accounted for in conservation and management measures that achieve the goals and objectives under paragraph (2);

(5) contain conservation and management measures—

(A) that achieve the goals and objectives under paragraph (2);

(B) that will be implemented through relevant fishery management plans; and

(C) that will not limit or otherwise affect the conservation requirements of the national standards or other provisions of this Act; and

(6) contain a monitoring and evaluation plan—

(A) to describe available data sources and specify information gaps for assessing the performance of management in achieving fishery ecosystem-level goals and objectives specified under paragraph (2);

(B) to develop measurable standards and performance measures based on indicators of fishery ecosystem health identified under paragraph (1)(E); and

(C) to measure the achievement of fishery ecosystem-level goals and objectives specified under paragraph (2).

(c) ASSESSMENT AND UPDATING OF PLANS.—

(1) IN GENERAL.— Each fishery ecosystem plan prepared by a Council ~~or the Secretary shall~~ may be assessed and updated as necessary to better achieve ecosystem-level goals and objectives.

(2) ASSESSMENT CRITERIA.—A plan assessment or update under paragraph (1) ~~shall~~ may—

(A) identify research priorities—

(i) to improve monitoring of fishery ecosystem health and understanding of fishery ecosystem processes; and

(ii) to fill data gaps;

(B) analyze progress in meeting fishery ecosystem-level goals and objectives included in the fishery ecosystem plan; and

(C) specify additional actions that shall be taken when practicable to better meet fishery ecosystem-level goals and objectives.

(d) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as requiring a Council or the Secretary to exercise the discretionary planning authority provided by this section.

SEC. 304. ACTION BY THE SECRETARY

Remove all new instances of 'fishery ecosystem plan' in Section 304.

Attachment 2: Suggested revisions to new Section 404(f), if it is not removed entirely. Section (f)(3) should be removed at a minimum.

(f) IMPROVING DATA COLLECTION AND ANALYSIS

(1) IN GENERAL.—The Secretary, in consultation with the science and statistical committees of the Councils established under section 302(g), shall develop a report to Congress on ways to ~~and publish in the Federal Register guidelines that will~~ facilitate greater incorporation of data, analysis, and stock assessments from nongovernmental sources, including fishermen, fishing communities, universities, and research institutions, into fisheries management decisions.

(2) CONTENT.—The guidelines report shall—

(A) identify types of data and analysis, especially concerning recreational fishing, that can be reliably used as the best scientific information available for purposes of this Act and the basis for establishing conservation and management measures as required by section 303(a)(1), including setting standards for the collection and use of that data and analysis in stock assessments and for other purposes;

(B) provide recommendations specific guidance for collecting data and performing analyses identified as necessary to reduce the uncertainty referred to in section 404(e)(2)(C).; ~~and~~

~~(C) establish a registry of persons providing such information.~~

~~**(3) ACCEPTANCE AND USE OF DATA AND ANALYSES.**—The Secretary and Regional Fishery Management Councils shall—~~

~~(A) use all data and analyses that meet the guidelines published under paragraph (1) as the best scientific information available for purposes of this Act in fisheries management decisions, unless otherwise determined by the science and statistical committee of the Councils established under section 302(g) of this Act;~~

~~(B) explain in the Federal Register notice announcing the fishery management decision how the data and analyses under subparagraph (A) have been used to establish conservation and management measures; and~~

~~(C) if any data or analysis under subparagraph (A) is not used, provide in the Federal Register notice announcing the fishery management decision an explanation developed by such science and statistical committee of why that data or analysis was not used.~~