



# North Pacific Fishery Management Council

Simon Kinneen, Chair | David Witherell, Executive Director  
1007 W. 3rd Avenue, Suite 400, Anchorage, AK 99501  
Phone 907-271-2809 | [www.npfmc.org](http://www.npfmc.org)

September 30, 2021

The Honorable Jared Huffman  
1527 Longworth House Office Building  
Washington, D.C. 20515  
c/o Casey MacLean, legislative assistant  
[Casey.MacLean@mail.house.gov](mailto:Casey.MacLean@mail.house.gov)

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

Dear Representatives Huffman and Case:

Pursuant to the August 25 letter from your legislative assistant Casey MacLean to Mr. Marc Gorelnik requesting comments from the eight fishery management councils on H.R. 4690 “Sustaining America’s Fisheries for the Future Act of 2021”, I am responding on behalf of the North Pacific Fishery Management Council (North Pacific Council, or Council).

The North Pacific Council has a successful record of science-based, sustainable fisheries management since the Magnuson-Stevens Fishery Conservation and Management Act (MSA) was implemented in 1976. Each year, vessels homeported in Alaska, Washington, and Oregon harvest over 2,200,000 metric tons of groundfish in the North Pacific, worth approximately \$2.5 billion first wholesale. The abundance of groundfish stocks is high, and most stocks are well above the abundance levels that produce maximum sustainable yield. In the past 40 plus years, no Alaska groundfish stocks have been overfished or have been subject to overfishing.

The MSA has provided the North Pacific Council with the flexibility to develop a very successful fisheries management program in the North Pacific, resulting in global recognition for our sustainable and valuable fisheries. As such, the North Pacific Council believes that it is able to achieve the goals of sustainable fisheries management, including improving climate resiliency under the existing MSA. Under the current flexibility provided by the MSA, the Councils have the authority to identify data needs and promote stock resilience to climate change through a transparent and inclusive public process that relies on the best available science. Through implementation of the MSA, the United States is the global leader in the successful conservation and management of fishery resources and associated ecosystems in a proactive, sustainable manner.

The North Pacific Council offers the following comments on specific sections of H.R. 4690 that are applicable and of higher importance to the North Pacific Council. The following comments are not intended to provide support for or against the legislation. Rather these initial comments are based on the North Pacific Council’s ability to meet its conservation and management goals under the MSA, and the objectives specified in its 5-year NOAA Grant. As this bill goes through the legislative process, we will be pleased to provide additional comments if requested.

**Sec. 102. Promoting climate resilience in fisheries management.** Requires fishery management plans to promote stock resilience, identify data needs due to climate change, examine the vulnerability of a

fishery and its participants, and assess the anticipated impacts of climate change. Adds several new requirements for the contents of fishery management plans (FMPs), including an assessment of how management measures account for climate change and other environmental and ecological changes on the fishery, and an identification of the distribution for the fish stocks managed under the plan.

Comment: The North Pacific Council and its scientific advisory bodies already work closely with National Marine Fisheries Service (NMFS) to incorporate climate science into annual stock assessment processes and fisheries management to be consistent with the current requirements of the MSA, so a requirement to add this information to FMPs would be duplicative which could cause confusion and would divert staff time to amending FMPs continuously, each time new information becomes available. It is unclear what benefit would be gained by having this information in an FMP, which takes time and staff resources to amend, versus having this information in annual stock assessments which are prepared through a public process, publicly available and updated annually.

**Sec. 103. Incorporating climate science.** Requires that new Council members receive training on climate change and its impact on fisheries and adds changes in range, species distribution and productivity of a fishery to an area of fisheries research (MSA Section 404).

Comment: The NMFS has already started to include training on climate change and potential fisheries impacts as part of its new council member training. Such training will assist new Council members in getting up to speed on the research and management measures undertaken to understand and address potential impacts of climate change.

**Sec. 104. Climate-ready fisheries innovation program.** Establishes a program to develop innovative tools and approaches to increase the adaptive capacity of fishery management to the impacts of climate change. It includes coordination with the Councils.

Comment: The legislation appears consistent with the direction of science and management in the North Pacific. The NMFS Alaska Fisheries Science Center has been developing advanced models of climate and ecosystem responses. The North Pacific Council has been actively working towards climate ready fishery management and resilience through its Bering Sea Climate Change Taskforce for its Bering Sea Fishery Ecosystem Plan. It would be helpful to understand what this new provision would add to the current process in order to understand whether it would aid, divert or delay current efforts in the North Pacific.

**Sec. 106. Emerging fisheries.** Creates a framework for establishing a new fishery or gear type and requires Councils to analyze potential impacts and management of the new fishery or gear type. This section requires a Council to review its fisheries and gear on the list of fisheries (50 CFR 600.725), which are fairly generic, and make them more specific (including identifying geographic distribution of the fishery, and what species are authorized to be caught and retained by that gear type) and to ensure only active fisheries are included on the list.

Comment: The North Pacific fisheries and authorized gear on the list are not geographically detailed and not species specific. The North Pacific Council concurs that analysis of new gear types and new fisheries help to understand and regulate potential impacts before a new fishery occurs or a new gear type is used in a given fishery. For example, the North Pacific Council has analyzed new gears prior to authorization for use in a specific fishery, most recently authorizing the use of pot gear as a legal gear type for a Bering Sea and Aleutian Islands directed halibut fishery, and longline pots for the Gulf of Alaska sablefish fishery.

However, the purpose of requiring a list of fisheries authorized to be caught and retained by that gear type remains unclear, and would result in overly cumbersome regulations, increase regulatory bycatch and waste, and reduce the flexibility of the Council to quickly adapt to climate change. These impacts would affect the Council's ability to carry out its responsibilities outlined in its grant without an increase in the Council's understanding and knowledge of authorized fisheries and gear types.

For the North Pacific, the list of fisheries split out by gear type, geographic area, inside and outside of the EEZ, and by management jurisdiction will already be enormous and complex. Adding the species of fish authorized to be caught and retained in each fishery will make the list of fisheries extremely lengthy and cumbersome. For example, in just the North Pacific groundfish fisheries, there are 4 management areas (GOA, BS, AI, Arctic), at least 12 gear types (pot, longline pot, trap, jig, longline, hook and line, handline, rod and reel, spear, dinglebar troll, hand troll, bottom trawl, pelagic trawl), 2 agencies with jurisdiction (NMFS, State of Alaska), and over 150 individual groundfish species and approximately 400 other species that can be caught and retained in the groundfish fisheries. The list becomes even longer when the other fisheries (scallop, crab, and salmon) are considered. Any minor adjustment to the list of species would require the North Pacific Council to prepare a regulatory amendment to fix it, thus negatively impacting the Council's ability and available time to address other more pressing conservation and management issues.

A likely management response to a requirement to list species that are authorized to be retained is to shrink the list of species to make it more manageable. However, this will increase regulatory bycatch, as the fish species not listed for a specific fishery would be required to be discarded. Any list that constrains what species can be retained will result in increased bycatch, and will affect the Council's ability to meet National Standard 9. The Council seeks to achieve the goal of National Standard 9 to minimize bycatch by encouraging retention, and only restricting discards when necessary to achieve specific fishery management goals (e.g., preventing targeting of prohibited species). Many of the species caught and retained are not the primary target of the fisheries, but they are retained by fishermen because there is some marginal profit in doing so. Limiting what species can be retained simply increases bycatch and waste. It is not clear how the additional detail relative to fish species that can be retained would have positive effects on the process, or the conservation and management of fisheries.

Lastly, the legislation appears to provide an additional layer of Secretarial review that could establish a lengthy process to evaluate, review and approve any changes to the species that can be retained in a fishery, or the specific gear type used in that fishery. Thus, the legislation may affect the ability of the North Pacific Council to achieve its conservation and management goals by restricting its ability to more quickly develop new gear types to adapt to changes. Rapid changes in the ecosystem require an adaptable and flexible regulatory system as currently provided under the MSA.

**Sec. 205. Community participation in limited access privilege programs (LAPPs).** Adds provisions for Councils to identify eligible fishing communities and adds a process for fishing communities to participate in LAPPs. Establishes minimum requirements for a Community Sustainability Plan that may be submitted by a community to a council.

Comment: The language in 303A(c)(1)(L) is not clear regarding the requirement to 'provide a process for fishing communities to participate...' which could cause confusion and further limit

the ability of Councils to use these provisions. Further clarity on what ‘participation’ entails is needed, as well as the timing of the submittal of the community sustainability plan. In effect, it is not clear if the provisions would require each LAPP to have a community allocation, whether other means of participating are acceptable, whether a different process is required other than the normal Council process, and whether a community sustainability plan must be submitted to and accepted by the Secretary before a LAPP can be approved. It is also unclear whether there must be a direct link between the eligible communities and the specific fishery that is subject to the LAPP, aside from being in the management area of the Council. Management areas in the North Pacific are very large. The bill could provide additional clarity by specifying whether the fishing community provisions apply only to newly developing LAPP programs.

In developing LAPPs for North Pacific fisheries, the Council has used a wide range of tools intended to provide for the sustained participation of communities engaged in and dependent on the fisheries subject to the LAPP. While allocations to communities are one tool, and the authority to use that tool to comply with National Standard 8 could be made clear, continued allowance of other tools to maintain community participation in a LAPP would provide the Council the flexibility to meet the needs of the communities most effectively and meet the management objectives of its grant.

**Sec. 206. Findings.** Adds a technical amendment to findings. The proposed finding contains the sentence “Many coastal areas are dependent on fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources; ensuring sustainable use of fishery resources is essential to the well-being of these areas.”

Comment: Because the bill explicitly acknowledges that overfishing is not always the cause of a stock being in low abundance, and thus replaces the term “overfished” with the term “depleted”, and further acknowledges that climate change can affect fish stock abundance, it is unclear whether this finding is to apply to depleted fisheries or fisheries affected by climate change. If the intent is to have this finding apply to various reasons, it could be further modified by inserting “or stock declines caused by environmental change” after “...the overfishing of resources” to continue to explicitly recognize that fishing resources can be adversely affected by more than just overfishing.

**Section 302 – Tribal Representation at the North Pacific Council.** Adds two Alaska Native Tribal seats to the North Pacific Council and establishes a process by which members are selected.

Comment: The North Pacific Council notes there are substantial differences in the appointment process, term limits, and choice of alternates for the proposed new council seats as compared to other existing appointments to the North Pacific Council. Unlike all other appointed seats on the Council, the Tribal representatives would be appointed by the Secretary based on a list provided by Alaska Tribes (not the Governor), would not be subject to term limits (no maximum of three 3-year terms), and would get to choose their own alternate for their seat (no other appointed member is allowed an alternate). Further, the alternate is neither bound by approval of the Tribal governments nor subject to the same level of qualifications for membership as are other Council members. It is also worth noting that the addition of two additional ‘Alaska’ seats alters the geographic representation of Council membership, such that 7 of the 9 appointed members would be from Alaska.

**Sec. 304. Council procedures and participation.** Requires roll call votes for every motion (except procedural matters). This section would require that council meetings be held in person to the extent

possible, but ensure the availability of remote participation and voting. To the extent possible, all Council and CCC meetings must have a live audio or video broadcast on the Council's website, and a recording of the Council and SSC meetings posted by not later than 30 days of the meeting. The Secretary must archive these audio or video recordings and any transcripts and make them available to the public.

Comment: The Council notes that for some motions roll call votes can disrupt the flow of the meeting and inhibit consensus building. There are several reasons for this. First, many motions only provide minor technical fixes to amend the main motion, and it is clear from the discussion that there is unanimity for the amendment, and a voice call by the chair for any objections retains the flow of the deliberations whereas a roll call vote would be disruptive. Second, a member can object on a voice call vote on a motion, in which case it gets noted in the minutes. In cases when more than one member voices an objection, or the chair senses from the discussion that there may be some disagreement, a roll call vote is made. Third, roll call votes are taken on all final action votes. Additionally, under the existing MSA language at Section 302(e)(5), any Council member can request a roll call vote on any motion. If the intent of the legislation is to determine how each council member voted on each motion, one solution might be to use the language: "All votes on all motions shall be taken and recorded in a manner that allows the public to discern whether each council member supported, opposed or abstained from the vote." This would allow for the Council chair to run the meetings smoothly without constant interruptions of holding roll call votes, while still recording how each council member voted on each motion.

The requirement that *to the extent possible, each Council shall—(A) seek to hold meetings in person; and (B) ensure the availability of remote meeting participation and voting* seem to be at odds with one another and detail a level of logistics to each Council that is unnecessary and potentially unworkable. It is unclear how we can hold a meeting in-person, but allow council members to participate and vote remotely. Does a quorum of members need to be present in-person? Or can we hold an in-person meeting whereby all members attend remotely and vote remotely, and just a staff person is in the meeting room?

The Council appreciates the "to the extent practicable" language in the requirement for webcast or live audio and video broadcast of Council and CCC meetings on its website because this would provide more flexibility for meetings in Alaska. Web platform and live broadcasts generally require strong Internet connections to be effective, and such internet service has not been available in most remote locations near fishing ports in Alaska. While it is possible to have live broadcast by meeting in major population centers with strong internet, this runs counter to the goal of the North Pacific Council to provide more direct outreach to potentially affected stakeholders by holding meetings in small, remote coastal communities. The North Pacific Council has little ability to 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, and provide the flexibility that allows the North Pacific Council to meet in smaller, more remote coastal communities, which may lack the necessary internet bandwidth for webcast or live broadcast of meetings.

**Sec. 305. Council accountability and membership.** Revises lobbying and financial recusal requirements for Council members. Expands the criteria for Council member nominations to include subsistence expertise, and expertise in ecosystem-based fishery management or climate science, and requires a balanced apportionment of council membership among commercial, recreational, and now subsistence representation on a Council. Extends judicial review of agency actions to 60 days (Section 305(f)(1)).

This section also requires the Secretary to appoint to each Council at least one individual who does not have a financial interest in matters before the Council. This section also adds language that council members shall be subject to all law, rules, and policies regarding ethics and sexual harassment and assault that apply to federal employees, and that Council members are individually liable for their actions.

A new section is added that establishes in the MSA a prohibition on using Federal funds for lobbying by employees, members of the council or advisory bodies, or contractors. Technical or factual presentation directly related to the performance of a Council's duties can only be made through hearing testimony or written statements in response to a documented request (which must be posted on the Council website). All communications with NOAA GC regional offices relevant to the lobbying prohibition must be publicly available on the website, along with copies of all communication with Federal or State legislators or executive branch officials on any subject other than routine fishery management. Verbal communications must be documented.

Comment: This section states that Council employees shall be deemed Federal employees with respect to any requirement that applies to Federal employees, but apparently stops short of designating Council employees as Federal employees. Council employees are not Federal employees; this was established in the original MSA (Fishery Conservation and Management Act of 1976) specifically for councils to provide flexibility in the hiring and employment of council employees, and to provide some separation and independence of the Councils from NMFS. There are numerous requirements of Federal employees that have no bearing or relationship to council employees (e.g., U.S. citizenship, residency requirements, mandatory training, etc.). Requiring all Council employees to be subject to any requirement that applies to federal employees, or redesignating as Federal Employees, does not appear to be the intent of this section. Since this section is about ethics, the Council suggests that wording be modified by simply inserting the word "ethics" before the word "requirement".

Council staff already follow strict ethics requirements that are similar to those followed by Federal employees. The Rules of Conduct of Employees and Advisors of Regional Fishery Management Councils is prepared by the Ethics Law and Programs Division of the Office of the General Counsel of the U.S. Department of Commerce. All Council employees and advisory body members are required to agree to abide by these rules before serving. See: Rules of Conduct of Employees and Advisors of Regional Fishery Management Councils (2018)

The proposed determination for a financial interest (and thus prohibiting voting and deliberation) is "would have a relevant and probable effect on a financial interest of an individual." There is no significance threshold other than if it is likely to have any effect on someone's financial interest relative to the financial interest of other participants in the same sector. This could prevent many North Pacific Council members from deliberating and voting on many issues, as virtually every North Pacific Council action affects the financial interest of some participants and not others within the same sector. The proposed threshold for determination on financial interest would prevent the North Pacific Council members who are most knowledgeable about the fishery in question from even participating in the discussion and deliberation of the issue. Council members who are knowledgeable about a fishery have the ability to ask probing questions, understand interactions that may occur within the fishery and among the fisheries given the changes being considered, and provide outreach and trust in the management process from their fishing sector. This knowledge and expertise improves the quality and thoroughness of North Pacific Council decisions and improves the regulatory process by having all aspects of a decision considered prior to Council final action. Measures that restrict the contributions of knowledgeable North Pacific Council members would negatively affect decision-making and could result in decisions that need

to be reconsidered or amended, requiring the North Pacific Council to spend additional time and resources that could go to other important efforts. The MSA was designed to provide an opportunity for fishery participants affected by Federal regulations to contribute expertise and improve the regulatory process through Council membership.

This change will also require development of a whole new conflict of interest and recusal process. The conflict of interest and recusal provisions were recently clarified and revised and published in September 2020 (85 FR 56177) after an extensive public process and continue to require full financial disclosure as well as a significance threshold to determine a financial interest that triggers recusal. NMFS has also drafted a revised policy directive “Fishery Management Council Financial Disclosures and Recusal” (01-116; policy directive), and the accompanying procedural directive “Procedures for Review of Fishery Management Council Financial Disclosures and Recusal Determinations” (01-116-01; procedural directive). The North Pacific Council provided extensive comment during the agency’s development of the new regulations governing recusal and believes that these regulations provide the appropriate transparency and safeguards in establishing a recusal standard for determining conflict of interest and requiring recusal from voting.

It is not clear what problem the bill is trying to address with the lobbying provisions in this section. Council members and staff are already prohibited from using Federal funds to lobby on Federal or State regulations. Substantive requests by Congress for Council input are all made in writing and the Council responses are publicly available. As proposed, the legislation would place a huge burden on the Councils and NMFS to comply, and will negatively impact communication without improving the process. Under the proposed language to prohibit lobbying, Council staff (whose time is paid with federal funds) would no longer be able to answer factual questions by phone or in person with any legislator or their staff, even when the legislator calls them directly to ask a technical question; otherwise the staff person risks termination of employment. This will result in less information being used in the development of Congressional issues, which can translate into poorer outcomes.

Under the bill’s provisions, all communication (emails and texts) from employees, members of the Council and advisory bodies, and contractors (equating to approximately 250 people in the North Pacific) to anyone in the Federal executive branch – e.g., NMFS staff -- not involving “routine fishery management issues” would need to be posted on the website. This requirement will require intensive monitoring and extensive tracking of emails and texts (e.g., “Congratulations on your Promotion!”, “Hey, would you please share your chili recipe?”). Documentation of all phone calls or in-person discussions with anyone in the agency that didn’t involve routine fishery management (“How is your daughter doing at the University?”) would be similarly burdensome and be even more difficult to track and retain. Such monitoring and documentation requirements would add an enormous workload to the Council staff, which would impede the ability of the staff and Council to evaluate and advance priority conservation and management measures. It would also greatly limit interpersonal communication and adversely impact working relationships among the Council staff and NMFS staff, resulting in an erosion of trust and efficiency in working cooperatively to develop, analyze, and implement the conservation and management objectives of the Council and the agency.

The Council notes that NOAA GC represents the Council and thus communications should be subject to attorney client privilege. These communications also include legal issues regarding personnel employment matters. Requiring that all correspondence and communication (email, phone) with NOAA GC in the region be publicly available will result in reduced efficiency and

timeliness as all communication – including emails - would likely need to be first cleared by headquarters and create delays in time-sensitive situations.

Every Regional Fishery Management Council already has members without any financial interest in the fisheries managed by the Councils. A majority of North Pacific Council members do not have financial interests in the managed fisheries, which includes voting members (NMFS, WA, AK, OR representatives) and non-voting members (PSMFC, USFWS, USCG, and State Department). There are 7 appointed members (2 from WA, 5 from AK), which may have some financial interest in a segment of the fishery. These are understood through clear and direct disclosure requirements – with financial disclosure forms submitted and signed by each member that are posted and publicly available on the Council website -- and a clear and direct recusal process implemented by NOAA GC. The regional fishery management council system was designed to give fishery participants a direct say in the management of fisheries ('ground up instead of top-down management'). Requiring that the Secretary ensure at least one appointed member has no financial interest reduces the ability for fishery participants (and representation) to directly participate in the decision-making and inhibits the nomination process of governors. This requirement will reduce the on-the-water experience that can be critical to the discussion and deliberation at North Pacific Council meetings, and result in less informed decision-making. It will also reduce the outreach and communication with fisherman, who tend to trust information regarding North Pacific Council activities when provided by other active fisherman or fishing representatives. The MSA currently allows state governors to nominate a list of individuals that have no financial interest.

**Sec. 308. Saltonstall-Kennedy Act reform.** Creates an Advisory Committee to assist in the awarding of fisheries marketing, research, and development grants through Saltonstall-Kennedy (S-K) funding.

Comment: The North Pacific Council notes that the S-K proposal review process has been subject to at least some criticism over who does the reviews, the criteria used to evaluate reviews, the timing of the request for proposals, the limited ability to provide review, and transparency of the process. This draft legislation addresses some of these concerns by establishing a formal committee process for decision-making, making the evaluation criteria more explicit, and requiring independent reviews of the proposals. However, the Council notes that under the legislation, representation of Alaska fisheries on the American Fisheries Advisory Committee may be very limited (possibly only one or two members). As proposed, Alaska is grouped with Hawaii, Guam and American Samoa that have completely different fisheries and types of research, and operate at a substantially smaller scale than Alaska. Given that 60% of the seafood harvested in the U.S. is from the North Pacific, the Council notes the disproportionately small representation on the American Fisheries Advisory Committee, which could impede the marketing, research, and development of North Pacific fisheries.

**Sec. 402. Expanding and improving electronic technologies.** Sense of Congress that expresses the importance of electronic technologies and adapting to management needs, especially in the context of climate change. Authorizes the Councils to include electronic monitoring (EM) or on-board observation for data collection purposes. Requires the Councils to consider the use of EM as part of the information collection program (Section 402). Requires a review of existing electronic technology capabilities in NMFS, establishes a prize for electronic technology innovation, and establishes an advisory panel on electronic technologies to consider performance standards, identify knowledge gaps, and address data storage, ownership, and management.



Comment: The North Pacific Council has a comprehensive monitoring program that consists of onboard observers and/or electronic technology to monitor substantial portions of the fishing fleet in the North Pacific. The Council and the fishing industry have been working diligently to expand and improve the use of electronic technology for monitoring catch in different sectors of the fleet, including halibut and sablefish longline and pot fisheries and pollock trawl fisheries. The Council notes that the Advisory Panel for Electronic Technologies Development and Deployment as proposed in the legislation would benefit from the knowledge and experience of fishermen who helped to develop and deploy EM in the North Pacific.

**Sec. 403. Stock assessments.** Requires the Secretary to report to Congress on NMFS' progress on prioritizing and improving stock assessments.

Comment: Stock assessments provide the fundamental information necessary to successfully manage sustainable fisheries. The North Pacific Council believes that an annual report on NMFS' progress to prioritize and improve stock assessments, and concomitant data collection and analysis would be useful to the Councils in making fishery management decisions. Improving stock assessment methods, collecting additional data and evaluating data gaps will reduce the uncertainty in setting harvest limits. While this section focuses on stock assessments, the Council notes that data collection through regular stock surveys can be more important to the conservation and management of fisheries than developing new stock assessments and stock assessment methodology. Stable and adequate funding for survey work is critical to acquiring fundamental information for managing fisheries.

**Sec. 404. Cooperative research and management.** Clarifies authorities for cooperative research and management projects to make the use of these more consistent. Updates priorities for cooperative research, including electronic technologies and climate research, and requires the Secretary to issue guidance on the development of cooperative management agreements, oversight, and enforcement. Adds to MSA findings that science and statistical committees (SSCs) should consider outside sources of information when seeking the best scientific information available.

Comment: The Council notes that cooperative research can provide useful information for the conservation and management of North Pacific resources, including stock assessment information and conservation engineering projects to reduce bycatch. However, cooperative research and other outside sources of information should have adequate peer review before consideration by the SSCs as best scientific information in order to meet the requirements of the MSA and withstand public scrutiny and legal review. Basing management decisions on poorly designed studies and questionable information can be highly detrimental to the conservation of stocks and management of the fisheries. Overall, having the SSCs continue to be the body identifying whether information is of sufficient quality to inform conservation and management ensures scientifically based decision-making for the North Pacific Council.

**Sec. 407. Emergency operating plans.** Requires NOAA to develop a contingency plan for pandemics or other emergencies that make it impractical to use human observers and conduct stock assessments, and to report to Congress on the plan.

Comment: The North Pacific Council was very concerned about the loss of critically important stock surveys in 2020 due to the pandemic, and pressed the agency to have contingency plans for 2021 surveys. NMFS successfully planned and conducted the research in 2021 as planned in the North Pacific region.

**Sec. 502. Essential fish habitat consultation.** Strengthens essential fish habitat (EFH) consultation and requires federal agency actions to avoid adverse effects to EFH or minimize and mitigate the adverse effects; requires federal agency actions to avoid adverse effects to Habitat Areas of Particular Concern (HAPC) and the species for which HAPC was designated. Adverse effect is defined as any impact that reduced the quality or quantity of EFH. The section also requires Councils to identify HAPC, develop plans to protect EFH, and periodically review habitat protection plans and EFH and HAPC designations.

Comment: Under MSA Section 303(a)(7), EFH is a required component of a fishery management plan. The FMP must describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), *minimize to the extent practicable adverse effects* on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat. Note that conservation of EFH is not one of the national standards.

The bill implies that the Federal agency that authorized fishing activities (i.e., NMFS) would also have to ensure that the authorized activity avoids adverse effects to EFH or minimizes and mitigates the adverse effects (defined as any impact that reduces the quality or quantity of EFH). This would establish a different standard than that currently contained in MSA section 303(a)(7) which includes the words “to the extent practicable”, for minimizing effects on EFH from fisheries. The EFH regulations define practicability: “(iii) Practicability. In determining whether it is practicable to minimize an adverse effect from fishing, Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation, consistent with national standard 7.”

For the waters off Alaska, all waters and habitats are EFH for some species or life stage of a managed fish species. EFH cannot be avoided in the course of any fishing operations. In the North Pacific, all commercial fishing gear types, with the exception of jig and troll gear, are considered to have some adverse impacts on EFH (at least localized, short-term impacts). For those gears that have some level of adverse impacts on EFH, the North Pacific Council has taken steps to minimize those adverse effects to the extent practicable. Without the term “to the extent practicable”, or some other reasonable threshold, fishing with bottom tending gear types (e.g., longlines, pots, trawls, dredges) may not be authorized unless effects can be minimized or mitigated, and as a result, fisheries using these gear types could be reduced or eliminated. This would greatly impact the North Pacific Council’s ability to meet the objectives of its grant, and meet the requirements of MSA including the National Standards.

The Council has a strong record of protecting EFH and identifying HAPC. Over 665,500 nm<sup>2</sup> (~65% of the EEZ) off Alaska has been closed to fishing with bottom trawls (and in some cases, other gears) to protect vulnerable habitats for crab, rockfish, and deep-sea corals. Some areas have been closed to all fishing gears, essentially creating marine reserves. These areas include the coral gardens, the Sitka pinnacles, all Alaska seamounts, Bowers Ridge and Ulm Plateau in Aleutian Islands. All of these habitat conservation measures were established through the flexibility afforded under the current MSA.

The bill appears to require Councils to identify HAPC in all FMPs, since it adds HAPC to required provisions of FMPs in Section 303(a). It is not clear how this would be achieved if there are no areas of EFH for FMP species that meet the HAPC criteria. The bill also revises the definition of HAPC to include the importance of its ecological function in maintaining and restoring spatial and genetic characteristics of fish populations. This change without further

clarification may invite uncertainty in application and potential litigation with respect to the scientific basis for assessing the performance or achievement of this objective.

The bill also requires Councils take action to minimize and mitigate any adverse effect on “the species for (SIC) with respect to which the HAPC is designated”. The Council established 20 HAPC sites consisting of seamounts and high-density coral areas that are EFH/HAPC for a whole suite of groundfish species, and not to a single species in need of further conservation using habitat protection as a tool. All of these groundfish species for which HAPC has been designated are already fully conserved via annual catch limits. One could interpret the requirement to minimize adverse effect on these species as further limiting or eliminating fisheries, as the fisheries could be considered to have an adverse effect. This would impact the Council’s ability to manage fisheries to provide optimum yield, and could create a perverse situation whereby the Council would need to remove HAPC designations to allow for sustainable fisheries as provided by the MSA.

Lastly, the bill’s provision to ‘prevent adverse effects on HAPC caused by fishing’ would appear to require that the Councils prohibit any fishing impact on HAPC. The North Pacific Council’s approach with HAPC has been to minimize adverse impacts from fishing but not to eliminate or prevent all adverse impacts from fishing at HAPC sites unless warranted by scientific information. This provision could lead to a prohibition of all fishing activity at sites designated as HAPC, including the Bering Sea skate egg deposition sites and the GOA Fairweather Grounds coral areas, which have not been adversely impacted by fishing based on submersible research observation. These areas are also important fishing grounds. MSA provisions that would prohibit fishing in HAPC areas would limit the North Pacific Council’s management flexibility and may create unnecessary adverse economic impacts on the fisheries, without concomitant benefits to habitat.

**Sec. 503. Reducing bycatch.** Revises the wording of National Standard 9, establishes a new nationwide standardized bycatch methodology and reporting system, and amends the bycatch reduction engineering program language.

Comment: With very limited exceptions, all 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 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, there is no standard against which the appropriate level of minimization can be evaluated. At one extreme, bycatch could be considered minimized through a measure that reduced bycatch by some negligible amount, whereas at the other extreme it could also be considered minimized if all fishing was prohibited, or even eliminated entirely if all fish were required to be retained. Without a definition of term ‘minimize’, the phrase ‘to the extent practicable’ provides the Council the flexibility to establish measures to minimize bycatch that are tailored to, and appropriate for, the diverse fisheries in the North Pacific.

Inclusion of the phrase “to the extent practicable” provides some threshold for achieving bycatch minimization, which is necessarily to be balanced with other national standards. By eliminating

the practicability clause, the proposed bill creates a major policy change for just one fishery management component (bycatch), which could create uncertainty for the Council when considering and balancing the existing national standards. Other national standards, except preventing overfishing and using best available information, have qualifying language to acknowledge tradeoffs. Even National Standard 10 requires conservation and management measures to promote safety of human life at sea to the extent practicable. The net effect is that the proposed language would elevate bycatch considerations above all other National Standard considerations. The legislation would thus impede the ability of the North Pacific Council to carry out its responsibilities by limiting the flexibility of the Council to limit bycatch to a reasonable amount while still providing for sustainable fisheries, minimizing waste, and working towards climate resilient fisheries and ecosystems.

As for the modifications to the standardized bycatch methodology and reporting system, the amount and type of bycatch in each fishery within the Council region is monitored and assessed using a standardized bycatch methodology established in compliance with 50 CFR 600.1600-1610 (82 FR 6317). The regulation currently 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. The legislation would require consistent data reporting, data collection, and assessment across fisheries. The Council notes that such consistency may not be possible given the differences between recreational and commercial fisheries, and among 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. Maintaining flexibility would allow the North Pacific Council to establish data reporting, collection, and bycatch assessment that is specifically tailored to each fishery, to provide the best scientific information in a cost-effective manner, such that the Council is able to meet its responsibilities under the MSA and its grant.

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 as proposed in the legislation would require the North Pacific Council to incur significant costs to revise its management plans and regulations, as it may require that nearly all fish caught and discarded on every vessel would need to be observed and monitored, as opposed to being estimated through sampling. Although most of the larger vessels participating in federally managed commercial fisheries of the North Pacific have human observers or cameras on vessels to monitor and collect discard information, such observations may be neither cost effective nor technically feasible for small commercial fisheries or even socially acceptable aboard recreational fishing boats. While having 100% observer coverage would provide more precise discard information and better data on mortality for assessments, such coverage is not practical for all fisheries and would be too costly for some vessels to operate.

**Sec. 504. Improving rebuilding outcomes.** Requires more detailed information in NOAA's annual status of stocks report to identify stocks subject to overfishing and in need of rebuilding plans; specifies that conservation and management measures are required to improve stock status for stocks approaching an overfished condition; amends the rebuilding timeline to be specific to stock biology; requires adequate and measurable criteria and progress in rebuilding plans; and strengthens requirements for responding to rebuilding failures.

Comment: The bill changes the rebuilding time requirements to “not to exceed the time the stock of fish would be rebuilt without fishing occurring plus one mean generation...” Removing the arbitrary 10-year requirement better aligns the rebuilding timeline with the biology of each species, thus providing the North Pacific Council with the ability to develop rebuilding plans that are more closely connected to the biological traits of the species. It also provides Councils with management flexibility so as to avoid negative economic impacts from overly constraining measures that may have little or no conservation gain.

However, the bill eliminates the exceptions for cases where environmental conditions dictate a different rebuilding time period. This seems counter to the intent of the bill to explicitly recognize that the status of some stocks is affected by non-fishing factors like environmental conditions/climate change, as evidenced by the bill replacing ‘overfished’ with ‘depleted’ (see below). This will affect the North Pacific Council’s ability to develop rebuilding plans, as there is an expectation that stocks can be rebuilt in a reasonable time frame, regardless of environmental conditions. The Council’s rebuilding plan for the Pribilof Islands Blue King Crab stock acknowledges that the stock status is entirely dependent upon environmental conditions and not affected by fishing mortality. Note that this crab fishery has been closed for the past 30 years, and all other fisheries with bycatch of these crab have been prohibited in the area (i.e., fishing mortality in almost nil). There is no expectation of rebuilding this stock within the next 50 years due to environmental conditions, even without any fishing mortality. As this example shows, climate change can affect a rebuilding time period, and should be recognized as such in rebuilding requirements. Otherwise, the North Pacific Council may be required to develop rebuilding plans with unrealistic rebuilding periods, which will require the Council to use its limited resources to regularly revisit and amend the rebuilding plans, without any benefit to the stocks or rebuilding schedules.

The bill requires the Secretary to review progress to rebuilding every 2 years. If the stock is unlikely to be rebuilt in the time period, or mortality rates or catch limits are exceeded without correction, or for other reasons, the Secretary shall make immediate revisions to that fishery to achieve progress, and for all other fisheries, the bill requires Councils to take appropriate action within 9 months. If the stock is not rebuilt under the original time period for rebuilding, the bill states that a new rebuilding plan shall be prepared that has no less than a 75% chance of rebuilding by the end of the new time period. Requiring that a rebuilding plan meet an artificial goal (75% or greater probability of success) if a rebuilding plan is not meeting the expected progress would almost certainly result in significant adverse impacts to fishermen and fishing communities, and would affect the ability of the Council to carry out its grant because it would be revisiting its rebuilding plans regularly, thus adding costs and reducing the time available to address other pressing conservation and management issues. The experience of several Councils shows that this requirement could lead to closing fisheries, with severe impacts on communities. The suggested language would take away the flexibility that Councils currently have in balancing the need to rebuild overfished fisheries with the need to minimize the economic effects on fishing communities. This reduces the ability of the North Pacific Council to balance its responsibilities under the MSA.

**Sec. 505. Depleted fisheries and preventing overfishing.** Replaces “overfished” with “depleted” throughout the Act. Includes a rule of construction regarding “overfished.” Requires that objective and measurable criteria are used to identify overfished stocks and stocks experiencing overfishing, clarifies that Councils cannot be less precautionary than science and statistical committee (SSC) recommendations, and requires SSCs to provide advice on accounting for all sources of mortality,

promoting resilience to climate change, and objective and measurable criteria for overfishing and depleted stocks.

Comment: The Council believes that the wording change to ‘depleted’ accurately reflects that fish stocks can be at low population levels for reasons other than overfishing. The North Pacific Council’s FMPs all include objective and measurable criteria for overfished and overfishing. The bill would add significantly to the duties of SSCs, which are already overburdened with meeting existing annual catch limit requirements. Members of the SSC are not employees of the Council but are outside agency or university scientists who volunteer their time (some members are eligible for a small stipend for meeting days). This additional workload may make it more difficult for Councils to attract talented and knowledgeable members for its SSCs, which would negatively impact Council decision-making.

**Sec. 506. Preparation and review of secretarial plans.** Requires the Secretary to develop a fishery management plan or amendment if a fishery requires conservation and management, should a Council not prepare and submit an FMP or amendment within 180 days.

Comment: This section creates new requirements of the Secretary of Commerce that serve to undermine the Council’s role and public process, and creates opportunity for increased litigation. It is not clear who determines ‘if such a fishery requires conservation and management’. Under section 302(h)(1), the Councils determine if a fishery requires conservation and management, but the legislation suggests that the Secretary would have the sole authority for this determination. The language requiring the Council to develop an FMP or amendment, along with the required documentation to comply with NEPA, MSA, and other laws and executive orders within 180 days, would greatly impact the ability of the Council to carry out its responsibilities under its grant. Such actions take a minimum of 12-18 months to complete, due to the Council’s use of sound scientific analysis and transparent public process as set forth in its grant. Thus, this legislation would effectively eliminate the role of the Council in making fishery conservation and management decisions pursuant to its grant and responsibilities for Councils established under the MSA. Secretarial review actions do not have the same level of public process and vetting as a Council submitted FMP, and we note that the original MSA intended for regional input as the primary mechanism to undertake fishery management actions.

**Sec. 507. Councils.** Requires that research should prioritize fisheries and habitats experiencing or expected to experience shifts in geographic range, spatial distribution or productivity. Requires Councils to develop objective and measurable criteria for identifying overfishing and depleted fisheries, develop a plan to protect EFH from adverse effects caused by fishing, including quantitative and measurable targets for increasing the quantity, quality, and representativeness of EFH, and update habitat protection plans no less than once every 7 years.

Comment: The Council agrees that fisheries and habitats experiencing shifts in geographic range, spatial distribution, or productivity can be an important research topic. However, requiring that research be prioritized on this topic will limit the flexibility of the North Pacific Council and its SSC to prioritize areas of research necessary to respond to the most pressing conservation and management needs during the 5-year period as specified under the MSA. The loss of this flexibility may affect the ability of the Council to carry out its responsibilities under its grant and meeting the requirements of the MSA, particularly if research funding is all directed at stocks or habitats undergoing shifting distributions, and not to other research needs that may be critical to the conservation and management of North Pacific fisheries.

The Council notes that the existing regulations require the Councils to review and identify EFH and take action as needed to conserve and enhance EFH at least once every 5 years, so it is not clear what will be the effect of the bill's language requiring review of habitat protection plans every 7 years. If the intent of the bill is to add additional EFH reviews, it would impact the North Pacific Council's ability to carry out its grant by leaving less time to work on other conservation and management issues, and other activities as outlined in the grant.

**Sec. 508. Forage Fish Conservation.** Directs the Secretary to define forage fish, requires an assessment of the potential impacts of a new commercial forage fish fishery, and requires consideration of predator needs in existing fishery management plans.

Comment: The Council notes that the Secretary's definition of forage fish may create uncertainty regarding what species are identified as forage species in an FMP. The Council also notes that the term "forage fish" appears to imply a special importance of the species as prey, however nearly all fish species are prey to larger predators and thus all fish species provide energy transfer up the food chain. The Council notes that, in our marine ecosystems, nearly all species of fish are "forage fish" at some point in their lives. Lastly, it is not clear if the legislation's requirement for the establishment of catch limits for forage fish only applies to fisheries that are directed on forage fish species. The proposed changes could affect the ability of the North Pacific Council to carry out its grant by introducing uncertainty in the definition of forage fish and the uncertainty regarding potential requirements for conserving forage fish.

In the North Pacific, what we consider forage fish species, as designated and specified in our groundfish fishery management plans (smelt, capelin, sand lance, lanternfish, krill, etc.), are already protected by regulations established by the Council. All directed fishing for these forage fish species in Federally managed waters is prohibited. Additionally, the sale, barter, trade, or processing of forage fish and grenadiers is prohibited, except that a limited amount of forage fish that are incidentally caught in other groundfish fisheries may be retained and processed into fishmeal. Although there are no directed fisheries on forage fish species (or catch limits), the NMFS does provide an assessment of those species comprising forage fish and their ecological importance every other year. A summary of forage fish management and protection measures in the North Pacific can be found here:

<https://meetings.npfmc.org/CommentReview/DownloadFile?p=e2efceab-a9e6-4dca-b258-29563b276e22.pdf&fileName=Forage%20Fish%20paper.pdf>

Because the Council has determined that forage fish and ecosystem concerns are adequately addressed by the existing North Pacific management programs developed under existing MSA provisions, the bill does not appear to enhance the Council's ability to meet the MSA's conservation and management goals for forage fish species.

Overall, provisions that would require the North Pacific Council to specify catch limits for forage fish species to account for the diet needs of marine mammals, birds, and other marine life would require an enormous amount of research information that is currently lacking. Many predators are opportunistic feeders and shift their prey based on abundance and availability. As a result, determining the exact amount of individual prey needed each year would divert limited research monies away from other critical research such as surveys and stock assessments. The Council notes that NOAA does not currently have enough financial resources to fully survey target stocks, let alone prepare stock assessments for individual forage species which would be needed to set scientifically based annual catch limits. In the absence of this critical information and necessary resources, catch limits would need to be reduced to account for this largely incalculable uncertainty, which could greatly impede the Council's ability to meet the goals and objectives of

its conservation and management program that includes achieving sustainable harvests of fish. Prey needs for upper trophic predators are already accounted for as natural mortality removals in most stock assessment models.

Once again, thank you for the opportunity to review this draft legislation, and to provide these comments to you on behalf of the North Pacific Fishery Management Council. We look forward to our continued dialogue on these critically important issues.

Sincerely,



Simon Kinneen  
Chairman

cc:  
Senator Lisa Murkowski  
Senator Dan Sullivan  
Representative Don Young  
Regional Fishery Management Councils  
Janet Coit, NOAA Assistant Administrator for Fisheries