

REVIEW OF RECENT LEGISLATION

NPFMC Legislative Committee meeting, 1/29/21

David Witherell

- H.R. 8632 – The Ocean-Based Climate Solutions Act (12 slides)
- Huffman Discussion Draft on MSA Reauthorization (16 slides)
- H.R. 59- Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act (1 slide)
- H.R. 272 (1 slide)
- Keep Fish Free Act (1 slide)

NOAA GC has previously provided legal guidance for making Council comments on draft legislation, summarized as follows:

The Council must receive a specific request on legislation from Congress (member or staff) to provide comments. Any comments the Council submits should be tied to the Council's performance of its grant as specifically as possible. Therefore, comments should explain how the council believes specific provisions of the bills (or provisions missing from the bills) could have harmful or beneficial impacts on the Council's ability to fulfill its responsibilities under the MSA, or affect the Council's ability to conserve and manage marine resources and resource users. Comments should not express general support or disfavor with the bill or with a particular provision without description of the impairment.



H.R. 8632 THE OCEAN-BASED CLIMATE SOLUTIONS ACT

Preliminary evaluation of major provisions with
potential effects on the council's ability to
conserve and manage fisheries

DAVID WITHERELL, FEBRUARY 2021

116TH CONGRESS
2D SESSION

H. R. 8632

To direct the Secretary of Commerce, acting through the Administrator of the National Oceanic and Atmospheric Administration, to provide for ocean-based climate solutions to reduce carbon emissions and global warming; to make coastal communities more resilient; and to provide for the conservation and restoration of ocean and coastal habitats, biodiversity, and marine mammal and fish populations; and for other purposes.



MAJOR COMPONENTS OF H.R. 8632 THAT COULD IMPACT THE COUNCIL PROCESS

- Title I – Marine and Coastal Blue Carbon
- Title II - Marine Protected Areas
- Title IV - Climate-Ready Fisheries, Efficient Fishery Vessels, and Buy American Seafood
- Title VIII – Strengthening Marine Mammal Conservation
- Title IX – International Agreements, Efforts in the Arctic, and BIA Tribal Resilience



TITLE 1 – MARINE AND COASTAL BLUE CARBON

- Requires a national map of blue carbon ecosystems and assessment of the vulnerability of blue carbon ecosystems to climate impacts, including human stressors
- Requires an assessment of the greatest anthropogenic threats to blue carbon ecosystems
- Creates a new interagency working group to identify priority blue carbon ecosystems for protection
- Requires NOAA Administrator to designate coastal carbon areas of significance and describe measures to ensure protection of coastal carbon areas of significance



Bottom line – no immediate impacts, but potential for future actions that may occur outside of Council authorities



TITLE II – MARINE PROTECTED AREAS

SECTION 201 AND 201

- **30 by 30 Task Force** – Will develop a plan to identify and implement closure of 30% of EEZ to commercial extraction & destructive activity by 2030.
 - Start with inventory of current areas with prohibition on all “bottom-tending fishing gear” and with “bycatch rates adversely affecting marine populations”. Many other factors to be considered in design, including diversity of ecosystems, relatively pristine areas, and interconnected network of MPAs, etc.
- Notes – Terms not defined. Not clear if 30% by region or country-wide. Council closures developed surgically through science-based, transparent and public process; not a top-down approach for closures of all fishing gear to meet arbitrary threshold. Bill suggests additional closures could be based on current bottom trawl/dredge closure areas. Councils will be consulted.



Bottom line – Potential for enormous adverse economic affects on fisheries and coastal communities.

A less specific 30 by 30 initiative was implemented by Executive Order on January 27, 2021 – see next slide.



Executive Order on Climate Change Actions

January 27, 2021

The E.O. commits to the goal of conserving at least 30% of the land and ocean by 2030. A stakeholder process is initiated to identify strategies to achieve this. A report is due within 90 days recommending steps to achieve the goal, and a stakeholder process will be implemented to identify strategies within the first 60 days. See Section 216 of E.O.

(c) The SOC, through NOAA Administrator, shall initiate efforts in the first 60 days from the date of this order to collect input from fishermen, regional ocean councils, *fishery management councils*, scientists, and other stakeholders on how to make fisheries and protected resources more resilient to climate change, including changes in management and conservation measures, and improvements in science, monitoring, and cooperative research.



TITLE II – MARINE PROTECTED AREAS

SECTION 203

- **New National Marine Sanctuaries** – Automatically implements sanctuary status to the 5 successful nominations in inventory, including the St. George Island Unangan Heritage Sanctuary.
 - Bypasses normal process that includes preparation of management plan and regulations. Also bypasses requirement that designation of new sanctuary is prohibited until SOC determines there is sufficient funding for existing sanctuaries.
- Notes – St. George sanctuary is 30 nm out from island and includes important fishing grounds. Current law provides the Councils a 120-day opportunity to develop fishing regulations, but SOC determines if additional regulations are needed to achieve goals and objectives of Act and sanctuary. The CCC consensus is that MSA should be controlling authority for fishery regulations in sanctuaries.



Bottom line – Area includes important fishing grounds. Could affect Council authority to regulate fisheries in area. Councils should request to be fully consulted on management plan, EIS and draft regulations for sanctuaries.



TITLE II – MARINE PROTECTED AREAS

SECTION 204

- **Deep Sea Coral Marine Conservation Areas** – Administrator shall designate any area where deep sea corals are found: in EEZ; *and* in areas the council has designated as closures to trawls and dredges.
 - Activities, including the “use of bottom trawl nets or other bottom tending fishing gear” will be prohibited from these areas. .
- Notes – “Other bottom tending fishing gear” not defined (i.e., could it include pots and longlines?). Authority rests with Administrator, and not councils, to designate the areas, and to make recommendations on additional areas to be protected. Deep sea corals are widely distributed throughout the Alaska EEZ. Through a public process, the Council developed numerous area closures – and not just to trawls/dredges - to minimize impacts on potentially exposed, long lived coral colonies, while still providing for sustainable fisheries.



Bottom line - Potential for extensive closures if Administrator decides to close *any* area where deep sea corals occur.



TITLE IV – CLIMATE-READY FISHERIES, EFFICIENT FISHERY VESSELS, AND BUY AMERICAN SEAFOOD

SECTION 405 AND 406

- **Adapt fisheries management to anticipated impacts of climate change** – The SOC in consultation with councils, would 1) establish a program to promote precautionary approaches that increase resilience to anticipated climate impacts, and 2) implement a grant program to develop innovative tools and approaches to increase adaptive capacity to manage fisheries.
- Notes – This program may establish new criteria for approving or disapproving FMP or amendments.



Bottom line – Council supports more science to understand and be resilient to climate change, but substantially more funding will be required as the AFSC is already operating at a funding shortage.



TITLE IV – CLIMATE-READY FISHERIES, EFFICIENT FISHERY VESSELS, AND BUY AMERICAN SEAFOOD

SECTION 407

- **Shifting Stocks Task Force** – Shall develop decision-making criteria to make jurisdiction, allocation, and fishery management decisions. Will also made recommendations to Administrator and councils on the allocation and distribution of fishing privileges.
- Notes – Task Force to include one science person from each council region. Public can petition task force to review any shifting stock. Within 180 days of receiving a recommendation from the Task Force, the Council/NMFS would need to develop, publish, and implement a “compliant FMP” that “fully accounts for the best available science on shifting stocks and the recommendations of the Task Force...”



Bottom line – May limit authority of Councils to determine allocation and distribution of fishing privileges for shifting stocks.



TITLE IV – CLIMATE-READY FISHERIES, EFFICIENT FISHERY VESSELS, AND BUY AMERICAN SEAFOOD

SECTION 408

- **EFH and HAPC** – Federal agencies must *avoid* adverse impacts to EFH, and if not possible, minimize or mitigate impacts. No activity can be authorized that would have an impact on HAPC. New criteria are established for HAPC.
- Notes – “Minimized to the extent practicable” is replaced with just minimized. Because EFH is everywhere, and all fishing gear can have adverse effects, one can minimize impacts by prohibiting fishing effort. Current HAPC areas will need to be re-evaluated relative to new definition and requirement for no impacts.



Bottom line - Potential for new litigation regarding interpretation of 'minimize'. HAPC will need to be re-evaluated.



TITLE VIII – STRENGTHENING MARINE MAMMAL CONSERVATION

SECTION 801

- **List of Marine Mammal Stocks** – The SOC shall publish a list of marine mammal stocks that have “more than a remote possibility” of being impacted by climate change, and develop a plan to mitigate effects and increase resiliency. PBRs must take into account impacts of climate change in determining recover factors.
- Notes – The plan would “prevent interactions with fisheries...” and increase resilience by “managing prey species to improve availability of prey of such species”. SOC has authority to “take any other action as may be necessary to implement the strategy set forth in the plan.”



Bottom line – SOC would have authority to manage fisheries relative to marine mammals on the list, not Councils.



TITLE VIII – STRENGTHENING MARINE MAMMAL CONSERVATION

SECTION 802

- **Areas of Importance to Marine Mammals** – The Administrator and USGC shall designate “areas of importance to marine mammals” that includes all ESA critical habitat, areas with ship strikes, all sanctuaries, monuments, parks, wildlife refuges, and other areas. A speed limit of 10 knots will apply to all vessels $\geq 49'$, and AIS will be required on all vessels $\geq 49'$.
- Notes – Broad areas will be designated as “Areas of importance to marine mammals” off Alaska, and fishing vessels over 48' will be restricted.



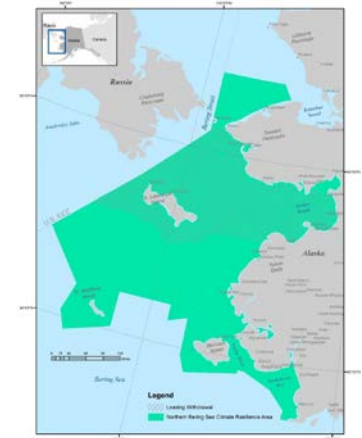
Bottom line – Marine area designations could lead to other fishery restrictions, particularly given SOC authority granted under Section 801.



TITLE IX – INTERNATIONAL AGREEMENTS, ETC.

SECTION 911

- **Northern Bering Sea Climate Resilience Area** – Reinstates Obama E.O. 13754 to establish the area, establish a Bering Sea Task Force and a Bering Intergovernmental Tribal Advisory Council to provide effective consultation with Alaska Native tribes, and incorporate traditional knowledge into decision-making.
- Notes – The area will stay closed to commercial fishing with non-pelagic trawl gear. Bypasses council intent to keep the area closed until research was done to understand potential impacts and may limit the ability of Council to achieve OY under climate change, given possibility of stocks shifting northward.



Bottom line – On January 20, President Biden reinstated the E.O. in its original form to implement these provisions.



HUFFMAN DISCUSSION DRAFT TO REAUTHORIZE THE MSA

Preliminary evaluation of major provisions with potential effects on the Council's ability to conserve and manage fisheries

DAVID WITHERELL, FEBRUARY 2021



[DISCUSSION DRAFT]

116TH CONGRESS
2D SESSION

H. R. _____

To amend the Magnuson-Stevens Fishery Conservation and Management Act
to _____, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. HUFFMAN introduced the following bill; which was referred to the
Committee on _____



SECTION 102 – PROMOTING CLIMATE RESILIENCE IN FISHERIES MANAGEMENT

- Adds new required provisions of FMPs, including an assessment of how management measures account to climate change, and identification of fish distribution for stocks managed under the FMP. It also requires Councils to “assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from the fishery under prevailing and anticipated future environmental conditions...”
- Notes: All of our FMPs would need to be amended to include required information. Making assessments under anticipated future environmental conditions seems to be somewhat speculative and could require determination of multiple status determination criteria. How would Councils/SSCs establish OY from anticipated future environmental conditions and which OY do we try to achieve right now?



Bottom line – Scientific data might limit our understanding of “anticipated future environmental conditions” and what MSY and OY might be for all managed stocks.



SECTIONS 103 AND 104 – INCORPORATING CLIMATE SCIENCE AND INNOVATION

- Section 103 requires Council members to receive training on climate change and impacts on fisheries. Adds species distribution to an area of research. Section 104 adds tools and approaches for fisheries management to adapt to climate change.
- Notes: Training for all council members? There was a climate change topic at new council member training in 2020. AFSC developing models to understand climate change and ecosystem responses



Bottom line – This seems like this would advance the direction the Council is already headed, but there would be added costs to NMFS.



SECTION 105 – MANAGING SHIFTING STOCKS

- Same language as was in section 407 of H.R. 8632 from 116th Congress
- Establishes a Shifting Stocks Task Force, with a scientific member from each region, to create a list of shifting stocks and develop decision-making criteria to make allocation determination for shifting stocks. The Task Force then shall make recommendations to the SOC and council for allocation and distribution of fishing privileges based on the criteria.
- Notes: Recommendations from a national body on allocation of fishing privileges may be of little help to address social and economic allocation issues that are local/regional in nature.



Bottom line – It is not clear if the recommendations from the task force would be just a consideration for the Council, or would have more power, such that the SOC could reject an action if it didn't comply with the task force recommendations.



SECTION 106 – EMERGING FISHERIES

- Requires the Councils to review the list of fisheries to ensure only active fisheries are listed and geographically specified. It also requires Councils to analyze potential impacts and management before a new gear or fishery is authorized.
- Notes: Analysis of proposed new gear types is consistent with current council practices (pot gear for halibut, sablefish pots in GOA). The existing list of fisheries (50 CFR 600.725) is somewhat outdated but has not been a critically important part of our management.



Bottom line – This section seems consistent with existing practice.



SECTION 205 – COMMUNITY PARTICIPATION IN LAPPS

- Elevates community participation in future LAPPs as something that “shall” be considered and promoted, and clarifies the location of the responsibility to develop and submit to the Council a Community Sustainability Plan as resting with the eligible communities. Modifies provisions to identify eligible fishing communities that no longer allows councils to determine additional eligibility criteria.
- Notes: The Council no longer has the burden of developing criteria for community eligibility to participate in a LAPP and criteria for a “community sustainability plan,” as currently exists. The fishing community provisions appear to only apply to LAPPs that are not yet implemented.



Bottom line: Appears to only apply to new LAPPs. No longer requires/allows Council to set additional eligibility criteria.



SECTION 303 – COUNCIL PROCEDURES AND PARTICIPATION

- Requires roll call votes on every motion. Requires that all council meetings ensure remote participation including voting to the extent possible. Requires live broadcast of CCC and council meetings and posting of SSC and Council recordings on website within 30 days.
- Notes: Roll call votes can be disruptive and not help with consensus building. Further, under existing MSA, any council member can request a roll call vote on any motion. Broadcasting meetings may not be possible from all coastal communities. Remote meetings are still expensive, reduces effective communication and trust in the process, and over time may result in less informed and potentially poorer decisions.



Bottom line – A combination of remote and in-person meetings will be substantially more expensive than either one and may offer few benefits in terms of efficiency and decision-making.



SECTION 304 – COUNCIL ACCOUNTABILITY AND MEMBERSHIP

- Any requirement that applies to Federal employees shall apply to Council employees. Council members shall be subject to all laws, rules regarding ethics and sexual harassment that apply to Federal employees and shall be held individually liable.
- This section implements more restrictive conflict of interest and recusal provisions, including determination of a financial interest of a member. Recused members may not vote participate in the deliberations except to provide technical information.
- Expands lobbying prohibitions to specifically include members of advisory bodies and contractors. Would have to document and post on our website all written and verbal communication (from Council members, staff, advisory body members and contractors) with Federal or State legislators or executive branch officials on subjects other than routine fishery management in the region.
- Broadens expertise allowance for council membership. Requires balance apportionment of council membership to include the conservation community, scientists, non-consumptive users, indigenous and tribal communities, and active participants in the commercial, recreational and subsistence fisheries. Requires 2 appointed council members from each council to have no financial interests.



Bottom line – COI provisions will limit more council members from deliberations and voting. Documenting all communication with executive branch officials will be extremely onerous. Membership apportionment and requirement for no financial interest will greatly reduce participation of fisherman in the decision-making, which the MSA was specifically designed to provide.



SECTION 307 – SALTONSTALL-KENNEDY ACT REFORM

- Creates an American Fisheries Advisory Committee to assist NMFS with awarding S-K grants. Requires technical evaluations of proposals from 3 or more independent scientists for each review.
- Notes: Only 1-2 members from the North Pacific would be appointed to the Committee, as Alaska is grouped as a region with Hawaii, Guam, and American Samoa, and the committee has 3 members from each region. These are dissimilar areas with respect to fisheries, research, and marketing needs. Should the grant money be distributed evenly across the regions, the North Pacific may be underrepresented.



Bottom line – This improves transparency in the grant process and should improve the quality of research funded. Concerns about North Pacific representation being lumped with Western Pacific.



SECTION 402 – EXPANDING AND IMPROVING ELECTRONIC TECHNOLOGIES

- Promotes the implementation of electronic technologies for monitoring and reporting, requires review of electronic capabilities, establishes an innovation prize, and establishes an Advisory Panel for electronic technologies development and deployment. The Advisory Panel is to make recommendations to the SOC on the potential value of national performance standards for electronic technologies used in fisheries data collection and management.
- Notes: National performance standards for EM across all fisheries and regions could undermine the current programs that were cooperatively developed with the Alaska fishing industry.



Bottom line – Concern about national performance standards or requirements for EM.



SECTION 501 – ESSENTIAL FISH HABITAT CONSULTATION

- Same language as Section 408 of H.R. 8632 from 116th Congress
- Federal agencies and federally approved projects must *avoid* adverse impacts to EFH, and if not possible, minimize or mitigate impacts. No activity can be authorized that would have an impact on HAPC. New criteria are established for HAPC.
- Notes – “Minimized to the extent practicable” is replaced with just “minimized.” Because EFH is everywhere (for some species/life stage), and all fishing gear can have adverse effects, one can minimize impacts by prohibiting fishing effort. Current HAPC areas will need to be re-evaluated relative to new definition and requirement for no impacts.



Bottom line - Potential for new litigation or guidelines regarding interpretation of 'minimize'. HAPC will need to be re-evaluated.



SECTION 503 – REDUCING BYCATCH

- Expands the definition of bycatch to include not only fish, but also marine mammals, sea turtles, and seabirds and other wildfowl. Eliminates “to the extent practicable” from NS9 and FMPs. Adds quantification of bycatch, and consideration of full retention, to required contents of FMPs. Establishes a national standardized bycatch reporting program to produce statistically accurate and precise information on bycatch, and consistent data collection and reporting for all fisheries.
- Notes: ‘To the extent practicable’ is an important phrase because it takes into account social and economic tradeoffs as a threshold for determining when bycatch is minimized. Without a threshold one could argue that bycatch is minimized only by not fishing, or retaining all fish caught. A standardized national bycatch data and reporting program would be expensive and would be difficult to apply across all fisheries and regions. We already have SBRM requirements in each region.



Bottom line – Practicability is critical for achieving optimal yield.



SECTION 504 – IMPROVING REBUILDING OUTCOMES

- Requires stocks undergoing overfishing or rebuilding to be identified in annual status of stocks report. Changes the rebuilding time period by removing the 10-year limit and replacing it with the time to rebuild with $F=0$ plus 1 generation time. If the stock is unlikely to be rebuilt in the time period, or catch limits are exceeded without correction the SOC shall notify the Council to take appropriate action to achieve rebuilding progress, within 9 months. If the stock is not rebuilt within the original time period for rebuilding, 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.
- Notes: There is no mention or provision of ecosystem change potentially affecting a rebuilding time period.



Bottom line – Eliminating the 10-year limit may provide flexibility. Rebuilding timelines can be impacted by ecosystem changes, which is not considered.



SECTION 507 – COUNCILS

- Requires Councils to include climate change in research priorities, to develop objective and measurable criteria for identifying overfishing and depleted fisheries, to protect EFH from adverse effects caused by fishing that include quantitative and measurable targets for essential fish habitat, and update habitat protection plans every 7 years. The 5-year research priorities would need to include research on stocks undergoing distribution shifts or productivity, as priority items.
- Notes: By adding these as council functions, it highlights requirements for council to identify overfishing and protect EFH from fishing impacts. Existing EFH regulations specify a review every 5 years.



Bottom line: The new required functions of the Council may be better specified as required FMP provisions (some already are), which councils approve.



SECTION 508 – FORAGE FISH CONSERVATION

- Directs the SOC 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.
- Notes: The language is significantly revised from a previous Huffman bill on forage fish and has addressed many of the concerns we previously raised. The definition of forage fish is left up to the Secretary, and the identification of forage fish species is left up to the Councils to list in the FMPs. OY for forage fish is reduced to provide for diet needs of fish, marine mammals, and birds.



Bottom line: Improved language. Councils should be fully consulted on the SOC's proposed definition of forage fish.



SECTION 511 – AUTHORIZATION OF APROPRIATIONS

- For fiscal year 2021, an amount equal to \$396,875,000 increased by the estimated percentage change in the Consumer Price Index since 2013; for each of fiscal years 2022 through 2026, an amount equal to the amount authorized for the preceding fiscal year, increased by the CPI %.
- Notes: \$396 million was the appropriations amount specified by the SFA for 2013. It has never been clear how appropriations for MSA translate to NMFS or Council budgets.



Bottom line – There are numerous new requirements, grants, and expansive data collection that will add substantial costs to Councils and NMFS - an agency that is already underfunded relative to its ability to collect basic survey data.



H.R. 59 Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act

On January 7, Congressman Don Young (R-Alaska) has introduced legislation (H.R. 59) to reauthorize and amend the Magnuson-Stevens Fishery Conservation and Management act in the new 117th congress. The text of the bill is not yet available, but you can track the progress of the bill here: [HTTPS://WWW.CONGRESS.GOV/BILL/117TH-CONGRESS/HOUSE-BILL/59/ALL-ACTIONS?S=1&R=4&OVERVIEW=CLOSED](https://www.congress.gov/bills/117/congress/117th-congress/house-bills/59/all-actions?s=1&r=4&overview=closed)

The bill is likely to be similar to the bill introduced in the 116th congress (H.R. 3697) and 115th congress (H.R. 200). The council's prior comments on H.R. 200 can be found here: [HTTPS://STATIC1.SQUARESPACE.COM/STATIC/56C65EA3F2B77E3A78D3441E/T/5AC27E4A8A922DFD6530B483/1522695754219/040218_NPFMCOMMENTLTRYOUNG_HR200_HR2079.PDF](https://static1.squarespace.com/static/56c65ea3f2b77e3a78d3441e/t/5ac27e4a8a922dfd6530b483/1522695754219/040218_NPFMCOMMENTLTRYOUNG_HR200_HR2079.PDF)



H.R. 272

Representative Young (R-AK) recently introduced a bill (H.R. 272) to amend the national marine sanctuaries act to prescribe an additional requirement for the designation of marine sanctuaries off the coast of Alaska, and for other purposes. Essentially, this bill would prohibit designation of a National Marine Sanctuary off Alaska unless it was directly authorized by Congress.

See HTTPS://DONYOUNG.HOUSE.GOV/UPLOADEDFILES/MARINE_SANC.PDF



117TH CONGRESS
1ST SESSION

H. R. _____

(Original Signature of Member)

To amend the National Marine Sanctuaries Act to prescribe an additional requirement for the designation of marine sanctuaries off the coast of Alaska, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. YOUNG introduced the following bill; which was referred to the Committee

KEEP FINFISH FREE ACT

Representative Don Young (R-AK) recently introduced a bill (Keep Fish Free Act of 2021) that would prohibit the Secretary of Commerce and the Secretary of Interior from authorizing finfish aquaculture in the U.S. EEZ.

See:

[HTTPS://DON YOUNG.HOUSE.GOV/UPLOADEDFILES/FIN_FISH_FREE_ACT_21.PDF](https://donyoung.house.gov/uploadedfiles/fin_fish_free_act_21.pdf)



117TH CONGRESS
1ST SESSION

H. R. _____

To prohibit the Secretary of the Interior and the Secretary of Commerce from authorizing commercial finfish aquaculture operations in the Exclusive Economic Zone except in accordance with a law authorizing such action.

IN THE HOUSE OF REPRESENTATIVES

Mr. YOUNG introduced the following bill; which was referred to the Committee
on