

H.R. 8632 - The Ocean-Based Climate Solutions Act
DRAFT NPFMC Staff Notes
January 2021

The following provides a brief review of major sections of the bill that may have substantial 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. The sections reviewed include:

- 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 I – Marine and Coastal Blue Carbon

This section could impact the Council's ability to conserve and manage fisheries, but any potential impacts would not be known for some time. For example, the section requires a report that, among other things, includes an "assessment of the vulnerability of coastal and marine blue carbon ecosystems to climate impacts such as sea level rise, acidification, and salt-water intrusion, and other environmental and human stressors, such as development, water pollution, and aquaculture..." The report also requires an assessment of the greatest anthropogenic threats to blue carbon ecosystems. It is not clear if fishing would be considered as a human stressor or threat. This section also creates a new Interagency Working Group on Coastal and Marine Blue Carbon. One of the requirements for this working group is to "identify priority blue carbon ecosystems for protection".

This section also requires the Administrator to "designate as coastal carbon area of significance that "provides a spawning, breeding, feeding or nesting habitat for wildlife" or is estuarine habitat designated as EFH under the Magnuson-Stevens Act. The section requires the Administrator to describe and identify coastal carbon areas of significance and measures to ensure the protection of coastal carbon areas of significance. It appears that this will create a new type of ocean and coastal designation that may require additional protection. It is unclear whether this would override existing Council authorities.

Title II - Marine Protected Areas (Page 36)

Section 201 and 202 sets forth a policy on the protection of habitat: "It is the policy of the United States — (1) to prohibit any commercial extractive or destructive human activity in at least 30 percent of the ocean under United States jurisdiction by 2030. The 30 percent shall include existing areas in which commercial extractive and destructive human activities are and continue to be prohibited; and (2) to support the adoption and implementation of a global goal to protect at least 30 percent of land and 30 percent of ocean areas by 2030 under the Convention on Biological Diversity." A high level (Secretary level) multi-agency taskforce "30x30 Interagency Task Force", chaired by the Council on Environmental Quality, would prepare a plan and schedule to implement these closed areas.

Former Council member Linda Behnken recently published a comment on this provision in The Hill: <https://thehill.com/opinion/energy-environment/526193-sustainable-fisheries-are-facing-a-moratorium>

Staff Notes: Within 2 years, the task force will develop a plan that identifies and implements closures to all *commercial* fish extraction in 30% of the US EEZ. To develop these areas, the task force shall conduct an inventory of areas under U.S. jurisdiction that are subject to both a prohibition on all bottom-tending fishing gear and a prohibition on all fishing gear with bycatch rates that adversely affect marine wildlife populations, and identify additional prohibitions on non-fishing commercial activities in those areas. It is not clear if the legislation intends for a 30% closure of each geographic region or 30% cumulative for the US. While the stated policy to protect ocean habitats and ecosystems that first, represent the diversity of the U.S., there is also emphasis on protecting areas that are relatively pristine as well as other factors.

Not only will this section stop any commercial activity within these areas, but the policy section envisions an “interconnected network of marine protected areas...” This indicates that these will not be free-standing closed areas, but will need to be somehow connected to each other and provide migration corridors. This section intends the protection of areas for biodiversity, ecosystem protection, ecological functions protection, genetic diversity protection, and enhancement of resiliency. All are new factors to be used in determining areas for protection.

Staff notes that there are no areas in the EEZ off Alaska that are subject to a prohibition on all fishing gear with bycatch rates that adversely affect marine populations. Further, it is not clear what is meant by ‘bycatch rates that adversely affect marine populations’. Does this refer to ‘takes’ of ESA species (i.e., Short-tailed Albatross) or interactions with MMPA species? Or fishing gear with relatively high bycatch rates of fish (e.g., longline fisheries or crab pot fisheries)? Or relatively high bycatch amounts of fish (e.g., trawl fisheries)?

There are existing closures to different types of fishing gear in the North Pacific. Most closure areas are closed to bottom trawling. Some areas are closed to all bottom contact gear, and several areas are closed to all commercial fishing gears. Areas of the North Pacific EEZ currently closed to all commercial fishing gears include the Arctic EEZ, the AI coral habitat protection areas (aka coral gardens), the Alaska seamounts, and the Sitka Pinnacles Marine Reserve. See https://www.npfmc.org/wp-content/PDFdocuments/resources/mfr_witherell_MPAs.pdf Together, these no-fishing areas would not meet the 30% threshold established in this legislation, even if just applied to the Alaska EEZ. The bill suggests that additional closures to all fishing gears (all extractive commercial fisheries) to meet the 30% threshold would be based primarily on closures to bottom trawling and scallop dredging. This may not be the most optimal approach, and could greatly affect the fishing communities (e.g., should the Southeast Alaska trawl closure be designated as an area where commercial fish extraction is prohibited).

The draft plan of areas and agency implementation plans developed by the task force will be available for comment through the Regional Fishery Management Councils.

Staff Recommendation: The Council could note that the definitions in Section 1 should define and list of bottom-tending fishing gear, and that the meaning of ‘bycatch rates that adversely affect marine populations’ could be better clarified. A high-level task force using a top-down approach may not be the optimal approach to designating fishery closure areas. The Council may want to comment that much better approach would be through the Regional Fishery Management Councils, which have been successfully evaluated and implemented MPAs using the science-based, transparent, and public process. Additionally, establishment of 30% of the

EEZ to fish extraction appears arbitrary, may not provide additional benefits beyond existing closure areas already established to protect habitat and biodiversity, and would likely cause substantial and permanent adverse economic impacts to fishermen, processors, and communities.

Section 203 would create new National Marine Sanctuaries, including in Alaska. Each of the areas identified in the Inventory of Successful Nominations of NOAA, National Ocean Service, as of October 20, 2020.

Staff Notes: This section would automatically create the St. George Unangan Heritage National Marine Sanctuary, which is currently on the Inventory of Successful Nominations. The St. George Sanctuary boundary area would extend seaward 30 miles around the island of St. George, except where there would be a 20-mile boundary with St. Paul to the north. The sanctuary would include encompass a portion of the Pribilof Canyon and other important groundfish and crab fishing areas around St. George Island.

Immediate designation of Sanctuaries through this legislation skips over several important steps in the process, as detailed in the Sanctuary Act and regulations (15 CFR 992). This includes preparation of a sanctuary management plan and applicable regulations, including carrying out surveillance and enforcement activities and conducting such research, monitoring, evaluation, and education programs as are necessary and reasonable to carry out the purposes and policies of the Act. Additionally, it is worth noting that under current law, the Secretary is prohibited from designating new sanctuaries unless he determines there is sufficient funding for the existing sanctuaries. This section would remove that limitation, and add a whole new suite of new sanctuaries, but no additional funds for managing them.

The authority to manage fisheries within a National Marine Sanctuary does not entirely reside with the Councils and NMFS. Section 304 (a)(5) of the Act, and the implementing regulations (15 CFR 992.22) provides that the appropriate Council shall have an opportunity (120 days) to prepare draft regulations for the EEZ as the Council may deem necessary to implement the goals and objectives of the proposed designation. However, if the Secretary of Commerce deems that the Councils proposed regulations fail to fulfill the purposes and policies of the Sanctuary Act and the designated sanctuaries goals and objectives, the Secretary shall draft the regulations. Note that one stated goal of the sanctuary is “Enhance the economic vitality of St. George by protecting and managing the ocean ecosystem surrounding the island, thereby ensuring thriving subsistence fisheries...” The proposal further states that “A management question warranting further consideration is the extent to which commercial fishery removals of walleye pollock, Atka mackerel and Pacific cod from the waters of the Pribilof Domain might be affecting the availability of these species to marine mammals and seabirds.”

Prior draft legislation (e.g., H.R. 200) included language that would clarify that the MSA would be the controlling fishery management authority in the case of any conflict within a national marine sanctuary. The NPFMC and CCC wrote letters in support of this MSA revision, noting that under the MSA, the Councils are charged with managing, conserving, and utilizing the Nation’s fishery resources as well as protecting essential fishery habitat, minimizing bycatch, and protecting listed species within the United States Exclusive Economic Zone. This is done through a transparent public process that requires decisions to be based on the best scientific information available.

Staff Recommendation: As the Sanctuary boundary includes important fishing grounds, the Council may wish to suggest language be added to clarify that MSA would be the controlling authority for any fishing regulations in National Marine Sanctuaries. Additionally, the Council could request to be fully consulted regarding any management plan, Environmental Impact Statement, or draft regulations for the St. George Sanctuary.

Section 204 proposes additional protection of deep sea corals. “The Administrator shall designate as a Deep Sea Coral Marine Conservation Area any area where deep sea coral is found — (1) that is— (A) within the waters of the exclusive economic zone; or (B) on the Outer Continental Shelf; and (2) in which the Administrator or a Regional Fishery Management Council established under section 302 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852) has prohibited the use of gear in contact with the ocean bottom, and towed from a vessel, which is moved through the water during fishing in order to capture fish, including otter trawls, beam trawls, hydraulic dredges, non-hydraulic dredges, and seines (with the exception of a purse seine).

(b) PROHIBITIONS.—Except as provided in subsection (c), the following activities are prohibited in a Deep Sea Coral Marine Conservation Area— (1) exploring for, developing, or producing oil, gas, or minerals; (2) using or attempting to use poisons, electrical charges, or explosives in the collection or harvest of any marine resource; (3) intentionally introducing or otherwise releasing any non-native species; (4) anchoring on any living or dead coral; and (5) drilling into, dredging, or otherwise altering the seafloor; (6) use of bottom trawl nets or other bottom tending fishing gear; and (7) deliberate dumping or discharge of noxious substances, materials that may cause eutrophication, or materials that artificially increase endemic pest outbreaks.”

Staff Notes: Deep sea corals are broadly distributed throughout the North Pacific EEZ, and not limited to discrete locations

https://www.coris.noaa.gov/activities/deepcoral_rpt/Chapter2_Alaska.pdf). Thus, expansive areas of the EEZ off Alaska could be designated as Deep Sea Coral Marine Conservation Areas. These designations would be made regardless of the coral species and their life cycle, relative vulnerability to fishing impacts, or importance to the ecosystem. For example, small soft corals occur throughout the Bering Sea shelf, but due to their small structure are considered to have only minimal value as fish habitat and not to be adversely impacted by fishing gear.

The term ‘bottom tending fishing gear’ could be interpreted to also include pots and longlines, as these gears are certainly on the bottom, and left to be tended to at a later time. In the 50 CFR 679 regulations for example, bottom contact gear means nonpelagic trawl, dredge, dinglebar, pot, or hook-and-line gear.

It is also worth noting that for the deep sea coral marine conservation areas (yet another new ocean designation created by the legislation), the legislation would define activities (including fishing) to be restricted, and this authority would reside with the Administrator and not the Councils. This section also requires the Administrator to analyze and make recommendations to the Councils every two years on additional areas that should be protected.

Staff Recommendation: The Council could suggest that the term bottom tending gear be specified as to which gears are considered to be in this group.

The Council could note that it has already established numerous closed areas to bottom tending gear to protect vulnerable deep sea coral aggregations. The Council has taken a surgical approach to these area closures, so as to minimize impacts to potentially exposed, long lived coral colonies, while still providing for sustainable fisheries. This has been accomplished through a science-based, transparent and public process.

The Council may wish to comment that corals are broadly distributed throughout the EEZ, so designation of Deep Sea Coral Marine Conservation Areas in any area where deep sea corals are found, beyond the existing closure areas, would likely cause substantial economic impacts to fishermen, processors, and communities.

Title IV - Climate-Ready Fisheries, Efficient Fishery Vessels, and Buy American Seafood (Page 76)

Section 402 allows the SOC to make grants to assist marketing and promote consumption of domestic seafood products, including invasive species, less known species, and “environmentally- and climate-friendly products that minimize bycatch and impacts on marine mammals”. **Section 403** would eliminate federal subsidies that contribute to overcapacity, overfishing or IUU fishing, and would require parties in trade agreements to report on subsidies, establish an independent stock assessment group, and cooperate in RFMOs. **Section 404** addresses improving fuel efficiency in fishing vessels.

Staff notes: The bill would prohibit the use of subsidies which would reduce fuel operating costs. This could be broadly interpreted to mean that there could not be any grants, etc for making fishing vessels more fuel efficient, which seems to run counter to this section which intends to encourage making fishing vessels more fuel efficient.

Section 405 would amend the MSA to have the SOC, in consultation with the Regional fishery Management Councils, establish a program to identify and implement adaptive ways to improve the management of fisheries under current and anticipated impacts of climate change. This would occur through expanding science and data collection, developing new tools including forecasting and climate and ecosystem modeling, promoting management approaches that increase resilience, etc.

Staff notes: This section would require the Secretary to establish a program to identify, develop and implement adaptive strategies...to improve the management of fisheries under current and anticipated impacts of climate change. It would require the Secretary to “prepare and adapt fishery management for climate change by promoting a precautionary approach to management...” and “promote management approaches that increase resilience to current and anticipate climate impacts...”. This section could thus provide the Secretary a new criteria for determining whether to approve or disapprove an FMP or amendment.

Sections 406 provides for include coordination and consultation with Regional Fishery Management Councils on development of a grant program to develop innovative tools and approaches designed to increase the adaptive capacity of fishery management to the impacts of climate change. This program would include coordination and outreach to the NMFS regional offices, the Councils and their SSCs, and other programs.

Staff Notes: The legislation appears consistent with direction of science and management in the North Pacific. Alaska Fisheries Science Center has been developing advanced models of climate

and ecosystem responses. The Council has been actively working towards climate ready fishery management and resilience through its Climate Change Taskforce.

Staff Recommendation: The Council may wish to note that the AFSC is already operating at a funding shortage, and in the past few years has had to reduce staff and the amount of science conducted, including not being able to fully complete critical surveys that are essential for stock assessments and sustainable fisheries. The Council would certainly support more science to understand climate change and improve resiliency, but substantially more funding to the National Marine Fisheries Service will be required.

Section 407 establishes a ‘Shifting Stocks Task Force’. The Task Force shall develop, in consultation with the Administrator and the Regional Fishery Management Councils, science-based decision-making criteria to make jurisdiction, allocation, and fishery management decisions that minimize the risk of overfishing and maximize stock and ecosystem resilience to the effects of climate change. Additionally, the Task Force shall make recommendations to the Administrator and to the Regional Fishery Management Councils for the allocation and distribution of fishing privileges based on these criteria. The public can petition the Task Force to review information on any shifting stock.

Staff notes: The Shifting Stocks Task Force would be composed of one member with scientific background from each council jurisdiction (but cannot be council members). The Task Force is charged with developing science-based decision-making criteria to make allocation determinations for shifting stocks that minimize the risk of overfishing and minimize stock and ecosystem resilience to the effects of climate change. Once the criteria are developed, the Task Force shall make recommendations to the SOC and Council for the allocation and distribution of fishing privileges based on these criteria. The public can petition the Task Force to add a shifting stock to the list.

The bill would require that a “compliant fishery management plan” that “fully accounts for the best available science on shifting stocks and the recommendations of the Task Force is created, published, and implemented” within 180 days of receiving the recommendations of the Task Force.

It appears that the Task Force is not specific to cross council jurisdictions, and thus their recommendations could be applied to shifting stocks under a single council’s authority. Having an outside body advise the Council on the allocation and distribution of fishing privileges would be interesting, as these decisions have heretofore been made by the Councils and NMFS.

Section 408 on Page 93 establishes strict essential fish habitat provisions in the MSA by requiring Federal agencies to avoid impacts on EFH, or if avoidance is not possible, minimize and mitigate impacts on EFH. In the case of habitat areas of particular concern (HAPC), no Federal agency may authorize, fund, or undertake an action if such agency determines, in consultation with the Secretary, that such action would have an adverse effect on a habitat area of particular concern. Much of the rest of this section would essentially codify the EFH guidelines on agency responses and Council authority to comment on actions likely to adversely affect EFH, and a new definition of HAPC.

Staff notes: 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. Conservation of EFH is not one of the national standards.

The existing MSA Section 305(b) details existing consultation requirements:

- Federal agencies must consult with the Secretary on all actions, or proposed actions, authorized, funded, or undertaken by the agency, that may adversely affect EFH;
- the Secretary shall provide recommendations (which may include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH) to conserve EFH to Federal or state agencies for activities that would adversely affect EFH.
- the Federal action agency must provide a detailed response in writing to NMFS and to any Council commenting within 30 days after receiving an EFH Conservation Recommendation

The draft legislation makes some measures substantially more restrictive. For example, the legislation requires Federal agencies to avoid impacts on EFH, or if avoidance is not possible, minimize and mitigate impacts on EFH. Additionally, no Federal agency may authorize, fund, or undertake an action if such action is determined to have an adverse effect on a habitat area of particular concern. Practicability may no longer be a consideration in determining whether or not, or to what extent, to allow activities to impact EFH.

Staff Recommendation: The Council may wish to comment on the new consultative language for EFH and HAPC. 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. All commercial fishing gear types, with the possible exception of jig gear, would likely be considered to have some adverse impacts on EFH (at least localized, short term impacts). Thus, fishing may not be authorized unless effects can be minimized (or mitigated, which I don't think would be possible for fisheries). But without the term "to the extent practicable", or other reasonable threshold, one could argue that effects could be minimized if there was no fishing effort.

Additionally, the legislation requirement that no activity be allowed that could have an adverse impact on HAPC, could affect the fishing activities in and around current council HAPCs. For example, the skate egg deposition areas HAPC does not prohibit fishing. The Fairweather grounds Primnoa coral HAPC area in Southeast Alaska does allow fishing in portions of the designated HAPC area. This legislation would prohibit all fishing within these HAPC area boundaries.

In addition, the Council may wish to note that the changes to the HAPC criteria (A and D) from the EFH guidelines and regulations could cause confusion with respect to consultations and potentially require Regional Fishery Management Councils to reconsider existing HAPC areas in the FMPs. For example, under the revised criteria D, HAPC would be an area of EFH that "due to prevailing or anticipated future environmental conditions, are or may become important to the health of managed species".

Section 409 establishes an Ocean Aquaculture Research and Policy Program to address opportunities and innovation in restorative ocean aquaculture development in coastal waters and the EEZ.

Staff notes: “restorative ocean aquaculture” is a new term, at least to fishery managers, and remains undefined in the bill. Is this specific to seaweeds and kelp, or does it include marine animals such as oysters and mussels?

Title VIII – Strengthening Marine Mammal Conservation (page 142)

Section 801 requires the Secretary to publish a list of marine mammal species and stocks that may be impacted by climate change. A climate impact management plan and implementing regulations for each species or population will be published in the FR. The plan includes strategies and regulations to mitigate effects of climate change and increase resiliency. A monitoring program for studying adverse effects will be established. Marine mammal stock assessments and potential biological removal estimates shall take into account adverse impacts of climate change in in setting potential biological removal (PBR), to “take into account the adverse impacts of climate change in determining the recovery factor applied to each stock”.

Staff notes: In creating a list of marine mammal populations for which climate change with or without other factors other factors have a “more than a remote possibility” of resulting in a decline in population, abundance, of impeding population recovery, or of reducing carrying capacity, this provision would appear to add a new threshold for which marine mammal populations might require additional protection. The section also uses other new thresholds such as “are likely to occur within 20 years” and that have “more than a remote possibility of occurring with 100 years”.

The Secretary would be required to publish a climate impact management plan and proposed regulations for each marine mammal species or population that is on the list. The plan would, among other things, “prevent interactions with fisheries and other human activities that may occur as a result of changes in marine mammal distribution or other indirect effects of climate change. The plan would also increase resiliency by “managing prey species to improve availability of prey to such species and population stocks”. In addition, this section allows any outside group to petition to add other marine mammal species or populations to the list requiring protection from climate change. All federal agencies would be required to use their authorities to further the strategies and conservation and management measures in the plans. The bill also gives the Secretary the authority to “take any other action as may be necessary to implement the strategy set forth in the plan”, which, from my interpretation, could override existing authorities such as the MSA.

Section 802 requires the Administrator and USCG to designate areas of importance to marine mammals and establish a mandatory vessel speed limit of 10 knots or less for all vessels greater than 49 feet overall. Areas include all areas designated as critical habitat under ESA, areas with high mortality caused by ship strikes, all marine sanctuaries, marine monuments, national parks, national wildlife refuge, and other important areas for marine mammals. Automatic identification system (AIS) will be required on all vessels \geq 49 feet, some for hire passenger vessels, towing vessels, and other vessels as necessary. Penalties are listed, including fines and suspension of vessel operating licenses and fishing permits.

Staff notes: This section creates another ocean designation of “areas of importance to marine mammals” and applies a speed restriction for any vessel over 49 feet. This designation appears to be fairly broad including any area that are important to feeding, breeding, calving, rearing, or

migratory habitat". This section also adds the disruption of vocalization patterns and masking of biologically important sounds as a criteria for being included in this designation. This designation would also include areas of year-round or seasonal aggregations of marine mammals. Note that this section would also give the Secretary the authority to implement "temporary, seasonal or dynamic area closures" and "gear restrictions or modifications" as deemed necessary.

While many commercial fishing vessels in Alaska already use AIS, this bill would require it on all vessels $\geq 49'$ LOA. It is not clear how the speed limit might affect fishing vessel operations.

Section 803 requires the Administrator to utilize the Integrated Ocean Observing System (IOOS) maintain and expand an ocean noise reference station network.

Section 804 requires the Administrator to establish a grant program to provide assistance to seaports to develop and implement mitigation measures to reduce impacts of vessel traffic on marine mammals.

Title IX – International Agreements, etc. (page 166)

Section 901 says that the U.S. should ratify the United Nations Convention on the Law of the Sea (UNCLOS), such that the U.S is a party to UNCLOS and the associated 1994 agreement that governs activities on, over, and under the world's oceans.

Staff notes: The CCC has supported the US signing UNCLOS.

Section 911 would reinstate Executive Order 13754 and make it have the force and effect of law. This E.O. establishes a Northern Bering Sea Climate Resilience Area and policy to confront the challenges of a changing Arctic by working to conserve Arctic biodiversity; support and engage Alaska Native tribes; incorporate traditional knowledge into decision-making; and build a sustainable Arctic economy. The E.O. established a Bering Task Force to coordinate policy development for the Arctic, and the Task Force was to create a Bering Intergovernmental Tribal Advisory Council, for the purpose of providing input to the Bering Task Force and facilitating effective consultation with Alaska Native tribal governments. The EO can be found here: <https://www.govinfo.gov/content/pkg/DCPD-201600836/pdf/DCPD-201600836.pdf>

Staff notes: Section 10 of the EO requires that the area included in the Northern Bering Sea Climate Resilience Area stay closed to commercial non-pelagic trawl gear. "Consistent with existing law, NOAA, in coordination with the NPFMC shall take such actions as are necessary to support the policy set forth in section 2 of this order, including actions to maintain the existing prohibitions on the use of commercial non-pelagic trawl gear." This language would apparently tie the hands of the Council in its ability to manage fisheries and adapt to climate change should fish stocks continue to shift distribution northward in the Bering Sea. The northern Bering Sea research area was originally established to prohibit bottom trawling from expanding into the area until such a time that research could be done to help understand what potential impacts might occur prior to bottom trawl fisheries starting there. This legislation would bypass the science informed decision-making ability of the Council with respect to managing fisheries in this area.

Overall staff comments: This legislation contains a number of new terms, new types of marine protection area designations, new grant programs, new task forces, and establishes new authorities that may trump existing authorities of NMFS and the Councils.