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Testimony

Before the Committee on Resources

United States House of Representatives

Legislative Hearing on the Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act

Focus on H.R. 5018,

The American Fisheries Management and Marine Life Enhancement Act

And

H.R. 1431,

The Fisheries Science and Management Enhancement Act of 2005

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Good morning, Mr. Chairman and Members of the Committee. My name is Lee Crockett, and I am the executive director of the Marine Fish Conservation Network (Network). The Network is the largest national coalition solely dedicated to promoting the long-term conservation of marine fish by pressing for changes in the way we manage our oceans. With more than 180 member organizations – including environmental organizations, commercial and recreational fishing associations, aquariums, and marine science groups – the Network uses its distinct voice and the best available science to educate policymakers, the fishing industry, and the public about the need for sound conservation and management practices.

Thank you for providing us with an opportunity to present testimony on the “American Fisheries Management and Marine Life Enhancement Act,” H.R. 5018, the “Fisheries Science and Management Enhancement Act of 2005,” H. R. 1431, and other issues related to the reauthorization of the Magnuson-Stevens Fisheries Conservation and Management Act.

Before commenting on the two bills, I would like to provide some context for my comments. When the Magnuson Act was passed in 1976, our view of ocean fisheries was much different. At that time Congress’ main concern was “Americanizing” our fisheries. That meant creating a law that phased out foreign fishing, promoted our domestic fishing industry, and gave a large say in management decisions to the fishing industry. Given that intent, who better than fishermen to decide how to promote fishing? But the decades of intense fishing pressure that resulted, have caused the decline and even collapse of many fisheries. These declines and other problems with our oceans led Congress to establish and President Bush to appoint the U.S. Commission on Ocean Policy.

U.S. Commission on Ocean Policy Recommendations

After three years of intense investigation into the health of our oceans, the U.S. Commission on Ocean Policy (USCOP) released its final report on September 20, 2004. The Commission concluded that “[o]ur failure to properly manage the human activities that affect the nation’s oceans, coasts, and Great Lakes is compromising their ecological integrity,

diminishing our ability to fully realize their potential, costing us jobs and revenue, threatening human health, and putting our future at risk.” The Commission went on to say, “[t]he message from both experts and the public alike was clear: our oceans, coasts, and Great Lakes are in trouble and major changes are urgently needed in the way we manage them.”

Among the recommendations were a series of measures designed to enhance fisheries science and management to ensure the long-term sustainability of marine fish. Specifically, the USCOP report recommended amending the Magnuson-Stevens Act to strengthen the role of the councils’ Science and Statistical Committees (SSCs) and require the councils to conform their management decisions to the scientific determinations made by their SSCs. The role of the SSCs, the report explained, should be to determine the allowable biological catch (ABC), and councils should be bound to those determinations. The report also recommended that the Secretary of Commerce provide for an independent review of the scientific information relied on by the SSCs. The model for these recommendations for science-based fisheries management was the North Pacific Fishery Management Council (NPFMC).

The North Pacific Model

Unlike most other councils, the NPFMC uses a precautionary science-based, approach to fisheries management. The NPFMC relies on the recommendations of its SSC to set an ABC and then sets the catch limits for individual fisheries below the recommended ABC. While there is some debate regarding what constitutes a sufficiently conservative ABC, the NPFMC includes a precautionary buffer to account for uncertainty. In addition, the council has made this model a requirement in all of its fisheries management plans. The net effect of this management approach is that none of the North Pacific finfish populations are currently classified as overfished.

Therefore, the recommendations of the USCOP to improve fisheries management, which are based on the success of the North Pacific model of science-based management, should serve as the basis of any legislation to reauthorize the Magnuson-Stevens Act. Unfortunately, the bills currently before Congress range from fully consistent with the Commission recommendations to the opposite. With that in mind, I would now like to discuss how H.R. 1431 and H.R. 5018 are and are not consistent with the USCOP recommendations.

H.R. 5018

First and foremost, the USCOP recommendations do not anticipate any weakening of existing law. In fact, they are built on, and intended to enhance, existing law. Unfortunately, H.R. 5018 proposes several rollbacks to current law. I would like to highlight several sections of the bill that we find particularly troubling.

H.R. 5018 replaces the term *overfished* with *diminished*, a new term, and defines it as a stock that is below the ‘*natural range of fluctuation*’ necessary to produce a healthy stock. While we understand that all fish stock declines are not the result of fishing and a new term may more appropriately describe the stock status, we have serious concerns about the new definition. The phrase *natural fluctuation* is not defined, and the addition of this phrase into the definition opens a giant loophole for inaction. Based on past experience, we are concerned that *natural range of fluctuation* will be used as an excuse to never identify a stock as *diminished* because fishermen will argue, as they frequently do now, that low stock size is the result of nature not man. Moreover, regardless of the cause of the decline, remedial action is necessary to rebuild the stock. This newly defined term will likely lead to fewer stocks being defined as *diminished*, which means needed actions to rebuild these stocks will be delayed or avoided. We suggest that *overfished* or *diminished* be defined as “a stock with a size below the long-term average abundance associated with the production of maximum sustainable yield (MSY) or a size, age, or gender structure that hinders the production of MSY.” This is a variation of the definition recommended by the National Marine Fisheries Service in its proposed MSA reauthorization bill.

To further compound the problems associated with the new definition for *diminished*, H.R. 5018 establishes three new exemptions to the requirement to rebuild overfished stocks within 10 years if biologically possible. The bill allows for extensions in cases where the Secretary determines that the cause of the fishery decline is outside of the council jurisdiction or that limiting fishing alone will not effectively rebuild the stock, the Secretary determines that the 10-year period should be extended, or if the Secretary makes substantial changes to the rebuilding targets after a rebuilding plan has been implemented. This is an extremely dangerous precedent to set, because extending rebuilding deadlines will only serve to increase fishing pressure on vulnerable stocks, threatening their ability to rebuild and delaying the benefits of rebuilt stocks to fishing communities.

The bill also authorizes the Secretary to determine that any management plan that complies with the MSA is deemed to be in compliance with the National Environmental Policy Act (NEPA). This amounts to a waiver of NEPA, because the MSA does not contain comparable requirements. For example, NEPA has very different requirements for evaluating the cumulative environmental impacts of proposed actions, considering a range of management alternatives, and allowing

public participation in the decision making process. Therefore, these important measures for insuring sound governmental decision making will be lost. While we understand the concerns expressed by some that the timelines of NEPA and MSA do not fit well together, this legislation is not necessary because NEPA's implementing regulations already provide the flexibility necessary to mesh the NEPA process with other laws. We urge you to drop this section, or if that is not possible, to replace this language with the NMFS proposal for meshing these two procedures because it retains the substantive requirements of NEPA and its implementing regulations.

H.R. 5018 exempts fisheries observer data from disclosure under the Freedom of Information Act (FOIA). This provision would severely limit public access to fisheries observer data. We understand that certain fisheries information should be shielded from the public in order to protect proprietary business interests, but aggregate fisheries observer data should be available to the public. Observer information is critical for the public to evaluate how managers are implementing legal requirements to minimize bycatch. If this section were enacted, only information provided by managers would be available to evaluate their performance. Obviously, this will not facilitate independent oversight. We also find it ironic that data which is collected using taxpayer's dollars would be unavailable for public review.

The bill also authorizes the use of alternative procedures which will allow managers to develop fishery management plans and amendments quickly but will restrict the public's ability to comment on fishery management measures developed through this process. Public input is a crucial component of developing management plans and amendments, and the public deserves to have a say in the management decisions regarding public fishery resources. However, we recognize that expedited procedures may be necessary in certain situations and suggest that you add restrictions so that these procedures may only be used in situations where management measures must be implemented quickly. We fear that the current proposal will allow their use to become the practice not the exception.

The final weakening of existing legal or regulatory requirements contained in H.R. 5018 involves the new statutory definition of "habitat area of particular concern," which is a subset of essential fish habitat (EFH) that is eligible for focused protections under the NMFS EFH regulations. The new statutory definition is inconsistent with the NMFS regulatory definition because it does not include habitats that are threatened with development. NMFS and the councils have been implementing the EFH requirements for nearly eight years and creating a new, inconsistent, definition will create confusion and undercut previous efforts to protect EFH. We recommend that you amend this definition to make it consistent with the NMFS regulatory definition.

I'd now like to discuss how H.R. 5018 does and does not implement the fisheries management recommendations of the USCOP regarding the composition, operation, and role of the regional fishery management councils.

Councils and the use of science

The most important recommendations of the USCOP are intended to improve the use of science in fisheries management decision-making and nationalize the Alaska model of science-based management. One needed reform involves ensuring the use of independent scientific advice. Currently, each council is required to establish a Science and Statistical Committee (SSC) to assist in the development, collection, and evaluation of the statistical, biological, economic, social, and other scientific information necessary for development of fisheries management plans and amendments. The USCOP recommended a number of changes in SSC member qualifications, compensation, and appointment, which are intended to improve their independence.

H.R. 5018 contains language that partially implements many of the USCOP recommendations, but does not go far enough. By adding the following changes, which can be found in H.R. 1431, the bill will fully implement the USCOP recommendations. Specifically, scientists with financial ties to the fishing industry should not be allowed to serve on SSCs. SSC members should be appointed by the Secretary of Commerce to further ensure their independence. The councils should also be required to pay SSC members a stipend to ensure the participation of independent scientists. The peer review section must contain more detailed standards and criteria for the peer review process, and allow for comment from the public, not just the "regulated community." These changes will not only ensure that the bill conforms with the USCOP recommendations, but help ensure that the councils base management decisions on best independent scientific information available.

While it is very important to ensure that the scientific advice provided councils is independent, it is of little value unless the councils are required to use it. Here H.R. 5018 does a much better job of following the USCOP recommendations. Consistent with the USCOP, the SSCs are required to provide scientific advice for setting catch levels and the councils are required to follow it. In addition, the councils are also required to set annual catch limits based on this scientific advice. The main deficiency in this section is that the councils are not required to deduct amounts that an annual catch limit is exceeded from the following year's limit. Such an accountability measure is necessary to ensure that overfishing is controlled. The bill also does not adequately define the basis for annual catch limits. The councils can also use "other

annual harvest effort control limits,” which are not as effective as catch limits. H.R. 5018 also only applies the requirement to set annual catch limits to the councils, not secretarial plans, and fails to provide a definition for the scientific recommendation designed to be the benchmark for these limits, i.e., the acceptable biological catch.

The USCOP also made a number of recommendations to improve the councils themselves which are also included in H.R. 1431. Current law requires the Secretary of Commerce to ensure a fair and balanced appointment of the representatives of the commercial and recreational fisheries under the jurisdiction of the council. Since 1985, this requirement has resulted in 80 – 90 percent of appointed council members representing fishing interests. The USCOP recommended that the governors be required to nominate slates of council candidates that include two representatives each of commercial fishing, recreational fishing, and the general public. The Network believes that the Secretary should also be required to ensure equal representation between commercial fishermen, recreational fishermen, and the public when making council appointments. H.R. 5018 does not contain language to implement this recommendation. The USCOP also recommended that the Secretary establish a council training program, which should be required for new members, and members who do not take the training should be prohibited from voting until they do. H.R. 5018 does require the Secretary to develop the training program and requires new members to take the training program, but does not restrict voting until the training takes place.

Limited Access Programs

The Limited Access Privilege Programs (LAPPs) section of H.R. 5018 contains language that addresses many of the recommendations of the USCOP, most importantly that there be a set of national guidelines to govern program design and conduct. However, there is one very significant deficiency in the bill's LAPP standards: no time limit on these programs. The USCOP and the state of Alaska have called for these programs to have time limits. Time limits are necessary to reinforce the fact that LAPPs are a privilege, not a property right, and add force to program reviews. A time limit allows managers a greater opportunity to make program modifications because LAPP participants know that continued participation in the program is contingent on good performance.

In addition, H.R. 5018 requires a council to develop a LAPP if the Secretary certifies a petition endorsed by 50 percent of the allocation holders in the fishery. This would allow the largest operators in a fishery to force the development of a LAPP despite opposition from the council and a majority of the permit holders in that fishery. Since a LAPP is a fundamental change in the fishery, all fishermen should have an equal voice in deciding to develop a program, not just the largest fishing businesses. Finally, H.R. 5018 exempts programs under development from the LAPP standards. Since there is no definition of under development, this creates a huge loophole which will allow many programs, even those in the discussion stage, to be exempted from the standards. This exception should be dropped from the bill.

Ecosystem-based Management

Finally, the major recommendation of the USCOP was to move fisheries management toward ecosystem-based management. While H.R. 5018 does include a section on ecosystem management, it merely calls for more ecosystem research. Twenty years ago the idea of ecosystem management was a novel idea and the research surrounding it was just beginning. Today, we have a better understanding of the importance of ecosystem interactions and the shortcomings associated with single species management. The research in this field has expanded rapidly, and it is time that legislation reflect what scientists have learned and begin the process of ecosystem-based management. This bill should go beyond developing regional research plans and include guidelines and requirements for developing and implementing Fishery Ecosystem Plans. The inclusion of an ecosystem approach into fishery management plans is a critical component to successfully managing our oceans and fisheries.

H.R. 1431

While H.R. 1431 is not a comprehensive MSA reauthorization bill, it proposes to fully implement some of the most pivotal recommendations made by the USCOP and would result in a thorough reform of the council system, especially how science is used for making decisions. Because of this, the Network strongly supports H.R. 1431. Building on the strengths of the existing management process, the bill amends the Magnuson-Stevens Fishery Conservation and Management Act to: (1) broaden stakeholder representation on fishery management councils; (2) significantly reduce financial conflicts of interest among council members; (3) provide training for new council members; (4) develop cooperative research, data collection and gear modification programs; and (5) enhance the use of science in fishery management decisions.

The bill strengthens the role of science in the fishery management process by insulating scientific determinations from political and economic pressures. The bill requires the Secretary to appoint and compensate members of each council's SSC. It requires that SSC members must be qualified federal, state, academic, or independent scientists who have no financial interest in any fishery. SSC members must have demonstrated scientific expertise in fisheries science or marine ecology;

or economics or social science as it relates to fisheries management. It requires that each council's SSC include a fishery and marine science subcommittee. The subcommittee, drawn from those members of the SSC who have scientific expertise in fishery biological science or marine ecology, is responsible for making scientific determinations that include biological catch and bycatch limits, habitats in need of protection, and additional species protections. Consistent with USCOP recommendations, the bill stipulates that the councils must develop management measures that are consistent with the determinations made by the fisheries and marine science subcommittee, but may provide for greater conservation in order to meet management objectives. Furthermore, the bill specifies that determinations made by each council's fishery and marine science subcommittee of the SSC must be periodically subject to peer review by qualified independent scientists appointed by the Secretary of Commerce.

In an effort to broaden representation on the councils, this bill requires each governor to nominate a slate of candidates for appointed council seats that include at least two representatives of commercial fishing interests, recreational fishing interests, and representatives of the public. In order to achieve actual balance on the councils, the bill directs the Secretary to ensure balance between commercial, recreational, and public interests when making council appointments. This bill would also prohibit council members from voting on any matter that would affect a financial interest the council member has disclosed, and it allows members of the public to request that the Secretary review a determination to decide whether a council member voted on a matter that would have an effect on the council member's financial interest. If a council member voted on a matter from which he or she should have recused him/herself, and his/her vote decided the council action, it shall be treated as a cause for invalidating or reconsidering the council action. The bill does not, as some have claimed, prohibit fishermen from sitting on the councils if they have financial conflicts. It also does not prevent fishermen with conflicts from engaging in the debate on matter they have a financial interest in. But, as I said above, they would be prevented from voting on matters they have a financial interest in.

Current law exempts council members from the conflict of interest standards that apply to all other regulatory bodies of the federal government. Instead, regulations implementing the Magnuson-Stevens Act require council members to recuse themselves from a council action if they own or represent more than 10% of a fishing gear type or sector. Even if a council member is found to have voted on a matter in violation of this standard, the vote cannot be reconsidered. A study by the Stanford University Fisheries Policy Project, entitled *Taking Stock of the Regional Fishery Management Councils*, found that 60 percent of the appointed council members had a direct financial interest in the fisheries they managed and that only two council members had recused themselves during years of the study. The conflict of interest standards in H.R. 1431 are necessary to bring fisheries management up to the same standards as apply to the rest of government.

H.R. 1431 also requires the Secretary to provide newly appointed council members with training, within six months of their appointment, in the following areas: (1) fisheries science and stock assessments; (2) basic ecology; (3) social science and fishery economics; (4) the requirements of the Magnuson-Stevens Act, the National Environmental Policy Act, the Administrative Procedures Act, and other relevant statutes or regulations; (5) conflict of interest policies that apply to council members; and (6) the public process for developing fishery management plans. Additionally, newly appointed members are restricted from voting on any council decision until they have completed the required training.

H.R. 5051

Finally, I'd like to say a few words about H.R. 5051, the MSA reauthorization bill introduced by Congressman Gilchrest. Of all the comprehensive reauthorization bills introduced in the House and the Senate, this bill is the one that most closely follows the recommendations of the USCOP and enjoys the greatest degree of support within the Network because it does not contain many provisions that weaken existing law found in H.R. 5018. However, that is not to say that we do not see areas that need improvement. H.R. 5051 has some of the same problems as H.R. 5018 in that it: 1) does not fully implement the USCOP recommendations for council member training and adding independent public interest seats to the councils, 2) would restrict the public's access to fisheries observer information, 3) allows the use of expedited management procedures that restrict public participation, 4) fails to include a time limit for LAPPs, 5) allows large scale fishermen to force councils to develop LAPPs, and 6) exempts LAPPs under development from the standards.

Conclusion

For almost two decades, independent reviews of our fisheries management system have yielded similar conclusions; science-based fisheries management is too often compromised by political and economic pressures, thus our progress towards ending overfishing and rebuilding depleted fish populations has been limited. Indeed, the governance structure of federal fisheries management needs to strengthen the role of science in management by separating scientific determinations from allocation decisions. Failure to follow scientific recommendations has resulted in ecological deterioration and economic losses

The NPFMC provides an example of a system that follows scientific advice in setting catch levels and maintains healthy

fish populations. Recognizing the success of the North Pacific management regime, the USCOP outlined a model to apply that success nationally. Now it is time for Congress to heed the call for reform.

I urge this Committee to make the changes I have recommended to H.R. 5018 so that it will advance the use of science in the management process, and most importantly not rollback critical conservation measures in current law. The future of marine fish, commercial fishing, and fishing communities is hanging in the balance and the time to act is now.

Thank you and I would be happy to answer any questions that you may have.