

**Statement of Greg DiDomenico Executive Director, Garden State Seafood Association**

***On Restoring Atlantic Fisheries and Protecting the Regional Seafood Economy***

**Oversight Field Hearing before the House Committee on Water, Power, and Oceans**

**Suffolk County Community College**

**Riverhead, New York**

**December 7, 2015**

Mr. Chairman, Ranking Member, and Members of the Committee, I appreciate the opportunity to appear before you today to discuss our concerns and recommendations related to maintaining commercial fishing access to healthy Atlantic Ocean resources. For the record, my name is Greg DiDomenico and I serve as Executive Director of the Garden State Seafood Association (GSSA). Our Association represents commercial fishermen, commercial fishing dock operations and shore-based seafood processors and associated seafood businesses in New Jersey. GSSA and its members are involved in all aspects of the fishery management process. Our members occupy advisory panel seats on management councils, participate in cooperative research and have a healthy respect for the ocean environment.

Our main objectives are to harvest marine fishery resources at the optimum yield level consistent with the Magnuson-Stevens Act, maintain a robust NJ commercial fishing industry, and to assure a regular supply of sustainable healthy seafood to the consumer.

We believe there are four main categories of threats to our industry that are consistent with the concerns of this Committee. The first is the status of the implementation of the MSA, often combined with poor data that result in overly precautionary quotas and limited management flexibility. The second category of concern is the growing effort of the Administration and environmental industry to curtail commercial fishing access via use of the Antiquities Act, National Marine Sanctuary designations, and the regional ocean zoning system currently being created pursuant to the National Ocean Policy. The third concern is that national precedent-setting allocation decisions (i.e. between stakeholder groups and for purposes of ecosystem-based management) will eventually limit our ability to harvest resources at the optimal level for seafood consumers. Finally, we are concerned the strict application of the Marine Mammal Protection Act and the Endangered Species Act often result in unrealistic constraints on the commercial fishing industry.

**1) MSA, H.R. 1335 and the National Standard Guidelines**

**The impact and reality of MSA 2006 Reauthorization**

The 2006 MSA Amendments dramatically changed the way domestic fishery resources are managed. The new provisions focused on ending overfishing, rebuilding stocks, reducing fishing

capacity, and developing limited access programs. The result is a multi-level decision-making process with a strict adherence to the precautionary approach through an academic exercise where an estimated level of risk is applied to the chance of “overfishing” after consideration of the “uncertainty” of stock assessments.

The implementation of the 2006 MSA amendments exceeded our scientific capabilities and this precipitated a loss in fishery yields due to chronic application of uncertainty buffers. The National Standard Guidelines (NSG1) evolved to include precautionary decision-making leading to safety buffers that effectively prevent the U.S. fishing industry from achieving optimum yield (OY). Even in examples where stocks are not overfished or where overfishing is not occurring, we still may never reach the OY benchmark. These are the core weaknesses of U.S. fisheries policy yet achieving OY is a primary objective of MSA.

### **Mid Atlantic Fishery Management Council Risk Policy**

The MAFMC has created a risk policy to aid in the implementation of the 2006 MSA amendments. The amount of uncertainty applied via this policy that the Council’s Science and Statistical Committee (SSC) assigns to any overfishing level (OFL) estimate also impacts the amount of the buffer and resulting allowable biological catch (ABC). The more uncertainty an OFL is deemed to have, the greater the precautionary safety buffer. The SSC can use the amount of uncertainty in the OFL (often referred to as CV or coefficient of variation) as produced by an assessment. However, to date the MAFMC SSC has always expanded the estimated uncertainty measures (CV) because not all uncertainties are fully captured in the assessment calculations. This expansion increases the buffers and decreases ABCs. Thus a safety buffer can either be larger (and ABC smaller) because the Council wants a lower risk of overfishing or because the SSC determines that to actually achieve a given risk a higher degree of uncertainty must be assumed and catch must be lowered. (*See 2011 Omnibus Amendment that established Annual Catch Limits and Accountability Measures*). The effects of the risk policy are provided in the following examples.

### **The MAFMC Risk Policy application / Scup Quota Setting Example for 2016:**

A description of how ABC is derived from the OFL for the East Coast scup fishery is provided here. Typically, The SSC applies the Council’s ABC control rule in the following way: Since the biomass to biomass at the maximum sustainable yield (B/B<sub>msy</sub>) ratio is above 1, the P\* (or probability of overfishing) is automatically 0.4 according to the Council’s risk policy. The ABC is derived using those parameters in combination with the specified CV of 60% and the projected biomass for each year. The result is that the 2016 ABC is just 87% of the OFL, but that results from the combination of the OFL, P\*, CV, and projected biomass. (*2015 Stock Assessment Review Committee Report*).

In this case for scup, the SSC debated vigorously about what level of uncertainty to assign to the assessment and the OFL derived from it. They had two levels of uncertainty to choose from: 30% would have resulted in an ABC recommendation that was 93% of the OFL; or 60%

resulting in 87% of the OFL. The SSC chose the more risk-averse approach and the result was an ABC of 31.11 million pounds instead of 33.39 million pounds.

The important point to understand here is that this example occurred on a scup stock that is actually healthy. The stock assessment was peer-reviewed and accepted by the Stock Assessment Review Committee in June of 2015. The stock was determined to not be overfished and overfishing was not occurring and the quotas are far from being reached. In addition, the stock was found to be two times the biomass at maximum sustainable yield (MSY) which meant it is twice rebuilt. Despite these healthy stock benchmarks, precaution and uncertainty persist in the quota setting process and resulted in a net loss of quota of nearly 2 million pounds.

### **Fluke Quota Setting for 2016**

In 2015 the MAFMC SSC received a stock assessment update for fluke. The most recent information suggested that the stock was experiencing overfishing in 2014. Under the Council's normal risk policy, this would require reducing commercial quotas and recreational harvest limits by about 43% in 2016. However, recognizing that a reduction of this magnitude could have severe social and economic impacts, the Council recommended that the reductions be phased in over a three-year period.

The SSC and the Council were forced into a situation where there were very few options due to an overfishing determination. I personally watched the SSC debate this issue and believe that they considered all relevant information and made prudent and science-based decisions. I believe the MAFMC reduced the buffers associated with their risk policy to the best of their abilities and in accordance with their policies. But considerable precautionary buffers remain between OFL and ABC in fact the difference is nearly 2 million pounds. This situation needs your attention and some remedy.

### **MSA Reform through H.R. 1335**

We remain fully committed to reauthorizing MSA and thank the leadership of this Committee for the hard work on H.R. 1335 and ask that you continue to work with your Senate counterparts to support passage of this Act.

One important point about the need for MSA reform is in regard to the ongoing rulemaking by NOAA to revisit NSG1. The NOAA process, which is not a certainty, will only result in guidance for regional councils. For us to achieve certain MSA reform, we must have Congress pass MSA reauthorization legislation.

I also believe it is important to make you aware that the Council Coordinating Committee (CCC), which consists of the chairs, vice chairs, and executive directors from each regional fishery management council, reached consensus on the following issues related to MSA reform.

The CCC positions add relevance to your efforts on H.R. 1335.

- 1) Consensus that some degree of additional flexibility with respect to stock rebuilding would allow Councils to balance the biological imperative to rebuild overfished stocks with need to minimize negative social and economic impacts associated with rebuilding.
- 2) Consensus was reached that exceptions to stock rebuilding requirements should be limited in scope and remains carefully defined.
- 3) Consensus was reached that the development of criteria for application of a mixed stock exception would have to be created to ensure ecosystem principles are being adhered to.
- 4) Consensus was reached for consideration of exemptions, or alternatives to, the existing Annual Catch Limit requirements for data-poor species.

### **MSA Reform via a separate NMFS Rulemaking, National Standards 1, 3 and 7**

The NSG1 provide guidance to the Regional Fishery Management Councils to facilitate compliance with the requirements of the MSA. NSG1 requires that conservation and management measures “shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.”

It is important to keep in mind that the National Standards themselves, which the guidelines interpret, are “basic objectives for a viable conservation and management program for the Nation’s fishery resources, (and) are designed to ensure that management plans and regulations take into account the variability of fish resources, the individuality of fishermen, the needs of consumers, and the obligations to the general public, now and in generations to come [emphasis added].” (Conference Report 94-711, March 24, 1976)

In other words, the NSG1 only provide suggested ways for the Councils to carry out their statutory obligations and those suggestions are intended to be flexible, taking into account the variety of fish stocks and fisheries that are being conserved and managed within the U.S. Exclusive Economic Zone.

After passage of the 2006 MSA reauthorization the Agency interpreted the new law which took approximately three years. Shortly thereafter, the regional councils were instructed to implement these new provisions. By the time the councils were barely finished the Agency was already in the process of revisiting the law.

Currently, each regional fishing council has submitted comments and responded to the Agency’s desire to revisit NSG1. Each Council has recommended substantial changes to the law designed to meet the needs of fisheries in their respective regions.

The GSSA has also submitted comments on the NSG1 rulemaking. Below you will find two elements of those comments submitted earlier this year.

## Revising Optimum Yield (OY) Guidance

The agency should take the lead in asking Congress to allow consideration of “relevant economic, social, or ecological factors” to both *increase* and decrease OY, for some limited period of time, depending upon the circumstances around the assessment of the status of a particular stock or stock complex. A clearer understanding of the relationship between the annual ACL and achieving OY over time is necessary.

In defining OY in the current NS1 guidelines the Agency fails to recognize the value of bait production from our fishery resources by defining the “greatest (economic) benefit to the nation” as being derived solely from the production of food or recreational opportunities. There has to be acknowledgement that “fish catch fish and fish feed fish.”

## Adequate Progress and Extending Rebuilding Timelines

It is important that the NS1 guidelines be revised to provide additional flexibility in stock rebuilding when factors such as environmental conditions or revised assessment parameters have a negative effect on a rebuilding schedule established by a Council. Similarly, the MSA’s rigid, non-scientific 10-year rebuilding requirement should be addressed in the NSG1 so that alternative timelines based upon environmental variables, stock complex relationships, changes in migratory/distribution patterns, or other factors can be taken into account to create rebuilding flexibility on a case-by-case basis.

## National Academy of Science’s National Research Council Report

In 2011, NOAA commissioned the National Academy of Science’s National Research Council to analyze the effects of the MSA mandate to rebuild overfished stocks. This included an evaluation of success in stock rebuilding, an investigation of the effects of uncertainty, and identification of means to better account for social, economic and ecosystem factors in the rebuilding plans. The purpose was to help NOAA and the regional fishery management councils better construct efficient and effective rebuilding plans.

It is crucial to point out that the NRC concluded that 36% of the stocks that were declared overfished in the past, the most recent stock assessment for those stocks found that *they were not overfished at the time of their determination*. This is clear evidence the fishing industry is suffering unnecessarily under the current MSA framework.

## 2) Antiquities Act, National Marine Sanctuaries, Magnuson-Stevens Act and National Ocean Policy Activities that Impact Commercial Fishing Access

One of the most serious threats to commercial fishing and consumer access to a sustainable supply of seafood is the loss of access to traditional fishing grounds. It appears to our industry that a well-orchestrated effort is being made under the Antiquities Act, National Marine

Sanctuary Act (NMSA), MSA and the National Ocean Policy (NOP) to reduce fishing access in regions across the country. ***We have every reason to believe that a network of Marine Protected Areas will be designated from Cashes Ledge in New England to the Flower Garden Banks in the Gulf of Mexico.***

This process has occurred slowly over time but under the current Administration we are experiencing a more urgent push that appears designed to curtail fishing activity in several areas around the country. Similar concerns were discussed by the Subcommittee on Water, Power and Oceans at its 09-29-2015 hearing titled “*The Potential Implications of Pending Marine National Monument Designations*”.

Here are just some bulleted examples that illustrate and justify our concerns related to the potential loss of access to fishing areas.

- NOAA proposes fishing requirements for the Pacific Remote Islands National Marine Monument Expansion that includes a permanent prohibition on commercial fishing (1/15)
- NOAA unilaterally expands Cordell Bank & Gulf of Farallones Marine Sanctuaries (3/15) to create a linkage with the Point Arena National Marine Monument previously established by the Administration (in June 2014)
- NOAA publishes Framework for a National System of Marine Protected Areas (3/15)
- The National Marine Protected Areas Advisory Panel is charged by NOAA to develop a national “connectivity plan” for marine protected areas (4/15)
- Administration releases “Report on the National Implementation of the National Ocean Policy” (3/15)
- NOAA issues new National Habitat Policy (6/15)
- NOAA proposes new Ecosystem-Based Fisheries Management Policy (9/15)
- Pursuant to the National Ocean Policy the Regional Planning Bodies (RPBs) in both the Northeast and Mid-Atlantic projected to finalize their regional ocean zoning plans by June 2016 which we believe will require pre-certification approval of all federally-permitted activities
- NOAA amends the National Marine Sanctuary nomination system (6/14) to accept public petitions for site nominations which precipitates extensive sanctuary nomination activities and additional calls for National Marine Monument Designations during 2014-2015 in Alaska, Florida, New England, and Mid Atlantic
- The Mid-Atlantic Fishery Management Council successfully mediates a multi-stakeholder MSA coral habitat protection amendment (10/15) which results in the protection of

approximately 38,000 square miles of coral habitat; which now the NGOs are calling for formal Sanctuary nomination and status.

The Antiquities Act provides no basis for learned discourse, no scientific, economic, or social analysis; it is whatever the President says it is. The use of the Antiquities Act to create Marine National Monuments is a true top-down, dictatorial approach which is frequently championed by big-bucks environmental groups and in which the public – including the fishing community that is directly affected – has no voice.

We are also concerned about the implementation of the National Ocean Policy (NOP) and its potential to impact access to natural resources. Though widely touted by the Administration and leading agency officials as merely a sharing of data to inform ocean planning that will not lead to any new regulations, the details suggest something more insidious. This uncertainty has created concerns throughout the regulated community, including the GSSA, who have written to Congress in a unified manner to bring attention to these issues.

It is unclear to our industry how the NOP can possibly achieve its stated goals of, among other things, *coastal and marine spatial planning, ecosystem-based management, regional ecosystem protection and restoration, and resiliency and adaptation to climate change and ocean acidification* -- absent the creation of new regulations to control human behavior.

We are already starting to see the emergence of a nexus to a regulatory regime with such concepts as “pre-certification” approval requirements for all federally-permitted activities. What other requirements, principles and “concepts” will be revealed in the coming months? Frankly, we believe that once we see the true extent of NOP implementation it will be too late to address the core issues.

Generally, we believe the preferred solution for many of these place-based conservation issues is a collaborative MSA-driven process that provides clear, justifiable science-based conservation benefits while ensuring future commercial fishing access. Our preferred option to protecting sensitive habitat areas is through the established MSA process.

The MSA provides for the identification of essential fish habitat (EFH) and the creation of habitat areas of particular concern (HAPC). More importantly, the MSA provides for a *public* process to evaluate and decide on what areas are going to be protected.

An excellent example of how this process can work is the coral habitat amendment managed by the Mid-Atlantic Fishery Management Council (MAFMC) in October 2015.

This past year the MAFMC finalized an amendment to protect coral habitat in 13 deep water canyons in the region pursuant to their MSA authority. A considerate approach that brought together many disciplines and backgrounds yielded the best possible results for all stakeholders and for these sensitive and unique habitats. Any future protections need to be similarly and

carefully vetted with the fishing industry that has the applied experience and technical capabilities to inform conservation. Without an adequate process developed through the regional management councils the result will be inadequate protections from a lack of knowledge resulting in a needless burden on the fishing industry.

This Committee and the House have already passed H.R. 1335 which among other things makes clear that the MSA is the controlling statute in fisheries management. By using the MSA process to develop regulations instead of the NMSA and the Antiquities Act, we will ensure that at least when it comes to fishing there will be thoughtful and thorough analysis and the opportunity for public comment.

The Committee also has pending before it H.R. 330 and H.R. 332, both introduced by Mr. Young of Alaska. H.R. 330 is more general in that it prohibits the establishment of a Marine National Monument anywhere in the exclusive economic zone before certain steps are taken, including getting approval from the governors of affected states. H.R. 332 is more specific in prohibiting the establishment of a Marine National Monument in the EEZ off Alaska. Both are good bills but we would prefer consideration of H.R. 330 because of its more general applicability across the country.

### **3) Allocation of Fishery Resources that will Affect Commercial Fishing Access**

In addition to the other threats facing commercial fishing industry access to resources in the Atlantic, we also face resource allocation issues between user groups and possibly even with other marine species under the new Ecosystem-Based Management Policy (EBM).

A bill currently before this Committee, the “Gulf States Red Snapper Management Authority Act” (H.R. 3094), is just the latest example in a series of attacks on the MSA process and commercial fishing industry access to shared-resources. We are concerned this legislation is precedent-setting and designed to reduce (and eventually eliminate) all commercial fishing and consumer access to the red snapper resource via a new state-driven management system with minimal accountability. The bill contains a specific provision to shift 9.9% of the commercial quota each year to the recreational sector absent federal oversight.

H.R. 3094 does nothing to address the growth in the recreational sector, quota overages resulting from that effort, and scientific improvements and enhanced data collection that could provide for potentially higher quotas for all stakeholder groups. However, the bill *does* create a new management system that could reallocate fish and removes the red snapper fishery from the MSA requirements for rebuilding the stock and accountability measures.

One of the key underlying problems in the red snapper fishery is that the recreational sector has experienced significant growth in recent years. This increase has resulted in the recreational sector exceeding its allocation for a number of years resulting in a decrease in the overall quota for all sectors. In fact, NOAA lost a court case brought by Gulf commercial fishermen who successfully argued they were being penalized for recreational overages.

Furthermore, the proponents of this legislation have clearly telegraphed their true intentions by circumventing this Committee's jurisdiction and the regional management process by attempting to add policy riders to the FY2016 Commerce, Justice State (CJS) appropriations bill and National Sportsmen's legislative package to secure changes to the red snapper allocation that will harm commercial fishing and consumer access.

The proponents of this legislation cite the "Atlantic Striped Bass Act" as the model for shared-resource management in the Gulf of Mexico. This reference is particularly worrisome to the commercial industry in the State of New Jersey and across the country because, despite the health of the Atlantic striped bass stock, the entire EEZ remains closed to all fishing activity and commercial fishermen have limited access to the resource compared to East Coast sport fishermen. In the State of New Jersey, striped bass is a gamefish and completely off limits to all commercial fishermen and consumers alike.

In past years, the GSSA has been forced to fend off several legislative efforts by sport fishing groups to make striped bass a national gamefish with zero commercial fishing and consumer access throughout the entire U.S.

The Gulf Council is already working on amendments to the reef fish management plan to implement a regional management plan for the red snapper fishery to allow states to have different seasons and bag limits within state waters; to reallocate red snapper between sectors; and to create a separate charter sector to delineate between the recreational sector allocation and the charter sector allocation so that the two sectors can have different seasons. We believe this MSA process should take precedence over H.R. 3094 and red-snapper related appropriations riders.

### **Ecosystem-Based Fisheries Management Policy (EBFM)**

Ecosystem-Based Fisheries Management Policy (EBFM) is another growing threat to commercial fishing access to fishery resources in the Atlantic and around the entire country. NOAA is currently finalizing a new policy (expected in 2016) to implement EBFM that will, according to NOAA "ensure resilience and sustainability of the ecosystem".

The new EBFM policy, in combination with National Ocean Policy (NOP) activities, will very likely enable the agency to incorporate the uncertainties of ecosystem-level data, trophic dynamics and the vagaries of climate change as a risk management bet "hedge" to more restrictively manage fisheries, forage fish species, protected species and essential fish habitat (EFH).

We believe there is great risk the Agency will be unfettered in its ability to utilize numerous laws, executive orders and policies such as the MSA, Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), Federal Power Act (FPA), Fish & Wildlife Coordination Act (FWCA), Coral Reef Conservation Act (CRCA), and National Marine Sanctuary Act (NMSA) to justify implementation of far-reaching EBFM.

The threats to commercial fishing could come in the form of reduced opportunity and access due to any number of precautionary measures including but not limited to reduced harvest levels: reduced/prohibited fishing on certain forage-type species; percentages of commercial quotas reserved for use by protected species; and areas such as sanctuaries, monuments, and EFH may be closed to fishing activity to provide migratory pathways to promote species resilience.

#### **4) Marine Mammal Protection Act and the Endangered Species Act**

The MMPA and ESA have not been reauthorized in quite some time. Currently, the application of these two Acts oftentimes results in a combination of unrealistic regulatory protections based on exceedingly conservative estimates of protected species stocks. The result has often been regulatory measures without the appropriate scientific justification and without a proper risk versus reward analysis.

Absent Congressional reform of these two laws, it is our belief the situation will worsen as marine mammal, sea turtle and Atlantic sturgeon stocks continue to expand while the science indicating their recovery lags behind the regulatory process. The growing regulatory burden will eventually lead to unprofitable fisheries and an impossible situation for many domestic commercial fishing businesses.

We believe substantive, common-sense reauthorization efforts will allow for the goals of the MMPA and ESA to be maintained while not unfairly impacting our industry. We encourage this Committee to begin the oversight process on the MMPA and ESA as soon as feasible.

Thank you for this opportunity to testify today and for the Committee's interest in our marine issues in the Greater Atlantic Region.

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