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Before the Committee on Resources

United States House of Representatives

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Good morning and thank you for the opportunity to once again testify before the Committee on critically important changes to the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In previous testimony to this Committee we have provided details on the successful fisheries management program in the North Pacific, as well as comments on several principle issues. Many of my comments today will mirror the written and oral testimony previously submitted by the North Pacific Council, though today I will focus on a few of the most critical MSA reauthorization issues. Overall, I believe the current version of H.R.5018 is a very positive, well constructed piece of legislation which appropriately addresses most, if not all, of the most important issues currently being considered. I respectfully offer the following specific comments relative to H.R. 5018 for further consideration. As requested, specific comments relative to H.R. 1431 are also offered.

Section 3 – Science-based Improvements

H.R. 5018 contains clear, direct language regarding the establishment of annual catch limits, including provisions to not exceed acceptable biological catch levels as recommended by the SSC. This reflects the model used in the North Pacific for three decades, and I believe this language represents a significant strengthening of the conservation aspects of the MSA. Adding a specific definition for ABC could provide additional clarity, and such definition could read as follows: "*ABC is defined as an annual specification of fishing mortality established for individual fish stocks or assemblages that prevents overfishing and promotes maximum sustainable yield.*"

Language regarding the membership and function of the SSC is also clear and direct, and provides the necessary clarification to strengthen the role of science in the management process. Regarding the requirement to establish a peer review process for regional stock assessment information (or other information), we hope that such requirement is accommodated by the current process in use in the North Pacific, whereby annual stock assessments are reviewed by scientific Plan Teams, as well as the Center for Independent Experts on a case-by-case basis, followed by additional review and approval by the SSC, prior to use by the Council. We believe that our SSC is the appropriate peer review process for all scientific information used by the Council, and additional peer reviews can be used on a case-by-case basis.

Section 4 – Data Collection

We support the changes proposed relative to data collection, particularly the clarifications relative to collection of information by observers, or other technologies, and protecting the confidentiality of that information. I also wish to bring to your attention another issue relative to data collection by observers, and recommend language which would address this issue relative to the North Pacific Groundfish Observer Program. Currently, observer sampling and monitoring duties are described in the North Pacific Groundfish Observer Program Sampling Manual (manual). The 400 page manual details how observers collect information on various vessels and processors, life at sea, safety information, data handling, and annual special projects.

Each year, the manual is revised to meet changing scientific information needs, describe sampling changes incorporated to support North Pacific Fishery Management Council management programs, and address technological and administrative changes. Because North Pacific groundfish observers are not Federal employees and may not be considered agents of the government, observer collected information may be subject to the Paperwork Reduction Act (PRA). In addition, all data forms and observer logbooks could be subject to the PRA.

Under the PRA, the manual, data forms, and logbooks could be required to be published in regulation. If this were to occur, annual changes to the manual or these forms would need to go through proposed and final rulemaking, as well as obtain annual OMB approval of information collection requirements. Engaging in this process on an annual basis would reduce NMFS's flexibility to incorporate changes to sampling protocols designed to meet scientific and management information needs, and could seriously limit NMFS' ability to manage groundfish fisheries of Alaska. In order to address

this potential problem, the Committee might wish to consider the following language:

(b) CONFIDENTIALITY OF INFORMATION

(4) Any observer collecting information for the Secretary under this subsection shall be deemed to be a federal employee for the purposes of Chapter 35 of title 44, U.S.C. [Paperwork Reduction Act]

Section 5 – Council Operations and Authorities

We strongly support training programs for Council members, but request clarification of the timing of training relative to ability to participate and vote in the Council process. Given that the timing of the training will not be within the control of the Council member, we recommend that completion of training not be a condition for voting.

This section contains a provision relative to observer program funding, which states that "costs for observer coverage that is primarily for enforcement…..or for data collection necessary for the monitoring of a fishery….shall be paid for by the Secretary, and, under a limited access program, may be considered as a cost to be recovered…". My comment in this regard is that it may be very difficult to separate observer duties among sampling for biological purposes, data collection for monitoring, and enforcement related duties. For example, a significant amount of observer duties in North Pacific fisheries could be construed to be related to data collection necessary for monitoring. This may pose a significant, and potentially unrealistic, burden on the agency that is currently being shouldered by the North Pacific fishing industry, recognizing that federal funding of at least some part of increasing observer costs may be necessary in the North Pacific, consistent with federal policy in other observer programs around the country. Further, it will in many cases be difficult to determine what portion of an observer's duties are related to a limited access program vs. duties that would otherwise be performed, coupled with the fact that a 3% fee may not be adequate to cover typical management and enforcement costs for a limited access program and observer costs as well. I do not have a handy solution to these interrelated issues, but wanted to note the critical importance of the observer program to managing our fisheries in the North Pacific, and to urge that whatever legislation is approved ensure continuation of this program through some combination of cost recovery and federal funding.

One other important provision in this section clarifies the Councils' and Secretary's framework authority for certain plan and regulatory amendments. We want to strongly support this clarification of framework authority as it will provide us the ability to craft plan and regulatory amendments necessary for timing implementation of management actions (such as annual specifications for catch limits, or trigger-based management actions that begin at the start of one year, based on previous years' conditions or performance).

Section 6 – Ecosystem-based Fishery Management

Based on recent discussions within our Council and among all the regional Councils, I believe that the approach taken within H. R. 5018 is the correct approach to ecosystem-based fishery management, it recognizes the ecosystem-based fisheries management already being done, and it is consistent with efforts already underway to better define and understand ecosystems and then identify further, appropriate management measures. It defines an iterative process based on sequential improvements in our understanding of ecosystem factors, and does not impose unrealistic requirements or timelines which would only serve as litigation fodder. H.R. 5018 represents a logical, realistic approach to further implementation of ecosystem-based fisheries management.

Section 7 - Limited Access Programs

We have commented previously on many of the specific provisions related to this critical MSA reauthorization issue, and many of our comments appear to have been considered in this proposed legislation. Overall, the limited access program (LAP) provisions represent an ambitious and comprehensive framework for future development of LAP programs. Generally these provisions represent a positive approach to LAP program design, but it needs to be recognized, due to the number of requirements and provisions (including, for example, development of criteria for, and evaluation of, community plans and regional associations), that development of LAP programs under these provisions will be a complex, time-consuming, and costly process. Some specific comments are listed below:

- Maximum flexibility for program design is key, and provisions need to be discretionary, rather than mandatory, wherever possible. This draft appears to grant considerable discretion to the Councils in many aspects of program design.
- Regional fishery associations represent an alternative way to recognize and protect a variety of interests when designing an LAP program. We recommend clarification that regional fishery associations may, depending on criteria developed by the Council, be manifested in the form of fishery cooperatives (such as those implemented for pollock under the American

Fisheries Act, and potentially include processor and/or regional linkages).

- The North Pacific Council has two LAP programs in extensive phases of development, including Amendment 80 which would establish fishery cooperatives for the non-AFA catcher processor sector and which is pending a final decision by the Council in June, but which will not be formally transmitted to the Secretary until later in the year. We have also initiated an EIS and attendant analyses for the comprehensive Gulf of Alaska rationalization program, though final Council action would not occur until sometime in 2007. Many of the provisions in that program are consistent with the concepts in the current legislation, but likely do not specifically conform with all of the provisions. Unless these programs are 'grandfathered,' significant revisions would be necessary resulting in delays to approval and implementation. The current language appears to provide for this but I would recommend clarification of the meaning of the phrase 'under development' in that section of the bill.

Section 9 - Observer program funding

The North Pacific Council is in the process of developing alternative funding mechanisms for the (mostly) industry-funded program off Alaska. Some type of across the board fee program is the most likely mechanism, and we need broad legislative authority to provide the necessary flexibility to accomplish this program revision. H.R. 5018 appears to provide this flexibility, though there are some concerns with the current language. Rather than vest sole authority for establishing the funding mechanism with the Secretary, the legislation should specifically include the Councils as part of this process. Also, the language should be clear as to whether and at what level a maximum fee is allowed, and how such a fee program would interact with an LAP fee program and the observer coverage language in Section 5.

Section 10 - Competing Statutes (MSA vs NEPA)

Mr. Chairman and Committee members, while other provisions of the draft legislation address important science and conservation issues, I believe the NEPA issue to be among the most important issues in the current reauthorization discussion, and it represents the single best opportunity to reduce superfluous litigation and streamline the regulatory process. I have heard our efforts to reconcile this statutory redundancy referred to as a 'red herring', as an attempt to evade environmental protections in our fisheries management actions, that the problems are perceived rather than real, that it is simply a matter of different schedules and timelines for review and approval. Nothing could be further from the truth. The NEPA process does not, and never will, fit the unique and dynamic nature of fisheries management, and despite our best efforts to date to comply with that process we will always be vulnerable to process-oriented litigation. And we will continue to expend vast, unnecessary resources in our attempts to bullet-proof everything we do against NEPA litigation, rather than focus our energies on Job 1 – which should be effective, timely management of our fisheries resources.

I would like to once again pose the essence of the NEPA problem with two of the most illuminating examples from the North Pacific. The first is the 7,000 page SEIS that was prepared to support our Bering Sea/Aleutian Islands and Gulf of Alaska groundfish FMPs, wherein one of the alternatives that had to be fully analyzed under NOAA GC's instructions for NEPA compliance was a 'No Fishing Alternative'. In a fishery where the Acceptable Biological Catch (ABC) levels total 4 million metric tons (and have for three decades), a fishery where Total Allowable Catch (TAC) levels are only half that amount (or 2 million metric tons), a fishery which supplies half the Nation's annual seafood production……we were required to analyze a 'No Fishing Alternative'. This part of the analysis took nearly 300 pages, more than the total noted in CEQ guidance as the standard for an overall EIS. In addition, we have still been required to prepare an annual Environmental Assessment (NEPA document) to support the annual TAC setting process, which continues to include a 'No Fishing Alternative'. And finally, the agency has recently determined that a full-blown EIS is now necessary for the annual TAC setting process, with continued inclusion of the 'No Fishing Alternative', or 'no action alternative' as required by NEPA. The recent letter from NOAA Fisheries to the Council (dated April 21, 2006 and attached), explaining the rationale for the decision to do an EIS, focuses on NEPA litigation avoidance as a driving factor in that decision. My point is not to fault NOAA for this decision, but to exemplify how NEPA is inappropriately driving the fisheries management process.

The second example is the Essential Fish Habitat protection measures that were recently approved for the Gulf of Alaska and the Aleutian Islands. The Council action, taken in 2005, would close about 95% of the Aleutian Islands area to bottom trawling or in some cases to all fishing (nearly 300,000 square nautical miles) to protect deep water corals and other fish habitat. Because the specific alternatives analyzed in the EIS for the Bering Sea did not match with the alternative finally developed through the Council process with input from all sides of the issue, we were advised by NOAA GC that we could not pick that alternative without reinitiating the entire EIS process (under NEPA). Therefore, the Council proceeded with action relative to the Aleutian Islands and the Gulf of Alaska, but not the Bering Sea. We are now addressing the Bering Sea EFH measures through an additional, separate process which will involve preparation of similar NEPA analytical documents, additional staff and Council time, and delays (likely years) in implementation of EFH measures for the Bering Sea. If promulgated under MSA alone, the Council could have picked the alternative that made sense, conducted the further, necessary analyses specific to that alternative, and submitted the proposed measure for Secretarial review and approval along with the other EFH protection measures a year ago.

While I believe that these ex

amples are compelling, they are only an artifact of the greater underlying problem associated with NEPA application to fisheries management processes. NEPA has subsumed the MSA as the guiding Act for fisheries management in the U.S., and attempts to apply the letter of NEPA, and to bulletproof all fisheries management actions against litigation under NEPA, have resulted in an extremely cumbersome, overly complicated, bureaucratic process of never ending legal review and regulatory revisions that ill serves the public's understanding of proposed management actions. While the timelines for review and approval of Council recommendations under NEPA could easily be matched with MSA requirements, the real problem lies within the up front development of management measures, and associated analytical documents such as EAs and EISs, prior to getting to a Council decision. Requirements for contrived, often unreasonable alternatives, for the sake of having multiple alternatives to comply with NEPA, coupled with seemingly unending lines of regulatory and legal reviews, often cause even the most simple, straightforward management actions to take years from conception to Council action, and additional years for rulemaking, approval, and finally implementation.

We fully support the development of more complete analyses to support proposed management actions and have been working diligently with our NOAA counterparts in this regard (in fact, in 2003 the North Pacific Council and NOAA Fisheries Alaska Region were jointly awarded the National Environmental Excellence Award for NEPA excellence, from the National Association of Environmental Professionals, for our Steller Sea Lion EIS). However, if we could do so under the authority of the MSA, rather than NEPA, we could develop and implement necessary conservation and management measures more quickly and at far less cost to the public, while still maintaining a focus on environmental protection and public process. Public process would be better served by providing meaningful, understandable analyses of management actions, as prescribed by the MSA, and we could once again devote the majority of our resources to practical fisheries management, rather than devoting those resources to the self-fulfilling prophecy of litigation avoidance in which we are currently engaged.

The current language in H.R.5018 grants discretionary authority to the Secretary to deem management actions to be NEPA compliant if prepared in accordance with MSA provisions. This appears on the surface to have the potential for vast improvements, but there are three reasons it will be unlikely to accomplish the intent: (1) based on current Department of Commerce (NOAA) policy and NEPA focus, it seems unlikely that the Secretary would in fact exercise the discretion to deem analyses NEPA compliant; (2) analyses would have to be completed under current MSA provisions prior to a discretionary finding by the Secretary, which means that if an analyses were deemed to not be in compliance with NEPA, we would have to start over, resulting in inefficient uses of staff and other resources, and delays in program implementation; and, (3) any actions, even if deemed NEPA compliant, would still seem to be subject to litigation and judicial review relative to NEPA compliance.

We need a clear and direct mandate with regard to NEPA application, and we need that mandate to confirm that the MSA is the appropriate Act governing fisheries management programs, and that compliance with MSA provisions exempts the action from NEPA. Replacement of the word 'may' with the word 'shall' in Section 315, Line 18 would accomplish this sorely needed statutory reconciliation, or alternative language that clearly exempts such actions from NEPA. With new provisions in the MSA for cumulative impact analysis and consideration of an appropriate range of alternatives, the MSA contains all the necessary provisions to ensure that environmental impacts are clearly assessed, that conservative management measures can be promulgated in a timely fashion, and that the public has ample opportunity, at several stages in the process, to comment on and influence those management decisions. The Councils and NOAA Fisheries could once again focus their limited resources on the real job of managing fisheries, and could do so without sacrificing any conservation and environmental protections or public process.

Marine Sanctuaries

H.R. 5018 provides language that strengthens the role of the MSA relative to the National Marine Sanctuaries Act; however, the Councils believe that additional language could clarify that jurisdiction over fishing activities within such sanctuaries is correctly under the purview of the regional Councils vis-à-vis the MSA.

Diminished Fisheries

H.R. 5018 proposes to replace the term 'overfished' with the term 'diminished', in order to correctly recognize the difference fish stocks that are truly overfished and those which are diminished, or depleted, due to other factors. Given that the bill also requires the annual status of stocks report to make such distinctions, we support the proposed change as an appropriate way to address this issue.

H.R. 1431

As the Committee requested, I will now address some comments specific to H.R. 1431. This bill proposes significant changes to the Council appointment and voting process, and significant changes to the Councils' authority vis-à-vis changes to the structure, operations, and authorities of the Council's Scientific and Statistical Committee (SSC) and proposed subcommittee. Generally, our Council believes that the current process works very well, and that significant changes in this regard are unwarranted. While our Council has not reviewed and discussed the specific changes contained in this bill, we have discussed the concepts embodied therein, and I am comfortable stating that some of the proposed changes are unnecessary, and would negatively affect, rather than improve, the currently successful process.

Voting members, term limits, and training (per H.R. 1431)

Our Council does not believe that major changes are necessary to the Council appointment process. The current Act provides the Governors' authority to make recommendations from a wide range of constituencies which can appropriately reflect the correct balance of representation depending on the region and issues, and mandating additional names from specific groups is unnecessary. It may also be difficult to define what constitutes the 'marine fish conservation public interest sector', as individuals from commercial or recreational fishing sectors could easily be construed to also represent the public interest in terms of conservation.

The new legislation appears to restrict Council membership to not only three consecutive terms, but to three terms overall. There does not appear to be a justification for this restriction. There may be cases where the benefits of long-term experience justify re-appointment of a previously seated Council member. Regarding training for Council members, we strongly support the provisions for training, but do not believe that a Council member should be restricted from voting for up to six months pending such training, particularly where the timing of such training may not be within the control of the affected Council member.

The legislation also appears to prohibit voting by a Council member on any issue which would have an effect on a financial interest that is required to be disclosed. This would appear to greatly alter the existing rules, such that any effect on any financial interest would result in the prohibition on voting. This seems overly restrictive and could hinder Council members' ability to participate and contribute their expertise to the process.

SSC membership and proposed subcommittee authorities (per H.R. 1431)

We continue to strongly support the SSC as the bastion of scientific information guiding Council decisions. We support the use of the SSC in establishing the upper bounds for annual catch limits. We support clarification of SSC membership which limits such membership to those without potential conflict or political agendas – we must ensure that the SSC process cannot be politicized. We suggest that the definition of 'independent scientist' be clarified to exclude not only those with any financial or employment link to fisheries, but also those with any financial or employment link to organizations engaged in political lobbying related to fisheries. We agree with granting authority for the Councils to pay a stipend to SSC members, but not with a mandate to do so. Budget considerations are a factor in this regard, and we have been able to assemble and maintain a world class SSC without a stipend requirement.

There is no need for a 'fisheries and marine science' subcommittee to the SSC to establish catch limits or other biologically related management measures – these fundamental recommendations should be compiled by the entire SSC which represents a diverse range of expertise (economists, sociologists, marine mammal and seabird scientists, oceanographers, ecologists, biologists and stock assessment experts, etc) and is therefore appropriate to make such recommendations taking into account all relevant factors. This model has worked extremely well in the North Pacific.

Neither the SSC nor any subcommittee should be given the authority to usurp the role of the Council. H.R. 1431 appears to replace a Council's authority for major management decisions by granting somewhat open-ended authority to the fisheries and marine science subcommittee of the SSC. If Councils are restricted to establishing annual catch limits within the upper limits recommended by the SSC, as is provided in H.R. 5018, that is the appropriate solution, and is the appropriate application of SSC and Council authorities.

Required Provisions (per H.R. 1431)

This section proposes to compel a Council to adopt measures at least as stringent as those developed by the fishery and marine science subcommittee. It is unclear how broad this authority of the SSC subcommittee extends and therefore how broadly this provision could be interpreted, though it appears to be somewhat open-ended. This provision seems unnecessary, particularly given the problems identified with establishment of, and authorities granted to, such an SSC subcommittee in the first place.

Peer Review (per H.R. 1431)

Periodic reviews are already conducted by the Secretary (through the Center for Independent Experts for example) and/or by the Councils through independently commissioned panels on a case-by-case basis. We believe a properly constituted and properly utilized SSC represents an appropriate group of qualified independent scientists to review stock assessment information and other scientific information brought to bear on Council decisions. Minor revisions in the Act, such as those contained in H.R. 5018, can ensure that SSCs are properly constituted and properly utilized to perform this and other necessary functions.

Thank you once again for the opportunity to appear before you and offer these comments on these critically important issues.