STATEMENT OF RICHARD J. WEISBERG ON
HR 307, TO ESTABLISH THE LONG ISLAND SOUND STEWARDSHIP INITIATIVE

I. Introduction

My name is Richard J. Weisberg. I reside at 34 Prince's Pine Road, Norwalk, CT. I am the State Legislative Director for the Recreational Fishing Alliance of Connecticut ("RFA-CT"). RFA-CT conceptually supports HR 307 (the "Act"), but has several concerns. Primary among these is that the Act, as drafted, may be utilized to restrict or deny marine recreational anglers access to Long Island Sound ("LIS").

II. Background

1. The Recreational Fishing Alliance and RFA-CT

The Recreational Fishing Alliance ("RFA") is a national, grassroots political action organization representing individual recreational fishermen and the recreational fishing industry on marine fisheries issues. The RFA Mission is to safeguard the rights of saltwater anglers, protect marine, boat and tackle industry jobs and ensure the long-term sustainability of our Nation's saltwater fisheries. RFA members include individual anglers, boat builders, fishing tackle manufacturers, party and charter boat businesses, bait and tackle retailers, marinas, and other businesses in fishing communities. RFA has over 3000 members residing in Connecticut and New York. RFA-CT is RFA's Connecticut chapter.

2. The Economic Impact of Marine Recreational Fishing in Connecticut.

Before proceeding to a discussion of our concerns, it is important to understand the substantial economic impact that marine recreational fishing has on Connecticut, particularly in its coastal regions.

As a general proposition, healthy recreational fisheries can provide "enormous economic benefits to coastal communities...." Studies indicate that the contribution by marine recreational anglers to the economy of Connecticut is extremely significant. The marine recreational fishery in Connecticut supports a huge, diverse economic infrastructure including party and charter boats, guide services, bait and tackle shops, sporting good stores, boat sales and repairs, marine supply houses, gas docks, marinas, retail food stores, restaurants and hotels, as well as local manufacturers of fishing boats, tackle and gear. In Connecticut, in 1997, there were 300,000 marine recreational anglers who spent a total of $158,000,000 on marine recreational fishing. This expenditure had an overall economic impact of $320,000,000 (after multiplier effects) and generated 4,000 jobs, and correlative state income and sales taxes. These figures appear to be conservative. Thus, more recent data developed by the National Marine Fisheries Service ("NMFS") indicates that in 1998 the total expenditures on marine recreational fishing by marine anglers in Connecticut was approximately $400,000,000 (without multiplier effects).

Continued angler participation and spending on marine recreational fishing is highly correlated to fishing opportunities. Therefore, depriving marine anglers of recreational opportunities can have severe, negative economic consequences. This phenomenon was quantified in the context of the Atlantic striped bass fishery by comparing angler expenditures during a period of stock depletion, to angler expenditures during a subsequent period of stock recovery.

Thus, as of 1981, the striped bass population along the Atlantic coast had been severely depleted, resulting in the imposition of stringent management measures to restore the stock. These conservation measures were successful and by 1995, the stock had been restored. The number of directed recreational striped bass trips increased from about one million in 1981 (a time of depressed stocks) to over seven million in 1996 (a time of abundance), an average increase of 38% per year. Angler expenditures on striped bass trips increased from $85 million in 1981, to $560 million in 1996, an average annual increase of 35%.

In short, marine recreational expenditures are a function of marine recreational opportunities. Consequently, denying marine anglers access to recreational opportunities in LIS will result in decreased recreational expenditures, with consequent adverse economic impacts of a potentially substantial magnitude throughout Connecticut, particularly in its coastal regions.

It is also important to keep in mind that recreational anglers have a decades-long, well documented history of fighting for fisheries conservation. As indicated above, by their very nature, marine recreational anglers and the marine recreational industry depend on robust fisheries and a healthy marine environment.

III. Comments

Given RFA-CT's interests, its subsequent comments are limited for the most part to the applicability of the Act to LIS's waters and submerged lands, rather than coastal uplands or other terrestrial lands bordering LIS, or islands within LIS.

1. The Act, as drafted, may be utilized to restrict or deny marine recreational anglers access to Long Island Sound ("LIS").

LIS has been determined by the U.S. Supreme Court to be "internal waters" and consequently, subject to the jurisdiction of the adjacent coastal states, i.e., Connecticut (sometimes referred to as the "State") and New York. Pursuant to the common law Public Trust Doctrine, Connecticut and New York, own and hold their submerged lands and waters waterward of the mean high in trust for the public. In Connecticut, as in other coastal states, the purpose of the Public Trust Doctrine is to assure public access to the State's coastal waters. Recreational fishing is one of the traditional public trust uses of state waters.

The Act provides for the establishment of a committee to be known as the LIS Stewardship Advisory Committee (the "Advisory Committee"). Employees of the Advisory Committee are deemed to be federal employees and the Committee is considered to be a federal agency for purposes of the Trade Secrets Act, 18 U.S.C. §1905. The Advisory Committee will be funded primarily by federal appropriations. The Chairperson of the Advisory Committee is the Director of the LIS Office of the U.S. Environmental Protection Agency ("EPA"), and the Advisory Committee makes its recommendations and reports to EPA's Administrator. Given these substantial attributes of federal agency status, the Advisory Committee would appear to be a federal agency for all purposes.

Section 4 of the Act establishes a LIS Stewardship Initiative Region (the "Region") which encompasses the immediate coastal upland and submerged lands along LIS. The Advisory Committee is authorized to select sites in the Region that are of importance as natural habitat for wildlife, or that support recreation activities and access to LIS. Pursuant to Sections 6 and 9 of the Act, the Advisory Committee is further authorized to evaluate applications from government or nonprofit organizations for funds to purchase land or rights to such stewardship sites; to evaluate plans concomitantly submitted by these government or nonprofit organizations to develop or manage these sites, to address threats; and to recommend that EPA's Administrator award grants to qualified applicants. With reference to submerged lands, it is RFA-CT's understanding that the State, as a matter of law, may not convey title to public trust lands. On the other hand, it appears that the State may convey by lease more limited rights to public trust lands for various commercial or management purposes.

As indicated above, a primary purpose of the Act is to promote public access to LIS and to enhance recreational opportunities. Apparently, however, some of the nonprofit groups contemplated as possible lessees of stewardship sites do not fully share this agenda, and have evinced a desire to limit fishing in LIS. Thus, at one of the many public meetings and conferences that culminated in the Act, David Miller, Executive Director of the National Audubon Society of New York stated the LIS Initiative "may include areas restricted to fishing but will be focused largely on land and public access to the water…." Mr. Miller's comment about restricting fishing was echoed by Steven Murray, a professor at California State University, and a presenter at this particular conference. Unfortunately, these restrictive sentiments are representative of a view held by a small coterie of environmental groups which seeks the total closure of marine waters to fishing, including even recreational catch and release fishing.

Closures of marine waters to fishing or other activities, in whole or in part, are referred to generically as Marine Protected Areas ("MPAs"). MPAs are a traditional tool for the management and conservation of fisheries and marine resources in general. They come in a wide variety of types and sizes. In the waters of the United States, there are approximately 300 MPAs. In the New England area, for example, there are two major MPAs - Buzzards Bay and the Stellwagen Bank National Marine Sanctuary. The former is closed to commercial, mobile gear net fishing, and the latter is closed to oil drilling and mineral mining. (The rule establishing the Stellwagen Bank Sanctuary explicitly prohibits restrictions on recreational fishing). The total closure of marine waters to fishing is often referred to as a "no take MPA".

It is imperative to understand that the RFA and RFA-CT support MPAs as an effective tool for the management and conservation of marine fisheries.

RFA and RFA-CT's support of MPAs, however, has its limitations. Thus, we believe that MPAs are a good idea and an effective tool for fisheries conservation when they are properly designed. A properly designed MPA is one that is based on biological need as determined by the best available science, and narrowly tailored to deal with a discrete, identifiable conservation problem at the site of the proposed closure. Conversely, MPAs are a bad idea if they are poorly designed, in which case they are apt to be ineffective and to cause considerable, unwarranted economic and social harm. MPAs should be based on biological need, rather than an absolute, one size fits all program, that seeks arbitrarily to impose the most draconian management measures in the first instance, instead of the last, without site specific scientific justification.

In short, RFA and RFA-CT do not oppose even no take MPAs provided they are biologically necessary, that the closed area will be reopened when such necessity ceases to exist, and that any regulation proposing to establish a no take MPA is subject to a public hearing. In the February 2004 session of the Connecticut legislature, RFA-CT sought enactment of a bill which would have protected marine recreational anglers by codifying a specific standard which no take MPAs would have had to have met before they could be imposed. The standard proposed by RFA-CT would have required that the marine waters of Connecticut could not be closed to recreational fishing unless there was a finding by the Commissioner of the Connecticut Department of Environmental Protection ("DEP"), utilizing the best available science, that (1) there was a conservation problem; (2) that this problem could not be remediated without imposing constraints on the recreational catch; and (3) that traditional, less severe conservation measures including, without limitation, minimum size requirements, bag limits, or seasonal closures, would not suffice to provide for the restoration of the affected fish stock(s). RFA-CT's proposed bill also provided for the periodic review of the continuing need for a particular closure, and its reopening whenever the need for the closure ceased to exist. Further, the bill provided that prior to the adoption of any regulation providing for a closure of State waters, the Commissioner of DEP had to conduct a public hearing. Thus, RFA-CT's proposed bill did not seek to preclude no take MPAs. Rather, it sought merely to define an objective standard, rooted in science and biological need, to prevent the arbitrary exclusion of the fishing public from Connecticut's marine waters and the attendant, unwarranted damage to the State's economy and quality of life.

RFA-CT's bill was not passed. It was opposed by DEP and members of the legislature on the ground that DEP's historic practice, in accordance with the general provisions of the State's statutes, was in accord with the standard sought by RFA-CT and therefore, passage of RFA-CT's bill was unnecessary. Thus, while RFA-CT's bill was not enacted the State's marine anglers were provided with some level of assurance that no take MPAs would not be imposed arbitrarily in Connecticut. The Act, however, does not provide this assurance.

Fisheries management in federal waters is governed by the Magnuson-Stevens Fisheries Conservation and Management Act (the "Magnuson Act", 16 U.S.C. §1801 et seq.). Marine fisheries in state waters, including LIS, are managed jointly by the Atlantic States Marine Fisheries Commission (the "ASMFC") - a consortium of 15 Atlantic coastal states created by federal law - and the ASMFC's member states. In Connecticut, the legislature has authorized DEP to establish unified coast-wide regulations for the management the State's marine fisheries, which conform to the fishery management plans developed pursuant to the Magnuson Act, "or other regional fishery management authorities…." (i.e., the ASMFC). Connecticut General Statutes ("CGS") §26-159a. In particular, DEP is authorized to close Connecticut's marine waters by regulation. Id. §26-159a(1).

As indicated above, State specific fishery management plans developed by DEP must conform to the guidelines of the fishery management plans established by the ASMFC. Fishery management plans established by the ASMFC are subject to an extensive public participation process including notice and comment and multiple public hearings. Similarly, any regulation published by DEP under CGS §26-159a is subject to a public hearing. CGS §26-159c.

The Act suggests that it could be utilized by parties acquiring an interest in submerged lands in LIS to operate a so called "reserve" outside the foregoing statutory framework, to the detriment of the recreational fishing community. Generally, the Act is framed in overly broad terms, which read literally, could conceivably allow a party holding rights under the Act to manage submerged lands and the overlying waters in LIS, to manage the fisheries therein, including restrictive measures such as no take MPAs. Clearly, Mr. Miller of New York Audubon believed this to be the case.

The typically general language of the Act is coupled with two rather specific provisions that further the impression that parties granted the right under the Act to managed submerged lands could be authorized to manage related fisheries in a manner circumventing the comprehensive federal/state scheme of marine fisheries management noted above (the "National Program").

Thus, Section 10(c) entitled "Recognition of Authority to Control Land Use" provides that "[n]othing in this Act modifies the authority of Federal, State, or local governments to regulate land use." The exclusivity of this provision clearly may be interpreted to mean that federal or state authorities not dealing with land use are or may be modified by the Act. Section 8 (d)(5) of the Act entitled "Public Comment" provides that "[in] identifying potential stewardship sites, the Committee shall consider public comments." Again, the exclusivity of this provision could be interpreted to mean that public comment will not be allowed on the management plans proposed by parties seeking to acquire rights to manage submerged lands and overlying waters, including the management of fisheries therein. Viewed together, the above two provisions strongly enforce the perception that the Act could be utilized to circumvent application of the National Program to fisheries management in LIS, including the right of the public to participate in the formulation of fishery management plans, which public participation is currently provided by both the ASMFC and Connecticut.

If indeed the intent of the Act is to excuse the Advisory Committee from compliance with the National Program, its passage

is improbable, since it is unlikely that any bill seeking a partial withdrawal from the constraints of the National Program by one or a few states will be enacted. This follows from the obvious fact that passage of such a bill would probably mean the end of National Program, as other state delegations would begin to press for legislation for exemptions favorable to their states. Further, to the extent that the Act would allow circumvention of Connecticut's fishery management statutes and regulations, it is of dubious legal validity, since there appears to be no basis for federal preemption of the relevant State laws under the circumstances. If the intent of the Act is not to excuse the Advisory Committee from compliance with the National Program, the Act must be clarified to eliminate possible misinterpretation. Thus, for example Section 10(c) could be redrafted to read broadly that nothing in the Act modifies any federal, state, or local authorities, and that compliance with applicable federal, state and local law remains obligatory. Or, Section 10(c) could be redrafted more narrowly to read that "[n]othing in this Act modifies or usurps the authority of Federal, State, or local governments to regulate land use or the management of marine fisheries." The provisions concerning public participation should also be broadened to provide for public participation in all of the Advisory Committee's decisions having an impact on the environment. Such broader public participation may be required by other laws in any event. (See the discussion below in comment 3).

2. The Act Gives Little Consideration to the Marine Recreational Fishing Community in Terms of Appointments to the Advisory Committee.

RFA-CT is also concerned with the wording of Section 5(c), dealing with the composition of the Advisory Committee. The marine recreational fishing community is not designated in Section 5(c)(1)(A)(ii) as a group a representative of which must be included on the Advisory Committee. Given that the marine recreational fishing community is the largest, or one of the largest user groups in LIS, this appears inappropriate. Accordingly, we believe that Section 5(c)(1)(A) (ii) must be modified to include the marine recreational fishing community as a group entitled to mandatory representation on the Advisory Committee.

3. The Act Appears to Create a New Federal Agency Whose Relationship to, and Obligations Under Other Federal and State Laws is Unclear, and Which Agency Will Be Unduly Expensive and Unnecessary, in That Most of Its Non-Advisory Functions Could Be Performed By Existing Federal or State Agencies.

RFA-CT believes that the Advisory Committee cannot be both a federal agency and an advisory committee. It can only be one or the other. Given its numerous incidents of agency status, there is in our view, as noted above, a likelihood that it will be construed as a federal agency. This raises questions not answered by the Act. In particular, how will the Advisory Committee fit into the overall federal/state statutory scheme? We have already noted problems in that regard in the context of the federal and state statutes governing fisheries management. The broader question is how will the Advisory Committee function with reference to other federal and state statutes? Such statutes, to name only a few, include the Administrative Procedure Act, 5 U.S.C §551, et seq., the Regulatory Flexibility Act, 5 U.S.C §301, et seq.; the Small Business Regulatory Enforcement Act, 5 U.S.C §801, et seq.; the Submerged Lands Act, 43 U.S.C §1301, et seq.; §§9 and 10 of the Rivers and Harbors Act, 33 U.S. §§ 401 and 403; the National Environmental Policy Act, 42 U.S.C. §4321, et seq.; and the statutes of both Connecticut and New York that require environmental review of actions that will have an impact on the environment. Further the Act appears to contemplate that the Advisory Committee will do much of its own technical work, rather than relying on DEP, the N.Y. State Department of Environmental Conservation ("DEC") and EPA. This suggests that that the Advisory Committee will have an extensive staff including a number of relatively high paid technical employees. In structuring the Advisory Committee as a distinct federal agency, with an extensive professional staff, it appears that the Act is creating yet another level of bureaucracy, which bureaucracy's administrative costs will consume much of the monies appropriated. It is not clear why the Act does not create a true advisory committee comprised entirely of volunteers, which relies on DEP, DEC and EPA for administrative and technical support.

Respectfully submitted,

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See, The Economic Importance Of Marine Recreational Fishing In The United States - Case Studies: Striped Bass And Bluefin Tuna, at 2, 12 (American Sportfishing Association "ASA") .

See, e.g., ASA at 4-5.

An Evaluation of the Capacity of Connecticut's Marine Finfish and Crustacean Resources to Accommodate Commercial and Recreational Fishing And Recommendations for Action at 9 (Connecticut Dept. of Environmental Protection, 2/97).

Marine Angler Expenditures in the Northeast Region, 1998, NOAA Technical Memorandum NMFS-F/SPO-47 June 2001 (Rev. January 2002).

ASA at 3.

Id. at 8-10.

Id.

Id. at 10, 11.

See, e.g, John F. Reiger, American Sportsmen and the Origins of Conservation (Ore. State U. Press, 3d Ed. 2001).

U.S v. Maine, et al., 105 S.Ct. 992, 996, 1001 (1985).

For example the State has leased extensive submerged lands for shellfish harvesting. In New York, the Nature Conservancy has obtained a lease for extensive submerged public trust lands in Great South Bay, off the south shore of Long Island.

Stamford Advocate, 3/4/01, Sound preservation comes ashore, at A1, A8.

Atlantic Coastal Fisheries Cooperative Management Act (16 U.S.C. §5101 et seq.).