



New England Fishery Management Council

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MEMORANDUM

DATE: January 13, 2021
TO: Executive Committee
FROM: Executive Director
SUBJECT: MSA Reauthorization

1. The Magnuson-Stevens Act (MSA) was due for reauthorization in 2014. With the sitting of a new Congress, it is probable that reauthorization efforts will be renewed. It may take a few months for this activity to begin. In recent years, the Executive Committee assumed responsibility to monitor legislative actions, brief the Council when necessary, and if time permits, prepare draft Council replies to any requests for information. I recommend the same practice be followed this year. Often, requests for information are received between Council meetings and have short turn-arounds. In these cases, the Chair and Executive Director coordinate the reply, taking into account previous Council advice and decisions. Replies are limited to educating or informing requestors of the impacts of draft legislation on the Council. We cannot take positions on specific legislation because we are prohibited from lobbying legislative bodies.

2. Congressmen Jared Huffman and Jamie Raskin released a discussion draft of an MSA reauthorization bill on December 18, 2020. This is a wide ranging document that, if enacted, would make numerous changes to the MSA. I've attached a summary of the draft, an overview of issues that are most relevant to the Council, with preliminary comments on the effect, and the actual text of the draft for your reference.

Attachments: (1) Huffman/Case MSA Reauthorization Act overview
(2) MSA Discussion Draft Overview/Impacts
(3) MSA Reauthorization Act Discussion Draft

THE MAGNUSON-STEVENS ACT REAUTHORIZATION DRAFT

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) is the country's primary statute governing fisheries management in federal waters and has made the United States a world leader in sustainable fisheries. Despite the strengths of the MSA, it was last reauthorized in 2006 and updates are needed to address the many new challenges facing fisheries management and science in an era of climate change, new technologies, and changing ocean use. This reauthorization has taken a stakeholder-driven, science-based approach to provide important and timely updates to the MSA. The viewpoints and proposals heard during discussions, listening sessions, and public comments have resulted in a comprehensive discussion draft. In addition, several bipartisan bills introduced during the 116th Congress are included in whole or in part. These amendments to the MSA, along with provisions to support coastal communities and fishing businesses, are intended to address the changing needs in fisheries management and science to ensure the MSA meets the needs of stakeholders now and into the future.

Title I. Climate-ready fisheries: Requires consideration of climate change and climate science in regional fishery management council priorities and planning and provides new tools and approaches to address shifting stocks and other climate impacts on fisheries management. Tackling climate change is crucial as oceans and fisheries are facing some of the largest impacts due to ocean warming, acidification, and other climate stressors.

Title II. Supporting fishing communities: Addresses the needs of fishermen, businesses, and coastal communities through an improved disaster relief program, creates a working waterfront grant program, and increases support for seafood marketing. This title also acknowledges the importance of subsistence fishing and how it is defined under the MSA.

Title III. Strengthening public process and transparency: Increases representation of different viewpoints on regional fishery management councils and improves transparency, accountability, and stakeholder participation in fisheries management. This title expands coverage of NOAA's sexual assault and sexual harassment policies, including for fishery observers and Council staff.

Title IV. Modernizing fisheries science and data: Expands electronic technologies and data management systems, updates cooperative research and management, and improves data collection and methods. This title requires NOAA to develop operating plans for emergencies that make it impractical to use human observers and conduct stock assessments, as occurred during the Covid-19 pandemic.

Title V. Sustaining fisheries through healthy ecosystems and improved management: Strengthens essential fish habitat consultation, builds on MSA conservation standards to improve outcomes for overfishing and rebuilding, conserves forage fish, and requires descending devices for recreational fishing in the Gulf of Mexico. This title also replaces the term "overfished" with "depleted" to encompass the complexity of threats to fish stocks.

MSA Discussion Draft Overview/Impacts

1/7/2021

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| Title 1 | | | |
| Climate Ready Fisheries | | | |
| 5-6 | Various | Amends MSA to acknowledge changing environmental conditions and climate change | |
| 7 | 15-19 | Establishes RMFC responsibility to address impacts of climate change on stocks of fish, management, ecosystems, etc. | |
| 7 | 21-22 | Amends Policy section of MSA to require using best available climate science | |
| 8 | 5-11 | Amends Policy section to require consideration of and planning for climate change in fisheries management and research | |
| 8 | 17-18 | Requires FMPs promote resilience of fish stocks to cumulative stressors including climate change | Uncertain how to “promote resilience” and measure effectiveness of measures. |
| 8 | 25 | Requires FMP to MSY and OY under prevailing and anticipated future environmental conditions | Could require determination of multiple status determination criteria. Potentially complicates management: which ones do we aim for? This and several similar sections would require an evaluation of what anticipated conditions will be. |
| 9 | 5-7 | Requires FMPs identify data needed for effective implementation under prevailing and anticipated environmental conditions. | Complicates identification of data needs, because requires evaluation of anticipated environmental conditions. |
| 9 | 9-13 | Expands AE by requiring examination of vulnerability of fishery and participants to anticipated environmental conditions. | Given recent NEPA changes, expanding AE requirements is problematic. Also, assessing vulnerability of participants to climate change will be difficult. |

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| 9 | 21-24 | Requires FMP assess and describe anticipated effects of climate change on the fishery, and assess how measures account for the changes. | Not clear how this will be accomplished in a typical FMP document, unless the analyses are linked to a specific proposed measure. |
| 10 | 4-11 | Requires FMP describe range and distribution of fishing, stocks managed, including areas outside the jurisdiction of the Council. Describe measures for coordination for stocks that cross management boundaries. | Expands requirements that would need to be included in an FMP. |
| 11 | 1-4 | Council member training shall include information on climate change and EBFM. | |
| 11 | 14-19 | Adds changes in spatial distribution and productivity to fisheries research responsibilities of the Secretary. | |
| 12 | 1-24 | Established climate-ready fisheries innovation program to develop tools and methods to manage effects of climate change | |
| 14-17 | Various | Details process for identifying cross-jurisdictional fisheries. Describes process for assigning jurisdiction, or for determining a fishery no longer is cross-jurisdictional. | Formalizes a process that is relatively informal at present. Process appears to assume two adjoining Councils will usually agree on how to manage cross-jurisdictional fisheries. Places deadline on FMP development if cross-jurisdiction is found. Not clear what problem this section is attempting to address. |
| 18 | Various | Requires Secretary define criteria for determining if a stock is cross-jurisdictional | |
| 19-24 | Various | Establishes a ten-member "Shifting Stocks Task Force." Each Council recommends one member, who cannot be a Council member. Task Force will develop "science-based decision-making criteria to make allocation determinations that minimize risk of overfishing" and maximize residence. Allows | Potentially takes certain allocation decisions out of the hands of Council members, and puts the decision in the hands of a national level board that does not include any Council members. Such decisions are typically considered a policy choice made by appointed Council members. Places requirements on the Council for a specific decision. Timeline for Council implementation of a recommendation (180 days) |

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| | | public request for a determination on a stock that is shifting. Requires a fully compliant FMP be published within 180 days of the Task Force recommendation. | is unrealistic, given the controversy certain to accompany allocation decisions. Administrative provisions allow any member of the public to petition a review of potentially shifting stocks. Ten member task force includes one representative recommended from each Council, who is not a Council member. Task Force meets at least four times per year, but members are not reimbursed (except for travel). Unclear what COI provisions apply to members. |
| 24 | Various | Requires Secretary to promote international cooperation on shifting stocks. | |
| 25-30 | Various | Revises and expands guidance on new fisheries and gears. Within 18 months, Councils must review list of gears and fisheries and submit proposed changes identifying active fisheries. Council given additional responsibilities for monitoring and evaluating EFPs for new fisheries or gear. Describes process and requirements for adding a new fishery to an existing FMP, including analytic responsibilities for the Council. | This section on Emerging Fisheries makes the current “list of fisheries and gear” more specific and constrains development of new fisheries until specific reviews are performed. Also adds to Council workload by requiring periodic review of this list. Make Council responsible for collecting, evaluating, and making public the data generated by an EFP. Making these data public might conflict with other data confidentiality provisions of the MSA. |
| Title II Supporting Fishing Communities | | | |
| 30- | Various | Amends Fishery Disaster Relief Program. In addition to clarifying many terms in a definition section, identifies causes that are eligible for or excluded from disaster relief. Defines how revenue losses are calculated (12 month period compared to average annual revenue over five years). Provides guidance on percentage of revenue loss needed for a disaster determination. Fisheries subject to overfishing are generally not eligible for a determination unless | Some of these provisions appear to be current agency policy. However, there are new provisions that may make it more difficult to receive disaster relief for fisheries that are subject to overfishing. |

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| | | Secretary concludes overfishing was not a contributing factor. Many of the provisions are similar to existing NOAA policy guidance. Includes cost sharing provisions. | |
| 54 | 16-20 | Repeals section 308 of the Interjurisdictional Fisheries Act of 1986 | This appears to delete the part of the act that authorizes appropriations for disaster relief. If that is accurate, the only statutory basis for disaster relief would be under the MSA. That does not appear to have an impacts. |
| 57-58 | Various | Adds definitions of subsistence fishing to the MSA | Definition may be broad enough that it could be interpreted as applying to recreational fishing. |
| 59-84 | 14-17 | Amends CZMA to create a working waterfront task force to identify and prioritize critical needs. Establishes a grant program to implement working waterfront plans approved by the Secretary. Establishes a loan fund as well. | Primarily of interest to communities, though Council fisheries would benefit from waterfront access. |
| 84 | 14-16 | Establishes National Seafood Council, directs NMFS to study to study possibility of establishing education and marketing programs, and directs Secretary of Agriculture to increase use of DOA marketing programs. | |
| 85- | Various | Provides for fishing communities to participate in LAPPs. Requirements include a community sustainability plan submitted to the Council. | Unclear how these groups access quota or permits. This might require amendments to FMPs to implement this participation. Such changes might be similar to those included in Multispecies Amendment 17 (Permit Banks). |
| 89 | 19-24 | Explicitly excludes “propagation and rearing of aquatic species in a controlled or selected environment in marine waters” from the definition of fishing. | Would prevent Council from managing aquaculture activities in federal waters. |
| Title III Strengthening Public Process and Transparency | | | |

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| 91 | 7-24 | Makes Council liaisons exchanged by NEFMC and MAFMC voting Council members, with duty to represent interests of “fisheries under the jurisdiction of such Council.” | The language “interests of fisheries of such Councils” is subject to interpretation. Does this mean the liaison is to restrict comments to impacts on MAFMC-managed fisheries? |
| 92 | 12-23 | Strikes language on roll call votes and requires that the Council hold a “recorded” vote on all nonprocedural matters. Encourages availability of remote meeting participation and voting. | Unclear what is meant by a “recorded” vote. Does a show of hands count? Consensus? Or does this mean every vote must be essentially a roll call? |
| 93 | 1-17 | Requires Council provide live audio or webcast of Council and CCC meetings, and provide access to audio or video recordings, or transcript, within 30 days. | Little effect – we already do this for Council and SSC meetings. |
| 94 | 4-7 | Makes Council employees subject to “any requirement that applies to Federal employees.” | Potentially a large issue, as the language is very broad. While the sub-heading refers to “Ethics”, it is not clear what this actually requires. Does this include all OPM employment practices and requirements)? Does this mean all training requirements that apply to Federal employees? Employment practices? Or is this just meant to refer to ethics guidelines? Since Council staff are not generally federal employees, how will these provisions be enforced? What is the process? |
| 94 | 10-18 | Council members subject to all laws, rules, and policies regarding ethics and sexual harassment and assault that apply to Federal employees. Council members subject to civil penalties for violation. | Potentially a large issue. Will create training requirement to educate Council members on all of the federal provisions. It is not clear what the penalty process looks like. The federal ethics guidelines may dramatically change the ability of appointed Council members to vote and participate in discussions, and may not be consistent with other MSA COI provisions. |
| 94 | 24-26 | “Designated official” that rules on conflict of interest determinations must come from NOAA GC. | Limited impact – this is current practice in our region. |
| 95-98 | Various | This section revises COI provisions in a number of ways. It adds contractor | This section would probably increase the frequency of Council member recusals. It includes contractor relationships |

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| | | relationships to financial interests that must be disclosed; changes the standard for recusal to a “relevant and probable effect” (vice current “significant and predictable” standard). Also, defines “relevant and probable effect” if there is a “causal link between the Council decision and an expected benefit to the financial interest of the affected individual.” Current language refers to a close causal link and an expected and substantially disproportionate benefit. | in the definition of an affected individual. The change in the standard for recusal is significant, and may result in removal of the current 10% criteria that is applied in many instances. This may make it more difficult to find Council members with fisheries experience who can participate as Council members. |
| 96 | 12-18 | Expands who can request a COI determination to include members of the public. | This could create nuisance requests for determinations, unless standards are established for determining what a valid request is. |
| 96 | 19-24 | Prohibits individuals ineligible to vote from participating in the deliberations, except to provide technical and factual information. | |
| 97 | 1-4 | Requires Council post all determinations on its web page. | |
| 97 | 6-13 | Requires agency to complete a requested review of a determination within 30 days. | This is current policy as describe om 50 CFR 600.235(g)(4) |
| 97 | 17-19 | While an individual ineligible to vote cannot participate in the deliberations, she/he can indicate how she would have voted on the decision. | |
| 98 | 13-25 | Formalizes and expands prohibitions on lobbying to include prohibition on using federal funds to attempt to influence issuance, advancement, or overturning of an executive order, Presidential proclamation, or similar Presidential directive or decree. | While this section does not change current restrictions on lobbying legislative bodies, it extends the prohibition to attempting to influence Presidential proclamations. This is a major change from current practice, which allows Councils to communicate with all elements of the executive branch. |
| 99 | 12-16 | Requires Secretary to investigate any complaints submitted by an individual or | Unclear how the Secretary can influence employment decisions of a Council, which is not a federal agency. |

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| | | government agency. Allows Secretary to issue civil penalties, including suspension, expulsion, or employment by the Council, for violation of lobbying restrictions. | |
| 99-100 | Various | Imposes extensive record keeping requirements on Councils related to all conversations about lobbying issues – including conversations with NOAA GC. Records must be available online. | This recordkeeping requirement is potentially burdensome. It appears this is an attempt to remove the need for FOIA requests to access Council information. It also effectively expands the concept of federal record to include conversations. |
| 101-106 | Various | Extensive guidance to Secretary on appointment process for Council members. Includes requirement that at least two Council members should not have a financial interest in the fisheries managed by the Council. | |
| 106 | 12-13 | Extends period for legal challenge to 60 days after implementation (up from 30). | |
| 112-125 | Various | Extends NOAA policy on the prevention of and response to sexual harassment to observers, at-sea monitors, voting members of Council, and Council staff. | This is an expansive section that includes guidance on reporting of incidents, investigation of reports (including a requirement that an investigation be initiated within 48 hours of a complaint), and annual reports. Implementation would require extensive and recurring training. |
| 125- | Various | Extensive changes to the S-K process. Only major provisions listed below. | |
| 126 | Various | Establishes an American Fisheries Advisory Committee (AFAC). Three representatives from each of six geographic regions would be appointed by the Secretary. One will have experience as a seafood harvester or processor; one as a rec or commercial fisher; and one represents the Council. Four other at-large members are appointed, including one NMFS person. The main role | This formalizes the S-K process. Structure of the AFAC (based on six regions) means that two Councils will not have a representative on the Committee. Role of AFAC is expanded from current review process. |

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| | | of the AFAC is to identify fishing community needs, develop RFP for grants, review applications, and select applications for approval. Describes COI and financial disclosure requirements. While the Secretary retains final approval authority for awarding grants, it does not appear a grant can be awarded unless approved by the AFAC. | |
| 135 | Various | Amendments to the S-K funding provisions in 15 USC 713C. | Not clear what the impacts are. |
| Title IV Modernizing Fisheries Science and Data | | | |
| 137 | 8-23 | Directs NMFS to provide an implementation plan for the Fisheries Information Management Modernization initiative. Plan to include provisions for stakeholder involvement. | |
| 138-144 | Various | Emphasizes importance of electronic technologies for data collection. Modifies discretionary provisions of FMP to allow EM/ET on board vessels. Directs Councils to consider EM/ET to meet information collection needs. Requires Secretary to review information collection and management every five years. Directs Comptroller General to review NMFS EM/ET capabilities. Establishes Electronic Technologies Innovation Prize. Establishes a National Electronic Technologies Advisory Panel. | Discretionary provisions of FMP explicitly recognize use of EM/ET. |
| 144-145 | Various | Requires annual report to Congress on stock assessment schedules, improvements and prioritization. | |

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| 146-150 | 1-25 | Makes funds available for support of Cooperative Research projects to address critical needs identified by the Councils. Each Council to provide list of such needs on an annual basis. Guidance given on priorities for such research: improve stock assessments, improve fishery dependent data collection and use, conservation engineering projects, HAPC identification, economic and social data, EM/ET text and expansion, etc. | Additional requirement for Council to identify research priorities and ties these to a specific program. |
| 149 | 1-10 | NMFS to develop cooperative management agreements to describe process in each region, with input from Councils. | |
| 150-151 | Various | Directs NMFS, in cooperation with the Councils, to develop a NE region regional pilot research trawl survey. NEMAP identified as an example, VIMS listed as a partner. Councils and NMFS to combine in report to Congress after study completed. | |
| 152-156 | Various | Several provisions to address recreational data consistency and improve recreational data. | |
| 159 | 17-22 | Directs Commerce and Interior to enter into a cooperative agreement to fund additional stock assessments that may be necessary as a result of wind energy development. | While this provision may increase assessment resources, it does not address the impact of wind farms on data collection. |
| Title V | | | |
| Sustaining Fisheries Through Healthy Ecosystems and Improved Management | | | |
| 160 | Various | Changes to the MSA Fish Habitat consultation provisions. Imposes requirement on other agencies to take action in response to NMFS comments on | Generally, seems to strengthen EFH consultation provisions by giving NMFS and Council comments more impact. Adverse effect determinations are no longer merely advisory, but require action to address and/or mitigate the effects. |

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| | | adverse EFH effects. Actions that would have an adverse effect on HAPCs are prohibited. Formalizes requirement that NMFS notify Councils, and allows Councils to make recommendations if Council believes it will affect habitat if managed resource (Council shall comment for anadromous resources). Agencies must respond to Council comments. | |
| 164 | 19-20 | Requires FMPs to identify and minimize adverse effects on EFH and HAPCs. Requires monitoring of efficacy of actions to avoid adverse effects | Removes qualifier “as practicable” from the requirement to minimize adverse effects. |
| 166 | 8-17 | Requires SSC and AP for HMS FMPs. Catch limits cannot exceed SSC recommendations. | While not a Council issue, may complicate international management of HMS. |
| 167-168 | | Modifies NS on bycatch, FMP bycatch requirements. Requires FMPs to consider full retention requirements for species with high catch mortality rates. | Removes “to the extent practicable” language in NS9, making it mandatory to minimize bycatch. Determining the standard that must be met may prove difficult absent agency guidance: does “minimize” mean “eliminate”? |
| 168-169 | 15-24 | Requires national standardized reporting requirements. Requires consistent data reporting. | |
| 170 | 1-25 | Provides more details on annual report to Congress on status of fisheries, including rebuilding progress. Introduces term “depleted”. | While the term depleted is used, later text makes it clear this does not remove the need to rebuild depleted fisheries. |
| 172-173 | 18-20 | Revises maximum rebuilding period to time to rebuild without fishing plus one mean generation. Rebuilding plans must contain objective and measurable criteria for evaluating rebuilding progress. | The change in the maximum rebuilding period would remove removes a discontinuity that currently exists. It is possible, however, that there may be fast growing stocks where the new standard is less than ten years. Atlantic herring is an example; where the maximum rebuilding period might be 6-8 years. |

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| 174 | 5-18 | Adds details on criteria for finding a lack of adequate rebuilding progress. | |
| 175 | 1-13 | After a notice of lack of adequate progress, Council has to take action within 9 months to make progress. The time period for rebuilding cannot be changed. | Time period for taking action is aggressive, depending on the action that may needed. While measures adopted by a framework/EA might be completed in nine months, more complex actions that would require an amendment/EIS are unlikely to be completed that quickly. Preventing a change in the rebuilding time period may require draconian reductions in fishing mortality. |
| 176 | 1-15 | If a stock is not rebuilt at the end of a rebuilding period, a Council must develop a new rebuilding plan with at least a 75 percent chance of rebuilding by the end of the new time period. | This provision seems to ignore the relationship between rebuilding time period and the probability of rebuilding. |
| 176 | 17-25 | Introduces term “depleted”, as the term for a stock that declined below the level at which the capacity of a stock to produce MSY. | While these next sections remove the term “overfished” and replaces it with “depleted”, later text shows this does not change rebuilding requirements., |
| 177 | Various | Revises definitions on overfishing, clearing up the statute’s definition of “overfished” and “overfishing” as the same thing. Replaces the term “overfished” with “depleted” throughout the statute. However, makes clear that “depleted” is a reference to “overfished” as previously used. Does not alter legal mandate to prevent depletion and rebuild depleted stocks. | Changing the definition of “overfishing” makes the statute consistent with current practice. |
| 179 | 1-24 | Modifies scientific advice SSC provides the Council to include: recommendations for accounting for all mortality, resilience to climate change, status determination criteria, and numerous reports (stock status, | Vastly expands duties of the SSC. Our SSC is not really equipped to provide the reports that would be required, on a regular basis. SSC members are volunteers, and this would increase their workload considerably – or require augmenting staff to do the work for the SSC. |

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| | | bycatch, habitat status, future impacts of climate change, etc.) | |
| 179 | 20-24 | Limits Council determinations on SDCs, ending overfishing, and rebuilding, to recommendations of the SSC. | Language of this section is not clear on how this works. Some elements of scientific advice are sensitive to determinations of acceptable risk. This is usually considered a policy determination. It is not clear if this section is shifting that responsibility to the SSC. |
| 180 | 15-24 | Further guidance on research priorities, to include prioritizing stocks expected to have a shift in range. | |
| 181-182 | Various | Further details on Council functions, to include following advice of SSC on SDCs, and developing a plan for EFH that will include measureable goals for increasing the quality, quantity, and representativeness of EFH. | WRT EFH provisions, it is not clear the Council can mandate actions that will increase quality, quantity etc. of EFH. Some of the stressors on EFH are not due to fishing. In some cases, they may overwhelm the impacts of fishing. This creates a standard that will be difficult for Councils to achieve. |
| 182-186 | Various | Adopts requirements for management of forage fish. Includes requiring a definition, adds requirements for forage fish research priorities. ACLs for forage fish would need to assess, specify, and reduce limits by needs of fish species and other marine wildlife. | Data may not be available for the analyses required when setting ACLs. This problem was encountered during the herring MSE, where we do not have consumption data on all species that eat herring. This could become a large burden, given the frequency that ACLs are set. |
| 187 | 11-25 | Requires that the Secretary add RH/S to the Atlantic herring and Atlantic mackerel FMPS, and that specific measures be adopted. | Note this mandates a Secretarial action, not a Council action, |
| 188 | 9-16 | Requires observer coverage on 60 percent of MWT trips. | Takes precedence over any other FMP provision. |
| 194 | 16-20 | Fines resulting collected as a result of Mults Plan violations are to be used to enforce and monitor (including EM) that FMP. | Change from current language, which only requires the funds be sued to enforce the FMP. |