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“A science based non-profit organization devoted to the conservation of our fisheries resources and the economic development of our fishing communities.”

REVIEW OF DISCUSSION DRAFT: “STRENGTHENING FISHING COMMUNITIES AND INCREASING FLEXIBILITY IN FISHERIES MANAGEMENT ACT”

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This document reviews the Discussion Draft “Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act” published by The House of Representatives on December 18, 2013. The Discussion Draft makes a positive contribution to reauthorization of the MSA and sets the stage for a national dialogue on reforming fisheries management.

The Discussion Draft identifies several opportunities for positive change of the MSA. The Center for Sustainable Fisheries (“CSF”) proposes further discussion should occur around components of the Discussion Draft.

Among the opportunities for positive change, the Discussion Draft identifies the following emendations:

1. Replace the term “overfished” with the term “depleted.”
2. Make membership on the New England Fisheries Management Council (“NEFMC”) and the South Atlantic Fishery Management Council (“SAFMC”) more representative of fishing communities.
3. Require transparency and public input into SSC advice and findings.
4. Require live broadcasts of Council meetings on Council websites.
5. Rewrite Section 304 “Rebuilding Depleted Fisheries” to eliminate the arbitrary rebuilding schedules and to recognize that stock depletion owes to factors other than fishing.
6. Take into account (section 304) the need to build mixed stock exceptions and socio-economic factors into rebuilding strategies.
7. Promulgate electronic monitoring objectives, performance standards, and regulations.
8. Allowing 80% of the Asset Forfeiture Fund to be obligated for data collection and cooperative research.

CSF believes that further detailed discussion on various sections of the Discussion Draft will achieve the goal of “strengthening fishing communities and increasing flexibility in fisheries management.” More detailed discussion is necessary in the following sections:

1. Modification of the National Standards, taking into account problems identified after 40 years of fisheries management to achieve the purposes of fisheries management as identified in the MSA. These problems are centered on a failure to implement the national standards as a coherent package.
2. Define “overfishing,” “Maximum Sustainable Yield,” and other terms to reflect scientific justifications.
3. Clarify the intended relationship between Sections 302(h)(6) and Section 302(m).
4. Replace “rebuilding” with the concept of maximizing yield subject to constraints on fishing mortality.
5. Promulgate regulations to substitute electronic monitoring for human observers, provide an opportunity for the public to comment on regulations, and clarify the Council’s authority to utilize electronic monitoring in Fishery Management Plans.
6. Clearly define Congress’ intent to eliminate a divergence of implemented fisheries management from Congress’ apparent intent.

1. Modify the National Standards

The Act’s central conceptual foundation is the Ten National Standards. At present, the Ten National Standards are narrowly implemented in a manner that focuses on only part of the first National Standard (prevention of overfishing). This results in policies that ignore concerns of Congress such as the impact of fishing regulations on the economic and social fabric of fishing communities. As discussed in more detail in CSF’s paper “Rewriting the Magnuson Stevens Act,”¹ much controversy and debate over Congress’ intent stems from the interpretation and implementation of the National Standards.

The focus on only a part of the first National Standard means that a major component of the National Standards is virtually ignored; resulting in a diffuse focus on ensuring that optimum yield is obtained, best science is being used, stocks are treated as a unit throughout their range, safety at sea is taken into account, and economic and the social fabric of fishing communities is considered.

CSF believes that the current National Standards must be rewritten (See Appendix A) to make clear and explicit Congress’ evident intent to take a balanced approach to the National Standards. CSF’s proposed National Standards ensure a balanced approach to fisheries management and development of explicit interactions among the National Standards. To achieve balance and development of explicit interactions, CSF proposes reducing the number of National Standards from ten to five.

As an example, CSF believes that National Standard 1 should be changed from,

¹ “Rewriting the Magnuson-Stevens Act” is available at <http://centerforsustainablefisheries.org/rewriting-the-magnuson-stevens-act/>

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.

To accurately reflect Congressional intent, as follows:

Conservation and management measures shall, promote the safety of human life at sea. Conservation and management measures shall maximize yield (or some economic function of yield) subject to the constraint of keeping fishing mortality at or below a level specified by the Council. Conservation and management measures shall, take into account and balance the importance of fishery resources to fishing communities with fishing mortality goals, by utilizing economic and social data that meet the requirements of National Standard (2), in order to (A) provide for the sustained vitality of such communities, and (B) minimize adverse economic impacts on such communities.

The rewritten National Standard 1 will have multiple functionalities. First, by maximizing yield, the rewrite changes the objective of fisheries management from the patently abstract and pejorative concept of “preventing overfishing” to a concrete meaning (i.e. optimum yield), well understood by economists, optimization theoreticians, conservationists, and the public. Second, by qualifying “maximizing yield” with the phrase “an economic function of yield,” the rewritten National Standard 1 ensures that National Standard 8, the economic and social fabric of fishing communities, and National Standard 10, ensuring human safety at sea, are explicitly brought to the forefront as primary objectives of fisheries management. Third, the rewritten National Standards constrain fishing mortality in a way that enables the Regional Councils to set rational judgment-laced limits on the quantity of fish caught. This gives the council maximum flexibility to set conservation-meaningful catch limits, rather than being constrained by the current thirty-five pages of unintelligible Federal Register guidelines that may have little connection with reality. Of particular importance, CSF’s proposal will give the Councils the flexibility to deal with the commonplace but theoretically ignored, multiple-stock fisheries.

Addressing the issue of balancing of the National Standards in this Reauthorization has the potential to facilitate and intensify such action by NOAA. In order to strengthen our fishing communities and increase flexibility, rewriting the National Standards is imperative.

2. Replace “Overfishing” and Define Both “Maximum Sustainable Yield” and “Best Science Available”

The Discussion Draft changes the word “overfished” to “depleted.” Additionally, the discussion draft also makes a considerable departure from the current MSA by recognizing that relatively low or depleted stocks can result from causes other than

fishing. Both are positive and necessary changes needed to strengthen our fishing communities and ensure effective science-based conservation measures are implemented.

The Discussion Draft must also eliminate all ambiguous terminology -- such as “overfishing,” “maximum sustainable yield” (MSY), and “best science available” -- that exists in the current version of the Act.

By failing to address all of the current Act’s ambiguous terminology, the Discussion Draft perpetuates NOAA’s flouting the clear intent of Congress to attain optimum yield as defined by best science available. A great deal of the current turmoil of fisheries management results from the ambiguous and equivocal language in the Act and the guidelines that attempt to interpret the Act resulting in multiple and confusing interpretations, political uncertainty, and conceptual vertigo regarding optimal goals for fisheries management.

a. “Overfishing” and “Maximum Sustainable Yield”

The current Act’s ambiguous terminology (e.g. “subject to overfishing” or “attaining MSY,” etc.) is not clarified in the Discussion Draft.

To exemplify the problem of ambiguous and equivocal language, the Discussion Draft does not change National Standard 1; in other words, it retains the ambiguous concept of “overfishing.” The Act defines overfishing as “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustained yield (MSY) on a continuing basis.” It is clear that to determine whether or not overfishing is occurring, it is first necessary to determine the level of MSY.

But here is where the system breaks down. There are many different ways to calculate MSY and its related overfishing level. For example, there are different definitions of overfishing; there are different models for calculating overfishing; and there are different constraints on interpreting overfishing condition (e.g. maxima and equilibrium versus non-equilibrium stocks).

Because MSY and overfishing can be ambiguous, two investigators using the same data for the same stock can very easily obtain very different results as to the level of overfishing and MSY. Failure to explain the sometimes very different results challenges the veracity of the science.

These observations bring into question the practical effect of changing “overfished” to “depleted” in the Discussion Draft. Depleted is defined in the Act as “... the stock is of a size that is below the natural range of fluctuation associated with the production of maximum sustained yield (MSY).”

Bringing these observations together, we can easily see that the terms “overfished” (or “depleted”) and “overfishing” depend on defining MSY. But as discussed, there is no unique definition of MSY. So under the current MSA and Discussion Draft both “depleted” and “overfished” depend on MSY, and MSY is ambiguous. This means that

“depleted” is operationally no different than “overfished.” If MSY is not further defined, the problems will erode the future of fisheries management performance.

b. Best Science Available

At present, “best science available” has been implemented as “NOAA’s scientific findings.” As discussed, in “Rewriting the Magnuson Stevens Act,” CSF identifies why Congress in this Reauthorization should further define “best science available” to broadly include scientific studies outside of NOAA. Furthermore, under CSF’s rewritten National Standard 2 what is “best” should be determined by the Councils after being presented with all reputable, relevant, and dependable studies and the pros and cons of each study.

Eliminating ambiguity will lead to less confusion and more efficiency in fisheries management because Congress’ intent will be clear.

3. Clarify Intended Relationship Between Sections 302(h)(6) and proposed Section 302(m)

Increasing the Council’s flexibility to set annual catch limits (“ACLs”) is important to ensuring that fishery management plans (“FMPs”) are in compliance with the National Standards. The Discussion Draft’s “Considerations for Modifications to Annual Catch Limit Requirements” allows the Council to “consider changes in an ecosystem and the economic needs of the fishing communities.” The Discussion Draft should clarify the effect this provision has on Section 302(h)(6), which mandates that the annual catch limits not exceed the recommendations of the SSC or the peer review process.

Further clarification concerning which provision is superior will ensure that conflict and confusion does arise. A Council may find that the SSC’s recommendation will have severe economic impact on a fishing community and utilizing Section 302(m) may modify an ACL by citing the economic needs of a fishing community. However, the Council’s action will be in violation of Section 302(h)(6).

Increasing the Council’s flexibility is important, but provisions meant to increase flexibility, must be coordinated with existing clauses of the current MSA. CSF proposes that the Council’s ability to change ACLs recommended by the SSC be superior to Section 302(h)(6) if the economic needs of the fishing community are such that not changing the ACL is likely to lead to an economic disaster.

4. Replace “rebuilding” with the concept of maximizing yield subject to constraints on fishing mortality.

As the Discussion Draft points out, under the current MSA, the rebuilding concept is specious because depletion may owe to factors other than fishing. In these cases, reducing fishing will not cause the stock to rebuild.

Causes for depletion are not generally understood by the scientific community. CSF's proposed National Standard includes the objective "maximize yield or an economic function of yield subject to constraining fisheries mortality to a level determined by the Council." Replacing the concept of "rebuilding" with maximizing yield will help to ensure fisheries regulations are promulgated on scientific methodology and principles that take into consideration economic impacts on the fishing communities.

5. Mandate the Secretary promulgate regulations to substitute electronic monitoring for human observers, provide an opportunity for the public to comment on regulations, and clarify the Council's authority to develop regulations if the Secretary fails to do so

The use of electronic monitoring is a positive step forward towards utilizing modern technology to improve long term efficiency of both funding and data collection.

CSF proposes that the Discussion Draft must be amended to also require that the Secretary "implement objectives for Councils to develop plans to substitute electronic monitoring for human observers." By stating a preference for the use of electronic monitoring will ensure that widespread, serious use of electronic monitoring occurs.

Additionally, under the Discussion Draft's proposed language the Secretary must "provide an opportunity for the fishing industry to comment before the regulations are finalized." Allowing public comment for regulations is necessary, important, and aligned with the Administrative Procedures Act's ("APA") formal rulemaking process. The Discussion Draft should not limit comments to merely the fishing industry. To ensure an all inclusive process and consistency with the APA and formal rulemaking norms, inclusiveness of all individuals that may be able to offer expert or alternative comments and advice is necessary. The Discussion Draft should be amended to read "provide an opportunity for the public to comment before the regulations are finalized."

Lastly and of great importance, the Discussion Draft allows the Councils to promulgate regulations only if the Secretary "fails to develop such regulations" within the statutorily mandated 6 month period. The Council's ability to utilize electronic monitoring in FMPs should not be contingent upon the Secretary failing to complete a statutorily mandated action. The Council should be authorized to utilize electronic monitoring in conjunction with a FMPs and individual fishery in its jurisdiction, just the same as the Council currently has the authority to implement observer coverage with a FMP. CSF proposes that Section (a)(3) be amended in the Discussion Draft to state:

(3) ACTION BY COUNCILS. – The Council may implement plans to substitute electronic monitoring for human observers for fisheries under the jurisdiction of such Council that are subject to a fishery management plan, if,

(A) electronic monitoring will provide a similar level of coverage as a human observer; and

(B) plans comply with objectives, performance standards, and regulations set by the Secretary pursuant to paragraph (1).

Electronic monitoring is a provision that must be written into the MSA. Drafting the provision to consider the current and historical structure of agency authority and to support the replacement of human observers with electronic monitoring will lead to greater long term success of electronic monitoring.

6. Clearly define Congress's intent to eliminate a divergence of implemented fisheries management from Congress's apparent intent

An issue of considerable concern is divergence of fisheries management from the apparent intent of Congress as inferred from the National Standards incorporated in the original MSA. The divergence of fisheries management from the apparent intent of Congress as inferred from the ten National Standards incorporated in the Act must be addressed in the rewriting of the MSA. In all fairness it is difficult to bring these issues into a discussion draft in the sense that many of these issues arise from the implementation of the Act. Presumably this issue will naturally arise if the MSA is redrafted in such a way as to include a serious analysis and amendments to regulations and agency policy. When this discussion takes shape it will need to include the National Standards and what is known and what is not known about fish population dynamics and the interactions of population dynamics with fishing.

Improving public policy associated with fisheries management will require a discussion of the extent of our knowledge. It is fair to say that a lot less is known about population dynamics than is implied by the language of the existing Act. The scientific cupboard is bare. For example, our understanding of single-population dynamics is as far as it can go. Our understanding of single species dynamics explains only a small part of the variability of fish populations and the interaction of fish populations with fishing. There are huge lacunae in our knowledge regarding ecosystems, multiple species interactions, recruitment variability, and the general multi-scale ocean environment. In order to deal with the abstraction of overfishing (and ecosystem management), we will need to understand these many phenomena.

CSF concludes with the following observations. First, the Discussion Draft is a platform to begin a needed national dialogue on fisheries management. Second, the discussion draft usefully focuses on the need to provide flexibility for fishery managers and stability for fishermen. CSF believes that in additionally in order to reach these goals it is imperative to obtain a balance among the National Standards and to eliminate ambiguous and equivocal language from the Act. And third and most important, institutional structural changes in of fisheries management are needed so that our resources are conserved while optimum yield contributes to our economy and employment.

CSF looks forward to a robust and dynamic dialogue and legislative process to move fisheries management into the 21st Century.

APPENDIX A

Proposed National Standards as Rewritten

The Ten National Standards should be combined and incorporated into five tenets which will allow for a scientific based fishery management system that balances conservation and sustainability for the fisheries, and the people who, and the port communities that comprise the industry.

These Five National Standards should be rewritten as follows:

REWRITTEN NATIONAL STANDARDS

(a) IN GENERAL.—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following equally paramount national standards for fishery conservation and management:

(1) Conservation and management measures shall, promote the safety of human life at sea. Conservation and management measures shall maximize yield (or some economic function of yield) subject to the constraint of keeping fishing mortality at or below a level specified by the Council. Conservation and management measures shall take into account and balance the importance of fishery resources to fishing communities with fishing mortality goals, by utilizing economic and social data that meet the requirements of National Standard (2), in order to (A) provide for the sustained vitality of such communities, and (B) minimize adverse economic impacts on such communities.

(2) Conservation and management measures shall be based upon the best scientific information available. The best available science shall be derived by a collaborative effort of government, educational institutions, and private and non-profit scientists coordinated by NMFS and NMFS's regional SSCs. The best scientific information available shall be determined by the Council after a comprehensive review of multiple analyses and the pros and cons of each analysis, as presented by the SSC in conjunction with other fisheries scientists.

Advanced technological mechanisms shall be utilized in every instance to gather and analyze samples and data.

(3) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. An individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination. Conservation and management measures shall, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided account for and allow the bycatch to enter the marketplace.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation and maximize yield as specified in National Standard 1; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall not have economic allocation as their primary purpose.

Condensing in a logical format into five interrelated standards will enable NOAA, the NMFS and the Council to more effectively implement the Congressional intent of MSA. Let the debate begin but let's have an honest debate as how to rewrite and reauthorize of this most important statute. The clear purpose of our efforts should be to ensure that the fisheries management system is effective, fair, transparent, and responsive to the ever changing natural environment and socio-economic needs of the fishing communities.