

APRIL 2015 DRAFT NPFMC comments on **HR1335 - “Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act”**.

POTENTIAL Council comments are contained within *italicized* text.

Sec 4. Rebuilding plans

Changes to Section 304(e), p. 92. **All are similar to previous House draft with exceptions noted.**

1. Requires the council to select a time period for rebuilding that is as short as ‘practicable’ instead of ‘possible’.
2. The amendments remove the current 10-year timeframe and change it to ‘the time the stock would be rebuilt without fishing occurring plus one mean generation’. The MSA currently provides exceptions to this rule, and the amendments create more exceptions for the SOC:
 - if the stock being depleted is outside the jurisdiction of the council or the rebuilding program cannot be effective only by limiting fishing activities;
 - if it’s a mixed stock fishery that cannot be rebuilt within that timeframe without significant economic harm to the fishery;
 - if recruitment, distribution, or life history of, or fishing activities for, the stock are affected by informal transboundary agreements under which management actions outside the EEZ may hinder domestic efforts; or
3. Allows an FMP to use alternative rebuilding strategies including harvest control rules and fishing mortality targets.
4. Allows the council to remove the FMP or regulations for rebuilding a stock if the SSC determines and the SOC concurs that the original determination was erroneous either 1) within the two years after implementation; or within 90 days after the completion of the next stock assessment after such determination. **Similar to last House draft except authority lies with the SSC, instead of Council, to make determination.**

Generally, the NPFMC has been supportive of proposed ways to provide more flexibility in rebuilding schedules. This was a prominent recommendation resulting from the Managing Our Nation’s Fisheries conference in May 2013. Seems appropriate to allow the SSC the authority to determine if a rebuilding plan is no longer necessary.

Emergency Regulations and Interim Measures

Changes to Section 305(c), p. 99. **Same as previous House draft.**

- Allows for emergency rules to be in effect for one year (as opposed to 6 months) and can be extended by another year (as opposed to 6 more months) if the public has had a chance to comment and the Council is pursuing means to address the problem permanently.

The NPFMC has not identified concerns with this change previously.

Sec 5. Modifications to the ACL requirement

Changes to Section 302 (which establishes the Regional Fishery Management Councils), p. 59. **Similar to previous House draft, with exception noted below.**

Adds a new section (m) on p. 73: Considerations for modifications to ACL requirements.

1. This allows councils, in establishing ACLs, to consider ecosystem changes and the economic needs of the fishing communities.
2. Explicitly states that Councils do not have to develop ACLs for:
 - An ecosystem component species (see definition below in #5)

- A fishery for a species with a life cycle of one year unless its subject to overfishing
 - A stock for which more than half of a single year class will complete their life cycle in less than 18 months and fishing will have little impact on the stock.
3. Each ACL must take into account management measures under international agreements with the US; informal transboundary agreements under which management by another country outside the EEZ may hinder US conservation efforts for a transboundary species; and in instances in which no transboundary agreement exists, activities by another country outside the EEZ that may hinder conservation efforts by the US.
 4. A council may establish: an ACL for a stock complex; or ACLs for each year in any continuous period up to 3 years.
 5. Defines ecosystem component: a nontarget stock that is incidentally harvested *in a fishery*, or a nontarget, incidentally harvested fish that a Council or the SOC has determined: A) is not subject to overfishing, approaching a depleted condition or depleted; and B) is not likely to become subject to overfishing or depleted in the absence of measures.

The previous House draft included a change to Section 302(h)(6) that required Councils to develop ACLs for each of its managed fisheries that may not exceed the overfishing level recommendations of its SSC, as opposed to the fishing level recommendations. This meant that Councils would no longer be prohibited from exceeding the ABCs set by the SSC, only the OFLs. The Council previously expressed concern with this provision, and it has been deleted in HR 1335. Council comments on HR1335 would support this deletion.

ACLs are not required for ecosystem component species. Defining EC with reference to ‘non-target stock’ could be confusing given how targets and non-targets are defined in North Pacific fisheries (based on catch composition, which means all major stocks may be a non-target at certain times, while ACLs must be set prior to the fishing year). While this would not likely change how we set ACLs in the North Pacific, clarification may be achieved by deleting the words “in a fishery” to accomplish the apparent intent (which may already be accomplished by recent east coast court rulings, or change “non-target” to “not generally retained”). This would be consistent with our previous comments.

Sec 6. Distinguishing between overfished and depleted

Changes to Section 3 (definitions), p. 10. **Similar to previous House draft.**

1. (34) Revised this definition to only refer to ‘overfishing’, and not ‘overfished’. The new definition states: ‘The term overfishing means a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.’
2. Adds a definition for ‘depleted’: the stock has a biomass that has declined below a level that jeopardizes the capacity of the stock to produce maximum sustainable yield on a continuing basis.
3. Amends entire MSA to strike ‘overfished’ anywhere it appears, and replace with ‘depleted’.
4. Amends section 304(e)(1) (action by the SOC relevant to rebuilding fisheries). This section currently requires that the SOC shall report annually to Congress and the Councils on the status of fisheries that are overfished or are approaching a condition of being overfished (now ‘depleted’). This section is amended to state that this report by the SOC shall distinguish between fisheries that are depleted as a result of fishing versus factors other than fishing. The report shall also state whether the fishery has directed fishing.

The Council (and CCC) has previously commented that this distinction makes sense, and may address species like Pribilof Island blue king crab, in combination with adjustments to the rebuilding requirements (i.e., time period can be exceeded in cases where rebuilding is determined to not be effective only by limiting fishing activities). However, while the distinction makes sense, the legislation does not explicitly exempt such a situation from development of a rebuilding plan; therefore, the Council might provide comment recommending such an exemption in cases where fishery management actions would not effect or affect rebuilding.

Sec 7. Transparency and Public Process

Changes to Section 302, p. 66. **Similar to previous House draft, with noted exceptions.**

1. Requires that the SSC develops advice in a transparent manner and allows for public involvement.
2. Requires that each Council shall make available on the web, to the extent practicable, a webcast, an audio recording, or a live broadcast of each Council and CCC meeting, with the exception of executive sessions.
3. Audio, video (if the meeting was in person or by video conference) or a searchable audio or written transcript of the Council and SSC must be posted on the web within 30 days of the meeting.
4. Requires the SOC to maintain and make public an archive of Council and SSC meeting audios, videos, and transcripts.

The NPFMC (and CCC) already provides live Webcast of Council meetings and searchable audio transcripts. We assume that this wording does not require that the meeting be video-taped. This language would require us to maintain full audio taping, or transcripts, of SSC meetings, which I believe would be an unnecessary burden given the detailed nature of SSC minutes which are currently developed.

Changes to section 303, p. 74 **(NEPA/MSA reconciliation):**

1. Replaces the existing requirements for fishery impact statement (section 303(a)(9)) with new requirements. It specifies that the FIS shall assess, specify and analyze the likely effects and impact of the proposed action on the human environment. It lists several required elements, which mirror existing NEPA requirements.
2. Specifies that the FIS, which may be draft, must be available no less than 14 days before the beginning of the Council meeting in which final action is scheduled, and shall accompany the submittal of the final amendment package and regulations.
3. Allows the Councils to establish criteria to determine actions or classes of actions of minor significance, for which preparation of an FIS is unnecessary and categorically excluded from these requirements. Subject to SOC approval.
4. Councils must prepare procedures for compliance that provide for timely, clear and concise analyses.
5. Adds a requirement for SOC review of FMPs or FMP amendments (Section 304(a)(2), p. 88) to evaluate the adequacy of the FIS as a basis for fully considering the environmental impacts.
6. Adds NEPA to the list of laws that need to be complied with under the time limitations currently in place for Secretarial review of FMPs, regulations, and Secretarial amendments.

The very original Hasting bill contained a new section (Compliance with NEPA) that stated that: Any FMP or regulation that is prepared in accordance with sections 303 and 304 of the MSA is considered to satisfy NEPA. Specifically section 102(2)(C), which is the requirement that the federal government provide a detailed statement about the environmental impacts, alternatives (e.g., the NEPA analysis). While that would have been a direct approach to resolving the NEPA/MSA issue, that language did not survive in HR4742 as introduced last April. HR4742 as introduced contained the CCC recommended approach, which expanded Section 303 of the MSA to include key NEPA analytical provisions directly into the MSA, and (importantly) a paragraph 7 at the end of that expanded Section 303 which stated that development of the revised Fishery Impact Statement would constitute compliance with NEPA. That critical paragraph 7 is not included in HR1335, which essentially moots the entire intent and effect of the CCC recommended approach. As currently constructed, the legislation would require development of the expanded fishery impact statement under MSA, AND would not exempt us from (what would now be redundant) NEPA requirements.

In effect, Councils would be required to continue to comply with NEPA and also undergo a new, repetitive NEPA-like process in their development of a fishery impact statement. Previous Council and CCC positions on NEPA have supported incorporating NEPA into the MSA, on the condition that those requirements satisfy NEPA. At a minimum, our comments on HR1335 should stress the importance of including that paragraph 7, or alternatively, delete that section in its entirety and fall back to status quo NEPA application (barring some other solution).

Sec 8. Limitations on Future Catch Share Programs. Similar to previous House draft.

- Defines catch share in 'definitions' in section 3: Any fishery management program that allocates a specific percentage of the TAC for a fishery, or a specific fishing area, to an individual, cooperative, community, processor, representative of a commercial sector, or regional fishery organization established under 303A(c)(4), or other entity.
- Modifies the referendum provisions to establish new catch share programs for New England, Mid-Atlantic, South Atlantic, and Gulf of Mexico councils.

This makes it clear that all of these structures are considered catch shares to be subject to the referendum provisions established for four other councils. The only other place the term 'catch share' is used is in the provisions for data confidentiality (below). Note that the term 'sector' was removed from the last House draft and replaced with 'representative of a commercial sector'; thus, the definition of 'catch share' program does not appear to include overall sector allocations. Council comment would be same as with previous version.

Sec 9. Report on Fee New

Changes to section 304(d)(2) on LAPP fees, p. 91:

- Adds a new requirement for the SOC to report annually to Congress and the relevant Council on the amount of LAPP fees collected from each fishery and detail how the funds were spent.

Previous Council comments supported this requirement.

Sec 10. Data Collection and Data Confidentiality. Similar to previous House draft, differences noted.

Electronic Monitoring

1. Adds a section requiring that the SOC issue regulations governing the use of EM for the purpose of monitoring fisheries subject to the MSA, no later than one year after implementation of the Act. The regulations shall distinguish between monitoring for data collection/research and compliance/enforcement. They shall include minimum criteria, objectives, or performance standards. In issuing regulations, the SOC shall consult with Councils and fishery management commissions, publish proposed regulations, and provide for public comment.
2. After the issuance of final regulations, a Council or the SOC may, on a fishery by fishery basis, and consistent with the goals of the FMP, incorporate EM as an alternative tool for any of the above purposes and allow for the replacement of a percentage of observers with EM. This can only apply if the Council or SOC, respectively, determines that such monitoring will yield comparable data collection and compliance results.
3. Before the issuance of final regulations, the Council or SOC may conduct a pilot project for the use of EM.

The main difference from previous version is that EM may be used for compliance and enforcement purposes, which was a specific recommendation of the NPFMC. It also changes the structure and order of these tasks by requiring that NOAA first publish general regulations governing the use of EM. This section states that such EM must yield comparable data collection and compliance results, but does not state to what EM results must be comparable (one can assume data collected by human observers). It also appears to allow the Council to make this determination if it is a Council-initiated amendment. I recommend that Council comments support this language.

Confidentiality. *Includes some changes from previous House version.*

4. Modifies 402(b)(1)(E) and (G) to substitute the words 'catch share' for 'limited access', thus establishing that information is confidential and cannot be disclosed except when it is used by a state, Council or marine fishery commission to verify catch under a catch share program or by the SOC when such information is required to be submitted for any determination under a catch share program. *This means that ongoing federal rulemaking defining what falls under the purview of a 'determination' is still relevant.*
5. Adds VMS or other technology used onboard a vessel for enforcement or data collection purposes as information that is confidential, similar to observer information.
6. Allows disclosure of confidential information to other persons if the Secretary has obtained written authorization from the person submitting such information or from the owner of the vessel to release such information for reasons not otherwise provided for in this subsection. *This is a positive change from the previous House version and will allow for the continued disclosure of observer information directly to Sea State, which is necessary to manage salmon bycatch at the cooperative and individual vessel levels. This is a positive response to previous Council comments (i.e., we did not support deletion of section 402(b)(2)(A), which was deleted from the previous draft).*
7. Explicit prohibition on providing vessel specific or aggregate vessel information from a fishery that is collected for monitoring and enforcement to any person for the purposes of coastal and marine spatial planning.
8. Provides a definition of 'confidential information' in section 3 (definitions) to mean: trade secrets; proprietary information; observer information; and commercial or financial information the disclosure of which is likely to result in harm to the competitive position of the person that submitted the information to the SOC. *Note that observer information also includes VMS and EM under other changes to this section.*

Increased data collection and actions to address data poor fisheries. Same as previous House draft.

9. Section 404 (Fisheries Research, p. 156) is amended to add that the SOC can use a portion of funds (up to 80%) collected as US enforcement penalties for data collection purposes in the region in which they were collected. These purposes explicitly include the use of state staff, resources, and survey vessels to survey and assess data-poor fisheries for which FMPS are in effect. It can also fund cooperative research activities under section 318 to improve or enhance fishery independent data used in stock assessments.
10. Each Council shall identify its data-poor fisheries and prioritize those based on the need of each for updated information (and provide this to the SOC).
11. Adds a definition for 'data-poor fishery': a fishery that hasn't been surveyed and a stock assessment completed in the preceding 5 years; or for which limited information on the status is available for management.

Previous Council comments on this section noted the potential impact to NOAA Enforcement capabilities, but did not oppose this language (stressing the importance that such funds be used in the region from which they were collected).

Sec 11. Cooperative Research and Management Program New

Changes to Section 318, p. 145:

- Requires the SOC, after consultation with Councils, to publish a plan for implementing and conducting the cooperative research and management program detailed in section 318 within one year of implementation of the Act. Specifies necessary elements and requires revision and updating every 5 years.
- Replaces section (c) Funding with "Priorities". The language requiring that funds are awarded on a competitive basis and based on council needs remains. This section adds 1) expansion of electronic catch reporting programs and 2) improving monitoring and observer coverage through the expanded use of EM as priorities for funding.

Council comments could support this section generally, or could more specifically support the priority status for EM applications??

Sec 12. Council Jurisdiction for Overlapping Fisheries

Not applicable to NPFMC.

Sec 13. Gulf of Mexico Fisheries Cooperative Research and Red Snapper Management

Not applicable to NPFMC.

Sec 14. North Pacific Fishery Management Clarification. Same as previous House draft.

Amends Section 306(a)(3)(C), p. 111.

Under section on State Jurisdiction, it changes one of the circumstances in which a state may regulate a fishing vessel outside the boundaries of the State to read:

(C) The fishing vessel is not registered under the law of the State of Alaska and is operating in a fishery in the exclusive economic zone off Alaska for which there ~~was no~~ is no fishery management plan in place ~~on August 1, 1996~~, and the Secretary and the North Pacific Council find that there is a legitimate interest of the State of Alaska in the conservation and management of such fishery. The authority provided under this subparagraph shall terminate when a fishery management plan under this Act is approved and implemented for such fishery.

The State and NPFMC have strongly recommended these changes. This will remedy the potential loophole identified during the salmon FMP revisions in 2012 that allowed for unregulated salmon fishing in the west areas the council removed from the FMP. Currently, while unlikely, a vessel could commercial fish in those areas of the EEZ, without being licensed with the state, if they come up from the lower 48 and never enter state waters (and fish in the EEZ only).

Sec 15. Ensuring Consistent Management for Fisheries throughout Their Range

- In general, a section was added to the MSA that states that in any case of a conflict between this Act and the National Marine Sanctuaries Act or the Antiquities Act, the MSA shall control.
- A section was also added that states that any management restriction in the EEZ that is necessary to implement a recovery plan under the Endangered Species Act shall be implemented using the authority, processes, and time schedules under the MSA.

These are new sections compared to the previous House draft. While the intent can be inferred, our comments should seek clarity on intent, and further clarity on how such intent would be effected with this language, relative to current application of statutory authorities.

Sec 16. Limitation on Harvest in North Pacific Directed Pollock Fishery *Same as previous House draft.*

- Amends the American Fisheries Act (AFA) to allow the NPFMC to change the pollock harvest cap (currently 17.5%) to as much as 24%.

Does not require that the Council change the harvest cap for pollock, but if they do, it cannot exceed 24%. We need to determine whether the Council has a position on this proposed language.

Sec 17. Recreational Fishing Data *NEW*

Amends Section 401(g), p. 150.

1. Inserts a new section on Federal-State Partnerships. Currently, the SOC can exempt recreational fishermen from a federal registry program if they are covered under a suitable state program. The amendment requires that the SOC establish partnerships with states to develop best practices for implementation of these state programs, and that the SOC develop guidance to that effect.
2. Requires a biennial report from the SOC to Congress on the estimated accuracy of the registry program or state program; priorities for improving recreational fishing data collection; and an explanation of use of information collected by state programs and the SOC.
3. The SOC shall make grants to States to improve implementation of state programs consistent with this section. Grants are prioritized based on the ability of the grant to improve the quality and accuracy of the state program.
4. Requires the SOC to enter into agreement with the National Research Council (within 60 days) to study the implementation of programs described in section 401(g), and details the elements of the study. Report to Congress within one year after entering the agreement.

This section appears to potentially allow for grant funding to help support recreational fisheries monitoring programs undertaken by the State, which serve to make federal registry unnecessary. In the NPFMC, this would apply to ADF&G's logbook/survey program to monitor recreational harvest of halibut. The State received a one-time grant several years ago but no longer receives federal funding. Seems like a positive provision which the Council could/should support??

Sec 18. Stock Assessments Used for Gulf of Mexico Reef Fish

Not applicable to NPFMC.

Sec 19. Estimation of Cost of Recovery from Fishery Resource Disaster

Amends section 312(a)(1), p. 129.

- Requires the SOC to publish the estimated cost of recovery from a disaster no later than 30 days after the SOC makes a disaster declaration.

Sec 20. Deadline for Action on Request by Governor for Determination Regarding Fishery Resource Disaster

- Requires the SOC to make a disaster declaration decision regarding a request from a governor within 90 days after receiving an estimate of the economic impact from the entity requesting relief.

Sec 21. Prohibition on Considering Red Snapper Killed During Removal of Oil Rigs

Not applicable to NPFMC.

Sec 22. Prohibition on Considering Fish Seized From Foreign Fishing

- Prohibits consideration of fish seized from a foreign vessel engaged in illegal fishing in the EEZ from accruing to the TAC for that fishery.

Sec 23. Subsistence Fishing

- Adds a definition for subsistence fishing that is very detailed (Section 3).
- Makes it clear (Section 302(b)) that the criteria for being appointed as a Council member includes those that are knowledgeable or have expertise in commercial, recreational, or subsistence fishing. Requires in Alaska, a governor must also consult with subsistence fishing interests prior to submitting Council member nominations.

This definition was previously reviewed by Subsistence Division when it occurred in a previous draft. It does not exactly match the state of Alaska definition, but it serves the purpose intended and no significant concerns were raised.

Sec 24. Inter-sector Trading of Commercial Catch Share Allocations in the Gulf of Mexico

Not applicable to NPFMC.

Sec 25. Authorization of Appropriations

- Revises the duration of appropriations to 2015 through 2019.