



Mid-Atlantic Fishery Management Council

800 North State Street, Suite 201, Dover, DE 19901
Phone: 302-674-2331 | FAX: 302-674-5399 | www.mafmc.org
Michael P. Luisi, Chairman | P. Weston Townsend, Vice Chairman
Christopher M. Moore, Ph.D., Executive Director

September 30, 2021

The Honorable Jared Huffman
1527 Longworth House Office Building
Washington, DC 20515
c/o Casey MacLean, legislative assistant
Casey.MacLean@mail.house.gov

The Honorable Ed Case
2210 Rayburn House Office Building
Washington, DC, 20515

Dear Representatives Huffman and Case:

Pursuant to your letter requesting Council comments on H.R. 4690, the Sustaining America's Fisheries for the Future Act, I am responding on behalf of the Mid-Atlantic Fishery Management Council (Council or Mid-Atlantic Council). The following comments will not address all topics addressed in the bill and will instead focus on high-priority issues of particular relevance to the Mid-Atlantic Council. We are working in collaboration with the other regional fishery management councils to develop additional comments which will be submitted after the next meeting of the Council Coordination Committee (CCC) on October 19-21, 2021.

In general, the Mid-Atlantic Council believes that the current Magnuson Stevens Fishery Conservation and Management Act (MSA) provides a strong framework for sustainable fisheries management through a science-based, transparent, and participatory management process. While we recognize the need to respond and adapt to new challenges and changing environmental conditions, we do not believe that large-scale changes are needed. We also believe that any changes to the Act should be national in scope with reasonable flexibility to address region-specific issues. Mandates specific to one region should be carefully considered, especially with respect to how these modifications might affect operations in other regions.

Section 102. Promoting climate resilience in fisheries management

This section adds a number of new climate change-related requirements for any new fishery management plan (FMP) or FMP amendment submitted to the Secretary after January 1, 2021 and would require that any changes to fishery management plans required by this section be implemented for all FMPs within four years.

While the Council does not object to the intention of this section, we have concerns about the increased workload and the lack of information available to support some of the additional requirements such as "assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery under prevailing and anticipated future environmental conditions" or "assess and describe the anticipated impacts of climate change and other environmental and ecological changes on the fishery."

Section 102(c) requires the Secretary, within three years and every five years thereafter, to assess the vulnerability to climate change of fish stocks within each Council's geographical area of authority, notify the Councils of such vulnerability, and recommend conservation and management measures.

The information provided through such an assessment would be valuable to the management process. However, we believe that the Councils are best equipped to develop conservation and management measures through our existing management process.

Section 105. Managing Shifting Stocks

This section adds a number of administrative requirements to address jurisdictional issues that may arise as fish stocks are affected by climate change. Chief among these is a required Secretarial review of each Council's geographical area of authority to determine if "a substantial portion" of any fishery is within the area of another Council. If this criterion is met, the Secretary must notify the Councils concerned, which triggers a formal process to either designate one of the Councils to prepare an FMP or establish joint management by the Councils.

While the administrative steps outlined in Section 105 do formalize a process for revising Council authority as a result of changes in fishery distribution, many of these issues are already addressed by the Councils themselves. This has been a particular area of focus on the Atlantic coast, where fisheries management authority in federal waters is divided between the New England, Mid-Atlantic, and South Atlantic Councils. These Councils have recognized this challenge and are working closely with each other to adapt to changing conditions. For example, the three East coast Councils are currently collaborating with the Atlantic States Marine Fisheries Commission and NOAA Fisheries on a climate change scenario planning initiative. Through this structured process, fishery scientists and managers are exploring how to best adapt and respond to jurisdictional and governance issues related to shifting fishery stocks.

It is important to note that a number of fishery management plans already account for overlap between Council management areas. For example, the New England Fishery Management Council and Mid-Atlantic Fishery Management Council manage two fisheries under joint fishery management plans and cooperate on the management of several other fisheries that overlap the geographic areas of both Councils. Similar arrangements exist between the Mid-Atlantic and South Atlantic Councils and the South Atlantic and Gulf Councils.

It is difficult to predict or comment on the specific impacts of Section 105 without specific details regarding how "substantial portion" will be defined. However, there appears to be potential for these provisions to create a "musical chairs" scenario with our managed fisheries. Frequent reassignments of management authority could cause disruptions in Council operations, duplications of effort, and losses of institutional knowledge among the staff, Council and SSC members, and others who have acquired specialized knowledge about the management or biology of a stock through years of involvement with the fishery. While major changes in management regimes may be warranted in certain cases, the Council believes that less disruptive methods of adapting to climate change should be pursued first.

Section 303. Atlantic Councils.

This section adds a voting seat for a Mid-Atlantic Council member on the New England Council and a voting seat for a New England Council member on the Mid-Atlantic Council. These liaisons would represent the interests of the fisheries under their jurisdictions on neighboring Councils, which is particularly important as stocks shift with climate change.

This change is consistent with previous recommendations offered by the Mid-Council on previous reauthorization bills. Southern New England states have an important interest in fisheries managed by the Mid-Atlantic Council, and conversely, the Mid-Atlantic states have an interest in a number of important New England-managed fisheries. We believe that vesting liaisons with voting and motion-making rights will allow these interests to be more effectively represented across Councils.

Section 303 (a)(4) states that the Secretary may only appoint an individual to be a liaison between 2 Councils under this subsection if such individual has expertise in a fishery that spans the geographical areas of both such Councils.

The Mid-Atlantic and New England Council's (non-voting) liaisons have traditionally been designated by each Council's Chair. It is within the self-interest of the Councils to designate liaisons with expertise in both geographical areas. We believe that the Councils are best equipped to select their own liaisons.

Section 304. Council procedures and participation

Section 304 (a)(1) requires the Councils to hold roll call votes on all nonprocedural matters.

Requiring roll call votes would be time consuming and disruptive to the Council process. On major amendments the Council often votes on each set of alternatives before voting on whether to approve a final amendment for submission to the Secretary of Commerce. For example, when the Council took final action on the Bluefish Allocation and Rebuilding Amendment during our June 2021 meeting, the Council voted on eleven separate motions before voting to approve the amendment. With 21 voting members, the Mid-Atlantic Council is the largest of the eight regional Councils, and conducting a roll call vote for each of eleven motions would have been incredibly time consuming and would have substantially slowed the process.

The MSA already requires the Councils to hold roll call votes at the request of any voting Council member (a much lower threshold than the one fifth of a quorum required for roll call votes in the U.S. House or Senate). While we do not believe that changes to voting requirements are warranted, a less disruptive alternative would be to require roll call votes only on final approval of any fishery management plan or amendment to be submitted to the Secretary.

Section 304 (a)(2) requires the Councils to seek to hold meetings in person and ensure the availability of remote meeting participation and voting.

The requirements described in this section could hinder the Council's ability to conduct business in an efficient and cost-effective manner. We believe it is important for Councils to

have some flexibility to adapt meeting practices to meet the needs of our members and constituents.

Providing a transparent and open public process is of utmost importance to the Mid-Atlantic Council. Prior to COVID-19, we held all full Council meetings in person with remote access provided via a listen-only webinar. Advisory body and committee meetings used a mix of in-person and webinar formats, depending on factors such as the length of the meeting, number of participants, and ability of meeting participants to travel. This flexibility enables a more efficient process and allows some individuals to participate who might not otherwise be able to if they had to take additional days off for travel to an in-person meeting.

The ongoing pandemic has forced us, like many organizations, to adapt our procedures and find new ways of conducting business in an all-virtual format. A positive outcome of this is that we have created a smoother, more user-friendly webinar experience. As we plan for the resumption of in-person meetings we will likely need to incorporate virtual participation options for some time to come. However, we are concerned about the requirement to ensure the availability of remote voting on a permanent basis. Council meetings are an invaluable opportunity for stakeholders to interact with Council members face-to-face. Requiring the Councils to allow remote voting would mean that members of the public may not have opportunities to see or speak to members. It is unclear how this would benefit the process or the public.

Finally, the Council notes that any new meeting-related requirements should specify exactly which types of meetings any such requirements apply to. In addition to full Council meetings, we hold meetings our advisory panels, Council committees, Scientific and Statistical Committee, monitoring committees, fishery management action teams, working groups, and various other ad-hoc groups. Many of these bodies routinely meet via webinar. It would be costly and disruptive to shift to all in-person meetings, and we often get comments from constituents that they appreciate the convenience of remote meetings.

Section 304 (b) requires the Council to make a webcast, live audio, or video broadcast of each meeting of the Council and the Council Coordination Committee meetings available on the Council's website with certain exceptions. This section also directs the Council to post on its website audio or video recording, searchable audio recording, or written transcript of each Council meeting and each meeting of the SSC. The Secretary would be required to maintain a public archive.

The MSA provides for a very transparent and participatory regulatory process, and the Mid-Atlantic Council already fulfills most of the requirements described in this section. We provide live webinar access to all Council and SSC meetings. Council meeting recordings are available on the website shortly after the meeting, and SSC meeting recordings are available upon request. We are concerned about the additional staff workload associated with the proposed requirement to post SSC recordings on the Council website. Given the fact that the SSC is an advisory body and we prepare detailed meeting reports for review by the Council, this provision seems unnecessary.

Additionally, we are concerned that in the absence of a specified timeframe, this mandate could be interpreted to mean that meeting recordings must be maintained online indefinitely. This could present significant technological challenges, as audio and video files for multi-day

Council and SSC meetings are generally quite large. We recommend that these requirements specify a time period the recordings must be available (e.g., 6 months from the date of recording) or that they be broadened to allow Councils to make recordings available upon request. We would also note that requiring the Councils and the Secretary to both maintain public archives of all meeting recordings seems like an unnecessary duplication of effort and resources.

Section 305. Council accountability and membership

Section 305 (a) deems all Council employees to be Federal employees with respect to any requirements that apply to Federal employees.

The purpose and potential implications of this provision are unclear. Additional detail and explanation in this section would be appreciated.

This section states that all Council, committee, and advisory panel members shall be subject to all law, rules, and policies regarding ethics and sexual harassment and assault that apply to Federal employees.

The Council is committed to maintaining a safe, ethical environment that is free of any form of harassment. We believe this section would benefit from additional clarification regarding the specific laws, rules, and policies that would apply to Council members and advisors. We are not aware of a universal policy for all federal employees. Council members, staff, and advisors are already subject to the rules of conduct prepared by the DOC Office of General Counsel.¹ To ensure coherence and consistency of policies, it may be more appropriate to direct the Secretary to ensure that these rules of conduct address ethics and sexual harassment concerns. The Council also requests clarification on whether Council members and advisors would receive ethics training similar to the training provided to Federal employees.

Section 403. Stock Assessments

This section requires the Secretary to report to Congress within one year and annually thereafter on NMFS progress to prioritize and improve stock assessments.

The Council believes that a comprehensive plan to prioritize and improve stock assessments would be beneficial. However, this requirement represents a substantial workload, and the Council believes that similar benefits could be achieved with a less frequent reporting cycle (e.g., every 3 years).

Section 406. Recreational Data Consistency and Recreational Data Improvement Program

This section would require the Secretary, within 2 years, to establish guidelines to improve recreational catch data. This section would also require the Secretary, within 1 year and at least once every 5 years after, to develop and publish a strategic plan for recreational data improvements.

Effective fisheries management is dependent on the availability of accurate and timely catch and effort data. Recreational fisheries are inherently uncertain in that catches are estimated

¹ [Rules of Conduct for Employees and Advisors of Regional Fishery Management Councils 2021](#); [Rules of Conduct for Members of Regional Fishery Management Councils 2021](#)

through a statistical methodology rather than tallied under a mandatory reporting framework as occurs in federally managed commercial fisheries. These challenges have been amplified since the 2006 MSA reauthorization introduced the requirement to manage fisheries with Annual Catch Limits (ACLs). Recreational stakeholders have expressed frustration with the frequent changes in management measures and harvest limits from year to year, which they often attribute to perceived inaccuracies in the recreational catch estimates. There have been concerted efforts to address recreational data issues in recent years, and the Council has simultaneously worked to develop management approaches that better account for uncertainty in catch estimates. However, there is still much work to be done, and the Council welcomes any efforts to improve the accuracy and timeliness of recreational catch estimates. Development of guidelines and calibration methods, as proposed in Section 406, could facilitate the incorporation of recreational data sources that may currently be underutilized. While the Marine Recreational Information Program (MRIP) is not explicitly addressed in this section, the Council believes increasing funding for MRIP could enable states to collect more intercepts and thus improve the precision of catch estimates.

Section 409. Offshore wind collaboration.

This section requires the Secretary of Commerce and the Secretary of the Interior (acting through BOEM) to enter into a cooperative agreement to fund additional stock assessments and fisheries and marine wildlife research which may be necessary due to actions taken by BOEM for the development of offshore wind energy.

The Council appreciates the inclusion of provisions to fund additional stock assessments and other research necessary due to offshore energy development. This was identified as a priority in the Council's response to E.O. 13921.

Section 502. Essential Fish Habitat Consultation

Section 502 (a) modifies the procedure for consultation on Federal agency actions that may have adverse effects on EFH.

This will strengthen the ability of the Secretary to ensure that Federal agency actions do not adversely affect EFH and will provide additional protection to EFH identified by the Council. This could be particularly important in the Mid-Atlantic region where offshore wind and aquaculture development may have impacts on habitat. The Council appreciates the requirement that Federal agencies respond to the Council comments and expects that this will facilitate improved dialogue between the Council and Federal agencies.

The MSA currently requires the Councils to minimize, to the extent practicable, adverse effects on EFH caused by fishing. Section 502 (b) revises this language to remove the phrase "to the extent practicable." This section also adds a new definition of the term "*adverse effect*" to mean "any impact that reduces the quality or quantity of EFH."

The practicability clause provides the flexibility necessary to consider social and economic tradeoffs in the decision-making process. The Council is concerned that this change could essentially require the elimination of any fishing that has, or could have, any impact on EFH.

The significance of the phrase “to the extent practicable” was discussed in *Conservation Law Foundation v. Evans*². The court stated:

Moreover, the plaintiffs essentially call for an interpretation of the statute that equates "practicability" with "possibility," requiring NMFS to implement virtually any measure that addresses EFH and bycatch concerns so long as it is feasible. Although the distinction between the two may sometimes be fine, there is indeed a distinction. The closer one gets to the plaintiffs' interpretation, the less weighing and balancing is permitted. We think by using the term "practicable" Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.

This interpretation suggests that removal of the practicability clause could open the door to litigation (or re-litigation) on any fishery management action that allows for any degree of adverse impacts to habitat.

The Council also notes that the new definition of “Adverse Effect” is quite broad and, in combination with the removal of the practicability clause, would significantly increase the Council’s responsibility to restrict fishing activities that have any adverse effect (even temporary) on EFH. The Council believes that the EFH and HAPC provisions in the MSA are vitally important to protecting fish habitat. However, we are concerned that the proposed changes leave little flexibility to balance habitat protection with the other management objectives identified in the MSA, such as the requirements to achieve optimum yield, minimize adverse economic impacts, or consider efficiency in the utilization of fishery resources.

Section 503. Reducing Bycatch

This section modifies National Standard 9 (NS 9) regarding the minimization of bycatch to remove the words “to the extent practicable.” A similar change is made in the section describing required elements of fishery management plans.

The phrase “to the extent practicable” is used widely throughout the MSA. This language appropriately reflects the imperfect nature of fisheries management and the challenges of balancing many, often conflicting, objectives. Selective removal of the practicability clause for NS 9 while leaving other standards (such as the requirement to promote the safety of human life at sea) unchanged, raises questions about whether Congress intends for bycatch minimization to take precedence above all others.

Similar to our comments on Section 502, we are concerned about the potential for litigation that could arise from the proposed change. In *Legacy Fishing Co. v. Gutierrez*³, the Court found that NS 9 cannot be viewed in a vacuum but is a component of a larger balancing scheme that NMFS must consider. In *Ocean Conservancy and Oceana v. Gutierrez*⁴, the Court wrote that “bycatch could only be entirely avoided by eliminating all commercial activity in the fishery” and that “National Standard 9 only made sense within the larger context of the Magnuson-

² *Conservation Law Foundation v. Evans*, 360 F.3d 21 (1st Cir. 2004)

³ *Legacy Fishing Company v. Gutierrez*, Civil Action No. 06-0835 (JR) (D.D.C. Mar. 20, 2007)

⁴ *The Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 148 (D.D.C. 2005)

Stevens Act if it was interpreted as requiring the NMFS to find the combination of regulations that would best meet the statute's various objectives.”

Although some level of bycatch is inherent in fishing operations, the Councils have been leaders in promoting bycatch reductions through actions such as time/area closures, gear modifications/prohibitions, bycatch caps, participation in take-reduction groups, and modifications to rules to address regulatory bycatch. As monitoring and technology improves, almost every fishery will have opportunities to examine and reduce bycatch in the future, and the Council welcomes opportunities to participate in those efforts.

Section 504. Improving Rebuilding Outcomes

This section removes the 10-year limit on the time period for rebuilding a depleted stock and replaces it with a requirement that the rebuilding timeframe “not exceed the time the stock of fish would be rebuilt without fishing occurring plus one mean generation unless management measures under an international agreement dictate otherwise.”

The Council believes that replacing the 10-year rebuilding timeframe with a biologically-derived timeframe will result in a more consistent application of rebuilding requirements across fisheries. For certain longer-lived species, we expect that this additional management flexibility will allow for the mitigation of some adverse socioeconomic impacts while still achieving rebuilding objectives.

We feel it is important to emphasize that over the long term, statutory deadlines and rebuilding requirements have benefitted Mid-Atlantic stocks, as well as many of the communities that rely on those fisheries for jobs, income, subsistence, and recreation. While these successes have often come at significant social and economic costs, we recognize that some adverse impacts are unavoidable during rebuilding periods. However, we feel that the 10-year rebuilding requirement has often exacerbated adverse impacts by limiting the Council’s ability to fully incorporate social, economic, biological, ecological considerations into the development of rebuilding plans. We believe that basing rebuilding time requirements on the biological characteristics of the stocks will result in a more even application of the law across fisheries.

Section 505. Depleted fisheries and preventing overfishing

Section 505 (a) replaces the term “overfished” with “depleted” throughout the Act. This change in terminology does not alter the definition itself or any legal mandates to prevent fisheries from becoming depleted and to rebuild depleted fisheries.

We believe this change in terminology more appropriately reflects the fact that a fishery's status is typically influenced by multiple factors. The Council has previously noted that the use of the term “overfished” can unfairly implicate fishermen in cases where deterioration of a stock may result from pollution, coastal development, offshore activities, natural ecosystem fluctuations, and other factors unrelated to fishing.

Section 505 (b) expands the responsibilities of the SSC. Specifically, this section requires SSC to provide (i) recommendations for accounting for all sources of mortality in establishing management measures, for the acceptable biological catch levels, for preventing overfishing, for maximum

sustainable yield, and for achieving rebuilding targets and promoting resilience of fish stocks to climate change; (ii) objective and measurable criteria for determining whether a stock is depleted or experiencing overfishing; and (iii) reports on stock status and health, sources of mortality, bycatch, habitat status, social, ecological, and economic impacts of management measures, and sustainability of fishing practices, and prevailing and anticipated future impacts of climate change on fish stocks, fishing communities, and fishery sectors.

In general, the Council agrees that this level of detailed information for each of our managed fisheries would be valuable. However, we have some concerns about the feasibility and workload associated with this section.

(i) Regarding the requirement to “provide recommendations for accounting for all sources of mortality,” the Council notes that management measures are designed to control *fishing* mortality, but management doesn’t have the ability to control other sources of mortality (e.g., natural mortality due to old age, disease, or predation). These other sources of mortality, outside of fishing mortality, are also very hard to estimate, and it is not clear how the SSC would provide this advice. It is not clear what “promoting resilience of fish stocks to climate change” means and what type of advice the SSCs would be expected to provide. The words “supporting” or “enhancing” may be more appropriate. Similarly, we are concerned about the feasibility of, and lack of data to support, the requirement to report on the “prevailing and anticipated future impacts of climate change on fish stocks, fishing communities, and fishing sectors.”

(ii) The Council would appreciate clarification on the purpose or need for the SSC to provide objective and measurable criteria for determining whether a stock is depleted or experiencing overfishing. These reference points are already defined for every managed stock, as required already under the MSA and National Standard 1 guidelines (50 CFR § 600.310). It is not clear what additional guidance the SSCs would be expected to provide on this topic. This addition, along with the similar language proposed in Section 507, seems redundant with existing requirements and could create potential for confusion.

(iii) The list of reports the SSC would be required to provide is quite extensive. We feel it is important to highlight the fact that the SSC is not a research body and their work largely involves reviewing, and developing advice based on, existing scientific information. The majority of the science used in the management process, including stock assessments, socioeconomic data, climate and ecosystem reports, and much more, is provided by the Northeast Fisheries Science Center. Adding new SSC responsibilities is unlikely to have any meaningful impact without measures to ensure the availability of the science needed to support those mandates. Consideration should also be given to the additional resources (staff support, meeting costs, etc.) that would be needed to fulfill these requirements.

Section 506. Preparation and Review of Secretarial Plans

The MSA currently authorizes the Secretary to prepare FMPs or amendments for stocks requiring conservation and management if the appropriate Council fails to do so in a reasonable period of time or if the Council fails to submit the necessary revisions after an FMP has been disapproved or partially approved. Section 506 of H.R. 4690 modifies this language to specify that the Secretary must prepare

such plans or amendments if the Councils do not submit the required FMPs or amendments “after a reasonable period of time **not to exceed 180 days.**”

The 180-day timeframe proposed in this section is unrealistic and likely could not be met while complying with the rigorous and time-consuming requirements of the MSA, the National Environmental Policy Act (NEPA), and other applicable laws. It generally takes 2.5-4.5 years to complete a new FMP or major amendment. The proposed 180-day timeframe may only encompass three Council meetings, which would not allow nearly enough time to initiate an amendment, conduct scoping hearings, form a fishery management action team (FMAT), collect and analyze data, develop and refine alternatives, solicit input from the SSC and other advisory bodies, draft decision documents, conduct public hearings, review public comments, take final action, and prepare the required documents for submission to NMFS.

The MSA already provides the Secretary appropriate discretion to assess whether a Council is making reasonable progress toward development of the required FMP or amendment. This flexibility is necessary to account for the variability in time needed to complete a management action, which can vary significantly depending on the complexity of the issue, availability of scientific information, Council workload on competing priorities, and other factors. Any specific time requirements for completion of Council actions should be crafted carefully and based on a detailed understanding of the Councils’ responsibilities and procedural requirements under the MSA, NEPA, and other applicable laws. A detailed description of the Council process and phases of FMP/amendment development can be found in NMFS Procedure 01-101-03: Operational Guidelines for the MSA Process.⁵

If the intent of Section 506 is to improve the timeliness of Council actions, this could be accomplished by improving alignment between NEPA and the MSA. Compliance with NEPA requirements is often the most time-consuming aspect of FMP or amendment development. The CCC’s white paper on “Integrating National Environmental Policy Act Compliance into a Reauthorized Magnuson-Stevens Act”⁶ explores this issue and discusses potential areas for improvement.

Section 507. Councils

This section amends the Section 302(h) of the MSA to include the following in the list of Council functions: “(8) approve, for each of its managed stocks, objective and measurable criteria for identifying whether the stock is depleted or experiencing overfishing, which may not be less precautionary than the recommendation of its scientific and statistical committee.”

This requirement is already addressed in Section 303 of the MSA (Contents of Fishery Management Plans). Given that Councils are required to prepare FMPs for each managed stock, it seems redundant to include this as both a Council function and an FMP requirement.

⁵ [NMFS Procedure 01-101-03: Operational Guidelines for the Magnuson-Stevens Fishery Conservation and Management Act Fishery Management Process](#)

⁶ [Integrating National Environmental Policy Act Compliance into a Reauthorized Magnuson-Stevens Act – A Council Coordination Committee Concept White Paper](#) (February 2015)

Section 508. Forage Fish Provisions

This section directs the Secretary to define forage fish, requires an assessment of the potential impacts of a new commercial forage fish fishery, and requires consideration of predator needs in existing fishery management plans.

The Council believes that forage fish play an important role in the structure and function of marine ecosystems. As such, we have taken a proactive approach to conserving unmanaged forage species and the ecosystem services they provide in the Mid-Atlantic region. During previous MSA reauthorization discussions we have been vocal in our support for the inclusion of a requirement to consider the ecological role of forage fish in the quota-setting process. However, we have also recommended avoiding overly prescriptive mandates for forage species. We believe the MSA language regarding Optimum Yield considerations already provides the Councils with adequate authority to address forage concerns. Greater specificity is unlikely to be appropriate given the rapid evolution of ecosystem science and the high degree of uncertainty that remains regarding interactions among species. Additionally, we believe forage fish cannot be defined with a one-size-fits-all description or criteria and that Councils should have the authority to determine which species should be considered and managed as forage fish.

Section 508 (c) requires each SSC to make recommendations regarding “maintaining a sufficient abundance, diversity, and localized distribution of forage fish populations to support the role of such populations in marine ecosystems.”

The Council requests clarification on whether this pertains to managed or unmanaged forage populations. As a general comment, the Council notes that there is very little information available to address certain components of this section. The Council also requests clarification regarding the meaning and intent of the term "localized distribution.”

Section 508 (d) would require the Council, in developing its 5-year research priorities, to “prioritize fisheries and habitats experiencing or expected to experience shifts in geographic range, spatial distribution, or productivity.”

The Council acknowledges the importance of understanding and collecting information on fisheries and habitats experiencing distribution and productivity changes. However, we have concerns about a statutory requirement to prioritize this specific area of research over other habitats/stocks which may be high priorities for other reasons. In general, we believe the Councils and SSCs should have full autonomy to determine how research needs are prioritized. Our concern with this section could be addressed by revising the wording to say “(B) identify priorities related to fisheries and habitats experiencing, or expected to experience, shifts in geographic range, spatial distribution, or productivity;”

Section 508 (g) requires the Secretary to, within 180 days, amend the Mid-Atlantic Council’s Atlantic Mackerel, Squid, and Butterfish FMP and the New England Council’s Atlantic Herring FMP to add shad and river herring to the list of managed stocks. Within one year from the date of the addition of the species to the FMPs, the Secretary would be required to complete plan amendments to develop and implement all required conservation and management measures for those species.

As a general principle, we believe the Councils should retain the authority to determine species requiring conservation and management through FMPs. Any legislation that directs the Secretary to prepare or amend fishery management plans (e.g., recent legislation to add shad and river herring as managed species) creates conflicts with current management under other existing authorities.

While the importance of river herring and shad (RH/S) from a fishery, cultural, or ecological perspective has never been in dispute, the Council has previously voted twice that an FMP would not be appropriate. The rationale, detailed in related supporting documents⁷, has been that (1) there is no evidence that RH/S are targeted in federal fisheries (despite spending the majority of their lives in the ocean), (2) RH/S are already being managed by the ASMFC⁸, (3) a Council FMP would not substantially improve the condition of RH/S stocks, and (4) the Council limits the catch of RH/S in federally-managed fisheries and reviews its approach annually.⁹

Because RH/S are caught in fisheries targeting other species that are managed by the Council, the Council works closely with its management partners, including the NOAA/ASMFC Technical Expert Working Group to promote the conservation of RH/S. The Council limits the incidental catch of RH/S in the Atlantic mackerel fishery through a catch cap that can and has closed the directed mackerel fishery when the cap is reached. The New England Council has similar provisions for the Atlantic Herring fishery. The combined caps in all federal fisheries since implementation of the RH/S caps has averaged less than 300 metric tons (2014-2019), which represents only a few percent of directed historic RH/S landings (20,000-35,000 metric tons in the 1950s and 1960s).

As we have noted in response to similar legislation introduced in previous Congresses, the timeline and process proposed in this section are unrealistic and problematic for several reasons. First, RH/S could not be added to an FMP without simultaneously establishing management measures for those stocks; the management measures are what makes an FMP. The MSA specifies that any FMP must contain the measures which are necessary and appropriate for the conservation of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery (16 U.S.C. §1853(a)(15)). Adding RH/S to the FMP and establishing management measures would need to occur within a single amendment. Therefore, it does not make sense to include two separate timelines in the bill.

Additionally, and as we noted in relation to Section 506 above, the time requirements proposed in this section could not be met while following the procedures described in the MSA and the National Environmental Policy Act (NEPA). It generally takes 2.5-4.5 years to complete a new FMP or major amendment, from the time action is initiated to implementation of new regulations. For example, when the Council established management of blueline tilefish through an amendment to the Tilefish FMP, it took about 2.5 years from initiation to final rule.

⁷ River Herring and Shad - Potential Management by the Mid-Atlantic Fishery Management Council, October 2016 Discussion Document (http://www.mafmc.org/s/MAFMC-RHS-Decision-Documents_2016-10.pdf).

⁸ See <http://www.asmfc.org/species/shad-river-herring> for details on ASMFC management.

⁹ It is important to note that contrary to the majority conclusion described above, some Council members believed, and continue to believe, that Council management would add substantially to RH/S conservation.

Blueline tilefish is a single species that only resides in offshore federal waters with few stakeholders, narrow habitat requirements, and a clear need for federal management. If Congress did decide to require Council FMP management of RH/S, the upper range of FMP implementation timing may be more appropriate, especially considering that our previous work on this issue indicated that a Council FMP would not substantially improve the condition of RH/S stocks.

Thank you again for the opportunity to provide these comments on behalf of the Mid-Atlantic Fishery Management Council. Please do not hesitate to contact me if you have any questions or would like clarification on any of the comments above. We appreciate your continued interest in our perspective and look forward to future involvement in MSA reauthorization discussions.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Luisi", written in a cursive style.

Michael P. Luisi
Chairman

Cc: Mid-Atlantic Fishery Management Council Members and Staff
Council Coordination Committee
Mr. Dave Whaley