



North Pacific Fishery Management Council

Simon Kinneen, Chair | David Witherell, Executive Director
1007 W. 3rd Avenue, Suite 400, Anchorage, AK 99501
Phone 907-271-2809 | www.npfmc.org

March 4, 2021

Senator Dan Sullivan
702 Hart Senate Office Building
Washington, DC 20510

Dear Senator Sullivan:

Pursuant to a request from your office (via email from Carina Nichols dated 12/17/2020) to provide comments on a State of Alaska (State) proposal (see attached letter) to amend the Magnuson-Stevens Act (MSA), I am responding on behalf of the North Pacific Fishery Management Council (Council). Specifically, the State's proposal is to amend MSA Section 302 (h)(1) by adding the word "federal" to specify fisheries that require conservation and management under a Council fishery management plan (FMP). The State's intent with the proposal is to allow the State to continue to manage the Cook Inlet salmon fishery and other Alaska salmon fisheries in certain portions of federal waters off Alaska when those fisheries are not included in a federal FMP.

The Council discussed the proposed MSA revision and other potential approaches relative to the Council's ability to meet its management goals, objectives, and responsibilities under its federal grant. The Council is appreciative of your request for input, and this letter is intended solely to convey information regarding the anticipated consequences of the State's proposed approach, as well as to address the likely impact of other approaches on the Council's performance of its responsibilities. The Council is unable to provide a recommendation on the proposed approach or alternative statutory language, as such a recommendation could be construed as lobbying.

The State's proposed legislative revision would amend section 302(h)(1) to explicitly state what the Council has long understood as its responsibility – to prepare an FMP or FMP amendment for each fishery under its authority that requires federal conservation and management. The State's proposal is broad in that it would apply to all councils, and general in that it would not dictate a particular outcome. The proposal would clarify that a council may choose to defer management of a fishery to a State by excluding the fishery from federal management under an FMP if the council determines that the fishery does not require *federal* conservation and management, using NOAA's comprehensive guidance on this subject¹ While the impacts of this clarification likely vary by region, the Council identified the following consequences of the State's proposal on fisheries off Alaska.

The MSA revision proposed by the State would specify that the Council must prepare an FMP only for those fisheries under its authority that have been determined to require federal management by the Council and the National Marine Fisheries Service (NMFS). In regards to salmon fisheries occurring in federal waters adjacent to Cook Inlet, Prince William Sound and the Alaska Peninsula (also known as the three traditional net fishing areas), this clarification of authority would restore the option for the Council to follow its long-standing approach to salmon fisheries management for these areas. The State's proposal also would confirm long-standing State management of several non-salmon fisheries that occur in federal waters off Alaska without an FMP, such as the Gulf of Alaska Tanner crab fishery and Gulf of Alaska blue and black rockfish fisheries. Because the State's proposal would apply to all councils, it seems likely

¹ NMFS regulations for section 302(h)(1) at 50 CFR 600.305

the revision would confirm the authority for current management structures for EEZ fisheries in other regions that are managed by a state agency, such as fisheries for West Coast pink shrimp and spot prawns. It would effectively confirm the ability of the Council to determine that federal management of salmon fishing in the three traditional net areas is not necessary if the Council determines that the State is adequately managing the fishery and that State management is preferred to a duplicative, complicated, and costly federal system that would not provide additional biological, economic, social, or operational benefits.

The State's proposal would restore the option for the Council to return to the historically used management tool for the three traditional net fishing areas, which is no longer available due to a Ninth Circuit decision. Under the Council's Salmon FMP, most federal waters in the FMP's West Area are closed to salmon fishing to facilitate State management of salmon fisheries in State waters as well as the few salmon fisheries in federal waters; this closure provides enforcement with an effective tool against illegal, unreported and unregulated (IUU) fishing for salmon in the EEZ. The FMP recognizes that the State is the entity best suited for managing Alaska salmon fisheries given the existing infrastructure and expertise developed since statehood for managing salmon. In the West Area, the State manages Alaska salmon stocks using a management approach that is specifically designed to address the life cycle of salmon, the nonselective nature of fishing in a mixed stock fishery, and the fact that a given salmon stock is subject to multiple fisheries through its migration from marine to fresh waters. With Amendment 12 to the Salmon FMP in 2012, the Council revised the FMP both to reflect its policy for managing the three traditional net fishing areas and to comply with the MSA. In developing Amendment 12, the Council considered (1) alternatives for defining the scope of the FMP and determining where federal conservation and management is required, and (2) options for the specific management provisions in the FMP that apply to the fisheries managed under the FMP. For the West Area, Amendment 12 specifically excluded from the FMP the three traditional net fishing areas—Cook Inlet, Prince William Sound, and the Alaska Peninsula—and the sport fishery and updated the FMP to facilitate State of Alaska salmon management for the fisheries that take place in those excluded areas. The State's proposed legislative revision would restore the option of reverting to the Amendment 12 management approach for the three traditional net fishing areas, noting that the potential for IUU fishing under this option has already been considered and determined to be negligible.

An association of Cook Inlet commercial salmon fishermen filed a lawsuit in Federal district court challenging Amendment 12 and its implementing regulations. The lawsuit focused on Amendment 12's removal of the Cook Inlet Area from the FMP. In defending the implementation of Amendment 12, NMFS argued that an FMP is required only for fisheries that require *federal* conservation and management, but the Ninth Circuit disagreed. The appellate court determined in 2016 that MSA 302(h)(1) clearly and unambiguously requires a Council to prepare and submit FMPs *for each* fishery under its authority that requires conservation and management and that no other provision in the MSA creates an exception to this statutory requirement. Because the Council and NMFS had concluded that the Cook Inlet salmon fishery requires conservation and management by some entity (the State of Alaska), the Ninth Circuit found that the Cook Inlet portion of the salmon fishery must be included in the FMP given the current statutory language of the Magnuson-Stevens Act. We note that the Prince William Sound and the Alaska Peninsula traditional net fishing areas also need to be addressed given the Ninth Circuit's decision, but the Council chose to focus its initial efforts on amending the FMP to include the Cook Inlet Area first, and then await the outcome of NMFS's review of the Cook Inlet salmon fishery action prior to initiating amendments for these areas.

The Ninth Circuit decision required the Council and NMFS to amend the FMP to include the Cook Inlet EEZ in the FMP and manage the salmon fishery occurring within it. Since the Council's preferred management alternative under Amendment 12 was no longer available, the Council's management

alternatives were limited to 1) federal management of the commercial salmon fishery within federal waters of Cook Inlet through delegation to the State of Alaska with a costly and duplicative federal oversight process that could negatively impact salmon fisheries management in federal and state waters, 2) federal management of the commercial salmon fishery within federal waters of Cook Inlet that would be separate from the adjacent state-managed salmon drift gillnet fishery and that could result in the closure of federal waters by NMFS to commercial salmon fishing, and 3) federal management of the commercial salmon fishery within federal waters of Cook Inlet but with a Council policy decision to close federal waters to commercial salmon fishing.

After analyzing the available management alternatives, in December 2020 the Council selected the alternative to close Cook Inlet federal waters to commercial salmon fishing because it determined that net benefits to the nation would be greatest from a management approach that results in all Cook Inlet salmon removals coming from state waters under the State's established management. The Council determined that the other two alternatives, a delegated management approach that would establish a duplicative and burdensome federal oversight process or a direct management approach that would establish separate, burdensome and duplicative state and federal fishery management structures, would impose significant costs on the respective management agencies with very uncertain impacts for Cook Inlet salmon fishery participants. The Council anticipates that the rulemaking to implement the December 2020 recommendation will be effective for the 2022 fishing season.

In making its recommendation, the Council expressed concern about the negative impacts of closing federal waters to commercial salmon fishing² and reiterated its support for the management approach implemented under Amendment 12 to maintain State management of the Cook Inlet EEZ salmon fishery without including it within a federal FMP. Therefore, enactment of the State's proposed legislative revision would restore the Council's historically preferred management approach to the Council's toolbox for consideration of Cook Inlet EEZ salmon management and management of the Prince William Sound and Alaska Peninsula salmon fisheries in the future. It would not require such an approach of any Council, but it would allow Councils to continue to consider and implement such an approach if it was warranted, similar to status quo. Such a change would maintain discretion for councils to determine whether a fishery requires federal conservation and management and not require any adjustments to FMPs or Council practice because current NMFS regulations implementing section 302(h)(1) already recognize that not every fishery requires federal management³.

Adding the word "federal" to MSA Section 302(h)(1) would clarify Council functions, return to the Council its discretion to determine whether federal conservation and management is needed, and explicitly support NMFS regulations interpreting section 302(h)(1). If the State's proposal is enacted and MSA Section 302(h)(1) is amended to include "federal," the Council would likely take further action to revise its December 2020 Cook Inlet salmon management action and determine whether the salmon fishery in the Cook Inlet EEZ requires federal conservation and management. However, NMFS has been sued multiple times by certain participants in the Cook Inlet EEZ salmon fishery over the last 12 years, and the Council anticipates that any action taken by the Council and NMFS for the Cook Inlet EEZ salmon fishery is likely to be litigated, including any action the Council might take following enactment of the State's proposal, further prolonging management uncertainty for the Cook Inlet EEZ.

² For example, the regulatory analysis estimated that an average of \$10.3 million per year (48.7% of fishermen's gross revenue) was generated in the EEZ, and represents a maximum revenue at risk due to closing the EEZ portion of Cook Inlet to commercial salmon fishing. See:

<https://meetings.npfmc.org/CommentReview/DownloadFile?p=96f2b5db-397e-42df-b455-013f171130ab.pdf&fileName=C2%20Cook%20Inlet%20Salmon%20Analysis.pdf>

³ 50 CFR 600.305(c)(1).

After reviewing the anticipated impacts of the State's proposal on the Council's ability to meet its management goals, objectives, and responsibilities under its federal grant, the Council considered the impacts of an additional, more specific MSA revision to provide specific authority in the MSA for the State to manage Cook Inlet salmon fishing in federal waters off Alaska, similar to the Section 306 note on page 114 of the MSA as published⁴, which provides the direct authority of West Coast states to manage Dungeness crab fisheries in the EEZ. The Council takes no position on the merits of the alternative approach compared to the language suggested in the State's proposal, but includes this alternative approach because you requested alternatives that might accomplish the goal you have articulated to allow state management of these fisheries. A more specific, prescriptive approach that would authorize the State of Alaska to manage salmon fisheries in the Cook Inlet EEZ or the three traditional net fishing areas subject to certain statutory conditions, similar to the approach taken for the West Coast Dungeness Crab fisheries, would not require a general change to MSA. A similar, specific authorization to the State of Alaska for the Cook Inlet EEZ or for the three traditional net fishing areas would not involve other Councils or states. Additionally, a specific, prescriptive approach that would authorize the State of Alaska to manage salmon fisheries in the Cook Inlet EEZ or the three traditional net fishing areas would essentially continue status quo State management under Amendment 12. However, such an approach would not resolve the issue presented by the Ninth Circuit's decision with other State managed fisheries in the EEZ, such as the Kodiak Tanner crab fishery, or other councils facing similar issues with State authority to manage fisheries in the EEZ.

The Council anticipates the federal waters of Cook Inlet will be closed to commercial salmon fishing beginning in 2022. Closure of the Cook Inlet EEZ may cause permanent alteration of the Cook Inlet fishery and a long period of uncertainty and vulnerability for the other two traditional salmon fishing areas in the EEZ. Congressional action to enact legislation that is general, specific, or some combination may ameliorate this situation.

While the Council cannot provide specific alternative language to your office, we also encourage you to consult with NOAA Fisheries staff, who are available to provide technical drafting assistance on draft legislation, should you wish to pursue legislative action.

Once again, thank you for the opportunity to review this proposed revision to the MSA, and to provide this information to you on behalf of the Council. We look forward to our continued dialogue on this critically important issue.

Sincerely,



Simon Kinneen
Chairman

Enclosure (1)

Cc: Carina Nichols, Legislative Assistant, Senator Sullivan's office
Ann Robertson, Legislative Assistant, Senator Murkowski's office

⁴ See:

<https://static1.squarespace.com/static/56c65ea3f2b77e3a78d3441e/t/56d76cd560b5e9a19100f2b6/1456958678437/MSA-2007.pdf>



THE STATE
of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Fish and Game

OFFICE OF THE COMMISSIONER
Headquarters Office

1255 West 8th Street
P.O. Box 115526
Juneau, Alaska 99811-5526
Main: 907.465.6136
Fax: 907.465.2332

December 14, 2020

The Honorable Lisa Murkowski
United States Senate
522 Hart Senate Building
Washington, DC 20510

The Honorable Dan Sullivan
United States Senate
7002 Hart Senate Building
Washington, DC 20510

The Honorable Don Young
United States Congress
2111 Rayburn Building
Washington, DC 20515

Dear Senator Murkowski, Senator Sullivan, and Congressman Young:

The North Pacific Fishery Management Council (Council) recently closed federal waters in Upper Cook Inlet to commercial salmon fishing. This controversial decision focused on the amount of federal intrusion the State was willing to accept to continue its management of these federal waters and the impacted state water fisheries.

This issue started when a commercial fish organization filed a lawsuit in federal court seeking more federal oversight of these waters. The lawsuit was opposed by the state as an intervener in the case. A federal court ordered the Council to amend the existing Fishery Management Plan (FMP) in federal waters of Cook Inlet in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and all other applicable federal laws, of which there are many.

Allowing federal oversight of mixed stock salmon fisheries has the real potential to significantly impact fisheries in state waters because the fisheries under review are first-in-line mixed stock fisheries. It could also potentially result in allocation shifts to already fully allocated fisheries in Cook Inlet or worse, impact the current management plans designed to protect weak or recovering stocks. Finally, it could shift allocation battles to the Council process usurping the authority of the State and Board of Fisheries and create even more complexity for both managers and users navigating dual, and possibly opposing, state and federal regulatory processes.

Even more concerning however is the domino effect this could trigger in other fisheries occurring in federal waters off Alaska's coastline. Of specific concern is the potential for this process to be applied to federal waters in Prince William Sound, off the Alaska Peninsula, and off Southeast Alaska. It could also result in the opening of other federal waters creating new intercept fisheries, operating with its own set of rules, targeting Alaska's currently fully allocated salmon resource.

It is for these reasons the State could not support the establishment of a process that requires annual federal and Council review and oversight of our salmon fisheries and their management. While the State does not like closing waters to commercial harvest, we saw it as the only option of the three available choices to preserving state management of the mixed stock fisheries in Cook Inlet and to ensuring against federal incursion into this and other state-managed salmon fisheries.

The Department continues to believe the best way to address this issue is amend the MSA to allow the State to continue to manage the Cook Inlet salmon fishery and other Alaska salmon fisheries in federal waters without federal fishery management plans. There is a consistent history of successful management of these fisheries by the State of Alaska. There are no federal management plans in place, nor is there the apparatus to develop them without re-assigning federal resources.

The simplest and easiest way to fix this would be to amend the Magnuson-Stevens Fishery Management and Conservation Act in the following manner:

16 U.S.C. § 1852(h)(1) is amended to read:

Each Council shall, in accordance with the provisions of this chapter—

- (1) for each fishery under its authority that requires **federal** conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);

While this is one solution we have identified, we are open to other options to preserving the state right to manage our salmon fisheries.

We stand ready to assist you in your efforts to resolve this issue. Thank you.

Respectfully



Doug Vincent-Lang
Commissioner

Cc: John Moller, Policy Advisor, Governor's Office, State of Alaska
Kip Knudsen, Director State/Federal Relations, Governor's Office, State of Alaska