

Testimony of Gerald Leape

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On Behalf of the Marine Fish Conservation Network Before

The Subcommittee on Fisheries Conservation, Wildlife and Oceans

On the Subcommittee Discussion Draft Reauthorization

Of the Magnuson-Stevens Fishery Conservation and Management Act

May 2, 2002

Good afternoon Mr. Chairman and Members of the Subcommittee and thank you for the opportunity to testify on behalf of the more than 145 member groups of the Marine Fish Conservation Network (Network) and our more than 5 million members. My name is Gerald Leape and I am a member of the Network's executive committee and the Marine Conservation Program Director of the National Environmental Trust. We look forward to continuing to work with you and your staff to strengthen the conservation provisions of this draft so that we can support it when it comes to markup and realize our shared goal of ensuring sustainable fisheries and healthy marine ecosystems. The Network has a comprehensive agenda for strengthening the Magnuson-Stevens Fishery Conservation and Management Act, which is appended to my statement. In addition, I have appended xxx and YYY to my statement for the record. We also want to convey to you our strong support for H.R. 2570, The Fisheries Recovery Act of 2001, which was introduced by Congressman Sam Farr on July 19, 2001. As you know, 67 members of the House have cosponsored Mr. Farr's bill.

As requested, we will focus our comments on the discussion draft circulated with the invitation letter. We support the general intent of the discussion draft, however, several provisions need significant modification to ensure that current regulations are not undercut, fish conservation is enhanced, and the Network can enthusiastically support the bill.

First, we would like to offer some overall comments on the draft. In most of the conservation provisions in the bill, the proposed amendments call for more studies and reports to Congress. In many of the sections, there is no directed action or if there is such a suggested action, there is no deadline for completing the action.

In several cases, there are rollbacks from existing law that, if enacted, would undercut the gains in habitat protection, rebuilding overfished stocks, and minimizing bycatch realized by passage of the Sustainable Fisheries Act (SFA) amendments of 1996. These amendments were passed by the House by a vote of 387-38 and in the Senate by a vote of 99 - 0. Mr. Chairman, those votes support our position that, at a bare minimum, we must not go backwards. For the sake of the fish and the fishermen, we must move forward to not only complete implementation of the SFA, but strengthen existing law to achieve the vision of the 1996 amendments to the Act. Below are my specific comments organized by section of the discussion draft.

SECTION-BY-SECTION ANALYSIS AND RECOMMENDATIONS

Overcapacity Report

The Network agrees that overcapacity in our fisheries should be reduced as overcapacity is linked to many other problems faced by U.S. fish populations. The General Accounting Office (GAO) has investigated the issue of overcapacity and buyback programs several times, most recently in June 2000. Therefore, we question the need for another study.

Recommendation:

We recommended that you: 1) ensure that the report does not duplicate previous work by the GAO; 2) require the Secretary to detail a specific course of action to address the problems be identified in both the June 2000 GAO report and this proposed report; and 3) establish firm deadlines for addressing the problems.

Buyout

We believe that this section contains the strongest improvements to existing law of any part of this discussion draft. This new language, which directly addresses problems that have plagued buyout programs to date, i.e., capacity being redistributed instead of permanently retired, can improve future buyouts by more effectively reducing fishing effort and capacity. One important drawback to this section is that it does not identify a funding source for the buyback program.

Recommendation:

Identify and include a dedicated source of funding.

Data Collection

We support this effort to improve recreation data by directing NMFS to collect and consolidate recreational fisheries data from the states. In fact, many states have indicated a willingness to cooperate in similar efforts, yet lack the resources to do so. Without some new mechanism or incentive to encourage states to participate, we feel that a lack of cooperation from the state could frustrate this effort to collect valuable recreational fishing data. Additionally, this program should be expanded to include the collection of state commercial fisheries data.

Recommendation:

We recommend identification of a mechanism to encourage and enable states to comply with the spirit and letter of this new directive.

Conserve Marine Ecosystems

Fishery managers and scientists have long recognized the need to expand fishery management beyond traditional single-species planning to include ecosystem considerations. As far back as 1980, studies of federal fisheries management by the American Fisheries Society, National Fish and Wildlife Foundation, and others have called for moving to ecosystem-based management. Such an approach includes, but is not limited to, interactions between key predator and prey species within an ecosystem and the habitat needs of living marine resources and other limiting factors in the environment. This concept supports the precautionary approach to fishery management,

especially when the ecosystem effects of fishing are uncertain. The precautionary approach requires managers to act to avoid likely harm before causes and effects are clearly established.

It is widely believed that some fishery declines and difficulties in restoring overfished populations are due, at least in part, to fishing caused disruptions of ecosystems. Under existing law, fishery managers do have limited authority to consider ecosystem interactions, including predator-prey relationships, in management plans. The principal reasons ecosystem relationships are not currently being adequately considered is a lack of guidance regarding the information that is needed, clear direction regarding the principles and policies that should be applied, and most importantly, the absence of a legal mandate to require the application of such principles and policies to fishery management decisions.

Mr. Chairman, you have been a steady advocate for ecosystem-based management since we first worked with you on fisheries management issues more than eight years ago. Six years ago, during debate on the SFA, we worked closely with you to identify the questions that needed to be addressed prior to beginning the necessary transition from single species management to ecosystem-based management. The NMFS advisory panel, created by the SFA and charged with answering these questions, has done its job. They have not only answered the questions raised, but have made recommendations on how to proceed. We are happy to see that the section on ecosystem-based management in H.R. 2570 would implement these recommendations.

Concern:

The draft is admirable in its effort to promote the development of plans to fill identified information gaps and begin the process of establishing criteria for the development of fisheries ecosystem plans. However, there is no requirement for managers to develop fisheries ecosystem plans, or to ensure that their fisheries management plans are consistent with ecosystem principles, in short, to implement ecosystem-based management. As we pointed out earlier, a number of studies and reports over the last two decades have recommended moving toward ecosystem-based management, yet little has happened. Dr. Bill Hogarth testified before this Subcommittee in June of 2001 that NMFS was moving to implement ecosystem-based management and that NMFS would be holding stakeholder meetings in the Fall, again, nothing substantive has happened. The message to us and we hope you, is clear, without a legal mandate, NMFS and the councils will not implement ecosystem-based management. Finally, there is no dedicated source of funding to accomplish this enormous task.

Recommendation:

To realize the goal of ensuring America's of fisheries are managed in an ecosystem context Mr. Chairman, there must be a legal requirement for managers to do so. Therefore, we recommend that you merge your ecosystem research plan language with the ecosystem language in H.R. 2570. This will codify the recommendations of the SFA mandated panel, establish a clear legal mandate for ecosystem-based management, set up

a reasonable 6 year timetable for action, and dedicate specific funding to achieve this goal.

Establish a National Fishery Observer Programs

Objective observation and accurate data collection are vital to effectively manage marine fish and fisheries. The ability of fishery managers to address the problems of overfishing, bycatch, and degradation of EFH is currently limited by a lack of accurate and reliable information on a fishing vessel's catch and bycatch. In many fisheries there is an incomplete understanding of the total catch, i.e., landed catch and discarded bycatch. Overfished stocks cannot be rebuilt if we do not understand and control all types of mortality. Minimal, but inadequate, observer coverage exists along the Atlantic Coast, the Gulf of Mexico, and the West Coast, a far more comprehensive national observer program is necessary to protect the sustainability of America's marine fish, fisheries, and fishing communities. The catch and bycatch data that would be achieved as a result of such a comprehensive program is vitally important to meeting the objectives of the Magnuson-Stevens Act, including the promotion of sustainable fishing.

Concern:

Consistent with your efforts Mr. Chairman and the efforts of others on this Subcommittee to gain an additional \$25 million for observers in fisheries around the country, we believe that progress on this issue should not be relegated to another report. There is broad and substantial support for and agreement on the need for a national observer program. Another feasibility study will only serve to further delay implementation of this badly needed program.

Recommendation:

Require the establishment of a national observer program. The information generated from such a program will allow us too make true progress in reducing bycatch and protecting essential fish habitat. We strongly recommend the observer language of H.R. 2570, which requires establishing observer programs in each fishery in order to gather statistically valid data. This does not mean requiring 100% observer coverage, but would require enough observers to produce statistically valid data. NMFS staff has told us that statistically valid data would generally require 30% observer coverage in most fisheries.

To help fund such a program, H.R. 2570 proposing using \$25 million in Saltonstall-Kennedy funds to offset the cost of observers. The remainder of the funding would come from a landing fee. If there is a need for an additional report, we recommend that it focus on other mechanisms to fund such a program and the level of observer coverage necessary in each fishery to provide statistically robust data. However, let me reiterate our strong opposition to authorizing a study without requiring the establishment of a national observer program, since we firmly believe that such a study would only serve to delay the establishment such a program.

Overfishing

Overfishing has been and continues to be one of the major problems threatening the survival of fisheries and the fish populations on which they depend. The most recent NMFS Status of U.S. Fisheries report found 81 stocks overfished (27% of the federally managed species that are assessed) and 65 stocks experiencing overfishing (24% of the managed species that have been assessed). This represents some improvement over last year, but much work remains to be done. We must continue to move forward to end all overfishing and to rebuild all overfished or otherwise depleted fish populations.

Concerns:

We appreciate your interest in separating the definition of overfished from overfishing. However, the proposed definition of overfished will significantly weaken existing law. Enacting this definition, which links the definition of overfished to a stock size that is below the natural range of fluctuation associated with producing MSY, would legitimize the efforts of those who blame all fisheries declines on anything but fishing. We in the conservation community believe that environmental change should be considered in efforts to determine the cause of fluctuations in biomass, but not as an excuse to avoid regulations necessary to rebuild overfished fish populations. Incorporating the “natural range of fluctuations” into the definition will add further scientific uncertainty and subjectivity to the definition, thus increasing the potential to increase the number of lawsuits rather than decrease them. We are also concerned that the proposed definition of overfished in the Chairman’s draft would, because of the difficulty in identifying the natural range fluctuations, force NMFS to place greater numbers of stocks into the “unknown” status in its annual report on overfished fisheries. These unknown stocks will not be afforded the protections of the SFA.

Recommendation:

Maintain the existing overfishing definition in the draft bill, but remove the natural fluctuations clause from the proposed definition of overfished. Furthermore, we recommend that the draft should include language from H.R. 2570 that would eliminate the loophole that allows overfishing of weak stocks in a mixed stock fishery, require rebuilding plans for those stocks that are approaching an overfished condition, and requires the development of uncertainty buffers to prevent and stop overfishing.

Bycatch

Bycatch is the indiscriminate catching, killing, and discarding of fish and marine life other than those a fishing vessel intends to capture. This includes fish that are not the target species, sex, size, or quality. It also includes many other fish and types of marine life that have little economic value but are ecologically important, such as birds, starfish, sponges and skates. Primarily, bycatch results from fishing practices and gear that are not selective. In addition to visible mortality, fish and other sea life are sometimes killed

or injured when passing through or escaping fishing gear, and through “ghost fishing” from abandoned or lost gear.

Environmental problems caused by bycatch include overfishing, increased scientific uncertainty regarding total fishing mortality, and potentially serious changes in the functioning of ecological communities. Economically, bycatch equates to lost fishing opportunities as a result of mortality of commercially valuable juvenile fish.

Concerns:

While we appreciate the addition of birds to the definition of bycatch and the addition of a deadline into the standardized bycatch reporting system requirement, we take strong issue with the proposal to exempt councils from that reporting requirement if they simply explain why they can't meet it. While few councils have taken any action to assess or reduce bycatch, the legal obligation remains. We believe that any provision providing a loophole for continuing inaction on bycatch issues, such as the one provided in the draft bill, will be fully exploited by the councils given their current non-compliance with legal mandates. The proposed exception, if enacted, would be a significant step backward in the effort to reduce bycatch nationally. In addition, in those cases where the amount of bycatch in the fishery has been assessed, the draft contains no requirement for actual reductions in bycatch. We appreciate the intent of a gear development program for bycatch reduction, however, this may be a program that is more effective if run regionally under a national mandate. In addition, without authorized funding, it will be difficult for this program to realize its goal.

Recommendation:

We strongly recommend that you drop the language that allows councils to ignore the requirement to develop a bycatch reporting system. In addition, we urge the adoption of language from H.R. 2570 that requires councils to annually reduce bycatch, sets strict timelines for implementation of the current requirement for all councils to develop a standardized reporting methodology, and requires an annual report on efforts to reduce bycatch.

Essential Fish Habitat

We are greatly concerned that this proposal will severely limit the application of the SFA requirement to minimize the adverse impact of fishing on important fish habitats, thus rolling back existing law. This proposal will restrict the requirement to limit damaging fishing practices to only essential fish habitat (EFH) that has been identified based on information on growth, reproduction, and survival rate by habitat type. The requirement is further restricted by limiting it to fishing activities that jeopardize the ability of the fishery to produce MSY. Since this information is not available for nearly all managed fish species, this proposal will eliminate the requirement to minimize fishing impacts on EFH for years, if not decades.

In our view, this proposal will significantly rollback existing law. If this change is approved, it is assured that nothing will be done to protect EFH from the well documented damage of some fishing gears on EFH. Litigation on this issue has been settled and a process is in place where NMFS is going to come into compliance with the current regulations. Congress should let NMFS continue its work and if any changes need to be made, it should be in the form of additional funding for NMFS to do its job and developing precautionary language that will prevent the introduction of damaging fishing gear.

Recommendation:

We urge you to protect and strengthen current law by dropping this proposal to limit the protection of EFH. In its place, please include language from H.R. 2570, which will ensure that the impacts of damaging fishing practices will be evaluated and mitigated for before they are allowed.

Individual Fishing Quotas

Individual fishing quotas (IFQs) grant fisherman and fishing companies the privilege to catch specific amounts of fish. Congress has placed a moratorium on the submission, approval, or implementation of any plan that creates an IFQ program until October 1, 2002.

The Network supports continuing the moratorium on IFQ programs *unless and until* Congress adopts legislation containing standards for the design and conduct of IFQ programs to ensure that these programs contribute to and enhance the conservation and management of our nation's fisheries and ensure equity among all fishermen participating in any IFQ fishery. For your information, I have appended a redline copy of the Network's proposed legislative language detailing these necessary standards.

Concerns:

There are a number of positive changes contained in your proposal. First, we are pleased with your inclusion of language specifying that IFQs do not create a property right and that they must be reviewed every five years. There are also a number of provisions that will protect fishermen and fishing communities including requirements to provide fair and equitable allocation of quota shares and to establish limitations on consolidation. Finally, we are pleased with the requirement that such systems promote conservation.

However, the five-year review will likely be ineffective because it lacks a consequence i.e. a sunset of the program or some other penalty, for failing the review. In addition, the qualification on the 10-year sunset provision which states only that a review has to be conducted, not that fishing quota programs have to pass the review, virtually assures that no IFQ program would ever sunset, thus making the initial IFQ a permanent asset. Also, with no enforcement mechanism behind the review or requirement that IFQ participants pass the review, there will likely be no serious consideration of the conservation or equity

requirements of the program. The mandatory consideration of historical fishing gears, rather than participants, in considering allocation of quota, will, we believe based on experience, inevitably result in a codification of current fishing practices leaving little or no room for changes in the fishery to more environmentally friendly gear. While we appreciate the inclusion of a double referendum, we believe that it is a mistake to leave it up to the councils to decide who would be eligible to vote. All participants in the fishery should have a voice in the decision on adoption or rejection of an IFQ program. Finally, we are strongly opposed to the language in the draft that will allow processor quota shares. As we testified at the February IFQ hearing, processor quotas are likely to violate protections against anti-trust laws and are very likely to cause serious economic hardships to fishermen, while providing no public benefit to either the economy or conservation.

Recommendations:

Standards must be adopted that, among other things, clarify that IFQ programs:

- do not create a compensable property right;
- are of set duration, not to exceed five years;
- demonstrably provide additional and substantial conservation benefits to the fishery (defined as reducing bycatch, eliminating overfishing, and protecting essential fish habitat);
- are reviewed periodically by an independent body to determine whether the programs are meeting their conservation goals;
- provide for the review of individual permit holders and revocation of shares if the share holder fails to pass such a review;
- realize total recovery of costs (the proposed percentages may not be sufficient); and
- are only transferable if the above standards are enacted.

Additionally, we recommend that the language allowing processor quota shares be dropped and remove any provision stating that only permit holders can vote in the referendum.

Conserve Atlantic Highly Migratory Species

NMFS is responsible for conserving Atlantic highly migratory species like tunas, swordfish, marlins, sailfish, and coastal and pelagic sharks. All of these species, with the exception of sharks, are also managed under multilateral agreements through the International Commission for the Conservation of Atlantic Tunas (ICCAT).

In 1990, the Magnuson-Stevens Act and Atlantic Tunas Convention Act (ATCA) were amended to preclude U.S. fishery managers from issuing regulations, which have the effect of “decreasing a quota, allocation or fishing mortality level,” recommended by ICCAT. Since then, NMFS has done little more than implement ICCAT quotas and allocate them among domestic user groups. Moreover, where no ICCAT recommendations exist, no precautionary measures have been taken.

Although ICATT sets quotas, measures to implement the quotas and minimize bycatch mortality, such as area closures and gear modifications, must be implemented through domestic regulations. NMFS, however, interprets the law to prevent the U.S. from unilaterally reducing bycatch if it would affect the ability to fill the U.S. quota.

Concerns:

In cases where domestic management requirements are more stringent than those agreed to by the international community, NMFS and industry have often inappropriately interpreted this provision as essentially exempting U.S. HMS fisheries from the requirements of the Magnuson-Stevens Act. Such action is inappropriate and inconsistent with the intent of the Magnuson-Stevens Act and unfair to other commercial fishermen who must follow U.S. law.

Recommendations:

To address these concerns, the draft should be amended to include language that:

- gives the U.S. greater discretion and flexibility in the conservation and management of highly migratory species;
- repeals language that prevents or hinders the U.S. from implementing management measures that are more conservative than those recommended under international agreements; and
- requires NMFS to meet the requirements of the Magnuson-Stevens Act when managing highly migratory species.

Similarly, the ATCA should be amended to remove language limiting U.S. authority to conserve highly migratory species. Legislative language implementing these changes is contained in H.R. 2570.

Fishery Management Councils

Although regional fishery management councils are charged with managing the nation's marine fish for all Americans, representatives of fishing interests dominate the councils. Interests of the general public, as well as non-consumptive users of marine fish, such as divers, are not adequately represented on the councils. Marine fish are public resources and must be managed in the public trust. Decisions regarding their management should be made in the public interest, not simply the economic interest of the fishing industry. Accordingly, the interests of the public must be adequately represented on regional fishery management councils.

Concern:

While we support your intention of adding a non-fishing voice to each council, we feel that it is only a small step toward the balance that we need and deserve on these fishery management councils.

Recommendation:

To address these concerns, we recommend the provision from H.R. 2570 that calls for balanced representation between commercial fishermen, recreational fishermen, and individuals who represent the public and do not derive any of their annual income from commercial and recreational fishing.

Authorization of Appropriations

Finally, Mr. Chairman, we strongly urge you to increase significantly the level of authorized funding in the bill. In addition, we would urge you to look at increased user fees and the proposed allocation of funds from the Saltonstall Kennedy program to fisheries management as proposed in H.R. 2570. These funds are already being collected and were originally intended to be used to promote the fishing industry. We can think of no better way to promote the fishing industry than through sustainable fisheries management. Let's return a greater share of these annual funds back to their original purpose.

Conclusion

Once again, I, on behalf of the National Environmental Trust and the Marine Fish Conservation Network, appreciate the opportunity to testify on your discussion draft to reauthorize the Magnuson-Stevens Fishery Conservation and Management Act. The Network looks forward to working closely with you and your staff to strengthen this draft prior to its introduction so that we can give it our full support. I would be happy to answer any questions.