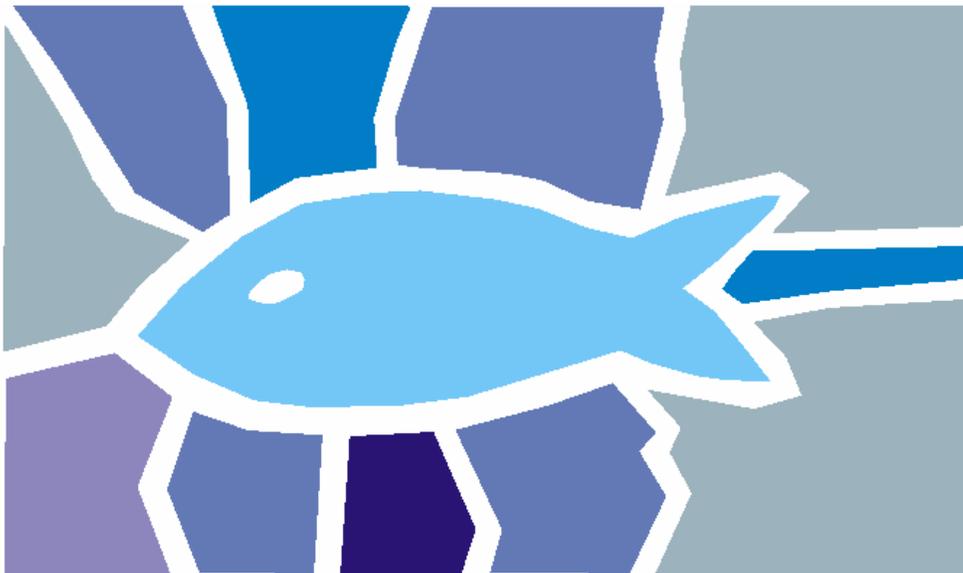


**Positions of the Regional Fishery Management
Council Chairs on Reauthorization of the Magnuson-
Stevens Fishery Conservation and Management Act**

April 28, 2005



Preface

The 109th Session of Congress is currently underway and it is anticipated that reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) will be addressed during this Congress. Regional Fishery Management Council (RFMC) input on MSA reauthorization has been requested by U.S. Senators Ted Stevens (R, Alaska), Daniel Inouye (D, Hawaii), Gordon Smith (R, Oregon), and Olympia Snowe (R, Maine), as well as U.S. Representative Wayne Gilchrist (R, Maryland). At the annual meeting of the RFMC Chairs and Executive Directors in Dana Point, California on April 27 – 28, 2005, the collective RFMC Chairs considered various issues associated with MSA reauthorization towards the purpose of developing consensus positions, including previous positions developed in 2001 and 2002.

This document describes the RFMC Chairs' positions on the nine issues developed at the referenced meeting. This document also contains the Council Chairs' positions from 2001 and 2002, as updated on the basis of a review for relevance and consistency with the 2005 positions to insure that any 2005 positions supercede and take precedence over any potential conflicts with prior positions. The Chairs adopted these positions, with the understanding that positions on outstanding relevant issues would be forthcoming at some point in the future.

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Issue 1: Dedicated Access Privileges (Individual Fishing Quotas, Community Quotas, Area-Based Quotas, and Fishing Cooperatives)

Preamble

A reauthorized MSA shall include comprehensive authority to develop dedicated access privilege programs, generally referred to as individual quotas (IQs), but also referred to as area-based quotas, community quotas, fishing cooperatives, allocation systems, or share-based programs.

No later than 18 months after reauthorization, the Secretary of Commerce (Secretary), in consultation with RFMCs, should develop National Guidelines consistent with the recommendations in this document for the establishment of allocation systems, including, but not limited to, IQs, community quotas, and cooperatives. However, the development of these National Guidelines shall not prevent the adoption of a new IQ program or compromise existing IQ programs while the guidelines are under development. Guidelines shall not be applied retroactively, although existing programs may be subject to periodic review and revision by RFMCs as appropriate.

Criteria for Allocation

The initial allocation of interests under an IQ program shall be consistent with existing National Standard 4. The RFMCs shall consider the interests of those who rely on the fishery, including vessel owners, processors, communities, and fishing crews. An IQ program may include provisions to protect these interests. However, goals of the IQ program should also be to create market-based programs and conserve the resource.

Conservation

IQ programs should include incentives to reduce bycatch and discards and to promote conservation wherever possible, consistent with existing National Standard 9.

Limitation on Interests and the Duration of IQ Programs

Shares under an IQ program must have tenure sufficient to support and facilitate reasonable capital investment in the fishery; however, any shares allocated under the program shall be a privilege, which may be revoked without compensation to the holder.

IQ program duration shall be at the individual RFMC's discretion without required sunset.

IQ Program Review

Periodic, comprehensive review of IQ programs shall be required to assess the extent to which the program is meeting original goals and objectives and to assess the social and economic ramifications to program beneficiaries.

Quota Transfers

Appropriate provisions governing transferability, which may include permanent and temporary transfers, shall be subject to limitations consistent with the social objectives of the program and shall be determined by individual RFMCs.

Excessive IQ Shares and Quota Accumulation Limits

The IQ program allowance should include limits on shares, including caps on holdings of a person or use of shares by a person or a single vessel. However, such limitations shall be determined on a program-by-program basis by the individual RFMCs.

Referenda of IQ Programs

Referenda shall not be a mandatory requirement for Secretarial approval of an IQ program. RFMCs may, however, establish requirements for referenda for individually tailored IQ programs.

IQ Program Cost Recovery Fees

IQ programs should include an allowance for the collection of fees to offset management and monitoring costs, including state costs. However, the collection of fees should not exceed 3% of the exvessel value and should take into consideration existing industry-born costs for observers.

Enforcement, Monitoring, and Data Collection

IQ programs should include provisions for effective monitoring and enforcement of the goals and objectives under the program.

Issue 2: Competing Statutes

MSA and National Environmental Policy Act

Following the addition of critical provisions to MSA sections 302, 303, and 305, thereby making MSA fully compliant with the essential intent of National Environmental Policy Act (NEPA), reauthorized legislation should specify MSA as the functional equivalent of NEPA and exempt from NEPA in the same manner as the MSA is exempt from the Federal Advisory Committee Act (FACA). Areas to be addressed include analyzing a full assessment of environmental impacts, a range of reasonable alternatives, cumulative effects, and the extent of analysis on effects to the human environment, as well as a comprehensive public participation process. The specific proposed amendment language is as follows:

SEC. 302 [16 U.S.C. § 1852] REGIONAL FISHERY MANAGEMENT COUNCILS CONTENTS OF FISHERY MANAGEMENT PLANS

(i) PROCEDURAL MATTERS.

(7) Prior to a Council submitting a fishery management plan, plan amendment or proposed regulations to the Secretary as described in Section 303, a Council shall prepare a fishery impact statement that shall

(a) include a range of reasonable alternatives;

(b) specify and assess likely direct and cumulative effects of each alternative on the physical, biological and human environment, including

(i) participants in the fisheries and fishing communities affected by the plan, amendment, or regulation and

(ii) participants in fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council representatives of those participants;

(c) be considered in draft forms during at least two Council meetings; and

(d) be made available to the public in draft form at least 10 days prior to the date of final Council action.

A final fishery impact statement shall be submitted to the Secretary coincident with a final recommendation.

SEC. 303 [16 U.S.C. § 1853] CONTENTS OF FISHERY MANAGEMENT PLANS

(a) REQUIRED PROVISIONS.

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

...

(9) include a fishery impact statement of the plan or amendment (in the case of a plan or amendment thereto submitted to ~~or prepared by~~ the Secretary after October ~~1, 1990~~**2005**) which will assess, specify, and describe the likely effects, ~~if any~~, of the conservation and management measures ~~on~~ **as described in Section 302 (i) 7. Fishery management plans prepared by the Secretary shall conform to the requirements of Section 302 (i) 7.**

~~(A) participants in the fisheries and fishing communities affected by the plan or amendment; and~~

~~(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council representatives of those participants;~~

SEC. 305 [16 U.S.C. § 1855] OTHER REQUIREMENTS AND AUTHORITY

...

(e) EFFECT OF CERTAIN LAWS.—

(1) The Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and Executive Order Numbered 12866, dated September 30, 1993, shall be complied with within the time limitations specified in subsections (a), (b), and (c) of section 304 as they apply to the functions of the Secretary under such provisions.

(2) Any plan or amendment or regulation developed under sections 302, 303, and 304 of this act, is deemed to be in compliance with the National Environmental Policy Act.

MSA and National Marine Sanctuary Act

Fishery management authority in national marine sanctuaries (NMS), for all species of fish as defined in the current MSA, shall be under the jurisdiction of the RFMCs and the Secretarial approval process described in the current MSA. This authority shall not be limited to species of fish covered by approved fishery management plans (FMPs), but shall include all species of fish as defined in the current MSA and shall cover the full range of the species in the marine environment. Prior to reaching decisions on the management regulations affecting fishing in NMS waters, a RFMC shall give full consideration of the responsibilities, goals, and objectives of individual NMS and any specific recommendations of the NMS.

In addition to the proposed changes in the MSA above, the RFMCs also recommend the National Marine Sanctuaries Act be amended to achieve jurisdictional clarity as follows:

NATIONAL MARINE SANCTUARIES ACT
SEC. 302. [16 U.S.C. § 1432] DEFINITIONS

As used in this chapter, the term-

...

(8) "sanctuary resource" means any living or nonliving resource of a national marine sanctuary, **excluding fish and Continental Shelf fishery resources under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1811)**, that contributes to the conservation, recreational, ecological, historical, education, cultural, archaeological, scientific, or aesthetic value of the sanctuary; and

SEC. 304. [16 U.S.C. § 1434] PROCEDURES FOR DESIGNATION AND IMPLEMENTATION

(a) Sanctuary Proposal

...

(5) **FISHING REGULATIONS-The appropriate Regional Fishery Management Council shall prepare fishing regulations for any fish and Continental Shelf fishery resources within a sanctuary in accordance with section 302 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1852). The Secretary shall review the proposed fishing regulations in accordance with section 304 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1854), and other applicable statutes. Regional Fishery Management Councils shall cooperate with the Secretary and other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practical stage in drafting any sanctuary fishing regulations. Preparation of fishing regulations under this section shall constitute compliance with section 304(d) of this Act. Fishing in compliance with regulations prepared under this section shall not constitute a violation of this Act.**

MSA and Freedom of Information Act

The MSA should be amended to clarify the confidentiality of observer data relative to the Freedom of Information Act (FOIA); i.e., unless otherwise authorized (as in 402(b)(1)(E) for example), prohibit the release of non-aggregated observer data. Other information such as that generated by electronic monitoring devices (VMS or video cameras, for example) should be afforded similar protection.

State law enforcement officials under a cooperative enforcement agreement with NOAA should be provided access to information and data gathered by the vessel monitoring system (VMS) operated by the National Marine Fisheries Service (NMFS) Office of Law Enforcement, and such information should be allowed for use in prosecutions of state and federal law violations.

The U.S. Coast Guard should be provided access to VMS data for enforcement and homeland security purposes unless otherwise arranged by agreement between agencies for enforcement, homeland security, and maritime domain awareness programs.

Issue 3: Integration of Science in the Fishery Management Process

Separation of Conservation and Allocation Processes

Final determinations of necessary scientific fishery parameters should be made within the RFMC management process and not in separate, distinct bureaucracies.

Councils shall adopt acceptable biological catches (ABCs) within limits determined by their Scientific and Statistical Committees (SSCs) (or appropriate scientific body) and shall set total allowable catches (TACs) and/or management measures, such that catch would be at or below ABC.

Structure and Function of SSCs

The specific structure of the SSC should be based on the policy of each Council consistent with the overall guidance of the MSA.

RFMCs should retain appointment authority for SSCs and establish terms to meet their standard administrative processes.

SSC members should not be subject to any limit to the number of terms they may serve.

When possible, the SSC should meet concurrently with Council meetings and at the same locale.

Opportunity should be provided for regional or national SSC meetings where members from different regions could discuss best practices and seek to identify analytical and research needs.

Best Scientific Information Available

Each Council's SSC shall peer review fundamental analyses needed for fishery management, including such matters as stock assessments, fishery impact models, and projection methodologies. For purposes of compliance with the Data (Information) Quality Act and attendant Office of Management and Budget guidelines, the MSA shall constitute the SSCs as an appropriate alternative review mechanism for influential and highly influential information. The SSC shall make a determination of the best available scientific information prior to Council decision-making and provide the Council with an assessment of the soundness of the scientific conclusions and the uncertainty of the science. The Council will consider the soundness of the data, levels of certainty, and socioeconomic factors when developing catch limits and/or management measures.

Best scientific information available determinations include the social and economic sciences, as well as the physical and biological sciences.

Need for Independent Review

There should be an independent peer review of scientific information and processes used by each Council at appropriate intervals determined by the Council. Such reviews should not be limited to stock assessments, but could also extend to socioeconomic and other types of models and analyses used by the Council.

Use of Default Mechanisms

Default measures that close fisheries entirely until science and management integration standards are met should not be used. Emergency and interim rules may be extended as necessary to address delays in the use of best available science, miscellaneous violations of National Standard 1, or other such potential concerns.

Making Research Relevant

SSCs should develop research priorities and identify data and model needs for effective management.

Other

NMFS should be provided with the support to dedicate more resources to stock assessments and socioeconomic impacts.

Issue 4: Ecosystem Approaches to Management

Overall Conclusions for Ecosystem Approaches

Ecosystem-based management is an important tool for enhancing fisheries and the ecosystems on which they depend.

The RFMCs and NMFS should work collaboratively to pursue an ecosystem approach to fisheries involving all stakeholders, managers, and scientists.

The RFMCs endorse a preference for the use of currently available tools in implementing ecosystem-based management and the resources and funding necessary to better engage those tools.

RFMCs and NMFS regions need to maintain the flexibility to manage regional fisheries. The concept of “national standardization” is incompatible with the need for ecosystem approaches to reflect regional differences.

A holistic approach is a realistic approach only with collaboration among RFMCs and NMFS, partner agencies, and stakeholders.

Regional Ecosystem Planning and the Role of Regional Ocean or Ecosystem Councils

The RFMCs do not support separate ecosystem councils, but do support establishment of regional coordinating bodies comprised of regional authorities/jurisdictions and public expertise to address non-fisheries management issues.

Technical Requirements for an Ecosystem Approach to Fisheries

The RFMCs and NMFS should (1) identify, prioritize, and develop weighting for ecosystem characteristics as recommended by the SSC at the *Managing Our Nation’s Fisheries II* conference (including human characteristics and reference points and performance indicators to measure progress, future monitoring, and research) and (2) inventory current ecosystem projects.

To develop successful ecosystem management, the approach must progress in a deliberate, evolutionary, and iterative process.

Science Limitations

A lack of data should not limit our ability to adopt a realistic ecosystem management approach.

Additional funding is needed to enhance ecosystem data collection and model development. The goals and objectives of any ecosystem management approach must match the reality of available information, the reality of budget limitations, and the evolutionary nature of the process.

The first priority should be to focus on improvements that can realistically be accomplished in the short term, using and improving on our current management tools, existing data sets, and knowledge, recognizing models and available data will differ by region.

Incorporating Ecosystem Planning in FMPs

Councils should develop ecosystem-based management documents for fisheries.

Ecosystem-based FMPs should be a fundamental, first order goal for each Council or region.

If an overarching fishery ecosystem plan is developed, it should provide general guidance to FMP development.

Process for Developing Ecosystem-Based Goals and Objectives

Broadly defined national level objectives should be developed, followed by regionally defined goals and objectives.

A steering committee comprised of Council and NOAA participants in each region or large marine ecosystem should provide recommendations on the process of developing goals and objectives.

Development of National Guidelines for an Ecosystem Approach to Fisheries

National Guidelines should provide general guidance, recognizing the diversity of ecosystems, and not be technical in nature. It is noted that many of the pitfalls in the development of national guidelines for essential fish habitat [EFH] and the complexities of overfishing can be avoided.

Guidance should help Councils and NMFS to use tools available under MSA and other mandates, to evaluate the potential for ecosystem-based management in each region, and address differences among regions.

Elements of an Ecosystem Approach to Fisheries that should be Codified in the MSA

Great caution should be applied in considering amendments to the MSA that include any specific requirements. More specifically, the RFMC are wary of strict regulations and guidelines that will require Councils to produce new FMP amendments across the board (as occurred with new elements in the 1996 Sustainable Fisheries Act), rather than building an ecosystem approach into existing management practices.

Noting the current MSA allows for ecosystem-based management, the RFMCs do not believe it is necessary to amend the MSA to address ecosystem management. Instead, it is recommended that

regional guidance be developed to help Councils move forward with an increased level of sophistication.

Issue 5: Rebuilding Time Frame

The RFMCs recommend MSA Section 104-297 (e)(4)(A)(ii) be deleted as follows to address the problems associated with the arbitrary 10-year rebuilding time boundary:

- (2) For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations prepared pursuant to paragraph (3) or paragraph (5) for such fishery shall—
 - (A) end overfishing within one year, and specify a rebuilding period that shall—
 - (i) be as short as possible, taking into account the status, mean generation time, and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; ~~and~~
 - (ii) ~~not exceed 10 years, except in cases where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise;~~
 - (B) allocate both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery; and
 - (C) for fisheries managed under an international agreement, reflect traditional participation in the fishery relative to other nations, by fishermen of the United States.

Issue 6: Governor's Nomination of Council Members

The RFMCs recommend no change in the process for nominating Council members.

Issue 7: FACA and Council Chairs Meetings

The RFMCs recommend amending § 302 of the MSA (16 U.S.C. § 1852) by adding subsection (k) as follows.

SEC. 302 [16 U.S.C. § 1852] REGIONAL FISHERY MANAGEMENT COUNCILS

(k) COMMITTEE OF COUNCIL CHAIRS.

(1) There shall be established a Fishery Management Council Committee of Chairs, consisting of the Chairs, Vice Chairs and Executive Directors of each of the Regional Fishery Management Councils identified in subsection (a)(1), and, in each case, selected under subsection (e)(2), of this section.

(2) The Committee of Chairs shall meet at a minimum annually, to discuss national policies and issues related to, and the effectiveness of implementation of, this Act and the relationship of these matters to other applicable laws.

(3) Council Members authorized to receive compensation and expenses under subsection (d)

of this section shall also receive such for meetings of the Committee.

(4) The requirements of the Federal Advisory Committee Act (5 U.S.C. App. 2) shall not apply to the Committee of Chairs, however, the requirements for Councils under subsection (i)(2) of this section shall apply to the Committee of Chairs.

Issue 8: Bycatch Reporting Requirements

The RFMCs recommend the following revision to section 303 (a) (11):

to the extent practicable establish a standardized-reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, ~~to the extent practicable and~~ in the following priority—

- (A) minimize bycatch; and
- (B) minimize the mortality of bycatch which cannot be avoided.

Issue 9: National Saltwater Recreational License

There should be no federal saltwater recreational license. States should be encouraged to maintain or institute licenses.

APPENDIX A

Recommendations of the 2001 Regional Fishery Management Council Chairs Regarding Magnuson-Stevens Fishery and Conservation and Management Act Reauthorization Issues

Originally adopted May 23, 2001. Revised and readopted April 28, 2005 May 3, 2005

At the 2005 Council Chairs and Executive Directors (CCED) meeting, the Regional Fishery Management Council (RFMC) Chairs reaffirmed a number of positions associated with reauthorizing the Magnuson-Stevens Fishery Conservation and Management Act (MSA) that were originally developed at the 2001 CCED meeting. Other 2001 positions were either updated or deleted as obsolete. The 2001 recommendations are listed below, first as a group of “Highest Priority Issues” and then as “Other Significant Issues.” Other than these two groupings, no relative priorities were assigned.

Highest Priority Issues

- **Section 3(29) and Section 304(e)...Redefine Overfishing**
The Council Chairs believe that there are a number of problems related to maximum sustainable yield (MSY)-based definitions of overfishing. For example, data deficiencies may lead to inappropriate calculations of MSY, that in turn skew overfishing definitions. Ultimately, this could lead to unnecessary social and economic dislocation for fishermen who are subject to measures that are tied to stock rebuilding schedules skewed by unrealistic overfishing definitions. We would like to work with the Congress in seeking solutions to our concerns as the re-authorization process proceeds.
- **Section 303(a)(7)...Essential Fish Habitat**
The Sustainable Fisheries Act (SFA) required Councils to identify and describe essential fish habitat (EFH), but gave little direction on how to designate EFH. The EFH definition, i.e., “those waters and substrate necessary for fish for spawning, breeding, feeding or growth to maturity,” allows for a broad interpretation. The EFH Interim Final Rule encouraged Councils to interpret data on relative abundance and distribution for the life history stages of each species in a risk-averse manner. This led to EFH designations that were criticized by some as too far-reaching. “If everything is designated as essential then nothing is essential,” was a common criticism. The Council Chairs believe that the current definition and descriptions of EFH serve a very useful purpose in the consultation process between NMFS and agencies that are responsible for permitting or carrying out proposed development projects in the marine environment. Those waters and substrates necessary to fish for spawning, breeding, feeding, or growth to maturity are all habitats of importance to each fishery stock, and the range of each stock from egg to maturity is overlapped by the ranges of hundreds of other stocks. The Council Chairs do, however, endorse the concept of using habitat areas of particular concern (HAPCs) as the next step in describing areas of EFH critical to certain life history stages for each stock, as proposed in the two Senate bills drafted in 2000. For years

a number of Councils have established HAPCs to protect pristine coral reef habitats and spawning aggregation sites.

- Section 313(a): see also Section 403...Observer Program
The Council Chairs reaffirm their support for discretionary authority to the Councils to establish fees to help fund observer programs. This authority would be the same as granted to the North Pacific Council under Section 313 for observers, but not necessarily limited to use of ex-vessel value as the basis in setting fees.
- Endangered Species Act (ESA)/Marine Mammal Protection Act (MMPA)
The Council Chairs recommend that the Councils be identified, for purposes of consultation, as being action agencies under the ESA and the MMPA, thereby being able to participate in the development of biological opinions.

ESA and MMPA considerations are playing an increasingly significant role in Council fishery management activities. The NMFS has stated that Councils “have a critical role in management of federal fisheries” and “must be aware of effects of proposed fishery management actions on listed species”. However, NMFS and NOAA/GC have determined that the Councils are not federal action agencies; therefore, they are not included in the consultation process.

By foreclosing the opportunity to participate in the consultation process, NMFS and NOAA/GC have made it virtually impossible for Councils to meaningfully address their responsibilities under MSA, ESA, and MMPA.

Therefore, the Council Chairs recommend that the MSA be modified to specify that the Councils are deemed to be action agencies for purposes of formal consultation under ESA and MMPA.

- Section 304(a) and (b)...Coordinated Review and Approval of Plans and their Amendments and Regulations
The SFA amended Sections 304(a) and (b) of the MSA to create separate sections for the review and approval of fishery management plans (FMPs) and amendments, and for the review and approval of regulations. Accordingly, the approval process for these two actions now proceeds on separate tracks, rather than concurrently. The SFA also deleted the 304(a) provision allowing disapproval or partial disapproval of an amendment within the first 15 days of transmission. The Council Chairs recommend modification of these provisions to include the original language allowing concurrent approval of FMPs, amendments and regulations, and providing for the initial 15-day disapproval process. The Councils would also like the ability to resubmit responsive measures rather than having to submit a complete FMP or amendment as is now required by subsection (4) of Section 304(a).

Other Significant Issues

- Section 302(d)...Council Member Compensation
The MSA should specify that Council-member compensation be based on the General Schedule that includes locality pay associated with the geographic locations of the Councils’

offices. This action would provide for a more equitable salary compensation. Salaries of members serving in Alaska, the Caribbean, and Western Pacific are adjusted by a COLA. The salary of the federal members of the Councils includes locality pay.

- Section 302(f)(4) and (7)...Receipt of Funds from any State or Federal Government Organization
Currently Councils can receive funds only from the Department of Commerce, NOAA or NMFS. The Councils routinely work with other governmental and non-governmental organizations to support research, workshops, conferences, or to procure contractual services. In a number of cases, complex dual contacts, timely pass-throughs, and unnecessary administrative or grant oversight are required to complete the task. The Councils request a change that would give them authority to receive funds or support from local, state, and other federal government agencies and non-profit organizations. This would be consistent with Section 302(f)(4) that requires the Administrator of General Services to provide support to the Councils.
- Section 302(i)(3)(A)(ii)...Review of Research Proposals
The MSA should be amended to include a provision for the Councils to close meetings to the public for the purposes of reviewing research proposals. Some of the Councils now provide and administer funding to researchers and fishermen for data collection and other research purposes. The proposals submitted to the Councils for funding may contain proprietary information that the submitters do not want to make public for various reasons. It will be in the best interests of this process for the Councils to have the ability to close meetings to consider these proposals.
- Section 303(b)...Regulating Non-Fishing Activities of Vessels
The Council Chairs recommend that Section 303(b) of the MSA be amended to provide authority to Councils to regulate non-fishing activities by vessels that could adversely impact fisheries or EFH. One of the most damaging activities to such habitat is the anchoring of large vessels near HAPCs and other EFH (e.g., coral reefs, etc.). When these ships swing on the anchor chain deployed in 100 feet of water, 10 to 20 acres of bottom may be plowed up by the chain dragging over the bottom. Regulation of this type of activity by the Councils should be authorized.
- Section 303(b)(7)...Collection of Economic Data
The MSA specifies the collection of biological, economic, and socio-cultural data to meet specific objectives of the MSA, and requires the fishery management councils to consider this information in their deliberations. However, Section 303(b)(7) specifically excludes the collection of economic data, and Section 402(a) precludes Councils from collecting “proprietary or confidential commercial or financial information.” The NMFS should not be precluded from collecting such proprietary information so long as it is treated as confidential information under Section 402. Without this economic data, multi-disciplinary analyses of fishery management regulations are not possible, preventing NMFS and the Councils from satisfying National Standard 2: “...conservation and management measures shall be based upon the best scientific information...”, National Standard 8: “...to the extent practicable, minimize adverse economic impacts...”, and other requirements of the MSA and the Regulatory Flexibility Act (RFA).

The Council Chairs recommend resolution of these inconsistencies by amending the MSA to eliminate the restrictions on the collection of economic data. Amending Section 303(b)(7) by removing “other than economic data” would allow NMFS to require fish processors who first receive fish that are subject to a federal FMP to submit economic data. Removing this current restriction will strengthen the ability of NMFS to collect necessary data, and eliminate the appearance of a contradiction in the law requiring economic analyses while simultaneously prohibiting the collection of economic data necessary for such analyses.

- Section 303(d)(5) and Section 304(d)(2)...Establishment of Fees

The Council Chairs are opposed to the imposition of fees that are not regional in nature and established by the Councils. However, we do support the National Academy of Science’s recommendation that Congressional action allow the Councils maximum flexibility in designing IFQ systems and allow flexibility in setting the fees to be charged for initial allocations, first sale and leasing of IFQs.

- Section 305(c)(2)(A)...NMFS Regional Administrator Emergency or Interim Action Vote

For the purpose of preserving the Secretary’s authority to reject a Council’s request for emergency or interim action, each NMFS Regional Administrator currently instructed to cast a negative vote even if he/she supports the action. While we recognize the extreme sensitivity in recommending a change to the voting responsibilities of our partners in the NMFS, we certainly do not wish to appear to be disparaging the Regional Administrator in any way. However, the Council Chairs believe that Congressional intent is being violated by this policy. We suggest a modification to the MSA as follows (new language in bold):

(A) the Secretary shall promulgate emergency regulations or interim measures under paragraph (1) to address the emergency or overfishing if the Council, by unanimous vote of the members (**excluding the NMFS Regional Administrator**) who are voting members, requests the taking of such action; and ...

- Section 312 (a)...Fisheries Disaster Relief

Purpose: to make available fishery disaster relief funds for fisheries being closed, or severely curtailed as a result of judicial decisions.

Amendment: We suggest modifying Section 312 of the Act as follows (new language in bold):

(a)...

(1) At the discretion of the Secretary or at the request of the Governor of an affected state or a fishing community, the Secretary shall determine whether there is a commercial fishery failure due to a fishery resource disaster as a result of

(A)...

(B)...

(C)...

(2) or closures imposed by a court to a fishery [Redesignate paragraphs (2), (3), and (4) as paragraphs (3), (4), and (5)]

Revise new paragraph (3) as follows (new language in bold): Upon the determination under paragraph (1) **or (2)** that there is a commercial fishery failure, **or a judicial closure of the fishery** the Secretary...

- Section 402(b)(1) and (2)...Confidentiality of Information
Section 402 replaced and modified former Sections 303(b) and (e). The SFA replaced the word “statistics” with the word “information”, expanded confidential protection for information submitted in compliance with the requirements of an FMP to information submitted in compliance with any requirement of the MSA, and broadened the exceptions to confidentiality by allowing for disclosure in several new circumstances.

The following draft language clarifies the word “information” in 402(b)(1) and (2) by adding the same parenthetical used in (a), and deletes the provision about observer information. The revised section would read as follows (additions in bold);

(b) CONFIDENTIALITY OF INFORMATION -

- (1) Any information submitted to the Secretary by any person in compliance with any requirement under this Act **that would disclose proprietary or confidential commercial or financial information regarding fishing operations, or fish processing operations** shall be confidential information and shall not be disclosed, except...
 - (2) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement under this Act **that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations**, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (1)(E).
- Bycatch Issues
There appears to be an inconsistent definition of bycatch, depending on geography. In the Atlantic, highly migratory species harvested in “catch and release fisheries” managed by the Secretary under 304(g) of the MSA or the Atlantic Tunas Convention Act are not considered bycatch, but in the Pacific they are. We suggest that highly migratory species in the Pacific, managed under a Western Pacific Council FMP and tagged and released alive under a scientific or recreational fishery tag and release program, should not be considered bycatch. Note that there also is an inconsistency between the MSA definitions of bycatch and the NMFS Bycatch Plan. The NMFS definition is much broader and includes marine mammals and birds as well as retention of non-target species. The Council Chairs prefer the MSA definition.
 - Section 302(i)(2)(c)...Notification of Meetings
The Council Chairs recommend that this section be modified to read: “notice of meetings be submitted for publication in local newspapers in the major fishing ports, or by other means that will result in wide publicity”. Other means such as press releases, direct mailings, newsletters, e-mail broadcasts, and web page updates of activities and events, including Council meetings are far more effective in communicating with our target audience than a legal notice in a local newspaper.

- Section 302(a)(1)(D) Caribbean Council
The Council Chairs request that Section 302(a)(1)(D) of the MSA be amended by inserting “Navassa Island,” before “the Virgin Islands”.

APPENDIX B

RECOMMENDATIONS OF THE REGIONAL FISHERY MANAGEMENT COUNCIL CHAIRMEN ON THE REAUTHORIZATION OF THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT

(Based on draft Bill H.R. 4749 dated May 16, 2002, 12:30pm)

Originally adopted May 31, 2002. Revised and re-adopted April 28, 2005

The following is a description of proposed changes to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) under H.R. 4749 and the positions agreed upon by the Chairmen of the eight Regional Fishery Management Councils during their annual meeting May 28-31, 2002, in Sitka, Alaska.

SECTION 3: REPORT ON OVERCAPITALIZATION

Recommendations: This section should be revised to require Secretarial consultation with the Councils in preparation of the overcapitalization report. Also, in subsection (b) page 3, line 6, after the word “financing” add “, government-funded buybacks or other available means.”

SECTION 4: BUYOUT PROVISIONS

(Page 3, line 12 through page 4, line 4). Current language provides that the Secretary can only embark on a buyout program if a Council or “the Governor of a State for fisheries under State authority” requests such a program. The proposed language changes the provision so that the Secretary can engage in a program without the request of a Council or Governor, but the Council or Governor may request such a program if they so wish.

Recommend that current language of the MSA be retained. The Chairmen believe that the Secretary should have the concurrence of the Council or a Governor in order to develop a buyout program.

Page 4, line 5 through page 5, line 11. The current language of the Act means that a vessel being bought out must surrender the applicable permit for which the buyout is intended. The proposed language means that all permits authorizing participation in any U. S. fishery must be permanently surrendered and the holder of a permit that does not currently own a fishing vessel shall be prohibited from engaging in a buyout program (eliminates old section 312(b)(2)(B)).

Recommend support for the proposed language. The proposed language seems to better reflect the intent that all capacity be removed, without being shifted into another fishery. The Chairmen believe that buyouts should apply to all fisheries, whether or not they have been identified as overcapitalized.

SECTION 5: DATA COLLECTION

(Page 5, lines 17-20). The Secretary shall develop a recreational catch data program “...through the use of information gathered from State-licensed recreational fishermen.”

The Chairmen recommend that data from recreational fishermen be included even if a State does not have a marine recreational fishing license.

The Chairmen strongly support better, more timely, collection of data to better meet current management needs, e. g. real time data for implementation of fishery management plan provisions.

Economic Data from processors. Page 6, line 9 through Page 7, line 2. Proposes the Secretary prepare a report to Congress regarding economic data from processors.

Recommendation: The Chairmen do not feel that the requirement for a report, alone, should be all that is adopted in this reauthorization. Councils cannot meet current needs under NEPA, Magnuson, etc. without access to data that describes the full range of the fisheries. The current prohibition prevents councils from being able to evaluate processor sector involvement in the fisheries. **In 2001, the Chairmen recommended the elimination of prohibitions on collecting economic data from processors. The Chairmen reaffirm their support for this position.** [See attached Chairmen's recommendations for the 2001 CCED meeting]

SECTION 6: ECOSYSTEM-BASED MANAGEMENT

The Chairmen agree that management based on ecosystem principles and ecosystem-wide information will be an important component of future fisheries management planning but sufficient information does not exist to embark on development of such plans at this time. Councils now include ecosystem-based information and ecosystem management principles and considerations in fishery management plans, to the extent they can do so. The effect of management on fishery-based communities is extremely important and ecosystem-based management should consider this factor. Improvements in science and the plan development process are clearly warranted and will come with time but adoption of ecosystem-based management now or in the near future is problematic given our current state of knowledge. The councils should lead in the effort to integrate ecosystem management principles into fishery management plans through the existing FMP amendment process..

For the current reauthorization, the Chairmen recommend that only subsection (b) "Authorization of Research" and subsection (c) "Definitions and Criteria for Management" should be included in this reauthorization and the other subsections should be deferred to a future reauthorization process. The Chairmen believe that subsection (a) is redundant to other provisions of the Act, and that it is premature to develop pilot programs (subsection (e)) because of the current lack of data. The Chairmen further recommend that subsection (c) be revised (Page 8, lines 1-2, "In General") to state:

"The Secretary **and the Councils** shall—(A) create a definition for "ecosystem" and for "marine ecosystem"; and..."

Unlike the SFA amendments for such things as EFH, where NMFS only consulted with the Councils in the promulgation of implementing rules, this will emphasize that the Councils must be full and equal partners in developing definitions and criteria for management based on ecosystem management principles and ecosystem-wide information.

Recommend that subsections (a), (d), (e) and (f) not be adopted in the current reauthorization.

Recommend that subsection (b) “Authorization of Research” be included in the current reauthorization.

Recommend that subsection (c) be included in the current reauthorization with the revision in (1) stating “The Secretary and the Councils shall—(A) create a definition for “ecosystem” and for “marine ecosystem”; and”

Recommend that subsections (b) and (c) of Section 6 “Ecosystem-Based Management” be enacted only if Congress provides substantive new funding to NMFS, the Councils and the States to engage in the research and development of an ecosystem-based management system.

SECTION 7: OBSERVERS

Recommend support (workload problems notwithstanding).

SECTION 8: OVERFISHING

(Page 11, lines 12-16). This proposal raises a substantive concern. Currently, definition 3(29) of the Act aggregates “overfishing” and “overfished” within the same definition. In attempting to clarify two different (although related) words, the proposal substantively changes the current interpretation of the word “overfished” with respect to the national standard guidelines adopted by the NMFS.

The proposed language would define an overfished stock as one with a size “below the natural range of fluctuation associated with the production of maximum sustainable yield.” It is unclear what the “natural range of fluctuation” would be or who would decide that term. Arguably, depending on the level of precision (confidence) one wished to achieve, the “natural range” could produce virtually any number. Conservative individuals could push for a small confidence interval around the estimate meaning “overfished” would be almost equal to Bmsy. A more liberal interpretation would produce a larger confidence interval and a lower “low end” of the natural range (i. e. “overfished” would represent a biomass level much lower than Bmsy). One can just imagine the arguments over this distinction, and therefore this definition should be based on the observed range of fluctuations rather than the natural (i.e., theoretical) range of fluctuations.

The NSGs appear to define an overfished stock as one for which the stock size is less than ½ of the Bmsy “minimum biomass threshold.” This is less subjective than the proposed language although still rather constraining on the councils’ flexibility to adopt regionally-specific reference points.

Recommend: The Council Chairs support separating ‘overfishing’ and ‘overfished’ definitions, but have no further specific recommendation at this time.

The proposed addition of the words “due to overfishing” means that a stock that is not building biomass due to environmental factors but is being exploited at a level of mortality that does not jeopardize the capacity of the fishery “to produce the maximum sustainable yield on a continuing basis” would not be considered overfished. Effectively, managers would have done everything possible (maintaining an appropriately low fishing mortality rate) but the stock has not responded due to environmental factors.

Page 11, line 21 through Page 12, line 5. This provision separates, as a reportable distinction, whether a stock is “overfished” due to fishing, or due to other causes. **Recommend support:** Consistent with the proposed language (Page 11, line 21-Page 12, line 5), we believe the definition of ‘overfished, however it is eventually determined, clarifies that that condition is ‘due to overfishing,’ consistent with that section.

Additionally, the Chairmen are concerned about interpretations by some parties of the current language regarding rebuilding requirements [Sec. 304(e)(4)(B)]. For example, in recent litigation on the east West Coast regarding groundfish, plaintiffs are focusing on both the terms both the terms ‘as short as possible,’ and ‘not to exceed 10-years’ as required mandates, regardless of the conditional language or the interpretive NSCs in place. The Chairmen’s concern is that ten years may not be appropriate for some species, and respectfully request that language be included in the Act reinforcing the conditional language in Sect. 304(e)(4)(B)(i) and a firm boundary to the maximum allowable rebuilding time frame, such as currently contained in the NSG on this matter.

SECTION 9: BYCATCH

Subsection (a) (Page 12, line 7) proposes to add the word “seabirds” to the definition of regulatory discards. We do recognize the need to protect seabirds and reduce mortality, but question whether placement of seabirds at this place in the definitions actually serves the purpose intended. **Therefore, until clarity is gained on this proposal, the Chairmen recommend against the proposed change.**

Subsection (b), page 12, lines 10-22. Mandates a time-certain establishment of (and the beginning of implementation of) a standardized bycatch reporting methodology. Also provides an exception in the event such a method cannot be established or implemented within the year. H. R. 4749 modifies this exception by adding “...and the Secretary shall take appropriate action to address those reasons.” The general section seems to be an appropriate inducement to proceed, while not locking the Councils or NMFS into another impossible mandate. However, the new clause in the exception means the Secretary alone is responsible for reconciling the deficiencies obstructing establishment and implementation. The Chairmen believe the Councils should play an equal role in this reconciliation.

Recommend support, with the following added language. The Chairmen believe the new exception should be revised at subsection (b)(2), page 12, lines 21-22 to state that;

“...the reasons why, and the Secretary **and the Council** must reconcile...”

Charitable Donations. Page 12, line 23. Provides for charitable donations of dead bycatch that, under specified conditions, cannot otherwise be avoided. The Chairmen recognize the advantage of such a proposal but also acknowledge the enforcement and administrative burdens the concept may create. **The Chairmen offer no opinion at this time.**

New Section 408, “Gear Development” Page 13, line 14. This creates a new Section 408 titled “**Bycatch Reduction Gear Development**” in the early Gilchrest Draft but changed to “**Gear Development**” in H. R. 4749. Two differences between the Gilchrest draft and H. R. 4749 are that the language for Grant Authority has changed slightly (“...subject to available appropriations...”) and in addition to grant funding being used to minimize bycatch, it can also be used to minimize adverse fishing gear impacts on habitat areas of particular concern. While this

change seems beneficial in Section 408, note the ramifications later when considering the newly-proposed definition of ‘habitat area of particular concern.’

This section must be viewed carefully. It is an attractive proposal but the activity must be properly funded. New subsection (e) adds “Authorization of Appropriations” in the amount of \$10,000,000 per year. This is much appreciated by the Chairmen but, of course, the funding has to get through the appropriations approval process and the proposal appears to be intended to fund only grants to entities other than NMFS, the Councils and the States. NMFS, Councils and the States need to be funded in this work if the program is to provide useful products.

Recommend: The Chairmen recommend that new Section 408 be enacted only if the Congress provides substantive new funding to NMFS, the Councils and the States and for research and development grants to engage in the research necessary to develop, or justify modifications to, fishing gear that will help minimize bycatch to the extent practicable.

SECTION 10: FISH HABITAT RESEARCH AND PROTECTION

Page 16, lines 7-21. Focuses conservation on those habitats for which sufficient information exists to be effective, or fishing activities for which the Council determines that the effects jeopardize the ability of the fishery to produce MSY on a continuing basis. This appears to be a useful attempt to direct limited resources towards the most important aspects of the EFH issue. H.R. 4749 adds to the required provisions of FMPs a provision to “minimize to the extent practicable adverse effects on habitat areas of particular concern caused by fishing.” This seems acceptable until one reads the newly-proposed definition of ‘habitat area of particular concern’ in H.R. 4749.

H.R 4749 adds a new definition of habitat area of particular concern as follows:

- (46) The term ‘habitat area of particular concern’ means any discrete habitat area that is essential fish habitat and that—
- (A) provides important ecological functions;
 - (B) is sensitive to human-induced environmental degradation; or
 - (C) is a rare habitat type.

This seems to mean that, once a discrete area is identified as essential fish habitat, any area that meets the tests in (A), (B) or (C) is automatically defined as a habitat area of particular concern, invoking some of the other mandatory measures that councils believe should be discretionary. The Chairmen wonder who decides whether an area meets the criteria in (A), (B) and (C)?

The Chairmen do not believe that such a specific definition is warranted. Effectively, it creates the same concerns that surfaced after passage and implementation of the SFA, e.g., EFH, in practical application (although not original intent), was defined as “everywhere.”

The Chairmen recommend support of Section 10 only if the definition of habitat area of particular concern is modified as follows, or deleted.

- (46) The term ‘habitat area of particular concern’ means any discrete habitat area that is a subset of essential fish habitat critical to spawning, breeding, feeding or growth to maturity and that a Council, or the Secretary for any plan developed by the Secretary, has so designated in a fishery management plan or plan amendment.**

The Chairmen support authority for the Councils to determine what constitutes an ‘adverse impact.’

**SECTION 11: DEMONSTRATION PROGRAM FOR OYSTER
SANCTUARIES AND RESERVES**

The Chairmen have no comment on this issue.

SECTION 12: INDIVIDUAL QUOTA LIMITED ACCESS PROGRAMS

The Chairmen have a number of recommendations to offer on this section but will depart from line-by-line analysis in favor of several broad recommendations. **The Chairmen recommend lifting the moratorium [see attached previous recommendations], with the following comments and recommendations:**

- 1. Any IFQ developed by a Council should only be able to be terminated by that Council through a fishery management plan or plan amendment.**
- 2. There should be no mandatory referenda to approve initiation of, or to ratify final approval of, a plan or plan amendment containing an IFQ. Essentially, the Chairmen believe that the existing council process is the appropriate forum for consideration, development and approval of such plans.**
- 3. The issue of processor shares of individual quotas should be determined by the Council developing the plan. The implications of this issue will vary by region.**
- 4. The ten-year sunset/review provision should be eliminated. The Councils do not support statutory sunset dates, but do support periodic review. The Councils can change or eliminate their IFQ plans as necessary by plan amendment.**
- 5. On the issue of fees, the Council developing the plan should establish the fees, the NMFS should collect the fees, and use of the fees should be only for the FMP for which the fees were collected.**
- 6. The Councils reaffirm their position that IFQs are not property rights and termination of a program does not constitute a taking.**

SECTION 13: COOPERATIVE EDUCATION & RESEARCH.

The Council Chairmen have no comment on this issue.

NOTE: On page 32, lines 10-11, "New England Fisheries Science Center" SHOULD read, "Northeast Fisheries Science Center."

SECTION 14: HIGHLY MIGRATORY SPECIES.

The Council Chairmen have no comment on this issue.

SECTION 15: PROHIBITED ACTS.

The Council Chairmen have no comment on this issue.

SECTION 16: MEMBERSHIP OF FISHERY MANAGEMENT COUNCILS

Page 33, line 23. This proposal would add New York to the member states of the New England Council. This is a regional issue on which the Chairmen have chosen not to offer a collective

opinion. The Mid-Atlantic Council supports the proposal. The New England Council believes there is a better way to address the issue. Both Councils are encouraged to pursue their views individually.

Page 34, Line 4. Additional Secretarial member. The Chairmen are uncertain what has prompted this proposal and note a technical error. H.R. 4749 makes substantive changes to the Gilchrest draft. The Gilchrest draft stated such member could not be directly employed or substantively compensated by the commercial, charter, or recreational fisheries. This seemed to leave open choices from academia, environmental organizations, or government. H.R. 4749 removes these qualification criteria, changes numbers of members, and cites an incorrect subsection as the authorizing subsection for how the appointments shall be made. (Section 302(b)(6) is the subsection that authorizes the Secretary to remove an appointed council member for just cause).

Recommend that this provision not be adopted because it unnecessarily adds to membership without a clear purpose. This adversely impacts both organizational efficiency and administrative costs.

The Chairmen believe that the appropriate way for knowledgeable and experienced citizens to become members of a Regional Fishery Management Council continues to be to have the Governors of the States include them on their nomination lists.

SECTION 17: MISCELLANEOUS AMENDMENTS

The Chairmen believe the proposed language does not substantively add to the effectiveness of the Act and respectfully request that such language changes not be adopted.

SECTION 18: FOREIGN FISHING

The Council Chairmen have no comment on this issue.

SECTION 19: DRIFTNETS

The Council Chairmen have no comment on this issue.

SECTION 20: SOURCES FOR DATA IN FISHERIES RESEARCH

Recommend support. Adds clarity that fishery-dependent as well as fishery-independent data sources should be used.

SECTION 21: MISCELLANEOUS FISHERY PROTECTIONS IN FISHERY MANAGEMENT PLANS

The Chairmen believe the proposed addition of a new paragraph (13) to section 303(b) is redundant [see section 303(b)(2)] and furthermore does not substantively add to the effectiveness of the Act. As alluded to in Section 17, such language may assist those who seek reinforcement in litigation. Again, believing that this is counterproductive to effective fishery management, the **Chairmen respectfully request that such language not be adopted.**

SECTION 22: COOPERATIVE MARINE EDUCATION AND RESEARCH PROGRAM

While the Chairmen believe support and funding for marine education and research is worthwhile, The Secretary can enter into such cooperative agreements without this section being passed. The Chairmen believe the list of included research items is too limiting and may constrain the funding of other appropriate areas of research. **Consequently, the Chairmen oppose Section 22 in its current limited form.**

SECTION 23. AUTHORIZATION OF APPROPRIATIONS

Recommend that the requirements of the SFA in 1996, and any new mandates under a 2002 reauthorization bill be adequately funded by the Congress. The Chairmen respectfully request that, if the Congress wishes to require more attention be paid to these issues, then the Congress must provide sufficient funding. Staffs within State and Federal agencies and the regional Councils are “fully exploited.” There is no “free time” to fill with new mandates; in fact, we need funding to cover the “old mandates” enacted in 1996.