



Assessment of H. R 200, Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act as Passed by House of Representatives

The Marine Fish Conservation Network (MFCN, or “Network”) is a coalition of commercial and recreational fishing associations, regional and national conservation groups, aquaria, and marine science organizations. For the last two decades, we have united commercial fishermen, recreational anglers, conservationists, scientists and citizens around a shared mission: **conserving and revitalizing wild ocean fisheries**. We aim to promote the long-term health of U.S. fisheries and strengthen the myriad of diverse small businesses that make up our fishing communities while ensuring our oceans and those who rely upon them can successfully meet the emerging economic and environmental challenges of the future.

Overview

Well-managed, abundant fisheries and strong fishing businesses begin with a strong federal law. The U.S. has taken a leadership role in implementing science-based fisheries management with the Magnuson-Stevens Act, and **this federal fisheries law is working**. We are making steady progress in restoring the health of U.S. fisheries due in great part to Congress’ leadership during the last two reauthorizations of the Magnuson-Stevens Act. The law’s science-based conservation requirements are essential to improving the long-term health and viability of our nation’s marine ecosystems, ocean fisheries, and coastal small fishing businesses and communities.

However, in some cases, the ability of the councils to meet their management goals and objectives has proven challenging. In certain regions, some fish populations have been slow to rebound. Infrequent stock assessments, catch data limitations, and bycatch remain problem areas, affecting the productivity and recovery of fisheries in many regions.

The Network urges Congress to preserve the science and conservation advancements already secured in previous reauthorizations of the Magnuson-Stevens Act. We support greater improvements in the law that promote the long-term health of U.S. fisheries, strengthen the wellbeing of fishing communities, and ensure that our oceans and those who rely on them can successfully meet the emerging challenges of the future.

H.R. 200, the Changes and the Implications

The House of Representatives passed H.R. 200 on July 11, 2018. The bill, as passed, reflected changes included in a Manager’s Amendment submitted by the primary sponsor, Rep. Don Young (R-Alaska), as well as a number of other amendments offered by various members. Although the final version of the bill omitted some

particularly egregious provisions that would have rendered the National Environmental Policy Act, Endangered Species Act, Marine Sanctuaries Act and Antiquities Act largely ineffective with respect to fisheries issues, H.R. 200 remains a bill that would seriously cripple the conservation and management provisions of the Magnuson-Stevens Fishery Conservation and Management Act. Significant provisions of the bill are examined in greater detail below.

TITLE I—MAGNUSON-STEVENSONS ACT FINDINGS AND DEFINITIONS, AMENDMENTS AND REAUTHORIZATION

SEC. 102. AMENDMENTS TO DEFINITIONS

- This section amends that part of the definition of “bycatch” to specifically exclude “fish released under a recreational catch and release fishery,” rather than “...a recreational catch and release fishery management program.” This is a reasonable amendment, as the current “catch and release fishery management program” language has been construed to mean fish released pursuant to a specific NMFS program (e.g., the Cooperative Shark Tagging Program); fish intentionally caught and released outside such NMFS programs are treated as “discards,” which doesn’t reflect the reality in recreational fisheries.
- This section would also define the term “depleted,” replace the term “overfished” with the term “depleted” wherever it appears, and require the agency to distinguish between fisheries that are depleted as a result of fishing and those that are depleted for reasons other than fishing in its annual report, even though the use of the term “depleted” rather than “overfished” seems to have no functional impact on the law or the management process.
- This section also adds a term “subsistence fishing,” which means harvest for “customary and traditional uses.” This is a provision that, on its face, seems intended to recognize the traditional practices of native populations.

TITLE II—FISHERIES MANAGEMENT FLEXIBILITY AND MODERNIZATION

SEC. 201. DEFINITIONS

- This section defines a “mixed-use fishery” as a fishery in which at least two of the three fishing categories—recreational fishing, charter fishing, and commercial fishing—takes place. Such definition will effectively deem any recreational fishery a “mixed-use fishery,” as there are few if any recreational fisheries that don’t include a charter component.

SEC. 202. PROCESS FOR ALLOCATION REVIEW FOR SOUTH ATLANTIC AND GULF OF MEXICO MIXED-USE FISHERIES

Subsections (a), (b)

- This subsection would require the Secretary of Commerce, within 60 days after H.R. 200 was enacted, to engage the National Academy of Sciences to conduct a study of mixed-use

fisheries in the South Atlantic and Gulf of Mexico, which would provide guidance to regional fishery management councils on criteria that could be used to allocate harvest in such fisheries, develop procedures for allocation reviews, review all current allocations in affected mixed-use fisheries and apply economic models to estimate the direct and indirect economic contributions of each sector. Such report would be completed one year after initiation.

Subsection (c)

- This subsection would, beginning two years after the enactment of H.R. 200 and every five years thereafter, require the South Atlantic and Gulf of Mexico fishery management councils to review the recreational and commercial allocations in each mixed-use fishery, requiring such regional fishery management councils to consider the conservation and socioeconomic benefits accruing from each of the two sectors. Such provision would require the specified regional fishery management councils to review all such allocations on a regular basis, whether or not there was any objective need for such review, and override the councils' discretion to review allocations only when there was a need urgent enough to justify the expenditure of council time and resources on such an effort.

SEC. 203. ALTERNATIVE FISHERY MANAGEMENT MEASURES

- This section would specifically allow regional fishery management councils to adopt "alternative" fishery management measures to manage recreational fisheries or the recreational component of mixed-use fisheries, including measures based on extraction rates, fishing mortality targets and control rules. The provision is probably not necessary, as such "alternative" measures are already permitted under current law, so long as overfishing does not result from their use.

SEC. 204. MODIFICATIONS TO THE ANNUAL CATCH LIMIT REQUIREMENTS

Subsection (a) Regional fishery management councils

(1) Annual catch limit requirements for certain data-poor fisheries

- This subsection would eliminate the need to set annual catch limits, and instead allow existing annual catch limits to be carried forward, in the case of certain species for which the annual catch limit is at least 25% below the overfishing limit, and no peer reviewed stock assessment has been performed within five years, and which are not subject to overfishing. It

should be noted that a stock may be overfished and still meet the subsection's criteria. The subsection would thus eliminate the need for a precautionary approach in the cases of data-poor stocks, which carry the greatest burden of management uncertainty; for example, without a recent stock assessment, there is no assurance that the stock is not, in fact, being overfished or that the existing overfishing limit is appropriate.

(2) Consideration of ecosystem and economic impacts

- This subsection would allow ecosystem changes and the economic needs of fishing communities to be considered when setting annual catch limits, which increases the possibility that annual catch limits will not meet the biological needs of the stock.

(3) Limitations to annual catch limit requirement for special fisheries

- This subsection would exempt ecosystem component species, a fishery for a species with a life cycle of "approximately" one year unless overfishing is occurring (but regardless of whether the stock is overfished), and any stock of fish for which more than half of each year class will complete its life cycle within 18 months and is not significantly impacted by fishing mortality, from the annual catch limit requirement. Such exemption could make it difficult to properly manage short-lived forage species.

(4) Relationship to international fishery efforts

- This subsection allows a regional fishery management council, when establishing annual catch limits for a species, to consider fishing that occurs outside of U.S. waters, eliminates the annual catch limit requirement for any species not subject to a transboundary agreement, if any portion of the fishery or any aspect of such species' life history is transboundary, and further provides that if an annual catch limit is established for such species, it must take fishing outside of U.S. waters into account.

(5) Authorization for multispecies complexes and multiyear annual catch limits

- This subsection allows regional fishery management councils to establish annual catch limits for multispecies complexes, without requiring that all species in such complex exhibit similar life histories and levels of abundance.

- This subsection also allows annual catch limits to be set for continuous periods of up to three years, without a provision requiring annual review to determine that such annual catch limits remain appropriate.

(6) Ecosystem component species defined

- This subsection defines ecosystem component species as nontargeted species incidentally harvested in a fishery, regardless of stock status, or a nontargeted species that is incidentally harvested and is neither overfished nor subject to overfishing. The distinction that allows incidentally harvested stocks “in a fishery” to be exempt from annual catch limits, even if overfished or subject to overfishing, is cause for concern.

(7) Rule of construction

- Nothing in the section is to be construed as creating an exception to the National Standards contained in Section 301(a) of Magnuson-Stevens, although it is unclear, as a practical matter, whether such subsection can be effective; for example, how one can comply with National Standard 1, prohibiting overfishing, if no annual catch limits are in place.

Subsection (b) Action by the Secretary

- In the event that a regional fishery management council notifies the Secretary that it intends to carry forward an annual catch limit for a data-poor stock pursuant to the provisions of subsection (a)(1), described above, the Secretary shall complete a peer-reviewed stock assessment of the fishery in question within two years after receiving such notice.

SEC. 205. LIMITATION ON FUTURE CATCH SHARE PROGRAMS

- This section would prohibit the New England, Mid-Atlantic, South Atlantic and Gulf of Mexico fishery management councils, as well as the Secretary of Commerce, with respect to highly migratory species, from creating a catch share program in any fishery unless such program has been approved in a referendum by a majority of the permit holders in such fishery.
- The section also changes the requirements for any referendum held to approve any catch share program from 2/3 of the permit holders voting to a majority of all permit holders eligible to vote, and clarifies the criteria for permit holders in the Gulf of Mexico who are eligible to vote. In the case of fisheries managed by the agency, no catch share program could be proposed absent a petition supported by at least 50% of all eligible permit holders. Thus, catch share programs with broad support among active fishermen could easily be defeated by the apathy of the holders of inactive

permits; the risk of that occurring is greatest in just the sort of fisheries that are most likely to benefit from a catch share program—those that are badly overfished and not producing anything close to maximum sustainable yield, with substantial latent effort waiting to jump back into the fishery once the stock shows any level of recovery.

SEC. 206. STUDY OF LIMITED ACCESS PRIVILEGE PROGRAMS FOR MIXED-USE FISHERIES

Subsection (a)

- This subsection would require the Secretary to engage the National Academy of Sciences to conduct a study of catch share programs in mixed-use fisheries, which would concentrate on the “inequities” arising out of such programs, and submit such study to Congress.

Subsection (b)

- This subsection would impose a moratorium on the creation of new catch share programs in mixed-use fisheries until the report required by subsection (a) is issued; any programs already pending would be exempted from the moratorium, but such programs would have to be revised to comply with the report’s recommendations once it is issued. Such subsection would, for a period of at least one year, take away regional fishery management councils’ ability to employ management measures that have been proven effective in eliminating overfishing, and substantially limit such councils’ discretion to craft measures tailored to a particular fishery even after the moratorium is lifted.

SEC. 207. COOPERATIVE DATA COLLECTION

Subsection (a) Improving data collection and analysis

- This subsection would require the agency to prepare a report identifying data and analysis that might serve to reduce uncertainty in a stock assessment, and determine whether such data and analysis could be provided by fishermen, fishing communities, universities or research institutions, without establishing scientific qualifications for the persons gathering such data or performing such analysis.
- Furthermore, this subsection would seek ways to incorporate such data into stock assessments and other scientific products used to conserve and manage fish stocks.

Subsection (c) NAS report recommendations

- This subsection would require the Secretary to consider, and if feasible implement, recommendations from the National

Academy of Sciences report on the Marine Recreational Information Program, including prioritizing electronic data collection, determining whether MRIP is appropriate for in-season management and, if it isn't, developing alternative management measures that are appropriate for in-season management.

SEC. 208. RECREATIONAL FISHING DATA

- This section would promote the development of state programs to gather recreational fisheries data and instruct the agency to have the Marine Recreational Information Program reviewed by the National Academy of Sciences, despite the fact that such state programs would be redundant with MRIP, and that MRIP was just comprehensively, and for the most part favorably, reviewed by the National Academy less than one year ago.

SEC. 209. MISCELLANEOUS AMENDMENTS RELATING TO FISHERY MANAGEMENT COUNCILS

Subsection (a) Council jurisdiction for overlapping fisheries

- This section would add a member of the Mid-Atlantic Fishery Management Council to the New England Fishery Management Council, and a member of the New England Fishery Management Council to the Mid-Atlantic Fishery Management Council to serve as liaisons capable of representing the interests of fisheries that straddle council boundaries, something that is becoming ever more important as fish stocks shift their centers of abundance in response to climate change.

Subsection (d) Prohibition on red snapper killed during removal of oil rigs

- This section would prohibit the agency from considering red snapper removals attributable to the removal of oil rigs when deciding whether the annual catch limit has been reached, although it does not prevent considering such removals for other purposes. Since removals of red snapper from all sources, including mortality attributable to rig removal, will have an impact on the stock, the proper application of removal data should be left up to the biologists responsible for setting the allowable biological catch and performing the stock assessment.

Subsection (e) Prohibition on considering fish seized from foreign fishing

- This section would prohibit the agency from considering fish removals attributable to illegal foreign fishing in U.S. waters when deciding whether the annual catch limit has been reached, although it does not prevent considering such removals for other purposes. Since a fish illegally caught by illegal foreign

fishing has the same impact on the stock as a fish legally or illegally caught by domestic fishermen, there is no biological justification for this provision.

SEC. 210. NORTHEAST REGIONAL PILOT TRAWL SURVEY AND STUDY

- This section would require the Secretary to create an industry-based Northeast regional pilot trawl survey and study, intended to “enhance and provide improvement to” existing NMFS trawl surveys. While a “peer reviewed net configuration” would be required, there is no similar requirement for a statistically-valid sampling protocol. The affected regional fishery management councils, along with NMFS, the Northeast Regional Science Center and the Virginia Institute of Marine Science, would be required to collect data and “evaluate discrepancies between fishing industry data and [NOAA Fisheries] data” for a period of five years. This is clearly support for industry efforts to impeach NMFS trawl survey data, which is collected in a statistically random and, ideally, unbiased manner, with data collected by fishermen who bias the collection process by targeting areas where fish are known to be concentrated; such industry efforts have been ongoing for years, accompanied by complaints that scientists “don’t fish where the fish are.”

TITLE III—HEALTHY FISHERIES THROUGH BETTER SCIENCE

SEC. 301. HEALTHY FISHERIES THROUGH BETTER SCIENCE

- This section would require the agency to assess all currently-assessed stocks at 5-year intervals, or at such other times reasonably determined by the agency, and to assess all unassessed stocks within 3 years or some other period reasonably determined by the agency, contingent on funding and the agency’s belief that such assessments are necessary, but takes no account of the human and other physical resources that would be needed to properly complete and peer-review the large number of stock assessments that would have to be performed.
- This section also requires the agency to identify data and analysis that might serve to reduce uncertainty in a stock assessment, and determine whether such data and analysis could be provided by fishermen, fishing communities, universities or research institutions, without establishing scientific qualifications for the persons gathering such data or performing such analysis.

SEC. 302. TRANSPARENCY AND PUBLIC PROCESS

Subsection (a) Advice

- This section creates a reasonable requirement that each regional fishery management council’s science and statistical committee develop its advice in a transparent manner, but adds a qualification that it allow public involvement in the process of

developing such advice, which is problematic given that such committees deal exclusively with biological and other data, making most forms of public input irrelevant to such committee decisions.

Subsection (b) Meetings

- This section requires each regional fishery management council to provide a webcast, recording or live broadcast of each meeting on its website.
- This section also requires that each such council provide an audio, video or a searchable audio or written transcript of such meeting within 30 days of the meeting's conclusion.
- This section also requires that the agency maintain and make available to the public an archive of such webcasts, recordings, transcripts, etc. All such measures provide the public with additional information about and insight into the management process, and would thus be beneficial.

SEC. 303. FLEXIBILITY IN REBUILDING FISH STOCKS

Subsection (a) General requirements

- This section would change the requirement that overfished stocks be rebuilt within a time that is "as short as possible" to "as short as practicable," which injects ambiguity into the rebuilding timeline.
- This section also would replace the existing 10-year default deadline for rebuilding overfished stocks to $T_{\min} + 1$ (the minimum time to rebuild the stock with no fishing occurring plus one mean generation), which could delay the rebuilding of some stocks.
- This section also would exempt from even that rebuilding deadline stocks that have been overfished as a result of actions outside a regional fishery management council's jurisdiction (which on its face would include activities occurring in state waters or in waters under the jurisdiction of other councils), and stocks that cannot be rebuilt only by limiting fishing, provisions that are likely to delay or prevent the rebuilding of some overfished stocks.
- This section also would exempt stocks that are overfished, but part of a multi-stock complex, and cannot be rebuilt within the specified timeframe without causing significant economic harm to the fishery, as well as stocks subject to a transboundary agreement under which actions occurring outside U.S. waters could hinder rebuilding efforts by the U.S. Such exemption is likely to delay or prevent the rebuilding of a number of commercially and recreationally important stocks.

- This section also would exempt stocks from the rebuilding deadline if they were affected by unspecified “unusual events” that would make it unlikely to rebuild such stock without causing significant economic harm. Such a vague exemption could arguably apply to many stocks, and frustrate the intent of the rebuilding provisions.
- In addition, the section would needlessly authorize the use of alternative management measures, as such measures are already permitted under current law.
- The section also would allow the council’s science and statistical committee, with the concurrence of the agency, terminate a rebuilding plan if it determines that the relevant stock was not overfished when such rebuilding plan went into effect, rather than making current stock status the sole determinant of whether rebuilding is required.

SEC. 304. EXEMPTED FISHING PERMITS

- This section provides that, should a federal, state or interstate fisheries management body object to the issuance of an exempted fishing permit, NMFS would be required to provide the objecting entity with a written explanation of why such permit was issued.
- This section also requires that, 12 months after an exempted fishing permit has been issued, such permit shall be reviewed to determine if it has created such negative impacts as to justify its cancellation.
- This section prohibits the issuance of any exempted fishing permit that creates a limited access privilege or catch share program.

SEC. 305. COOPERATIVE RESEARCH AND MANAGEMENT PROGRAM

- This section calls for the identification of important critical fisheries research needs, projects that could address such needs, and the cost of such projects. It would require the creation of a research plan, which would be reviewed and revised every five years, and would specifically expand the use of electronic technology to survey fish stocks and monitor fisheries. Such program could provide a substantial benefit to fishery managers.

SEC. 306. FEDERAL GULF OF MEXICO RED SNAPPER MANAGEMENT

- This section would completely replace the existing section 407 of Magnuson-Stevens. It would eliminate subsections (a), (b) and (c), which have been rendered obsolete after deadlines specified in such subsections passed. However, it would also eliminate subsection (d), which required that separate quotas be established for the commercial and recreational sectors, required the charter sector to be included in the recreational quota, and required that the quotas established reflect each sector’s allocation and did not reflect any harvest in excess of such allocations.

- The new section 407 would deal solely with the certification of state surveys that estimate recreational red snapper landings in the Gulf of Mexico. It would require the Secretary to provide the states with standards for such surveys and set a 6-month deadline for federal approval or disapproval of any survey submitted for certification. It also creates a procedure for modifying surveys that failed to achieve certification, and deems any survey that was not certified or denied certification six months after submission to be a certified survey. Such establishment of standards for state surveys is likely to improve the quality of such surveys in some states, in particular Florida and Texas, which currently lack an accurate survey process.

TITLE IV—STRENGTHENING FISHING COMMUNITIES

SEC. 408. PROHIBITION ON SHARK FEEDING OFF THE COAST OF FLORIDA

- This section prohibits divers from feeding or chumming sharks in federal waters off the coast of Florida, but exempts such actions if they are engaged in feeding or chumming for the purposes of research or harvesting sharks. The language is limited solely to divers and dive boat operators, and does not affect recreational or commercial fishing.

SEC. 409. RESTORATION OF HISTORICALLY FRESHWATER ENVIRONMENT

- This section appears to amend the definition of “essential fish habitat” to exclude certain areas that were previously land or fresh water, and includes other qualifiers that seem to limit such exclusion to the Louisiana coast. (Note that there appears to be a drafting error in this section, with the language containing the exception added after the word “feeding,” which appears in the existing definition; the definition, however, goes on to say “or growth to maturity.” A reading of the definition suggests that that the language was intended to follow that phrase instead of being inserted after the word “feeding,” which insertion makes the definition both unwieldy and illogical, as there is no easily discernable reason why nursery areas shouldn’t be included in the same exception.)

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. MITIGATIONS FOR IMPACTS TO SUBMERGED AQUATIC VEGETATION

- This section would relieve non-federal entities in the states of North Carolina, South Carolina, Georgia and Florida of their statutory obligation to conserve or provide compensatory mitigation for damage to submerged aquatic vegetation in the course of conducting maintenance dredging for an authorized Federal navigation project or inland waterway.

SEC. 502. REPORT ON LIMITED ACCESS PRIVILEGE PROGRAMS AND CONFLICTS OF INTEREST WITH RESPECT TO GULF OF MEXICO AND SOUTH ATLANTIC OCEAN RED SNAPPER

- This section would require the Comptroller of the United States to submit a report on the resource rent of limited access privilege programs for red snapper in the South Atlantic and Gulf of Mexico, and how to recover such resource rent for the United States Treasury. This section also would require the Comptroller to report on the fiduciary conflicts of interest with respect to red snapper on the Gulf of Mexico and South Atlantic fishery management councils, and how to eliminate such conflicts. The section appears to be intended to burden, and perhaps destroy, the catch share program that ended overfishing in the Gulf of Mexico red snapper fishery, and to force commercial and perhaps charter representatives on the two southeastern fishery management councils from voting on red snapper issues.

SEC. 503. PLAN FOR ELECTRONIC MONITORING AND REPORTING PROCEDURES FOR THE NORTHEAST MULTISPECIES FISHERY

- This section requires NMFS to submit a plan to Congress that would provide for fully operational reporting and monitoring of the Northeast Multispecies fishery by September 30, 2021. Such electronic monitoring program would benefit the fishery management process. However, the section also requires NOAA to pay for the cost of purchasing and installing the electronic monitoring equipment on each vessel, although it does not allocate any funds for that purpose.

SEC. 504. STUDY OF FEES CHARGED TO LOBSTER FISHING INDUSTRY

- This section would require NOAA to submit a report to Congress on all fees that it imposes on the lobster industry. The primary motive for insertion of this section appears to be a desire to reduce or eliminate fees associated with exporting lobsters to Europe.

SEC. 505. LIMITATION ON APPLICATION OF PROHIBITION ON ATLANTIC STRIPED BASS FISHING IN BLOCK ISLAND SOUND TRANSIT ZONE

- This section would exempt an area of federal waters between Block Island and the states of Rhode Island, Connecticut and New York from current regulatory prohibitions on striped bass fishing in the Exclusive Economic Zone, and also from an Executive Order that prohibits commercial striped bass fishing in federal waters. As the waters in question form part of the core summer range for striped bass, the exemption would lead to a significant increase in the harvest of large, fecund female striped bass at a time when the striped bass population is barely above the spawning stock biomass threshold, and could encourage other jurisdictions, most particularly Virginia and North Carolina, to seek similar exemptions for their offshore waters.

SEC. 506. FUNDING FOR MONITORING IMPLEMENTATION OF NORTHEAST MULTISPECIES FISHERY MANAGEMENT PLAN

- This section would permit the use of fines and penalties arising out of violations of the Northeast Multispecies Fishery Management Plan to be used for monitoring the fishery as well as enforcing the terms of the plan. The section may provide at least a partial source of funding for the purchase and installation of electronic monitoring equipment described in section 503.

TITLE VI—REEF ASSASSIN ACT

- This title proposes to encourage the killing of lionfish by allowing states to apply for exempted fishing permits which, if issued, would allow such states to reward individuals who submit a bag of 100 lionfish tails to state authorities with a tag that will allow such individual to take a red snapper, gag grouper, amberjack or gray triggerfish either out of season or in addition to the legal bag limit. Tags would be good for 5 years, would be freely transferrable and could be used by commercial or recreational fishermen. There would be no limitation on the number of tags that could be issued to any individual.