

Providing Authority to State Governments to Manage Pacific Halibut Fisheries

Discussion Paper on the Potential Effects of Amending the Northern Pacific Halibut Act of 1982

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Unlike the fisheries for many other marine species in the United States, Pacific halibut (*Hippoglossus stenolepis*) are managed exclusively under Federal regulations. Although this species is commonly found within the boundaries of Alaska, Washington, Oregon, and California (States), State responsibility and authority to manage Pacific halibut fisheries is virtually non-existent. This has caused difficulty in managing sport fishing which for all other species is governed typically by State governments. The need to integrate regulations for sport halibut fishing with existing State regulatory regimes for recreational fisheries has raised the prospect of changing the existing Federal statutory authority to allow for greater authority for the States. This paper discusses the effect of such a potential statutory change.

Background

The fisheries for Pacific halibut are governed under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773-773k). For the United States, the Halibut Act gives effect to the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Convention) signed at Ottawa, Canada on March 2, 1953, as amended by the Protocol Amending the Convention signed at Washington, DC March 29, 1979.

In brief, the Convention is an agreement between Canada and the U.S. concerning the conservation and management of Pacific halibut. The Convention requires that all fishing for Pacific halibut within Convention waters—which include State waters—comply with the Convention and regulations of the International Pacific Halibut Commission (IPHC). The Convention gives the IPHC broad authority to adopt regulations to develop and maintain Pacific halibut abundance. Annually, the IPHC makes regulatory recommendations to Canada and the U.S. which, in the U.S., are published in the *Federal Register* as Federal regulations. Further, the Convention states that Canada and the U.S. may establish additional regulation governing halibut fisheries that are more restrictive than those adopted by the IPHC.

The Halibut Act implements the Convention in the U.S. and gives the Secretary of Commerce (Secretary) general responsibility to carry out the Convention and the Halibut Act. The Halibut Act also provides authority to the Regional Fishery Management Councils, established under Sec. 302(a) of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), to:

“...develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with, regulations adopted by the [IPHC]” (Halibut Act, Sec. 773c(c)).

Pacific halibut are found only within the jurisdictions of the Pacific Fishery Management Council and the North Pacific Fishery Management Council. Hence, this special authority to develop halibut regulations extends only to these Regional Councils. The Halibut Act further requires that any regulations developed by these Regional Councils be implemented only with the approval of the Secretary. This requirement for Secretarial approval of Council-developed regulations is similar to the development of other fishery management policies and regulations that are authorized under the Magnuson-Stevens Act. Under both statutes, the implementation of a Secretary-approved proposal is done by Federal regulations.

Although the Regional Council development of regulations is similar for halibut under the Halibut Act and other species under the Magnuson-Stevens Act, a significant difference between these statutes exists in their treatment of State government authority. The Magnuson-Stevens Act expressly neither extends nor diminishes the jurisdiction of any State government, with certain exceptions (Magnuson-Stevens Act, Sec. 306(a)). The Halibut Act, however, provides no authority to State governments for the direct regulation of halibut. In a memorandum dated December 4, 1995, NOAA General Counsel determined that together, the Convention, the Halibut Act, and the development of Federal regulations developed by the IPHC and Regional Councils constitute “...a comprehensive and pervasive regulatory scheme that completely occupies the field of Pacific halibut fishery regulation...” (page 3). Although States may have some indirect effect on the regulation of halibut fisheries, are represented on both Regional Councils, and may be able to have regulations identical to Federal regulations, the States have no direct regulatory authority over the halibut fisheries.

The Sport Fishing Problem

In Alaska, as in most other states, the State has principal authority and responsibility for the management of sport fisheries. Sport fisheries include recreational guided (including charter boat or for-hire fishing) and non-guided independent angling. Most guided and non-guided sport fishing is done in near-shore waters within State jurisdiction, and therefore is governed by State laws and regulations. Sport fishing for halibut is the only exception for the reasons explained above. The basic sport fishing rules for halibut in Alaska—that limit anglers to using single line gear with no more than two hooks, a daily bag limit of two fish, and an 11 month season from February 1 through December 31—

are regulations developed by the IPHC (Sec. 25(1) and (2)) and published in the *Federal Register* most recently on March 3, 2006 (71 FR 10850). In addition, sport halibut fishing regulations developed by a Regional Council and approved by the Secretary under authority of the Halibut Act would be published as Federal regulations either in the annual management measures published in the *Federal Register* or in the Code of Federal Regulations (CFR). In Convention waters off the States of Washington, Oregon, and California, Federal sport fishing regulations developed by the Pacific Fishery Management Council appear at Sec. 25(4) pursuant to the Catch Sharing Plan for IPHC Area 2A (50 CFR sec. 300.63). For the Convention waters off Alaska, sport halibut fishing regulations developed by the North Pacific Fishery Management Council appear in the CFR at 50 CFR sec. 300.65(c), which currently include only non-restrictive guideline harvest levels for the sport halibut fishery in IPHC areas 2C and 3A.

The State of Alaska, also is involved, and has an interest in the management of sport halibut fisheries, despite having little or no statutory authority. The State requires licenses of sport fishermen (with certain exceptions) and performs the survey work on which estimates of sport halibut fishing mortality are based. These estimates are used by the IPHC as one component of its forecast of halibut stock abundance and estimates of allowable harvests. In addition, the State has authority over the sport harvest of all other species, and fishing for halibut may result in the catching of other species (and vice versa). Finally, the distinction between Federal and State management of sport fishing for halibut is largely transparent to the affected public who is governed by State licensing requirements and, when fishing for virtually all other species, State regulations.

The differences between State and Federal authority over the management of sport halibut fisheries becomes more pronounced when implementing regulatory changes and collecting data necessary for the monitoring and enforcement of Federal regulations. In Alaska, the State's regulatory process is substantially briefer and more quickly concluded than the Federal regulatory process. At the State level, a proposed regulatory change is developed within local citizen advisory committees and brought to the State's Board of Fisheries (Board) which may adopt it after public notice of the proposal and 30-day comment period. After adoption by the Board, a proposal generally is given a technical and legal review by the Alaska Department of Fish and Game and the State's Attorney General and filed with the State's Lieutenant Governor for publication in the State's Administrative Journal, the regulatory change becomes effective 30 days after filing. This process may take as little time as two months. Alternatively, the Board may adopt emergency regulations that are effective immediately upon filing, with an opportunity for public comment provided prior to making the regulation permanent. The Commissioner of Fish and Game also may implement certain temporary changes, including closure of a fishing season, immediately through emergency orders. An emergency regulation usually takes several days because a publicly noticed Board meeting must be arranged, but may take as little as one day if the Board is already scheduled to meet on another matter or if the Board delegates its authority to the Commissioner of Fish and Game. At its quickest, the emergency order process can be accomplished within a matter of hours.

The Federal process by comparison is more cumbersome by design to maximize public involvement and analysis of alternatives to the proposed regulatory change. This process is prescribed by numerous Federal laws and executive orders. It involves Regional Council analysis of the problem to be addressed and alternative solutions that assess and compare potential environmental and socio-economic impacts. Public concerns about the proposed action are addressed to the Regional Council during its review of the draft analysis. A Regional Council recommendation for a regulatory change is then made to the Secretary. After technical review by the National Marine Fisheries Service and legal review by NOAA General Counsel, the proposed change is published for additional public comment. Public comment on the proposed rule is considered before the Secretary will approve (or disapprove) the action and, if approved, publish the change as a final rule. This process may take from one to several years to accomplish.

The significance of these differences between the State and Federal regulatory procedures is that the Council is much more limited in its reaction time to the latest information about sport fishing effort and harvest rates that may be detrimental to other halibut fisheries or the halibut resource. Moreover, the desired Federal policy may have to be implemented by regulations that parallel or duplicate existing or similar State regulations. This is because Federal law enforcement is authorized to prosecute only violations of Federal regulations, and the Secretary can not rely on State regulations to implement a Federal policy that is consistent with all other applicable Federal laws. Hence, although it may be more responsive, the State regulatory process cannot be used to manage sport halibut fisheries because the Federal government “completely occupies the field of Pacific halibut fishery regulation” under the Halibut Act.

Proposed Statutory Change

The Alaska Department of Fish and Game has sought to remedy this problem by proposing a change to the Halibut Act that would explicitly provide for a delegation of limited authority to the State of Alaska to regulate recreational fishing for halibut. The proposed change would add a new paragraph (d) to 16 U.S.C. sec. 773c which would read as follows:

(d) Delegation of Authority to States

- (1) A state may regulate recreational fishing for halibut in the United States portion of Convention waters in and contiguous to that state, provided that the—*
- (i) Secretary approves a recommendation by the Regional Fishery Management Council having authority for the geographic area covered to authorize the state to regulate recreational fishing for halibut;*
 - (ii) state’s regulations are consistent with the Convention and with regulations adopted by the Commission and that Council; and*
 - (iii) state’s regulations do not discriminate against residents of different states.*

(2) For purposes of this section, state regulations will be deemed consistent with regulations of the Commission and the Regional Fishery Management Council if they are as restrictive or more restrictive than the regulations of the Commission or Council

or will otherwise restrain catch to a level equal to or lower than that allowed under regulations developed by the Commission or Council.

(3) Each state adopting any regulation under this section shall provide a copy of the regulation to the Secretary prior to the date the regulation becomes effective. If the Secretary determines that any state regulation is not consistent with the requirements of this section, the Secretary shall promptly notify the Governor of the state, the Commission, and the Council concerned of such determination, and shall provide a reasonable opportunity for the State to correct any inconsistencies identified in the notification. State regulations shall remain in force until changed unless superseded by regulations of the Secretary. If after notice and opportunity for corrective action, the state does not correct the inconsistencies identified by the Secretary, the Secretary shall promulgate regulations explicitly superseding the state regulations, and such regulations shall remain in effect until the Secretary determines that the State has corrected the inconsistencies.

Discussion of Proposed Change and Suggested Refinements

The draft proposed statutory text above is essentially the same as that discussed by State of Alaska and NOAA staff in June 2006. It appears differently, however, because it is rearranged in separate paragraphs to facilitate this discussion.

The basic design of this statutory change would be to allow a State government to respond quickly and efficiently to changes in the management needs of a recreational fishery for halibut that, except for the Halibut Act, would occur under the State's jurisdiction. The specific authority delegated to the State could be as broadly or as narrowly defined as the appropriate Regional Council and the Secretary specifies. For example, a Regional Council may wish to limit State regulatory authority to, say, sport hook or catch limits in certain areas. Alternatively, a Regional Council may wish to grant broad regulatory authority including time and area closures, gear restrictions, harvest or bag limits, and limited access criteria. A Regional Council also could make no recommendation for delegation of recreational halibut fishing authority to the State.

A critical feature of this proposed statutory language is that delegation of authority would be from the Secretary to a State, based on a recommendation from a Regional Council. Secretarial review and approval of a delegation recommendation is necessary because the Secretary is charged with the general responsibility to carry out the Convention and the Halibut Act under section 773c(a). Because approval of any recommended delegation of authority to a State would be at the discretion of the Secretary, withdrawal of the delegation also would be at the discretion of the Secretary. Secretarial review and approval of a Council recommendation also would be consistent with section 773c(c) of the Halibut Act which authorizes Regional Councils to develop regulations, including limited access regulations, and be implemented only with the approval of the Secretary.

For these and other reasons stated below, the drafted proposed statutory text should be changed as follows:

- In paragraph (d)(1)(ii) and (d)(1)(iii), “state’s regulations” should be more specifically stated as the “state’s recreational halibut fishing regulations.” This additional text would clarify that only a State’s sport halibut fishing regulations; not other types of regulations are pertinent to a delegation of authority.
- In paragraph (d)(2), a consistency determination should be with “...**approved** regulations **developed by** the Commission **or** the Regional Council...” The bolded text should be added for consistency with sections 773b and 773c of the Halibut Act which speak to the approval of regulatory recommendations made by either the IPHC or a Regional Council, respectively. Also, this language would clarify that consistency would be required only with approved regulations and not those that may be under development by either the IPHC or a Regional Council. The edited paragraph would read as follows (with added text in **bold** and deleted text in [brackets]): “(2) *For purposes of this section, state regulations will be deemed consistent with **approved** regulations **developed by** [of] the Commission **or** [and] the Regional Fishery Management Council if [they] **the state regulations** are as restrictive or more restrictive than the **approved** regulations **developed by** [of] the Commission or Council or will otherwise restrain catch to a level equal to or lower than that allowed under **approved regulations developed by the Commission or Council [regulations].**”*
- In paragraph (d)(3), a minimal time period should be allowed for Secretarial review of state regulations to make the consistency determination required in the preceding paragraph. Thirty days may be a reasonable review period. Review by the IPHC during this period also would be desirable for biological conservation purposes. Hence, the draft text in this paragraph should be changed to read as follows (with added text in **bold**): “(3) *Each state adopting any regulation under this section shall provide a copy of the regulation to the Secretary **and the Commission at least 30 days** prior to the date the regulation becomes effective.*”
- Also in paragraph (d)(3), the draft proposed statutory text should include explicit authority for the Secretary to withdraw delegation if a State’s regulation is determined to be not consistent under paragraph (d)(2). This authority may be implied by the initial delegation authority in paragraph (d)(1). However, without an explicit withdrawal authority, one could argue that only a superseding Federal regulation—developed by a Regional Council and approved by the Secretary—could obviate a state regulation from having effect if it is determined to be inconsistent under paragraph (d)(2). Hence, this paragraph should have the bold text added to read as follows: “*State regulations shall remain in force until changed unless superseded by regulations of the Secretary **or withdrawal of the authority delegated by the Secretary.** If after notice and opportunity for corrective action, the state does not correct the inconsistencies identified by the Secretary, the Secretary **may withdraw the delegation to the state or** [shall] promulgate regulations explicitly superseding the state regulations, and such*

regulations shall remain in effect until the Secretary determines that the State has corrected the inconsistencies.”

The Practical Effects of the Proposed Statutory Change

The overall effect of this proposed change would be to delegate to the States of Alaska, Washington, Oregon or California authority to implement certain regulations to manage the sport halibut fisheries within the respective states without going through the normal Council development and Secretarial review and implementation process currently required by the Halibut Act. If this Halibut Act amendment is adopted by Congress and signed into law by the President, its practical effect would be to allow a Regional Council to recommend broadly or narrowly defined authority to be delegated to one or more specific States.

Presumably, such a delegation action would be initiated at the Regional Council level in the same manner as other regulatory amendments are initiated, at the request of the public or a participating Council member or agency. The action to delegate would be a Federal action for which certain laws would require an analysis of alternatives and a public process for the review and adoption of a Regional Council’s recommendation to the Secretary. After the Council submitted such a recommendation to the Secretary for review and approval (or disapproval), NMFS would publish the delegation recommendation in the *Federal Register* for additional public comment. If approved, the delegation recommendation would be codified in Federal regulations at 50 CFR part 300 which would specify the authority delegated to the State. Sections 300.60 through 300.66 of this part currently implement provisions of the Halibut Act.

Although this process would be similar to that used currently to make fishery management plan amendments and regulatory amendments, it would not be governed by the Magnuson-Stevens Act. For the reasons stated above, management of the Pacific halibut resource is governed by the Halibut Act and not the Magnuson-Stevens Act. Hence, the Secretary would not be bound by the procedures and time limits in section 304 of the Magnuson-Stevens Act or other provisions of that statute. A Regional Council recommendation to delegate authority, however, would have to comply with other Federal statutes such as the National Environmental Policy Act, Regulatory Flexibility Act, Executive order 12286 and others that require various analyses or assessments and the Administrative Procedure Act that requires prior notice and opportunity for public comment on Federal regulations.

The specific types of regulations that may be delegated under this authority may be as broadly or as narrowly prescribed as a Regional Council wishes to make them. Delegation of regulatory authority also may stipulate a specific withdrawal or sunset date or it may continue in effect until changed. Sport fishing regulations generally fall into one or more of a few categories of regulations based on the activity being restricted or controlled. Regulations typically control how much fish may be caught and retained, when and where fishing may occur, what types of fishing gear may be used, or who may do the fishing. Recordkeeping and reporting requirements necessary to monitor the

harvest of a recreational fishery also may be delegated to a State, along with any fees that may be necessary to cover administrative costs.

A Council could, for example, recommend delegation of recreational fishing bag limit or gear limit regulations to a State that are applicable to Pacific halibut fishing only in certain IPHC areas or sub-areas thereof. Alternatively, the recommended delegation could be more broad and comprehensive. The only limit to the range of regulatory authority that could be delegated to a State under the proposed statutory change would be that it not conflict with IPHC- or Council-developed and approved regulations. A conflict would occur if a State regulation were less restrictive than IPHC or Council policies. For example, a conflict would occur if a delegation recommendation or a State regulation allowed the use of more than two hooks per angler or, in Alaska, sport fishing in January. Likewise, a delegation recommendation or a State regulation likely would be considered in conflict with an approved Council policy if it substantively changed the Individual Fishing Quota program or charter vessel fishing guideline harvest level. Such changes would have to be developed by the North Pacific Fishery Management Council and not by delegated State regulation. In addition, State delegated regulations would not usurp or conflict with the authority of the IPHC under the Halibut Act provided that a State's regulations served to implement the approved allocation policies of a Regional Council.

The Secretarial and IPHC review of a particular regulatory action by a State is not contemplated by the proposed statutory change to be lengthy or formal. Paragraph (d)(2) of the proposed text would state (including the recommended changes) that:

"...state regulations will be deemed consistent with approved regulations developed by the Commission or the Regional Fishery Management Council if the state regulations are as restrictive or more restrictive than the approved regulations developed by the Commission or Council or will otherwise restrain catch to a level equal to or lower than that allowed under approved regulations developed by the Commission or Council."

The phrase "deemed consistent with" implies that a formal review and approval process by the Secretary and the IPHC of a delegated State regulatory action would not occur unless that action is found to be inconsistent. If an inconsistency were found and, the State was unwilling to make its action consistent, then a formal Federal regulatory process would be required to correct it or the Secretary could rescind the delegated authority. Neither one of those Federal actions would be desirable. Hence a commitment to cooperation among the Regional Council, State, NMFS, and IPHC is necessary. Alternatively, to require a formal Federal review process, including public review, for every State regulatory action could defeat the purpose of a timely response to fishing patterns that the delegation is designed to achieve. Therefore, the formal Secretarial and public review process of the delegation is "frontloaded" by going through the normal Federal rulemaking process in first establishing the delegation. Subsequent actions by the State receiving the delegation would not be encumbered by formal Federal review.

Nothing in the delegation process would prevent a Regional Council from revisiting its delegation to a State from time to time to determine whether any changes to it should be made. Indeed, a Regional Council may require a State to provide regular reports on its management of the recreational halibut fisheries. In addition, a Regional Council should include in its delegation recommendation a system for dealing with public claims of inconsistency between a State regulation and approved regulations developed by the IPHC or the Regional Council.

Conclusion

This discussion of a prospective amendment to the Halibut Act does not argue for or against passage of the proposed statutory change. The potential pros and cons of the statutory proposal also are not addressed. Instead, this paper looks at the proposed amendment (as it currently is worded) from the perspective of the existing Halibut Act and Federal regulatory procedures. In summary, the contemplated amendment would provide authority to delegate management of recreational fishing for halibut to State fishery management agencies, providing State regulations are consistent with existing IPHC- and Council-developed regulations. The intent of this change would be to allow States to more quickly respond to recreational fishing trends and more responsively tailor recreational fishing regulations than currently is possible through the existing process of IPHC or Council development of regulations implemented by the NMFS. This also could allow Councils to more efficiently achieve their allocation policies that divide the halibut resource between the commercial and recreational sectors.

In brief, this discussion finds that the proposed statutory amendment text should be changed slightly to clarify (1) precisely what State and Federal regulations are affected, (2) to provide for a minimum review period of State regulatory changes under the delegation, and (3) to provide explicit authority to withdraw delegation in the event that the potential or actual effects of State regulations are found to be inconsistent with IPHC- and Council-developed regulations.

The discussion also finds that implementation of this delegation would require a Council recommendation to the Secretary to make or change the delegation of regulatory authority to a State. This procedure for making this recommendation would be similar to current procedures for implementing Council-recommended policies. The Secretary's action to approve and implement a Council recommendation to delegate authority to a State would be a Federal action that would require the usual analysis of alternatives and implementation by Federal regulation. Once the delegation is made, however, the State regulatory process would not be further affected by Federal intervention unless a State regulation was found to be inconsistent. Using this procedure, a Council could design its delegation recommendation to be as narrow and focused or as broad and comprehensive as it deems necessary. It could also change the delegation at any time by making a subsequent recommendation to the Secretary.

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