

**WRITTEN TESTIMONY OF MR. WAYNE SWINGLE,
EXECUTIVE DIRECTOR OF THE GULF OF MEXICO
FISHERY MANAGEMENT COUNCIL
BEFORE THE U.S. COMMISSION ON OCEAN POLICY
NEW ORLEANS, LOUISIANA, MARCH 8, 2002**

Mr. Chairman and Members,

Thank you for the opportunity to address the commission during this field hearing held in New Orleans. My name is Wayne Swingle. I have served as Executive Director of the Gulf Council since 1977. Before that, I served as Director of Alabama's Marine Resources Division and as a member of the Gulf States Marine Fisheries Commission. By training I am a marine fisheries biologist. In my oral and written testimony I have focused on major problems in the management system and solutions proposed by myself, our Council, and the Chairman of the eight regional Councils, in testimony presented to Congress for amendments to the Magnuson Stevens Act (MSA).

Management Information

The key to making decisions that result in successful management is having good management information (see Attachment 1, letter to Dr. Vavrinec of Pew Oceans Commission). This consists of two needs: (1) collection of fishery dependent and fishery independent information on each of the stocks, and (2) having the analytical capability to assess the condition of each stock. Unfortunately when the MSA was implemented in 1976, the only Gulf fishery for which there was a really good long-term data base was the commercial shrimp fishery (the nation's most valuable fishery). Most of the data collected for finfish fisheries were aggregated into species groups (e.g., groupers, snappers, sharks, etc.). That included the commercial landings data archived by NMFS in computer files beginning in 1963 and recreational catch and release data archived beginning in 1979.

Prior to MSA, the only management responsibilities NMFS had were those under international treaty agreements, e.g., ICCAT, ICES, etc. Therefore, the number of scientific personnel really competent in population dynamics was limited. The number of such personnel was gradually increased after implementation of MSA, as Councils began developing fishery management plans (FMPs). However, during the Reagan administration, NMFS and the Council were level funded, and although the number of FMPs increased, the number of stock assessment personnel did not. This resulted in a situation that there were insufficient stock assessment personnel to do all the assessments needed within the frequency requested by the Councils (i.e., annually or biannually). This was particularly true for the Southeast Region of NMFS which had responsibility for ICCAT and 3 Councils. This situation improved markedly in the post-Reagan years, but never reached a level consistent with needs of the Councils.

To solve these problems greater emphasis and additional funding needs to be applied to collection of management information, including continuation of cooperative programs with the states, such as Southeast Area Monitoring and Assessment Program (SEAMAP), Recreational Fisheries

Information Network (RecFIN), Commercial Fisheries Information Network (ComFIN), and Marine Fisheries Initiative (MARFIN).

In the collection of management information new and much greater emphasis should be placed on collection of data by observers. For many fisheries, this is the only way to collect reliable information on bycatch by species and size composition. It is also necessary to provide information on size composition and discard rate of targeted species that is important for stock assessments. The Council chairs (Attachment 3) felt this observer program should be an annual activity funded by NMFS as part of the cost of preparing reliable stock assessments.

One innovative way this data collection requirement is being approached in the New England area, is through cooperative research plans which involve the fishing industries in collection of both fishery dependent data (e.g., bycatch) and fishery independent data (e.g., trawl surveys to determine year class strength of juveniles). The program makes the fishery participants more comfortable with the results of stock assessments, and Congress appears more willing to fund such cooperative research when supported by commercial and recreational industries. Regardless of funding approach, the level of observer studies needs to be greatly increased. Only one such major observer survey has been done in the Gulf for finfish fisheries. It was for monitoring the commercial grouper (and other finfish) fishery off Florida, and that study was conducted during 1994-95 and may not be applicable now.

Another of the major data deficiencies is the lack of social and economic data on the fisheries, and especially on the fishing communities (See Attachment 4). Considering how very small the NMFS personnel complement of economists and sociologists is (7 and zero, respectively, at NMFS SERO), the most expedient way to increase this data base is for NMFS to have the funding for contracts to hire consultants. National Standard 8 requires the Councils and NMFS to take into account the impacts of management measures on fishing communities. However, the data to support such analyses are not available.

The current proposed NMFS budget for FY 2003 by the Bush administration has a section titled "Modernize Annual Stock Assessments," that creates an increase of 26 full-time (FTE) positions and \$9.9 million (Attachment 1). If this recommendation is accepted by Congress, it should go a long way toward solving that problem. The same proposed budget proposes to increase the NMFS national socioeconomic program by 7 FTEs and \$1.5 million. That portion of the budget needs to be doubled or tripled by Congress. Similarly, the portion of the proposed budget for observers (increase of \$4 million) is well below the level needed to improve the stock assessment information.

However, it should be recognized that this budget and the FY 2002 budget previously proposed by the Bush administration are the first in years with significant increases for these MSA activities.

ITQ (IFQ) Programs

The Gulf Council and Council Chairs (Attachments 2 and 3) suggested rescinding the prohibition on use of individual transferable quota (ITQs) so they could use this management tool. If the Commission on Ocean Policy wants to remove from the public sector the cost of buy-back and

similar programs to reduce over-capacity and excess effort of domestic fleets, and transfer that cost to the industries affected, then they need to support ITQ programs. Such programs where the ITQ certificate and the annual shares under the certificate can be bought, sold, or traded are designed for consolidation of effort by the marketplace into smaller, more efficient units in terms of vessels used. Over time there are fewer vessels and ITQ certificates, but the average value of the certificates in pounds increases. In addition to reducing effort and over-capacity, ITQ programs usually reduce derby fishing and increase economic efficiency and ex-vessel prices.

ITQs are certainly not a very effective system for some fisheries, especially those like Gulf shrimp that are annual crops with very large fluctuations in available annual harvest. Many of the Gulf commercial fisheries are currently under license limitation programs (i.e., moratorium on issuing additional permits). In such program reductions in effort and vessel capacity is by attrition only (i.e., non-renewal of permits).

Because ITQs are not that effective for some fisheries, and because large segments of the constituency of some Councils oppose the concept, MSA legislation for ITQ programs should allow each Council to determine whether to implement such a system. Some of the constituent opposition is due to the fact ITQs create a windfall profit for the persons who first sell the ITQ certificates. This could be eliminated by using language to allow the federal government to collect this windfall profit, as did the state of Florida for spiny lobster and stone crab trap certificate programs. In these programs, the state received 25% of the value of the certificates when they were first sold to another person. The state also had the authority to periodically reduce the value of all certificates (in terms of numbered traps fished) by up to 10% to reduce effort in the fishery. Re-establishing IFQs as a management tool was one of the recommendations of the National Research Council in Sharing the Fish.

Enforcement

At sea enforcement is largely carried out by the U.S. Coast Guard (USCG) and, to a more limited extent, by the states. For the USCG, prior to September 11, 2001, fishery enforcement activity is third in their operations priorities after search and rescue and drug interdiction. National Marine Fisheries Service (NMFS) has only about 18 officers for the Gulf region who are largely dedicated to sting operations and the processing of notices of violations (NOVA) and other documents for USCG and state officer's cases. The states have approximately 250 officers in the coastal areas of the Gulf, and twice that number they can call upon in emergencies, all of which are cross deputized under cooperative agreements to enforce MSA violations. However, the states most frequently have higher enforcement priorities for their officers, i.e., for state laws. Prosecution for MSA is carried out by the National Oceanic and Atmospheric Administration (NOAA) General Counsel office that issues NOVAs, collects or negotiates penalties, and schedule cases before the administrative law judges.

Major problems exist with the enforcement capability of both NMFS and NOAA General Counsel's office. The number of general counsels available to prosecute cases is too small; therefore, they do not prosecute all the cases made, and this creates a moral problem with state and USCG officers who made the cases. It also results in almost no enforcement of violations like bag and size limits in recreational fisheries which are usually considered minor cases. The budgets of past administrations have not significantly increased the NMFS enforcement complement over what it was 24 years ago. Our Council and the Council chairs concluded the most likely solution to this problem is the establishment of more formal cooperative agreements with the states that provide funds dedicated to enforcement and prosecution of MSA. This program has been initiated with some of the states on a trial basis, and is working well. If such funding is assured to the states each year, they are in a better position to hire additional officers for MSA enforcement than is NOAA/NMFS. It also appeared to the Council Chairs (Attachments 2 and 3) that Congress will be more likely to approve increased funding that will benefit their states.

Attachments to this testimony include:

- **Attachment 1: Mr. Swingle's letter to Dr. Vavrinec of the Pew Oceans Commission**
- **Attachment 2: Gulf Council Position on Amending MSA**
- **Attachment 3: Council Chair's Position on Amending the MSA**
- **Attachment 4: Mr. Swingle's Response to Questions of Senate Subcommittee on the following issues:**
 - **Essential Fish Habitat (EFH)**
 - **Regulatory Flexibility Act Compliance**
 - **Adequacy of Socio-economic Data**
 - **Use of AP Recommendations**
 - **MSY as a Goal or Target**
 - **Adequacy of Council Funding**

ATTACHMENT 1

February 2, 2001

Dr. John Vavrinec
University of Maine
Darling Marine Center
Walpole, Maine 04573

Dear Dr. Vavrinec:

With regard to your letter requesting examples of fishery management successes, I think that the Gulf of Mexico Fishery Management Council (Council) has developed successful management programs for those fisheries for which we have had good management information. This includes the restoration of some stocks that were classified as overfished. I have enclosed a summary of the provisions of the fishery management plans (FMPs) and amendments which constitute the management history for each of the seven fisheries we manage. From this document, you can identify those FMP amendments or regulatory amendments that you would like for us to send you copies.

Certainly the three crustacean fisheries that we manage would meet your criteria of management successes. Our Shrimp FMP manages three penaeid stocks that constitute the Nation's single most valuable fishery. Most of the shrimp landed are ultimately sold at the restaurant retail level which generates a rather significant increase in value as the product moves from the harvester to the consumer. The value to the Gross National Product in the 1988 period was estimated to be \$2.9 billion and certainly would be much higher now.

The three penaeid stocks, brown, white, and pink shrimp, are essentially annual crops that live to a maximum of about 18 months. The level of annual production is largely dependent on the environmental conditions existing in the estuaries when the shrimp are juveniles. Management of the stocks involves the states and the Council.

As background on the shrimp fisheries, I have enclosed Amendment 9 which is the most recent comprehensive amendment. Not only does this amendment contain statistics on the fishery, but it also requires bycatch reduction devices (BRD) in the trawls used by the fleet. The requirement of BRDs was implemented to reduce mortality on red snapper; and, over time, should result in the

restoration of the red snapper stock and positive impacts to other finfish stocks.

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I have also enclosed the Shrimp Overfishing Analysis which is updated annually. This indicates that none of the three stocks is subject to overfishing, nor have they been for the past 30 to 40 years. We also have management measures to seasonally or permanently close certain offshore areas to allow the shrimp to grow to a larger, more valuable size before harvest. I have enclosed the 2000 Texas Closure Analysis which summarizes the increased benefits from that closure for the 1981-2000 period.

Our commercial spiny lobster fishery occurs almost entirely in the Florida Keys area. It, like shrimp, has not been overfished, but annual production was adversely affected by the practice of using live, undersize lobsters as attractants in traps as they were redeployed in the fishery. We eliminated most of the mortality on undersize lobster by requiring that they be held in aerated live wells while on board vessels. We also required recreational and commercial divers to measure and release undersize lobster while in the water, rather than boating them first. However, because the industry was overcapitalized in terms of the number of traps deployed, the industry practice of trying to bait all these traps with undersize lobsters as attractants still resulted in unnecessary mortality. In 1992 the state of Florida and the Council implemented a trap limitation or trap certificate program designed to reduce, over time, the number of traps deployed in the fishery (See enclosed 1992 Spiny Lobster Regulatory Amendment). To give you an idea of the beneficial effect of the trap limitation on the stock, I have enclosed the 1999 Spiny Lobster Stock Assessment. Over time, this program is expected to reduce the number of traps to an optimum level, and yield from the fishery will then be maximized.

Our commercial stone crab fishery occurs off the Florida Keys and Florida's west coast. It has been an expanding fishery both northward and offshore for 20 years. Only in the past 4 years has this fishery appeared to reach the maximum sustainable yield (MSY) level. It, like the other crustacean fisheries has never been overfished. The minimum size limit for claws, set by the state, allows the females to spawn 2 years before being vulnerable to harvest. Only the claws are harvested and some declawed crabs, returned to the water, regenerate claws that are harvestable in subsequent years. The fishery is greatly overcapitalized in terms of traps deployed. Unlike the spiny lobster fishery, the overcapitalization in the stone crab fishery apparently causes no mortality to juveniles which appear to be able to enter and leave traps at will. However, this overcapitalization adversely affects the fishermen and, under some conditions, the environment. Therefore, the state of Florida and the Council are implementing trap limitation programs that, over time, will reduce the number of traps to the optimum level needed to harvest the resource. See enclosed Stone Crab Amendment 7 for the details of this program and statistics on the fishery. We feel management of these crustacean fisheries are examples of fishery management successes.

During the later 1970's, the Council became aware of persons using explosives to remove coral from a shipwreck. Because there was no Federal entity that could regulate coral throughout the exclusive
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economic zone (EEZ), the Council developed a FMP. The original rules for the FMP prohibited any harvest or possession of coral or coral reef resources except by scientific permit. In the 1990's, a large fishery developed for harvest of live rock (coral reef rubble with organisms attached). Amendment 3 (enclosed) phased out that practice and required persons to produce live rock for the aquarium trade through regulated aquaculture.

The Council's FMP for Coastal Migratory Pelagics was implemented in 1983. At that time, the scientific opinion was that the king and Spanish mackerels were single stocks ranging from the western Gulf through the mid-Atlantic/New England areas. In 1985, assessment information became available that indicated there were separate migratory groups of king mackerel for the Gulf and Atlantic areas with a mixing zone off the southeast Florida coast. This information indicated the Gulf migratory group of king mackerel were severely overfished, whereas, the information in Draft Amendment 1 indicated only a moderate reduction of total allowable catch (TAC) to 10 million pounds was necessary to prevent exceeding MSY. The Council, in October 1985, requested that the National Marine Fisheries Service (NMFS) implement an emergency rule to reduce TAC for Gulf group king mackerel from 14.4 to 5.2 million pounds. The rule was implemented on March 1986. In 1986 the Council, by regulatory amendment, reduced this TAC to 2.9 million pounds; and in 1987, by regulatory amendment, to 2.2 million pounds. Thus, the restoration program for Gulf group king mackerel began. The stock has currently been restored where overfishing is no longer occurring and the stock is only slightly below the minimum stock size threshold (MSST) delineating an overfished state. In fact, if we had been less precautionary in selecting the point estimate of MSST, the stock would not be classified as overfished. Gulf group Spanish mackerel was also classified as overfished and undergoing overfishing from the late 1980's to the early 1990's. Management measures adopted by the Council and states in the Gulf have resulted in a full recovery of this stock. The other major stocks in the coastal migratory pelagic complex are not classified as overfished nor is overfishing occurring (2000 NMFS Report to Congress on Status of Fisheries of the US). We, therefore, feel management of these stocks are examples of fishery management successes.

The Council completed the Reef Fish FMP and submitted it to NMFS for implementation in August 1981. The NMFS implemented the FMP in November 1984. A stock assessment prepared by the NMFS in 1988 indicated that the red snapper stock was overfished (<20% spawning stock biomass per recruit) and that the harvest of juvenile red snapper by shrimp trawls was contributing to this overfished condition. Furthermore, a reduction in shrimp trawl bycatch would be necessary to restore the stock. This stock assessment was partly the basis for development of Amendment 1 which initiated the restoration program for red snapper in 1990 by regulating the directed commercial and recreational red snapper fisheries. Many of the amendments and most of the

regulatory amendments in the document: “Summaries of the Provisions of FMPs and Amendments” from 1990 to 2000 are actions related to the Council’s restoration program. In 1991 the NMFS,

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responding to an amendment of the Magnuson-Stevens Fishery Conservation & Management Act, implemented a multi-year research program authorized by Section 405 to assess the effects of shrimp trawl bycatch on stocks and to develop gear to reduce such bycatch. In February 1997, the Council submitted Shrimp Amendment 9 requiring BRDs in shrimp trawls to the NMFS for implementation.

The NMFS implemented the amendment in May of 1998. Since that time, NMFS gear specialists have significantly improved the design of the BRDs so reduction of juvenile red snapper increased from about 27 to 40 percent. Now that the gear specialists understand the behavior of juvenile red snapper and water currents in trawls, more rapid advances in BRD designs are likely. The Council will, in the next month, submit to the NMFS the first 5-year segment of its rebuilding plan for red snapper under the Sustainable Fisheries Act. The Council has taken these actions to restore the stock

while trying to minimize adverse effects on the recreational and commercial sectors. These persons, who interface directly with the stocks, feel that significant progress has been and is being made by the Council in restoring the stock. We view these continuing actions as being a successful fishery management program.

In 1990, based largely on anecdotal information from commercial divers, the Council concluded that jewfish were overfished and implemented a prohibition on harvest or possession. The Council reviewed an assessment by the NMFS in 2000 which suggested this closure had greatly increased the number of fish in the younger year classes, but the closure should remain in place until more of the older age classes are restored.

More recently, red grouper and gag grouper have been identified as subject to overfishing (NMFS 2000 Report to Congress on Status of the Fisheries of US). In 1999, the Council took action, by regulatory amendment, to reduce fishing mortality on gag grouper by 16 percent. That action was implemented in May 2000, but its effect will probably not be known for several years. The Council is proceeding with development of Amendment 18 to address measures for red grouper and other species of the shallow-water grouper complex. Final action will be taken on the amendment in July 2001.

In 1986 the NMFS concluded that the red drum stock was being overfished and implemented a FMP limiting TAC to 625,000 pounds. The Council’s Amendment 2 prohibited any harvest or possession of red drum from the EEZ in 1988. That prohibition is still in effect. The fishery was overfished because the fishery in state waters, on the first 3 or 4 year classes was largely unregulated. At the Council’s urging, the states severely restricted harvest in order to allow greater escapement of age 3 and age 4 fish to the spawning stock in the EEZ. For example, Florida rules changed from no regulation on commercial harvest and no bag limit to a complete prohibition on commercial harvest,

a bag limit of 1 fish, a slot size limit of 16 - 22 inches, and a 3-month closure of the recreational fishery. This raised the escapement level from less than 2 percent annually to about 65 percent.

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Louisiana's annual escapement level was estimated at 70 percent in a recent analysis. The NMFS current stock assessments are somewhat inconclusive on the current status of the stock. However, the participants in the state fisheries view this as a successful fishery management program.

Thank you for the opportunity to comment on this issue. Please advise me or my staff if you need additional amendments or information.

Sincerely,

Wayne E. Swingle
Executive Director

WES:ldc

Enclosures: (1) Summaries of Provisions of Council FMPs & Amendments
(2) Shrimp Amendment 9
(3) Shrimp Overfishing Analysis
(4) 2000 Texas Closure Analysis
(5) 1992 Spiny Lobster Regulatory Amendment
(6) 1999 Spiny Lobster Stock Assessment
(7) Stone Crab Amendment 7
(8) Coral Amendment 3

c: Gulf Council, w/Dr. Vavrinec's letter
William Hogarth, w/Dr. Vavrinec's letter
Staff, w/Dr. Vavrinec's letter

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SCANNED COPY OF MR. VAVRINEC'S LETTER

UNIVERSITY OF MAINE
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Wolf of Swingle Fishery Management
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Tampa, FL 33619-2266

Mr. Swingle:

The Pew Oceans Commission was formed last year to encourage the adoption of policies and practices to restore and protect living marine resources in U.S. waters and the coastal habitats on which they depend. The Commission is composed of people with diverse backgrounds from all regions of the country. The goal of this independent and balanced group of people is to: 1) investigate the current status of marine life in American waters; 2) publish a report with specific recommendations regarding future policies and practices; and 3) increase public knowledge of the conditions of living marine resources.

Mr. Patten White (a Pew Commissioner) and I are compiling a report to be presented to the Commission this spring. We are looking for specific examples of fisheries management success stories. Too many people assume all fisheries are doomed to failure. Understanding how successful fisheries have been managed may help create better guidelines for all the fisheries on our coasts. We were hoping you might have some examples of such cases from your area. We would like details such as a history of the fishery, management implementations, and the ultimate outcome. Any help you could extend would be greatly appreciated.

If you have any questions concerning this report, please feel free to contact me. I can be reached via email (john.vavrinec@umit.maine.edu) or at the above address and phone number (ext. 304). The Same contact information can be used to send any information you think appropriate. We thank you for your time and look forward to hearing from you.

Sincerely,

John Vavrinec

THE LAND GRANT UNIVERSITY AND SEA
GRANT COLLEGE OF MAINE

ATTACHMENT 2

March 12, 2001

Mr. Richard Surdi
Office of Sustainable Fisheries
NOAA/NMFS
F/SF5, Room 13142
1315 East-West Highway
Silver Spring, Maryland 20910

Dear Mr. Surdi:

Our Council selected those reauthorization issues they felt they could support at our September and November 2000 meetings (a summary of which is enclosed). They selected these positions from the draft Senate bills by Senators Snowe and Kerry (et al) and from the draft House bill by Mr. Gilchrest (et al).

I talked with Dave Whaley who felt the House would not have a draft bill by the time of the Chairmen's meeting (May 22-25, 2001). However, Sloan Rappoport felt that Senator Snowe's sub-committee would very likely have a draft bill by that time. We definitely need to include the reauthorization issues on the agenda for the Chairmen's meeting. Therefore, I would appreciate copies of the material provided to you by the Council Executive Directors for the briefing book.

Best personal regards.

Sincerely,

Wayne E. Swingle
Executive Director

WES:lde

Enclosure: Summary of Council's Actions on Reauthorization Issues

- Kay Williams, w/enclosure
- Roy Williams, w/enclosure
- Clarence Pautzke, w/enclosure
- Council Executive Directors, w/enclosure
- Staff

**Summary of the Gulf Council's Actions &
Administrative Policy Committee Actions**
September 11 and 14, 2000
Mobile, AL
November 14-15, 2000
Biloxi, Mississippi

Documents Reviewed

Tab E, No. 3 - Council 1999 position on Magnuson-Stevens Act re-authorization issues as appended to Mr. Swingle's testimony of July 29, 1999 before the Senate Subcommittee on Oceans and Fisheries.

Tab E, No. 4(a) - Amendments proposed by Senator Kerry on July 27, 2000.

Tab E, No. 4(b) - Summary of above Kerry Bill.

Tab E, No. 5 - Senate staff working draft dated June 7, 2000, called the Snowe Bill in committee discussions. Changes by S.2832 proposed by Senator Snowe were noted in review of the staff draft.

Tab E, No. 6 - HR4046 called the Gilchrist Bill in committee discussion.

Note: The page numbers used in this text are for copies of the bills inserted into the text of the Magnuson-Stevens Act.

The Committee proceeded by addressing the Council's previous recommendations and the new issues in the handout to determine if members wished to change the previous recommendations or to support or oppose any of the new issues. In the process, the Committee editorially revised the Council's previous position statement on the issues in the following document, when appropriate.

1) Rescinding the Congressional Prohibitions on IFQs (or ITQs)

Currently Section 303(d)(1) of MSA prohibits a Council from submitting or the Secretary approving an IFQ system before October 1, 2000. Section 407(b) prohibits the Gulf Council from undertaking or continuing the preparation of a red snapper individual fishing quota (IFQ) or any system that provides for the consolidation of permits to create a trip limit before October 1, 2000. The Council supports rescinding those provisions. The Council also opposes extending the moratorium on IFQs.

The Council reiterated its stand on IFQs (as above) but should Congress extend the moratorium the Council requests that Congress provide language that would allow the Council to develop a profile during the moratorium, containing the information necessary for the industry to make a decision on whether ITQs were appropriate, when the referendum is conducted. The Committee did review the exclusive quota-based programs proposed by the Kerry Bill, but did not endorse it.

2. Regional Flexibility in Designing IFQ Systems

The Council, while philosophically opposed to fees that are not regional in nature and dedicated by the Councils, is concerned over the ability of the overcapitalized fleets to pay fees. However, they do support the National Academy of Science (NAS) recommendation that Congressional action allow the maximum flexibility to the Councils in designing IFQ systems and allowing flexibility in setting the fees to be charged for initial allocations, first sale and leasing of IFQs [MSA Sections 303(d)(2-5) and 304(d)(2)].

The Council recommended retaining this position and noted the Kerry Bill did not provide for regional accounts for fees.

3. Coordinated Review and Approval of Plan Amendments and Regulations

The Sustainable Fisheries Act (SFA) amended Sections 304(a) and (b) of the MSA to create separate sections for review and approval of plans and for review and approval of regulations. This has resulted in the approval process for these two actions proceeding in different time periods, rather than concurrently as before the SFA Amendment, which also deleted the 304(a) provision allowing disapproval or partial disapproval of the amendment within the first 15 days. The Council and the Timely Review Panel recommend these sections be modified to include the original language allowing concurrent approval actions for plan amendments and regulations and providing for the initial 15-day disapproval process.

Both Senate bills had identical language to implement this Council recommendation. Therefore, the Council took no action.

4. Regulating Activities That Adversely Affect EFH

The Council recommends that Section 303(b) of MSA be amended to provide authority to Councils to regulate activities by individuals or vessels that adversely impact fisheries or essential fish habitat (EFH). One of the most damaging activities to such habitat is anchoring of any vessels near habitat areas of particular concern (HAPC) or other EFH (e.g., coral reefs, etc.). When these ships swing on the chain deployed for anchoring in 100 feet, 20 to 70 acres of bottom may be plowed up by the chain dragging over the bottom. Non-consumptive diving has been shown to have an adverse cumulative affect on coral reef complexes; especially as levels of diving participation increase. Regulation of these types of activity should be allowed.

The Council's position on this issue was modified as above, (i.e., adding non-consumptive diving example). The Council noted that the Kerry Bill added 303 (b)(12) allowing regulation of vessel activity in coral or other sensitive habitats.

5. Bycatch

The MSA, under Section 405, Incidental Harvest Research, provided for conclusion of a program to (1) assess the impact on fishery resources of incidental harvest by the shrimp trawl fishery of the Gulf and South Atlantic, and (2) development of technological devices or other changes to fishing operations necessary to minimize incidental mortality of bycatch in the course of shrimp trawl activity, etc. Because this program has been the principal vehicle under which research and data collection has been carried out, the Council recommends that this program be extended and funded.

The Council's position on this issue was modified as above.

6. Gulf of Mexico Red Snapper Research (Section 407)

The research provided for has been completed. This section also provides, in Subsection (c), that a referendum be conducted by the National Marine Fisheries Service (NMFS) of persons holding commercial red snapper licenses, to determine if a majority support proceeding with an IFQ program and in Subsection (d) makes the recreational red snapper allocation a quota and provides for closure of the fishery when that quota is reached. The Council recommends that Subsection (c) for the referendum be retained and Subsection (d) be rescinded. The recreational fishery closure is having severe adverse economic impacts on the charter and head boat sectors. This year that fishery that began April 21 is projected to close on August 31. As the red snapper stock is being restored, the size of fish increases each year and the closure comes earlier each year, e.g., January 1 through November 27 in 1997 to January 1 through August 29 in 1999.

The Council's position on this issue was modified as above.

7. Collection of Economic Data [Section 303(b)(7)]

Situation: Language throughout the MSA specifies the collection of biological, economic, and socio-cultural data to meet specific objectives of the Act and for the fishery management councils to consider 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. However, 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 analysis of fishery management regulations is not possible, preventing NMFS/Councils from satisfying the requirements of the Act and of the Regulatory Flexibility Act (RFA). Economic data are required to meet the requirements of RFA and other laws, yet MSA restricts the economic information that can be collected under the authority of the MSA.

Recommendation: Amend the Act to eliminate these MSA 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 the plan to submit economic data.

Discussion: 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 analysis without allowing the collection of necessary data. NMFS and the Councils need data to be able to comply with RFA, and we should not be prohibited from requiring it.

Both Senate bills had identical language to implement this Council recommendation. Therefore, the Council took no action.

8. Confidentiality of Information [Section 402(b)]

Situation: Section 402 replaced and modified former Sections 303(d) and (e). The SFA replaced the word "statistics" with the word "information" expanded confidential protection from 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 to allow for disclosure in several new circumstances.

Recommendation: 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 regarding 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 **and that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations shall not be disclosed,** except:

- to Federal employees and Council employees who are responsible for fishery management plan development and monitoring;
- to State or Marine Fisheries Commission employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;
- when required by court order;
- when such information is used to verify catch under an individual fishing quota program;
- or
- when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act.”

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 **and 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).

Both Senate bills had identical language to implement this Council recommendation. Therefore, the Council took no action.

9. Observer Programs

Reaffirm support to give 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.

Mr. Swingle noted that the Kerry Bill had provisions for an observer program which allowed the Councils to develop the provisions of the program and set the fees. It also established an observer fund

that provided for regional accounts, by fishery, and dedicated the funds to that fishery, as had been the case under Section 313 for the North Pacific Council. **The Council did not endorse the Kerry Bill provisions, but retained its position on the issue.**

10. Congressional Funding of Observer Programs

Situation: Currently, the Secretary is not authorized to collect fees from the fishing industry for funding of observer programs. Funding of observer programs has been through MSA or MMPA appropriations.

The lack of adequate appropriations to run observer programs has resulted in statistically inadequate observer programs that do not satisfy the monitoring requirements of the statutes. This is of particular concern with regard to observer requirements that are a requirement or condition of an ESA biological opinion or a condition of a take reduction plan or take exemption under the MMPA. In addition, funding is taken from extremely important recovery and rebuilding programs to pay for the observer requirements. Consequently, investigations into fishing practices or gear modification (or other areas that would actually prevent the lethal take from occurring or causing serious injury in the first place) cannot proceed.

Recommendation: If the MSA is not amended to authorize the Secretary to collect fees from the fishing industry, then those fisheries that are required to carry observers as a condition of biological opinion under ESA, or as a condition of a take exemption under the MMPA, should be funded through the Congressional appropriations directed towards fisheries management under the MSA.

It was noted that consistent with the Council's position the Kerry Bill would authorize \$20 million annually to support federal observer programs. Therefore, the Council took no action.

11. Defining Overfish and Overfishing [Section 3(29)]

Currently, both overfished and overfishing are defined as a rate of fishing mortality that jeopardizes the capacity of a fishery to produce maximum sustainable yield (MSY) on a continuing basis. The Administration proposed redefining these to be consistent with NMFS' guidelines in the guidelines for National Standard 1.

The Council recommends that Congress define overfishing as harvest activities (i.e., rate of fishing mortality) that would result in too many fish being harvested and overfished as a level (i.e. minimum fishery biomass) resulting in too few fish left in the water.

12. State Fishery Jurisdiction

The Council supports language in the Act to establish the authority of the states to manage species harvested in the exclusive economic zone (EEZ) that occur in both the state territorial waters and the EEZ, in the absence of a council fishery management plan similar to the language specified for Alaska in the last amendment to the Act.

It was noted that Congress did not propose a change that established the state fisheries authority as suggested above. The Council took no further action.

13. Enforcement

The Council supports the implementation of cooperative state/federal enforcement programs patterned after the NMFS/South Carolina enforcement cooperative agreement. While it is not necessary to amend the Act to establish such programs it is consistent with the changes needed to enhance management under the Act to suggest to Congress that they consider establishing and funding such cooperative state/federal programs.

Both Senate bills had identical language to implement the Council recommendation for cooperative state/federal enforcement programs. Therefore, the Council took no action on that issue, but did recommend that Congress provide authorization for increased funding support for NMFS enforcement and for NOAA General Counsel's office to prosecute violations.

14. Council Member Compensation

The Act should specify that Council member compensation be based on the General Schedule that includes locality pay. This action would provide for a more equitable salary compensation. Salaries of members serving in Alaska, the Caribbean, and Western Pacific are adjusted by COLA. The salary of the federal members of the Councils includes locality pay. The DOC has issued a legal opinion that prohibits Council members in the continental U.S. from receiving locality pay; therefore, Congressional action is necessary.

The Council retained its position on this issue.

15. Emergency Rule Vote of NMFS Regional Administrator on the Council

Proposal: Modify the language of Section 305(c)(2)(A) as follows (new language bolded):

(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...

Currently, the NMFS RA is instructed to cast a negative vote even if he/she supports the emergency or interim action to preserve the Secretary's authority to reject the request. The Council believes that Congressional intent is being violated by that policy.

The Council retained its position on this issue.

16. Disclosure of Financial Interest and Recusal

Proposal: Modify the language of Section 302(j)(2) as follows (new language bolded):

- (2) Each affected individual must disclose any financial interest held by-
- a: that individual;
 - b: the spouse, minor child, or partner of that individual; and

- c: any organization (other than the Council) in which that individual is serving as an officer director, trustee, partner, or employee; in any harvesting, processing, or marketing activity that is being, or will be, undertaken within any fishery over which the Council concerned has jurisdiction,
- d: or any financial interest in essential fish habitat (EFH).

The Council feels an interest in EFH should be treated from an ethical point of view, the same as an interest in fishery operations, in determining whether a Council member should abstain from voting. The effect of this action would be to exclude the Council member who held interests in/or related to EFH from the provisions of Section 208 of title 18, SSC, which would prevent that person from voting on habitat protection issues. However, if he/she were able to file a disclosure notice under 302(j) of the MSA they could vote unless that action would substantially change the financial interests of the member. This action would put them on the same basis as a person having an interest in a commercial harvesting, processing, or marketing activity. A lot of the marshland in Louisiana is privately owned.

The Council's position on this issue was modified as above.

The Committee then reviewed the following issues first raised in the Gilchrist Bill Tab E, No. 6:

1. Council Members Nominated by Governors

Kerry Bill (Pages 40-41) - include consideration of members of conservation organizations [302(b)]
Snowe Bill - Silent

The Council supports the Snowe bill on this issue (i.e., no change).

2. Bycatch Reduction

Kerry Bill (Page 95) - Reduction Incentives; (Page 116) - Reporting and Task Forces
Snowe bill - No Change

The Council reviewed the bycatch reduction provisions in the Kerry Bill (page 95, 116) and felt uncomfortable with the provisions and, therefore, took no action.

3. Fishery Ecosystem FMPs

Kerry Bill (pages 95-96) - similar to Gilchrest except time periods
Snowe Bill (Page 105) - Development of One or More Pilot Ecosystem Plans

The Council recommends to Congress, that of the two Senate proposals for Fishery Ecosystem Plans, it supports the Snowe bill proposal, but reserves its position on whether Ecosystem Plans should be included as amendments to the Act. The Council takes this position because it has not had any information provided to it that demonstrates the Ecosystem Plans will provide a management regime superior to current FMPs, and because there are no NMFS guidelines upon which to base a decision on the complexity of such a plan. The plans could be as simple as concluding that our multi-species FMP for about 40 species of reef fish is an Ecosystem Plan, or as complex as requiring us to manage the other 150 species of finfish (most of which are small prey fish not harvested in the fishery), as well as all the invertebrates. We favor the Snowe bill provisions because they provide for a more gradual approach to evaluating the benefits or aspects of such an approach to fishery management.

The Committee then considered other important issues raised in the two Senate Bills as follows:

1. Capacity Reduction [303(e)]
Kerry Bill (Page 56); Also see [312(b)] - Page 87
Snowe Bill - No Change

The Council, after reviewing the provisions of the Kerry Bill took no action, pending a report by NMFS on this subject at the November Council meeting.

2. Peer-Group Review
Kerry Bill (Pages 97-98) - Establishes a Center for Review
Snowe Bill (Pages 46-47) - Uses SSC or Council Scientific Committees

After reviewing the provisions of both bills, the Council supports the current systems as proposed in the Snowe bill, with the realization the Council could, if they choose to, add other experts to the SSC/SAP/SEP review process on an ad-hoc basis.

3. Public Notice [302(i)] (Both the Same)
Kerry Bill (Page 46) - Also allows closed meetings to review research projects for cooperative research
Snowe Bill (Page 48)

Both Senate bills had identical language allowing the Council to notify the public of meetings “by any other means that will result in wide publicity” in addition to publishing a notice in the newspapers of seaports. Therefore, the Council supported that action.

4. Cooperative Research [408] - With industry/state/academic institutes
Kerry Bill (Pages 109-110)
Snowe Bill - (S.2832 page 9)

The Council supports the concept of Cooperative Research programs between the fishing industries, educational institutions, and state and federal agencies.

5. Habitat Areas of Particular Concerns [303(b)(7) and 305(b)]
Kerry Bill (Pages 50 and 65-66)
Snowe Bill (Page 7, 52, and 66-67)

Both Senate bills provided for HAPCs as the next step in describing areas of EFH critical to certain life history stages of each stock. The Council supports HAPCs as a subset of EFH that will be used to describe these critical areas.

6. Regional Fishery Outreach Program [317(a)(b)(c)]
Kerry Bill (Pages 96-97)
Snowe Bill - No Change

The Council reviewed the Regional Fishery Outreach Program provisions of the Kerry Bill (pages 96-97). They “wholeheartedly” support the outreach provision under paragraphs (a) and (b) of this section. Note: Subsequent paragraphs (c)(d) and (e) relate to peer-group reviews and were not supported.

The Committee deferred the other issues on the handout to a subsequent meeting. They did address two items of critical concern to Dr. Claverie. The first of these was a proposed policy on page 3 of the Snowe bill (Tab E, No. 5) which proposed that the Secretary of the Department of Commerce have exclusive authority for managing fishery resources. Dr. Claverie expressed concern that authority may supercede the Council authority. **Therefore, the Council objects to that provision.**

The other provision was on page 40 of the Gilchrist bill (Tab E, No 6). which would modify Section 301(b) to make the national standard guidelines have the full force and effect of law. **The Council opposes that change.**

ATTACHMENT 3

June 5, 2001

The Honorable Ernest Hollings
Chairman
Committee on Commerce, Science, and Transportation
558 Senate Dirksen Office Building
Washington, D.C. 20515

Dear Senator Hollings:

The Chairs of the eight Regional Fishery Management Councils, at their annual meeting, addressed Magnuson-Stevens Act reauthorization issues and developed the attached list of recommendations. On behalf of the Chairs I am hereby providing these recommendations for consideration by your Subcommittee.

Please advise us if you have any questions or need any clarification.

Best regards.

Sincerely,

Kay Williams
Gulf Council Chair

HKW:WES:lde

Attachment: Recommendations of the Council Chairs regarding Magnuson-Stevens Act
Reauthorization Issues

c: Council Chairs, w/attachment
Gulf Council, w/attachment
Staff, w/attachment

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

May 23, 2001

At the 2001 Council Chairs' meeting, representatives from the eight regional fishery management Councils reached consensus on a variety of recommendations associated with reauthorizing the Magnuson-Stevens Fishery Conservation and Management Act (MSA). These 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 are assigned.

Highest Priority Issues

· NEPA

The process for social and economic analysis, scientific review, and public comment specified in the MSA is substantially the same as the process specified under the National Environmental Policy Act (NEPA). However, the timeline and administrative process under these two Acts often conflict. These conflicts have led to cumbersome and unnecessarily complex administrative procedures resulting in long delays between the time that decisions are made and regulations are adopted. They have also created significant opportunities for procedural lawsuits that frustrate Council conservation actions. The Congress needs to resolve these conflicts between statutes in order to clarify and streamline the process. The following is submitted as a possible remedy to the effects of litigation on Council management actions:

Section 305(f)...Judicial Review

Purpose: to clarify that the Secretary's failure to comply with the NEPA in the management of a fishery under the MSA should result only in judicial guidance regarding NEPA compliance rather than judicial management of, or injunction against, a fishery.

Amendment: We suggest the following subparagraph be added to Section 305. Paragraph (f) is amended by redesignating subparagraph (4) as subparagraph (5), and inserting after subparagraph (3) the following:

(4) If the secretary has failed to comply with the NEPA, Section 4332 of Title 42, United States Code, in the management of a fishery under this Act, the exclusive remedy shall be an injunction related to the substance of the environmental analysis or the process for developing such analysis."

· 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 304(e)(4)(A)...Rebuilding Periods

Without a doubt, the Council Chairs support rebuilding targets under the SFA; however, the Councils should have greater latitude for specifying rebuilding periods than is provided under the National Standard Guidelines. The Council Chairs recommend that “the SFA be amended to provide sufficient flexibility to make short-term adjustments to rebuilding targets/programs to account for scientific uncertainty, natural variation, current stock status, current stock trends, and multi-species fishery relationships”.

· Executive Order for MPAs

The Council Chairs recognize that there is a conservation benefit realized by establishing marine protected areas (MPAs). The Councils have had the authority to establish MPAs for fisheries management and have done so since the first fisheries management plans were implemented under the MSA. The Councils are and will remain in the best position to determine when and what areas should be closed to fishing activities to protect fish stocks and habitat in the EEZ.

The Council Chairs recommend that Executive Order 13158 be rescinded, or alternatively, amended to reaffirm the sole authority of NOAA and the Councils to manage marine fisheries in the EEZ. Also, Congress should review the MPA issue and possibly develop legislation to clarify jurisdictional issues, set criteria for MPAs, and establish clear administrative procedures for establishing MPAs which among other things, reinforces the role of the states, territories, and Councils in managing marine fisheries.

- Section 303(d)(1)...Rescinding the Congressional Prohibitions on IFQs and ITQs
Section 303(d)(1) of the MSA prohibited a Council from submitting or the Secretary from approving an Individual Fishing Quota (IFQ) system before October 1, 2000. More recently, through the FY2001 Appropriation Act, this moratorium on IFQs/ITQs was extended for an additional two years. If the reauthorization process is completed in 2001, the Council Chairs support rescinding the moratorium before the year 2002 deadline. The Council Chairs recommend that MSA be amended to provide maximum flexibility to the Councils to tailor IFQ programs to specific regional, social, economic, and fishery conditions. Councils should have clear authority to address transferability and ownership issues; include harvesters, processors, and communities in such programs; promote conservation; and include measures necessary to successfully monitor and enforce the provisions of such a program.
- 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).

· Section 304(a)...FMP Review Program

The Council Chairs believe that NMFS, in its review of proposed FMPs, amendments, and framework actions, has failed to adequately communicate to the Councils perceived problems in a timely manner. We propose the inclusion of a mandate in the MSA to require an abbreviated rule-making process in which NMFS would consult with the Councils and consider such new information as provided by the Councils before disapproving FMPs, amendments, or framework actions submitted by the Councils for NMFS approval.

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. The Department of Commerce has issued a legal opinion that prohibits Council members in the continental U.S. from receiving locality pay. Congressional action, therefore, is necessary to implement this change.

· 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 311(a)...Enforcement

The Council Chairs support the implementation of cooperative state/federal enforcement programs patterned after the NMFS/South Carolina enforcement cooperative agreement. We applaud the inclusion of \$15 million in the 2001 NMFS budget to expand the program to other states. While it is not necessary to amend the MSA to establish such programs, Congressional action is needed to enhance management under the MSA to establish permanent funding for such cooperative state/federal programs.

· 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);

- CONFIDENTIALITY OF INFORMATION -

- 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...

- 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. We also wish to retain turtles in the definitions of “fish” because of their importance in every region and especially in past, and possibly future, fisheries pursued by indigenous peoples of the Western Pacific Region.

· 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”.

ATTACHMENT 4

October 15, 1999

Ms. Amber Poole
Committee on Commerce, Science,
and Transportation
Room SD-508
U.S. Senate
Washington, D.C. 20510-6125

Dear Ms. Poole:

Enclosed is a hard copy of my responses to the Subcommittee questions. An e-mail of questions and responses will be submitted to you on today by Ms. Kennedy.

Please advise me if you need additional information.

Sincerely,

Wayne E. Swingle
Executive Director

WES:jb

Enclosure

c: Gulf Council, w/encl.
Staff, w/encl.

POST HEARING QUESTIONS - SUBMITTED BY SENATOR SNOWE

Mr. Wayne E. Swingle

1. The National Marine Fisheries Service (NMFS) and the Councils have begun to identify a subset of essential fish habitat (EFH) called "habitat areas of particular concern." This subset targets critical areas such as places of spawning aggregations. Should these "habitat areas of particular concern" be the true focus of NMFS' work on EFH implementation? Please explain.

Response: The identification of habitat critical to certain life stages of the fish stocks and designating them as habitat areas of particular concern (HAPCs) seems to be the next logical step in protecting EFH. It would be most helpful to the management process if NMFS and the National Ocean Survey (NOS) could focus part of their research program on delineating these areas. The use of HAPCs is not a new concept. The Gulf and South Atlantic Councils established HAPCs in 1984 to protect pristine coral areas from the impacts of gear fished on the bottom, while simultaneously prohibiting harvest of stoney coral and sea fans. The coral HAPCs established off Florida and Texas total 390 square nautical miles. Through our shrimp fishery management plan (FMP) we permanently closed shrimp nursery grounds off Florida (3,652 square nautical miles) and seasonally closed nursery grounds off Texas for 45 to 60 days (5,475 square nautical miles). Subsequently we have (in 1994) prohibited all fishing in a spawning aggregation site for mutton snapper (11 square nautical miles) and (in 1999) proposed establishing two marine reserves at gag grouper spawning aggregation sites (219 square nautical miles). Identification of the importance of these areas to the life stages of the stocks we managed has required rather extensive at-sea sampling over many years. As we gain better biological information on the life histories of our fishery stocks, we recognize that there are other unique areas critical to production from these stocks. But to identify the location, scope, and importance of these areas will require additional research by NOS and NMFS.

2. NMFS has been criticized for its lack of compliance with the Regulatory Flexibility Act. Other agencies, such as the Environmental Protection Agency, are required to convene small business advocacy review panels for each rulemaking that will have a significant economic impact on small businesses.
 - A. Please explain in detail how a similar small business advocacy review panel process, such as the EPA's, could assist NMFS in bringing economic impact analysis to the forefront of fisheries decision-making?

Response: The Council already has its own advisory panel for every fishery in the Gulf that has a management plan. The membership of these panels mostly comes from the affected industry. These panels

look at proposed Council actions from various angles, including impacts on their respective businesses which generally fall within the SBA's definition of small entities. At the time these panels review Council plan amendments, the reviewed documents contain an analysis of impacts, inclusive of impacts on small business entities. If this analysis finds that the Council's proposed regulatory action has a significant impact on a substantial number of small entities, an Initial Regulatory Flexibility Analysis (IRFA) is included in the reviewed documents. If the reviewed Council actions are contained in a regulatory amendment, these panels are presented with various documents, including the report of the Council's Socioeconomic Panel, to aid them in reviewing potential Council actions.

Even before the enactment of the Small Business Regulatory Enforcement Fairness Act in 1996 which made the Regulatory Flexibility Analysis judicially reviewable, the Gulf Council has already been conducting an analysis of impacts on small business entities, including an IRFA where appropriate, which the advisory panels review. In this regard, the impacts of Council actions on small business entities are reviewed on a routine basis.

If more emphasis is needed to address the regulatory impacts on small business entities, the operating procedures governing the various advisory panels may be slightly modified to stress their task of reviewing impacts on small business entities.

B. Does the Gulf of Mexico Council receive an adequate amount of socio-economic data to consider in the development of fishery management measures. If not, please explain the impact that inadequate consideration of such factors has had on the decision-making process at the Council.

Response: The Gulf Council is generally provided with economic data which can provide an assessment of the general direction, if not the magnitude, of effects of management measures under consideration. Some measures require more refined data, such as financial information of directly affected vessels and dealers in certain areas in the Gulf or the recreational value of fish or fishing trip, that are usually not available. Most of the economic information in this regard are mainly based on input from the public through oral and/or written testimonies to the Council. In addition to these data that are not available, there is little or no information on fishing communities and their level of dependence on fisheries under Council consideration. This lack of information has at times hampered the Council in determining which of the regulatory measures that achieve the same objective provide the least negative or most positive impacts on fishing participants.

C. Please outline any suggestions that you may have for improving socio-economic data collection measures which would maintain an appropriate level of confidentiality.

Response:

- Conduct cost and returns studies on vessels and primary fish dealers, at least every 5 years.
- Include socio-economic questions in the applications for permits.
- Require logbooks now administered on permitted commercial vessels to include information on operating costs of vessel fishing operations.
- Collect more detailed dealer-level price information (e.g., by size category) on major managed species.
- Collect more detailed information on imported fish products.
- Conduct Gulfwide study profiling various fishing communities around the Gulf.

3. Other regional fishery management Councils have been criticized for their inability to manage meetings in a civilized manner. This has created an environment in which people may be too uncomfortable to actively participate. As a result, some proposed management measures may not receive adequate consideration.

A. Has the Gulf of Mexico Council had similar experiences?

Response: During the 23 years I have served the Council I can recall only one issue where some of the persons attending public hearings and the Council session were probably reluctant to testify. This was related to an alternative proposal in 1990 by the Council to close the exclusive economic zone (EEZ) off the central Gulf coast (i.e., Florida panhandle through Louisiana) to commercial shrimp fishing in May, June, and July, concurrent with the annual closure off the Texas coast. The proposal was an alternative for reducing trawl bycatch of juvenile red snapper by area closure, instead of bycatch reduction devices (BRDs). The public hearings were attended by about 4,500 persons and the final Council session by about 500, most of whom were opposed to the idea. I am sure some proponents of the closure were reluctant to testify. The Council concluded the adverse impacts greatly outweighed any benefit from the closure.

B. Please explain how the Gulf of Mexico Council facilitates an atmosphere which enables people to speak freely during meetings.

Response: The Council provides all persons wishing to testify an equal opportunity, and normally limits such testimony to either 5 or 10 minutes per person. After each person testifies, Council members ask them questions to clarify the points they were making, or about their fishing operations. This question and answer period does two things, it

assures the persons the members were listening to their testimony and it brings out information useful to the Council in making its decision. The Council is always willing to extend its session into the evening hours to allow more testimony or to rearrange the agenda items the next day for such an extension.

4. **Industry representatives have criticized the Councils for not using information and recommendations submitted by Advisory Committees. Please explain how the Gulf of Mexico Council incorporates the recommendations of such committees into its decision-making process.**

Response: The Council utilizes two management processes; (1) plan amendments and; (2) regulatory amendments to specify the total allowable catch (TAC) for certain stocks and the management measures necessary to constrain the catch within the TAC (e.g., quotas, bag limits, size limits, seasons, etc.). In the regulatory amendment process the industry advisory committee or advisory panel (AP) is provided the stock assessment documents, the Stock Assessment Panel (SAP) report, which provides an acceptable biological catch (ABC) range and the Socioeconomic Panel (SEP) report which examines the social and economic impacts of setting TAC at various levels within the ABC range. The reports are provided to the AP at intervals of 2 to 4 weeks in advance of their meeting and are presented at these meetings by the chairmen of the SAP and SEP. Based on this information the AP develops its recommendations to the Council. The Scientific and Statistical Committee (SSC) develops its recommendations to the Council independently based on the same data.

In the plan amendment process the draft amendment is provided to the AP (and SSC) for review during the period the Council is holding public hearings, unless the amendment is controversial, in which case, the AP usually reviews the amendment twice before final Council action. At the AP (and SSC) meetings Council staff presents the plan amendment.

In both processes the recommendations of the AP are reviewed and acted upon by the management committee with oversight responsibility for that stock. The management committee recommendations are subsequently acted on by the Council. Usually some of the AP recommendations are accepted by the Council and some are not. The same is true of SSC recommendations, some of which may conflict with the AP recommendations.

5. **Some question whether it is appropriate to continue to use Maximum Sustainable Yield (MSY) as the target for fisheries management.**

- A. Please explain whether you think that there are any modification to the management process which would make MSY a reasonable goal.

Response: MSY as a verbal concept is not an unreasonable goal. However, there are a number of computational problems in arriving at a reliable numerical value for MSY. For Graham-Schaefer and other stock production models that yield an estimate of MSY in biomass it is unusual that all of the conditions of the model can be met. Where there are multiple types of commercial gear used and a large recreational component in the total catch it is pure guess work on how to treat the effort for each of these components in order to have a single effort component to shape the MSY curve.

The long-term equilibrium yield from a stock will vary depending on the minimum size limit and other selectivity factors. For example the fishery for red drum which is a major recreational fishery has always been pursued on the first 3 to 4 year classes which occur in state estuarine waters. This results in an equilibrium yield (or MSY estimate) much lower than would be the case if the fishery were pursued on the adults in federal waters. The adults, while making a nice trophy, are not very desirable for human consumption because as they age parasite infestation increases. Surely the intent of Congress is that MSY be the lower value consistent with the historical fishery, even though that may be 2 or more times less than the MSY for harvest of adults only.

NMFS in their letter of June 14, 1999 (attachment 1) to the South Atlantic Fishery Management Council (SAFMC) which disapproved spawning potential ratio (SPR) proxies for MSY in their Sustainable Fisheries Act (SFA) Amendment, stated that “the national standard guidelines require biomass-based estimates for MSY.” Actually, the national standard guideline provides for other alternatives for expressing MSY when data are insufficient for specifying MSY directly, i.e., biomass-based MSY. Recent attempts by NMFS to determine a biomass-based MSY for red snapper illustrate the problem of arriving at a reliable estimate in terms of pounds. The current stock assessment has 6 estimates of MSY ranging between 37 and 204 million pounds depending on the assumptions used in the model. This same model analyses provide 6 estimates of the biomass associated with MSY ranging from 3.5 to 4.7 billion pounds. None of these seem to be realistic MSY estimates consistent with past maximum landing levels, which suggest MSY should be on the order of 30 million pounds or likely less. Apparently the models do not take into account that the size of the standing stock and MSY for red snapper is limited by the amount of habitat with reefs since red snapper congregate on reefs. The estimates of the biomass associated with MSY (standing stock at MSY) are particularly unrealistic. This illustrates that it is probably unrealistic to use a biomass-based MSY for some stocks.

B. Please outline alternatives to MSY as a target for management.

Response: Because of the problems cited above I feel a much better standard for most of our stocks would be to use a static spawning stock biomass per recruit (SSBR) proxy for MSY. NMFS is probably correct that the use of SPR based on fecundity (egg production) is not appropriate as a proxy, in that for many stocks there is no direct relationship between eggs produced and MSY. This is because most stocks overcompensate by producing many more eggs than is necessary to produce MSY. However, since SSBR is biomass-based parameter, it not only seems appropriate to use as a proxy for MSY but also to be an allowable alternative for MSY suggested under the national standard guidelines. The computation of the SSBR is more straightforward and reliable. If it is used as a proxy for MSY, then optimum yield (OY) should also be stated in terms of SSBR, but at a higher level to be precautionary in setting the harvest target.

C. How do you view ecosystem management as it relates to the management of species at maximum sustainable yield?

Response: We currently manage some stock-complexes as an ecosystem. For example, for the grouper complex (15 stocks) we set annual commercial quotas for the shallow-water and deep-water grouper complexes. The bag limits for the recreational sector are aggregate bag limits for all grouper species. This is because usually neither the commercial or recreational sectors can fish for a single species without harvesting other grouper species. Observer data for longline vessels targeting grouper indicate they commonly take about 85 species of other reef fish and sharks as bycatch. Similarly, the recreational fishermen targeting grouper catch other species. This makes it almost impossible to manage each of these interrelated stocks separately at a MSY level. What we have done for Nassau grouper and jewfish stocks, which are classified as overfished, is to prohibit any harvest or possession. This, while not completely eliminating fishing mortality, does significantly reduce it. Anecdotal information from divers indicate the jewfish stocks are recovering. Nassau grouper were overfished in the Caribbean Sea and are very rare in the Gulf.

Questions for Panel III

2. Adequacy of Council Funding

Mr. Swingle, you pointed out in your written testimony that while the work of the councils has increased dramatically due to the requirements of the Sustainable Fisheries Act, the budget request for the councils has increased a mere 2.3 percent.

Questions:

Do the councils have adequate financial resources to carry out their work? If not, what is being left undone due to financial constraints?

Response: No, the Councils have not had adequate financial resources to do a good job of carrying out their work since the early to mid-1980's. In the fiscal years 1977 through 1984 the allocations to the 8 Councils was sufficient not only to cover the administrative costs of their operations, but it also provided programatic funding which was used largely to get the information the Councils needed to carry out their management responsibility. These programatic funds made up 20 to 25 percent of the Councils' expenditures in the first several years and were gradually reduced to about 15 percent during the early 1980's, essentially ceasing to exist after 1984. The flexibility these funds provided to the Councils allowed them to do a much better job with smaller technical staffs. Our Council, for example, during the 1977-1981 period was concurrently developing 11 draft FMPs, each one requiring about 2 years for completion. Most of these were developed by contracting with academic institutions, Sea Grant programs, or private consulting firms. There was flexibility to have social impact analyses completed and even determinations of the coastal communities most dependent on commercial fishing. There was flexibility to have detailed environmental impact statements prepared and most importantly the flexibility to have analyses completed of management data sets needed for the FMPs or amendments to the FMP. In addition to the analyses and information obtained by these programatic funds, NMFS was also providing similar data and analyses, so the system was more efficient than it is now and much of the socioeconomic information was better.

The Councils, of course, like any governmental entity, live within the funding allocated to them. To give you an idea how tight the current budget is, the Mid-Atlantic Fishery Management Council needed \$90,000 to cover the cost of the additional member position created by the SFA, and the other Councils could not agree to readjust their budgets to cover that cost.

What is being left undone is that amendments to address rebuilding schedules for overfished stocks and other SFA issues, such as bycatch, are proceeding at a slower pace because budget limits the number that can be done each year. But more importantly even though the Council still makes its decisions on the best available scientific information, that information base is not as good as it should be or was. This is particularly true of the information related to social impact analyses and true of the information for economic

analyses. Our Council, in the past 4 years, has been able to fund only two social impact analyses of limited scope and two biological analyses. Currently NMFS has no technical capability in the social sciences that can be used to generate this information or the impact analyses. The reduction in NMFS' FTE personnel has even adversely affected their capability to complete all the stock assessments we need, and flexibility is needed to contract for some of these studies.

What would you recommend as an appropriate level of council funding, compared to current funding?

Response: Over the past 4 years, the Council chairmen and executive directors have met with NMFS' headquarter staff to discuss the next federal budget under development, as it relates to both NMFS' and Council needs. For the FY 2000 budget the Councils recommended to NMFS that their allocation be set at 15 million dollars. That represents a 15 percent increase over the FY 1999 allocation to the Councils. The Councils based the recommendations partially on the need to regain some programmatic funding to restore their flexibility in carrying out the management responsibilities.

3. Bycatch Reporting System

Mr. Hinman, you have pointed out that "no council established a required standardized bycatch reporting system" since the passage of the Sustainable Fisheries Act.

Questions:

What would the establishment of such a system entail in terms of data collection, technical operations, and funding?