COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER, OCEANS, AND WILDLIFE

HYBRID LEGISLATIVE HEARING
November 16, 2021
2:00 p.m. (ET)

Legislative Hearing on H.R. 59, H.R. 4690, H.R. 5770

Questions for the Record for Ms. Janet Coit, Assistant Administrator, National Marine Fisheries Service, Acting Assistant Secretary of Commerce for Oceans and Atmosphere, Deputy NOAA Administrator

Questions from Rep. Don Young, AK

On the topic of forage fish conservation, both H.R. 4690 and H.R. 5770 require the National Oceanic and Atmospheric Administration (NOAA) to specify the annual dietary needs of all marine mammals, birds, and other fishes, as well as account for all of this when setting fishery quotas. Based on what we have seen in Alaska regarding the Agency's inability to accurately assess the dietary needs of just one marine mammal Distinct Population Segment – the Western Steller sea lion – and with the Agency's survey days-at-sea generally reducing in number – I find it extremely hard to believe NOAA and the Councils will be able to accurately determine all of these dietary needs for all these species every single year and I fear we will be left with nothing but precautionary decisions that will reduce our commercial, charter, tribal, subsistence, and recreational fishing activities. In your opinion:

1. How might our management system be impacted by such legislation if it were to pass?

The National Marine Fisheries Service (NMFS) recognizes the importance of forage fish to maintaining healthy marine ecosystems and agrees in principle with the concept that ecosystem impacts should be a consideration in the management of forage fish. Under the current Magnuson-Stevens Fishery Conservation and Management Act (MSA), NMFS and the Regional Fishery Management Councils (Councils) have authority to manage forage fish and to take into account ecosystem impacts through the management of annual catch limits, the establishment of ecosystem component species, and implementation of ecosystem-based fishery management plans. The forage fish provisions in H.R. 4690 and H.R. 5770 would impose new scientific and management requirements on NMFS and the Councils to reduce harvest of fish that are currently managed according to the 10 national standards in the current MSA. These new requirements could affect a wide range of economically important stocks such as Alaska pollock and shrimp in the Gulf of Mexico. The requirement to manage forage fish such that the "diet needs of fish species and other marine wildlife, including mammals and birds…" are taken into account creates a very broad and data intensive requirement. There are tradeoffs between the needs of different "marine wildlife," and this section does not clarify how to prioritize those objectives or how those objectives should be considered in the context of the rest of the national standards. In addition, it is not clear if Congress intends for these requirements to apply to forage fish that are actively managed or if they apply broadly to any species identified as forage in a management plan. It is not clear

if the intent of Congress is to require the Secretary of Commerce to identify the dietary needs of each individual protected mammal or to manage broadly across the ecosystem for the collective needs of fish species and marine wildlife. Finally, the requirement for Councils to reduce catch limits for forage fish, particularly under climate related changing ocean conditions, appears to assume that sufficient forage for all marine wildlife will be achieved by reducing fishing. However, as climate related changes affect the abundance and distribution of forage fish, requiring Science and Statistical Committees to ensure sufficient abundance, diversity, and localized distribution of forage fish populations through a requirement for councils to reduce catch limits may not achieve conservation goals for forage and marine wildlife broadly. Determining the nutritional needs of any one species, including the Western Distinct Population Segment of Steller sea lion, is a complex and challenging scientific question that NOAA is continuing to research.

2. In the case of not being able to fulfill these scientific requirements, could an increase in lawsuits be a possible outcome?

   As with any legislative change, there is a possibility for new litigation. Unless Congress provides otherwise, any new requirement to specify and consider forage fish needs would be subject to MSA National Standard 2, which provides that conservation and management measures must be based on the "best scientific information available." The courts have recognized that this standard does not require an "accurate" assessment or determination, but rather that any analysis be reasonable based on what is available, and the courts generally give broad deference to NMFS' scientific judgment.

3. What will be the impacts of climate change on shifting stocks of forage species and how will this be accounted for if we do not even have the basic data to implement this provision?

   Climate change is affecting the distribution and productivity of many species in the marine environment, including both forage and non-forage fish. NOAA continues to work with partners to understand and respond to changing climate and ocean conditions to help minimize impacts, adapt to change, and ensure that present and future generations can enjoy benefits of healthy marine ecosystems. NOAA is also advancing science and technology to adapt fisheries management to changing climatic conditions. However, the specific impacts to individual species of forage fish will vary by region, their life history, and the degree of change occurring in the oceans. H.R. 5770 and H.R. 4690 would increase the scientific requirements for managed stocks and could result in additional species being deemed in need of conservation and management. In many regions we lack robust baseline information on fish and habitat distribution and regular surveys to assess changes in abundance, diversity, and productivity. The lack of basic information challenges our ability to quantitatively attribute fishery specific fluctuations to climate change, which could lead to more conservative management advice. The expanded requirements outlined in H.R. 5770 and H.R. 4690 would substantially increase the capacity needs for our science and management capabilities.

4. What are your thoughts about Alaska Pollock and sockeye salmon, which remain at low trophic levels and could easily be swept up in this ill-conceived but far-reaching legislation?

   Under H.R. 4690, it is the Secretary's responsibility to develop a definition of forage fish.

The bill gives the Secretary several criteria to consider. Under those criteria alone, it is possible that Alaska pollock, some salmon species, or other critical commercial fisheries could be considered forage fish and subject to the new science and management provisions of these bills. However, while the Secretary must consider those criteria, she ultimately has the authority to develop the definition. The agency would likely establish that definition through a regulatory process, and NOAA cannot pre-determine the results of that process, which would take into account public input.

Regarding litigation on forage fish management, NOAA has been challenged three times in recent years on shad and river herring, in which NOAA has prevailed twice and is about to prevail in the third and final case. In addition, the Mid-Atlantic Fishery Management Council (MAFMC) has already considered, and declined, this specific issue twice. During which, NOAA voted twice to oppose inclusion of such species. We understand these cases included the following:

Flaherty v. Raimondo, a case in the District of Columbia regarding Amendment 5 to the Herring FMP, NMFS won on summary judgment in March 2021, and the time for appeal has run,[out] so this case is done. In this case the Plaintiffs claimed that the NMFS violated the MSA and Administrative Procedure Act by not disapproving Amendment 5 due to its failure to include river herring and shad as stocks in the Atlantic herring fishery. Judge Kelly ruled that the MSA does not require the Secretary to consider in each Amendment whether stocks must be added to a fishery. The Judge also ruled that the Secretary complied with the National Environmental Policy Act's obligation to take a hard look at a reasonable range of alternatives designed to achieve the amendment's objectives. Judge Kelly held that while the Amendment included measures relating to bycatch of river herring and shad, the National Marine Fisheries Service was not required to consider alternatives for adding river and shad as stocks in the Atlantic herring fishery because it was not within the scope of the Amendment's goals and objectives.

Anglers Conservation Network v. Ross, also in DC before Judge Kelly, the plaintiffs challenged the Council's October 2016 decision not to include river herring and shad into mackerel Fishery Management Plans (FMP) after remand from earlier case by same plaintiffs. The parties filed summary judgment papers, and with its opening brief NMFS also filed motion to strike extra record materials that plaintiffs cited in their briefs. In May 2021, the court ordered the plaintiffs to refile a new brief without the extra record materials. The plaintiffs never filed anything, and the court dismissed the case on June 23, 2021 for failure to prosecute.

Natural Resources Development Council vs Secretary of Commerce. There's only one active case remaining relating to river herring, and it's the challenge to the National Marine Fisheries Service's (NMFS) 2019 determination that the Endangered Species Act (ESA) listing of river herring wasn't warranted. That case, brought by Natural Resources Defense Council, is in the District of Columbia and is in the last stages of summary judgment briefing, with NMFS's reply brief due on November 19.

Based on this information my questions are as follows:

Both H.R. 4690 and H.R. 5770 require your Agency to specifically add shad and river herring to New England Fishery Management Council (NEFMC) and MAFMC fishery management plans on the East Coast, the very same issues the courts ruled against the plaintiffs (and in favor of NOAA) in the cases referenced above.

1. Do you believe it is appropriate for Congress to now circumvent and undermine NOAA's

recent efforts in defending your management of forage fish as it relates to the requirements in H.R. 4690 and H.R. 5770?

The MSA establishes a stakeholder-driven, scientifically based fishery management council process that allows for regionally specific solutions for particular forage fish issues. NOAA strongly supports this process. The requirements in H.R. 4690 and H.R. 5770 to add river herring and shad to New England and Mid Atlantic Council fishery management plans remove Council discretion for determining which stocks are in need of conservation and management. In addition, adding the same stocks (shad and river herring) to two different FMPs managed by two different Councils would add an additional layer of complexity to managing these stocks, noting that both are currently subject to management under the Atlantic States Marine Fisheries Commission. Both the New England and Mid-Atlantic Council have established catch caps for river herring and shad designed to ensure bycatch of these species does not increase while holding the directed fisheries that incidentally take these species as bycatch accountable.

2. Do you believe it is appropriate for Congress to undermine the Court's prior rulings on these issues?

The dynamic science-based management process under the MSA provides the nation with a very successful fisheries management construct. The unique, highly participatory management structure centered on the regional fishery management council system encourages a collaborative, "bottom up" process where fishermen, other fishery stakeholders, affected states, Tribal governments, and the Federal Government all provide input and influence decisions about how to manage U.S. fisheries under the law. NOAA supports this process.

3. Can you please explain the management ramifications for commercial midwater trawl fisheries (and specifically New England Small Mesh bottom trawl and any other applicable fisheries) that might occur if these species were added to numerous East Coast FMPs?

The Mid-Atlantic and New England Fishery Management Councils have established numerous conservation and management measures that may be affected by new forage species Fishery Management Plans. The Mid-Atlantic and New England Fishery Management Councils adopted catch caps for both shad and river herring in the Mackerel, Squid, Butterfish Fishery Management Plan (FMP) and Atlantic Herring FMP, where the directed fisheries are closed when catch of forage species reaches the set amounts. In addition to these catch caps, we have approved measures that take into account the importance of numerous other forage species. Both FMPs have established catch caps for river herring and shad that serve to ensure bycatch of these species doesn't increase and to hold the directed fisheries accountable. Both species are currently managed by the Atlantic States Fisheries Management Commission. Further adjusting these FMPs and requiring co-management would be challenging given the intersection of two Councils advising on Federal management and the need to coordinate with state management through the Commission.

Forage fish conservation in H.R. 4690 (Section 508) and H.R. 5770 (and S.1484) is a major component of the MSA reauthorization debate. However, you do not address the topic in your written testimony for this, the only House reauthorization hearing we will have. As the

implementing agency, this provision has the potential to significantly impact your management of Alaska Pollock, the largest fishery you manage, as well as squid fisheries critical to your home state of Rhode Island, West Coast pink shrimp, Gulf of Mexico brown shrimp, and California sardine, just to name just a few. The issue also has implications for nearly every marine mammal stock your agency manages yet you provide no perspective on the topic. Can you please explain to the Committee:

1. Why did you not comment on this component of H.R. 4690 for the MSA hearing?

The bills being considered at this legislative hearing were extensive and we were not able to comment on every provision. Forage fish conservation and protections are important to ensuring sustainable fisheries in the U.S and NMFS, and our management partners, the Regional Fishery Management Councils, continue to improve management of forage fish under the existing, robust MSA provisions currently available for use, including through advancements in ecosystem-based fisheries management.

2. Specifically, is the current MSA implementation (including the ecosystem-based management approaches) by the Regional Councils and the Agency deficient to such a degree that we need to add this component to the Act?

Under the current framework in the MSA, multiple councils have implemented measures that directly benefit forage fish and that respond to region-specific fishery interactions and ecosystem needs. The current MSA provides NMFS and the Regional Fishery Management Councils authority to manage forage fish and to take into account ecosystem impacts through the management of annual catch limits, the establishment of ecosystem component species, and implementation of ecosystem-based fishery management plans. For example, the Mid-Atlantic Fishery Management Council currently conserves and manages 56 forage species or species groups, including five stocks of forage fish under one fishery management plan using the principles established in their Ecosystem Approaches to Management guidance document. The Pacific Fishery Management Council also defines forage fish under its Fishery Ecosystem Plan and manages them through their respective fishery management plans. The North Pacific Fishery Management Council takes a precautionary approach to management using existing authority under the MSA. That Council prohibits directed fishing for key forage fish species like eulachon and sets strict limits on the amount of incidental catch of these species to reduce harvest. NMFS and the State of Alaska monitor the catch of these species and can modify management measures using existing authority provided by the MSA, if needed.

It's clear that NOAA Fisheries, councils, harvesters, processors, and wide-ranging fisheries stakeholders understand that commercial fisheries management must adapt to changing habitats and fish distributions, driven by changes in climate. Testimony at this hearing covered a long list of actions the NPFMC is taking to address climate resilience, and you also noted a number of things that NOAA Fisheries is doing for climate resilience. All these things are being done under current MSA and other authorities.

1. Is there anything in the current MSA that prevents NOAA Fisheries from pursuing climate resilience? In other words, can NOAA Fisheries continue to pursue climate resilience efforts under current authority?

The current MSA neither mandates nor prevents NMFS and the Councils from taking action to pursue climate resilience and climate-ready fisheries. In fact, the MSA already contains many provisions aimed at ensuring the long-term sustainability of fish stocks and their ecosystems (e.g., requirements to end overfishing, rebuild stocks, prevent bycatch and protect habitat). NMFS is working with our partners on multiple fronts to deliver the science and prepare managers to respond to these changes. We have conducted climate vulnerability assessments of fish, protected species, habitats, and fishing communities. We have seven vulnerability assessments completed or underway that provide information on what species may be most vulnerable to changing climate. We are advancing the implementation of ecosystem-based fisheries management, which provides the framework for incorporating ecosystem information into fishery management decisions and assessing trade-offs across fisheries. The agency and councils are currently taking concrete steps to prepare for and respond to climate change impacts on fisheries. For example, NOAA is advancing an agency-wide initiative - the "Climate and Fisheries Initiative" - to build the operational ocean modeling and decision-support system needed to reduce impacts, increase resilience, and help marine resources and resource users adapt to changing ocean conditions. This initiative is a critical component of the President's Budget in fiscal year 2022. Another example is the work that NMFS and our Council partners have initiated on the east and west coasts to conduct scenario planning workshops. Scenario planning helps councils and stakeholders work collaboratively to identify priority management, jurisdictional and governance issues related to climate change and shifting fish stocks as a result of climate change. However, meeting the needs for climate resilience at a pace commensurate with the changes occurring in the environment in some areas may be challenging given competing science and management priorities, the difficulty of distinguishing climate impacts from fishing impacts, and governance challenges around long-held power and decision-making structures.

2. Does NOAA support maintaining regionally based council and SSC efforts to address climate change conditions unique to each region?

The MSA establishes a stakeholder-driven, scientifically based fishery management council process that allows for regionally specific solutions. The climate impacts to specific fisheries varies by region, and the MSA currently provides flexibility to allow for tailored regional solutions given the high diversity of fisheries, their environments and the type of environmental changes occurring due to climate change.

3. Region-based climate resilience work can be facilitated by data generated through NOAA surveys, so how can NOAA Fisheries better provide this and other technical support to regions?

NOAA is advancing an agency-wide initiative - the "Climate and Fisheries Initiative" - to build the operational ocean modeling and decision-support system needed to reduce impacts, increase resilience, and help marine resources and resource users adapt to changing ocean conditions. This initiative is a critical component of the President's Budget in fiscal year 2022. The results of climate vulnerability assessments along with other information will help NMFS prioritize science investments, while scenario planning will help NMFS and our Council partners identify management priorities for climate ready fisheries to further assist in prioritizing science advancements. This initiative will complement ongoing survey and monitoring work needed to better predict ecosystem changes due to climate impacts and

manage fisheries in light of those changes. NMFS is also developing a new portal to provide easy access to information on past, current, and likely future distributions of marine species for use in fisheries management.

There are some provisions in H.R. 4690 that would remove the term "to the extent practicable" in fisheries management national standards, including for bycatch minimization and essential fish habitat impact minimization.

1. If bycatch and habitat impacts had to be minimized – meaning bycatch or impact is as small as possible and cannot possibly be further reduced – what effect would that have on the ability to prosecute U.S. commercial fisheries?

In the United States, bycatch of protected species, such as sea turtles and marine mammals, remains a significant threat to recovering many dwindling populations. NMFS manages protected species bycatch and its impacts through several authorities, including the MSA, the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and other domestic laws and international agreements. NMFS is committed to minimizing protected species bycatch in U.S. fisheries to ensure our protected species are given the best chance to recover and serve as functioning elements in the ecosystem.

Bycatch of other species is a complex, global issue that can potentially threaten the sustainability and resiliency of fishing communities, economies, and ocean ecosystems. Given the highly diverse nature of such bycatch across the over four hundred federally managed fish stocks, the MSA provides flexibility to tailor conservation and management measures to the specific regions, their ecosystems, and communities. Many of the most economically important commercial fisheries are prosecuted with some degree of bycatch. Currently, we are required to minimize that bycatch "to the extent practicable." We caution that deleting "to the extent practicable" may create analytical problems and implementation confusion and could lead to management changes and increased costs in many fisheries.

2. How would NOAA Fisheries evaluate whether minimization had occurred? If the practicability term is removed and results in litigation, what would be the effect of having judges rule on minimization requirements?

Currently, for non-protected species bycatch, National Standard 9 of the MSA requires that Conservation and management measures shall, to the extent practicable, (a) minimize bycatch and (b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. "Bycatch" means fish that are harvested in a fishery, but that are not sold or kept for personal use. Our guidelines for implementing National Standard 9 (50 C.F.R. 600.350) provide that the priority under this provision is "first to avoid catching bycatch species where practicable. Fish that are bycatch and cannot be avoided, must, to the extent practicable, be returned to the sea alive. In their evaluation, the Councils must consider the net benefits to the Nation, which include, but are not limited to: Negative impacts on affected stocks, incomes accruing to participants in directed fisheries in both the short and long term; incomes accruing to participants in fisheries that target the bycatch species; environmental consequences; non-market values of bycatch species, which include non-consumptive uses of bycatch species and existence values, as well as recreational values; and impacts on other marine organisms." NMFS and the Councils currently evaluate all of their conservation and

management measures to determine whether minimization has occurred and whether further minimization is practicable. We are not aware of a judicial decision regarding any evaluation of minimization by NMFS or the Council to date.

3. Does NOAA Fisheries support removing "to the extent practicable" for bycatch and habitat impact minimization?

NMFS strongly supports the goal of reducing bycatch and ensuring healthy habitat for fish. Currently, each council has the flexibility to establish its own threshold of "practicability" for minimizing bycatch and adverse effects on fish habitat. Removing "to the extent practicable" would reduce the ability of councils to tailor conservation and management measures commensurate with the specific needs of their region's fisheries and ecosystems and could have significant impacts to many commercial fisheries and our fishing communities.

Certain provisions in H.R. 4690 suggest that it's problematic for harvesters and processors to serve as council members. Yet the Council system of regional decision-making fundamentally relies on expertise in and knowledge of the fisheries under the authority of the Council, and – in cases like the NPFMC – this expertise has been instrumental in implementing expansive closed areas, fishing reductions based on climate change and stock declines, and other actions that reduce fishing opportunity. Moreover, current law has many safeguards in place—including disclosures, recusals, and other provisions—to ensure transparent and proper council function; in fact, NOAA Fisheries just issued a final rule updating this policy in September 2020.

1. Are you finding that NOAA's recusal and disclosure rules and regulations are working?

NMFS has undertaken a number of important actions to improve the process for disclosure of financial interests by, and voting recusal of, Council members appointed by the Secretary of Commerce. In 2020, NOAA Fisheries published a final rule (85 FR 56177) with changes to the regulations to better address disclosure of financial interests. Following these regulatory changes, and to strengthen guidance on the review of financial disclosures by appointed members of the Councils, NMFS also updated policy and procedural directives to align with the final rule. These documents clarify the responsibilities of NOAA and Councils relating to financial disclosures, establish a vetting process to review the completeness and accuracy of information in nominees' and members' disclosure forms, and clarify the process by which NOAA and the Councils identify Council members' conflicts of interest. These policy and procedural directives can be found at: https://www.fisheries.noaa.gov/national/laws-and-policies/fisheries-management-policy-directives.

Further, in response to requests for transparency and predictability, NMFS, in conjunction with the Councils, will publish and make available to the public Regional Recusal Determination Procedure Handbooks, which will explain the process and procedure typically followed in preparing and issuing recusal determinations in each Region. These actions have improved the process for voting recusals and disclosure of financial interests for Council members.

2. What is the value of having experts and direct stakeholders from industry serving on the councils?

Experts and industry stakeholders are valuable to the fishery management process because they bring different perspectives and expertise to bear. The unique, highly participatory management

structure, through the councils, encourages a collaborative, "bottom up" process where fishermen, other fishery stakeholders, affected states, Tribal governments, and the Federal Government all provide input and influence decisions about how to manage U.S. fisheries under the law.

3. Under current council membership structures, have Councils been able to uphold requirements for using the best available science?

National Standard 2 of the MSA requires that conservation and management measures be based on the best scientific information available. The National Standard 2 (NS2) guidelines and other agency guidance provide legislative, policy, scientific, and process requirements to ensure that the mandate for using the best scientific information available (BSIA) is upheld. Council members have an important role in developing and recommending fishery management measures, and there are many steps in the process to ensure those measures are based on BSIA. For example, the MSA requires that annual catch limits are consistent with the advice of the Councils' Scientific and Statistical Committees. Additionally, the MSA requires the Secretary to determine if fishery management plans recommended by Councils are consistent with national standards, including NS2's BSIA requirement. The agency's NS2 guidelines provide further guidance on what constitutes BSIA for fishery conservation and management measures, provides standards for scientific peer review, and clarifies the role of the SSC in the review of scientific information for its Council.