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March 8, 2006

The Honorable Ted Stevens
Chairman
Committee on Commerce, Science
and Transportation
United States Senate
Washington, D.C. 20510

The Honorable Daniel K. Inouye
Ranking Member
Committee on Commerce, Science
and Transportation
United States Senate
Washington, D.C. 20510

Re: S. 2012, the "Magnuson-Stevens Fishery Conservation and
Management Reauthorization Act"

Dear Chairman Stevens and Senator Inouye:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members, I write to express our support for key provisions in S. 2012, which would reauthorize and reform the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "Act"). In particular, the ABA supports those provisions of the bill that would improve the management of critical marine resources by increasing the role of science in fisheries management, reducing conflicts of interest within regional councils, establishing meaningful annual catch limits, and reducing bycatch. While the ABA generally supports these provisions, we believe that these provisions, and the overall legislation, could be further improved by adopting new language that, among other things, would emphasize ecosystem-based management of our nation's living marine resources.

In August 2005, the ABA House of Delegates adopted three policy positions aimed at improving the United States' ocean policy and regulation, including fisheries management. Collectively, the ABA resolutions promote four main goals, including: (1) ecosystem-based management of the nation's living marine resources, including fish stocks; (2) science-based decision making in the management of the nation's marine resources; (3) public participation in the management process; and (4) increased United States leadership in ocean policy and management internationally.¹

¹The comments provided in this letter focus on the aspects of S. 2012 relating to reauthorization and reform of the Magnuson-Stevens Act. We do not offer substantive comment on the aspects of the bill that concern international oceans management and U.S. participation in international regimes. However, we are pleased to see attention being paid to this important component of sustainable oceans management policy, including with respect to regimes and issues expressly addressed in the ABA's policy position and report on international oceans policy and law.

These ABA principles are consistent with the recommendations of the U.S. Commission on Ocean Policy and the Pew Oceans Commission and with many of the proposed reforms contained in S. 2012, as described in more detail below. Copies of the ABA's three policies are available online at <http://www.abanet.org/poladv/oceanspolicy.htm>.

Increasing the Role of Science in Fisheries Management and Reducing Conflicts of Interest

S. 2012 contains a number of useful provisions aimed at increasing the scientific basis of fisheries management and reducing conflicts of interest in the regional councils that could interfere with science-based management. For example, language in Section 103 of the bill requires each Fishery Management Council to establish a Scientific and Statistical Committee (SSC) to assist in the development, collection, evaluation, and peer review of scientific and socio-economic data that is relevant to Fishery Management Plans. That section also requires each SSC to provide its Council with ongoing scientific advice as needed for management decisions, including recommendations for acceptable biological catch or maximum sustainable yield and the sustainability of fishery practices. In addition, Section 103(f) would establish a training program for new Council members that would provide them with information on a variety of topics relevant to fishery management. Finally, Section 103(h) contains language designed to reduce conflicts of interest within Councils.

The ABA supports the establishment of scientific committees and advisory panels like those contained in Section 103 of the bill as a means of ensuring that the Fishery Management Councils both have and consider the best scientific information available in establishing annual catch limits and making other management plan decisions. While these provisions are useful, the ABA nevertheless recommends that the bill be modified to direct the committees and advisory panels to provide the Councils with scientific information about the marine ecosystems that support the specific fisheries at issue and the effects of fishing on those ecosystems. Therefore, the ABA urges you to amend Section 103(b) in the bill to include the following language:²

(g) Committees and Advisory Panels—

'(1)(A) Each Council shall establish, maintain, rely upon, and appoint the members of, a scientific and statistical committee to assist it in the development, collection, evaluation, and peer review of such statistical, biological, economic, ecological, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

'(B) Each scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, based on the best scientific information available, including recommendations for acceptable biological catch (including annual limits and limits on bycatch) or optimum yield, ~~and reports on stock status and health,~~

² The ABA's proposed amendments outlined in this letter refer to the text of S. 2012 as introduced in the Senate on November 15, 2005. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

bycatch, habitat status, socio-economic impacts of management measures, and sustainability of fishing practices that will prevent overfishing, rebuild overfished stocks, achieve on a continuing basis the optimum yield for such fishery, and maintain or restore optimum ecosystem function in the marine ecosystems that support such fishery, taking into consideration predator-prey relationships, bycatch, essential fish habitat, the effects of fishing methods on habitat and the ecosystem generally, and other ecological factors.

The ABA generally approves of the language in Section 103(f) of S. 2012 that would create a training program for Council members, and we believe that this would help improve science-based management of the United States' fisheries. However, in order to further enhance its effectiveness, the ABA also recommends that this subsection of the bill be amended to state that in addition to the topics already listed, the training course also should cover the ecological effects of fishing, including bycatch, effects on predator and prey species, "fishing down the food web," and habitat destruction resulting from certain fishing methods.

The ABA also supports provisions in Section 103(h) aimed at reducing conflicts of interest among the decision makers on the regional Councils because such conflicts, if unabated, would undermine science-based fisheries management and the establishment of truly sustainable fisheries. Although these conflict-of-interest provisions are worthwhile, the ABA recommends that you further strengthen the provisions applicable to both Council members and members of the scientific committees and advisory panels to (1) require explicit disclosure of all actual and potential conflicts of interest in any advice, recommendation, or management plan decision, and (2) impose restrictions on Council members' ability to vote on any management plan or management plan amendment when members have financial interests, broadly defined, at stake in those decisions.

Annual Catch Limits

In an effort to prevent overfishing and preserve the sustainable harvest of fishery resources in all eight regional Council jurisdictions, Section 104 of S. 2012 would set annual catch limits. Specifically, the legislation would require every fishery management plan to contain an annual catch limit set at or below optimum yield. In addition, Section 104 would require that any harvests exceeding the annual catch limit be deducted from the annual catch limit for the following year. As approved by your Committee last December, the legislation also contains provisions that require regional Councils to consider economic impacts on each sector in setting allocations and that permit Councils to take a number of other factors into account that affect fisheries from different states and ports.

The ABA believes that the establishment of annual catch limits is essential to ensuring that each fishery will be fished in a sustainable manner. As a result, we support the annual catch limits in Section 104 as a positive step towards effective management of fish stocks. However, in our view, such catch limits cannot ensure sustainable fisheries unless they also consider the effects of fishing on the larger ecosystems that support the fish stock at issue. Therefore, the ABA urges you to amend the language of Section 103(c) of the bill so that the new paragraph (6) of 16 U.S.C. 1852(h) will read as follows:

(6) [regional Councils are required to] adopt annual catch limits for each of its managed fisheries based on ~~after considering~~ the recommendations of its scientific and statistical committee and considering the recommendations of any ~~or~~ other appropriate scientific body and that constitute the best scientific information available and that seek to prevent overfishing, rebuild overfished stocks, achieve, on a continuing basis, the optimum yield for such fishery, and maintain or restore optimum ecosystem function in the marine ecosystems that support such fishery, taking into consideration predator-prey relationships, bycatch, essential fish habitat, the effects of fishing methods on habitat and the ecosystem generally, and other ecological factors;

For similar reasons, the ABA recommends that you amend the language in Section 104(a) of the legislation, dealing with “Fishery Management Plan Requirements,” so that new paragraph (15) of 16 U.S.C. 1853(a) would read as follows:

(15) specify, in the plan or implementing regulations, annual catch limits (including limits on bycatch and specification of acceptable fishing methods) at a level that does not exceed optimum yield, which shall be established by the Council or Secretary based on the best scientific information available, and that seek to prevent overfishing, rebuild overfished stocks, achieve on a continuing basis the optimum yield for such fishery, and maintain or restore optimum ecosystem function in the marine ecosystems that support such fishery, taking into consideration predator-prey relationships, bycatch, essential fish habitat, the effects of fishing methods on habitat and the ecosystem generally, and other ecological factors, at a level that does not exceed optimum yield, and, for the purposes of which harvests exceeding the specified annual catch limit (including the specified annual catch limit for a sector and including the limits on bycatch) shall be deducted from the following year’s annual catch limit (including that sector and/or that bycatch).

Reducing Bycatch

The ABA also generally supports those provisions in Section 115 of the legislation that seek to reduce bycatch by directing the Secretary of Commerce and the regional Councils to create a regionally-based “Bycatch Reduction Engineering Program” to develop technological devices and engineering techniques for minimizing bycatch. These regionally-based programs would provide information and outreach to fishery participants to encourage adoption and use of the new technologies and they would have to be based on “the best scientific information available.” The program would be allowed to establish a system of incentives to reduce bycatch, including measures that establish collective or individual bycatch quotas, promote the use of gear with verifiable and monitored low bycatch rates, or, based on the best scientific information available, reduce bycatch rates or mortality.

While we support these bycatch reforms as far as they go, we believe that the bycatch reduction provisions should be *mandatory* in every fishery management plan. Accordingly, we urge you to amend the legislation to make these provisions mandatory.

Other Recommended Changes Involving Ecosystem-Based Management

Although the ABA supports many of the provisions contained in S. 2012, we believe it could be further improved by adding language designed to advance ecosystem-based fishery management goals of ensuring the continued economic and ecological viability of commercially and recreationally important fish stocks, with an emphasis on protecting the marine ecosystems that support such stocks. As a result, in addition to the other changes recommended above, the ABA urges you to expand those sections throughout S. 2012 that refer to the “best scientific information available” to include scientific information regarding the health and functioning of the ecosystems that support and sustain commercially and recreationally important fish stocks. The ABA also urges you to amend S. 2012 expressly to provide funding of basic scientific research about marine ecosystems and their functions and to provide funding for projects that seek to restore marine ecosystems upon which commercially and recreationally important fish stocks depend.

Some specific examples of the ecosystem-based management changes to S. 2012 that the ABA recommends include:

- ***Effects on Fishing Communities:*** An ecosystem-based management approach considers the long-term effects of fishing on the ecosystems that support the fisheries at issue, which in turn informs the Councils about the long-term effects of fishery management on the fishing community. Therefore, the ABA urges you amend Section 101(a) of S. 2012 to read as follows:

(a) NATIONAL STANDARDS—Section 301(a)(8) (16 U.S.C. 1851(a)(8)) is amended by inserting ‘by utilizing economic and social data and assessment methods based on the best economic and social information available, including projections of the long-term viability of the relevant stock(s) and its supporting ecosystem(s) and the effects of losses of the stock(s) and/or its supporting ecosystem(s) on the long-term economic and social stability of the effected fishing communities,’ after ‘fishing communities.’

For similar reasons, the ABA recommends that you amend Section 101(b) of the bill to read as follows:

(b) CONTENTS OF PLANS—Section 303(a)(9) (16 U.S.C. 1853(a)(9)) is amended by striking ‘describe the likely effects, if any, of the conservation and management measures on—’ and inserting ‘analyze the likely effects, if any, including the cumulative economic and social impacts (including medium- and long-term impacts based on the best scientific projections of the long-term viability of the relevant stock(s) and its supporting ecosystem(s) and the effects of losses of the stock(s) and/or its supporting ecosystem(s) on the medium- and long-term economic and social stability of the effected fishing communities), of the conservation and management measures on, and possible mitigation measures for (including science-based measures for extending the long-term viability of the stock(s) and for extending and restoring the full functioning of the ecosystem(s) that contributed to the viability of the stock(s))—’.

- ***Cooperative Research and Management Program:*** The ABA supports Section 204 of S. 2012 that would establish a cooperative research and management program. However, the ABA believes that the subsection titled “Eligible Projects” should be amended to also make funding available for projects that “address the ecosystem effects of fishing and the ecosystem functions required to support viable fish stocks, including predator-prey relationships; alterations in ecosystem function, including food webs; destruction and modification of habitat; areas of special importance, such as breeding grounds; and the differing effects of different fishing technologies.”
- ***Fisheries Conservation and Management Fund:*** The ABA supports Section 208 of the bill that would establish a Fisheries Conservation and Management Fund. However, the ABA believes that funding should also be made available for projects that maintain or restore the ecosystems upon which specific commercial and recreational fish stocks depend.
- ***Public Participation in Fisheries Management***

Finally, with respect to public participation in fisheries management, and in further promotion of ecosystem-based management, the ABA urges you to add language to S. 2012 that would amend Section 302(b) of the Magnuson-Stevens Act, 16 U.S.C. § 1852(b), to require that each Fishery Management Council include:

representatives of the public interest in marine fish conservation who are knowledgeable regarding the conservation and management of the fishery resources of the geographic area concerned. Such representatives of the public interest may not include individuals whose primary source of income is derived from commercial or recreational fishing or who are employed by any person or entity whose primary source of income is derived from commercial or recreational fishing.

The ABA also notes that in the course of complying with the National Environmental Policy Act (“NEPA”), the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, and the regional councils all provide a major vehicle for public participation in the establishment of scientifically based annual catch limits and fisheries management plans. Therefore, the ABA urges you and your colleagues to support the language contained in Section 105 of S. 2012—or other related legislation—to the extent that it would continue to require these entities to comply with the public participation-related provisions of NEPA. In addition, we hope that future versions of Magnuson-Stevens Act reauthorizing legislation will ensure that these entities cannot undermine this valuable means of public participation in any way.

March 8, 2006

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Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our senior legislative counsel for environmental law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: All members of the Senate Commerce, Science and Transportation Committee