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September 20, 2006

The Honorable Richard W. Pombo
Chair
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nick J. Rahall II
Ranking Member
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 5018, the "American Fisheries Management and Marine Life
Enhancement Act"

Dear Chairman Pombo and Ranking Member Rahall:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write to express our support for many of the key provisions in H.R. 5018, as reported to the full House of Representatives on July 17, 2006. In particular, the ABA supports the language in the bill that reauthorizes the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). In addition, we support many other key provisions of the bill that would provide authority for ecosystem-based fishery management, increase the use of peer-reviewed science and scientific assessments in fisheries management, establish total allowable catch limits for managed fisheries, and emphasize the importance of by-catch reduction incentives. The ABA also supports those provisions that seek to reduce conflicts of interest within regional councils, establish training programs, rebuild fish stocks, and increase public participation in fisheries management. The ABA also commends the Committee for addressing the emerging problem of ocean acidification and its effects on United States fisheries in this bill, although we suggest that the study should look broadly in assessing these effects. While the ABA generally supports these provisions, we believe that the legislation could be further improved by adopting a few clarifying and strengthening revisions to certain provisions in the bill that are outlined in more detail below.

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.

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 H.R. 5018, as described in more detail below. Copies of the ABA's three policies are available online at <http://www.abanet.org/poladv/oceanspolicy.htm>.

Ecosystem-Based Fisheries Management

As noted above, the ABA strongly supports the goal of incorporating scientifically sound ecosystem-based management into fisheries regulation. Sections 5(c) and 6 of H.R. 5018, as reported on July 17, 2006, would represent a significant start towards achieving this goal by shifting United States fisheries management to an ecosystem-based approach. To accomplish this, these sections of the bill would provide the regional fisheries management councils (FMCs) with clear authority to issue ecosystem-based fisheries management plans, establish ecosystem-based management as an official policy goal of the Magnuson-Stevens Act, and require the regulations and research that are the necessary prerequisites to ecosystem-based management. In addition, Section 5(g) of the bill would give the FMCs clear authority to establish scientifically-based marine protected areas, which are a necessary component of effective ecosystem-based management.

Although these provisions are an improvement over current law, the ABA notes that the provisions lack a mechanism to ensure that required ecosystem research is incorporated into fishery management plans and is used to address bycatch reduction and in the establishment of marine protected areas. Therefore, the ABA recommends that the House amend H.R. 5018 to provide such mechanisms, for example by specifying that the ecosystem studies constitute the "best scientific information available," and that, in adopting fishery management plans, FMCs apply an approach that is consistent with that information.

Increasing the Role of Science in Fisheries Management, Setting Total Allowable Catch Limits, and Reducing Bycatch

Scientific and Statistical Committees

H.R. 5018 contains a number of useful provisions aimed at increasing the scientific basis of fisheries management. For example, Section 3(c) 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 for fishery management decisions, including recommendations for acceptable biological catch and for maximum sustainable yield and reports on the sustainability of fishery practices.

The ABA supports the establishment and funding of scientific committees and advisory panels like those contained in Section 3 of the bill as a means of ensuring that the regional Councils both have and consider the best scientific data in the development of all fishery management plans. Nevertheless, the ABA recommends that Section 3(c)(B) be modified to reflect the ecosystem-based management policies in Section 6 and to downplay the potentially distorting role of socio-

economic considerations in the achievement of sustainable management. In particular, the ABA urges you to amend Section 3(c)(B) to read as follows:¹

(B) Each scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch and for the maximum sustainable yield for each fishery under the jurisdiction of the Council, taking into account increasing understanding for each fishery of interactions with the larger ecosystem(s) of which it is a part, and shall provide ~~and~~ reports on stock status and health, bycatch, habitat status, ~~socio-economic impacts of management measures, and sustainability of fishing practices, effects of the fishery on its ecosystem, effects of other ecosystem phenomena on the fishery, and, to the extent that such considerations do not interfere with the attainment of sustainably managed fisheries, the socio-economic impacts of management measures.~~

Total Allowable Catch Limits

In an effort to prevent over-fishing and preserve the sustainable harvest of fishery resources in all eight regional Council jurisdictions, Section 3(a)(2)(7) of H.R. 5018 would require FMCs to adopt a “total allowable catch limit or other annual harvest effort control limit” for each fishery. FMCs must “consider” the SSC’s recommendation and cannot exceed the SSC’s recommendation for the acceptable biological catch.

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 total allowable catch limits in Section 3 as a positive step towards effective management of fish stocks. It is relatively clear from these provisions that “acceptable biological catch” is the upper limit of the “total allowable catch limit or other annual harvest effort control limit.” However, the ABA suggests that the relationship between the acceptable biological catch and the total allowable catch limit or other annual harvest effort control limit could more effectively effectuate the bill’s sustainable management and ecosystem-based management policies. Therefore, the ABA recommends that you amend the language of Section 3(a)(1)(15) of H.R. 5018 to add a new subsection (C), as follows:

(C) will prevent over-fishing or diminishment of fish stocks, rebuild diminished or over fished stocks, achieve on a continuing basis sustainable management of each fishery, and maintain or restore optimum ecosystem function in the marine ecosystems that support such fishery by 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.

¹ The ABA’s proposed amendments outlined in this letter refer to the text of H.R. 5018 as reported by the House Resources Committee on July 17, 2006. Our suggested additions are underscored and our suggested deletions are noted by strikethroughs.

The ABA also recommends a parallel amendment to Section 3(a)(2)(7) of the bill, as follows:

(7) adopt a total allowable catch limit or other annual harvest effort control limit for each of the fisheries that will prevent over-fishing or diminishment of fish stocks, rebuild diminished or over fished stocks, achieve on a continuing basis sustainable management of each fishery, and maintain or restore optimum ecosystem function in the marine ecosystems that support such fishery by 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 which such a limit can be established after considering the recommendation of the scientific and statistical committee of the Council having jurisdiction over the fishery; In no case shall the adopted total allowable catch limit or other annual harvest effort control limit which shall not exceed the recommendation for the acceptable biological catch as recommended by such scientific and statistical committee; and . . .

Bycatch Reduction

The ABA supports those provisions in Section 5(f) of H.R. 5018 that seek to reduce bycatch rates and seabird mortality. The ABA notes, however, that these provisions of H.R. 5018 do not match the related provisions in the Senate-passed fisheries reform bill, S. 2012. Accordingly, the ABA encourages you to amend Section 5(f) of H.R. 5018 to direct the Secretary of Commerce and regional Councils to create a *mandatory*, regionally-based “Bycatch Reduction Engineering Program” akin to that described in Section 115 of S. 2012.

Conflicts of Interest, Training Programs, and Fish Stock Rebuilding

The ABA supports the provisions of Section 5(b) of H.R. 5018 that would establish mandatory training programs for all Fisheries Management Council members. The ABA suggests, however, that such training might better promote the bill’s policies of sustainable fisheries management and of a transition to ecosystem based management if Section 5(b)(k)(1) were amended to include an additional training topic, as follows:

(I) ecosystem-based fisheries management, including the ecological effects of fishing and the use of marine protected areas as fisheries management and restoration tools; and

~~(J)~~ other topics suggested by the Council.

The ABA also supports the provisions in Section 21 of the bill that would require a conflicts-of-interest review and report. This report would provide the FMCs, the Secretary of Commerce, and Congress with empirical information regarding violations of the existing conflict-of-interest rules and hence would promote the rule of law in fisheries management. However, a review merely for violations of the existing law would do little to educate the Secretary of Commerce and Congress regarding the overall adequacy of the existing conflict-of-interest and disclosure requirements, even if properly observed, to ensure that FMCs adopt scientifically sound fisheries management

requirements that in turn ensure sustainable fisheries. The ABA thus encourages you to amend Section 21 to expand the scope of the conflict-of-interest review and report beyond actual violations of law. Specifically, the ABA recommends that Section 21 be modified to instruct the Secretary of Commerce to provide an assessment of the adequacy of fisheries management measures to ensure sustainable fish stock levels and of whether adjustments to existing conflict-of-interest and disclosure requirements or other legal requirements for FMC operations may be needed.

Public Participation in Fisheries Management and the National Environmental Policy Act (NEPA)

The ABA also generally supports the many provisions of H.R. 5018 that explicitly require transparency and public participation in the fisheries management process. These provisions include Section 3(f)(1), related to the regional stock assessment process and the peer review process, and Section 5(h), which requires publication of final agency actions taken through alternative procedural mechanisms to be published in the Federal Register.

While the ABA supports these provisions, we believe that more direct public participation in the formulation of fisheries management decisions is also desirable. Thus, in order to promote greater public participation, and in further promotion of ecosystem-based management, the ABA urges you to add language to H.R. 5018 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.

Finally, the ABA is concerned about the effects on public participation of Section 10(c), which would eliminate independent environmental evaluation of fishery management decisions through the environmental assessment processes of the National Environmental Policy Act (NEPA). In the course of complying with NEPA, the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service, and the regional councils all provide significant vehicles 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 eliminate Section 10(c) from H.R. 5018 so that the Magnuson-Stevens Act 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.

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Thank you for considering the views of the ABA. If you have questions 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 House Committee on Resources
The Honorable Barney Frank
The Honorable John F. Tierney