Department of Commerce Comments on H.R. 4749
"Magnuson-Stevens Act Amendments of 2002"

Section 3. Report on Overcapitalization

H.R. 4749 calls for a report on "overcapitalization" that focuses on the 20 federally managed fisheries that are "the most severe examples" of this problem, recommends solutions, and sources of funding. The Department, through NOAA Fisheries, has already launched an initiative, begun three years ago, to measure levels of capacity in domestic fisheries, and will complete a report on "excess capacity" later this year and a second report on "overcapacity" in 2003.

In response to this provision, we can add to the overcapacity report recommendations regarding (1) remedial measures, and (2) sources of funding. Finally, although a technical point, we believe that the term "overcapacity" more appropriately addresses the crux of the problem, and, therefore, we recommend that the term "overcapacity" be used in place of "overcapitalization" and "excess capacity."

Section 4. Buyout Provisions

One means to remedy overcapacity is a buyout of surplus permits and/or vessels. H.R. 4749 would modify in various ways the Magnuson-Stevens Act's Section 312(b)-(e) Fishing Capacity Reduction Program. We also agree that this provision could be improved to make industry-funded buybacks easier to develop and administer, and more responsive to the needs of the fishing industry. Most significantly, H.R. 4749 would require that (1) to be eligible for a buyout, the fishery must have a limited access program; (2) both permits and vessels will be bought out; and (3) vessels that are bought out must not be redeployed in foreign or high seas fisheries.

We believe that the specific changes to the Section 312(b)-(e) program proposed by the bill will help us achieve the goals of this program and, therefore, we support this section. At the same time, we must note that a national buyout program that requires the surrender of both permits and vessels, and prohibits the redeployment of bought-out vessels in high seas or foreign fisheries will be costly to implement. By contrast, a Section 312(b)-(e) program that allows the removal of only permits, in cases where resources are limited, would be preferable.

Section 5. Data Collection

H.R. 4749 requires that the Secretary (1) develop and implement a program to share recreational catch data with the relevant State agencies, and (2) report to Congress on the need to obtain economic data from processors, including alternate sources of this information and confidentiality issues.

On sharing recreational catch data, the Department agrees with the need to work closely with the relevant State agencies on the collection and sharing of recreational catch data, and is already doing this with the States and the three regional Interstate Marine Fisheries Commissions. We note, too, that the States have their own data confidentiality laws, and we are somewhat limited in what we can do by applicable State laws. Accordingly, we have no objection to developing such a recreational data-sharing program and reporting to Congress on progress made in developing such a program. In so doing, however, we must respect certain prerogatives of the States, and would prefer retaining a certain flexibility to operate the program cost-effectively.

On obtaining economic information from processors, the Department is of the view that these data are necessary to conduct a number of mandatory regulatory assessments, but has no objections to the report to Congress required in the bill. With respect to the required report, the Department also notes that economic information from the processing sector is required primarily under the Magnuson-Stevens Act and Executive Order 12866, and secondarily pursuant to the Regulatory Flexibility Act.

Section 6. Ecosystem-Based Management

H.R. 4749 adds numerous ecosystem-related provisions to the Magnuson-Stevens Act. The bill adds ecosystem-related elements to the Act's policy objectives, research agenda, and the discretionary provisions of fishery management plans. In addition, the bill requires: (1) definitions of the terms "ecosystem" and "marine ecosystem"; (2) a report on criteria for developing ecosystem-based management plans; (3) the identification of specific marine ecosystems and regional research plans; and (4) the implementation of one ecosystem-based pilot program for the East Coast and another in a West Coast federally managed fishery.

The Department generally supports Section 6 of the bill, although, as a practical matter, we must also point out that implementation of these provisions will require significant increases in research on ecosystem processes and monitoring of ecosystem state variables. We also note that these provisions would require significant efforts to develop a decision matrix for socio-economic considerations.

The Department also recommends several minor changes in the bill:

o The policy statement in Section 6(a) should reflect not only the interactions between species, but also the relationships between marine and estuarine species and their environments. In addition, H.R. 4749 intends to amend 16 U.S.C. §1801(c) to include ecosystem principles; the citation provided in the bill must be revised.

o Section 6(c) would require the Secretary to define the terms "ecosystem" and "marine ecosystem." To avoid confusion in the use of the term "marine ecosystem," we suggest adding

the term "coastal ecosystems" to apply to state waters, estuaries, and rivers used by anadromous species. If this recommendation is accepted, Section 6(d)(1)(A) should be modified to require the identification of specific marine and coastal ecosystems in each region.

o Section 6(c) would also require the Secretary to establish criteria for the development of ecosystem-based management plans by each regional fishery management council based on the recommendations of the Ecosystems Principles Advisory Panel. We recommend that the word *each* be deleted to ensure the development of a standard criteria. We recommend broadening this requirement so that the Secretary's criteria must also be based on applicable recommendations from the Marine Fisheries Advisory Committee, which is currently examining the issues surrounding ecosystem-based fishery management.

o We suggest modifying Sections 6(d)(1) and 6(e)(2) to include consultation with the applicable Interstate Marine Fisheries Commission.

o Finally, we suggest that the pilot programs referred to in section 6(e) be called ecosystem plans. We also believe that the focus for preparing these plans in the pilot programs should be the relevant regional fishery management council, rather than the Secretary.

Section 7. Observers

H.R. 4749 would require a report on the need for a national observer program and identifies specific issues to be discussed in the report. NOAA Fisheries agrees that such a report would be valuable, and has already begun to compile a National Plan for National Marine Fisheries Service (NMFS) Observer Programs that would discuss many of the issues specified in the bill. Therefore, the Department generally supports this section of H.R. 4749.

We believe that the issues identified in Sections 7(b) and (c), such as observation options (e.g., electronic data collection, or on-board observers), whether the data should be used for management or enforcement purposes, required coverage, cost estimates, funding options, safety consideration, the best use of the data, and confidentiality, are important issues to address before implementing a comprehensive and mandatory observer coverage requirement for all fisheries. In fact, the single most pressing issue to address, in this time of limited resources and increased demands for observer coverage, may be payment options for observer programs, in particular the mechanisms that might be used to provide NMFS with the authority to collect funds from industry and/or other sources to pay for the costs of placing observers.

However, we are also concerned about provisions that may restrict access to and use of data collected by the Secretary, including section 7(c)(7)'s reference to the "confidentiality of the proprietary information collected through the (observer) program." We believe that the current

program, wherein enforcement as well as management have access to and use of such data, should be maintained.

Section 8. Overfishing

H.R. 4749 proposes separate definitions of "overfishing" and "overfished," and the Department agrees that this is an important and useful distinction. The bill proposes retaining the Magnuson-Stevens Act's current definition of "overfishing," which we support. However, the proposed definition of "overfished" raises two concerns.

First, H.R. 4749's definition of "overfished" uses the term "stock" in two places, whereas NMFS prefers "stock or fishery." The bill implies that determinations of "overfished" must be made on a stock-by-stock basis, and not for stock complexes or groups of related species. Given the large number of marine species caught or impacted by fishing operations, and our current data collection and staff resources, the Department has no choice but to assess the status of many species as parts of a stock complex. Therefore, we prefer the phrase "stock or fishery" or "stock or stock complex."

Accordingly, we prefer the following definition of overfished:

> The term "overfished", with respect to a stock or a fishery, means a stock or fishery whose size is below the range that is likely to occur for a stock or fishery that has not been subjected to overfishing.

The above definition is preferred mainly because it is linked more specifically to overfishing.

Second, we have concerns about the requirement to distinguish between those fisheries that are overfished as a result of fishing and those other fisheries that are "overfished" because of "factors other than fishing." This is an extremely difficult determination to make. Regardless of the cause of stock depletion, a depleted stock cannot sustain the same levels of fishing pressure as it could when it was larger. Whatever the cause, a depleted stock needs to be rebuilt, to the extent possible, to levels that will increase yields, and also reduce the risk of further stock depletion. One possible solution to this dilemma is to replace the word "overfished" with "depleted," in all appropriate places in the Act (including the section on definitions.) We agree that the onus for stock depletion should not be placed entirely on the fishing industry when other factors (e.g., habitat destruction) may be relevant. In any event, it is essential to acknowledge that, regardless of the cause, necessary action must be taken to ensure that the stock does not become further depleted.

Section 9. Bycatch and Seabird Interactions

H.R 4749 would require that a standardized methodology for reporting on bycatch be established and implemented within one year after the passage of the Act, and provide for the charitable donation of "dead bycatch that cannot be otherwise be avoided." In addition, H.R. 4749 would require that the Secretary, in conjunction with the Councils, list fisheries with "significant bycatch problems or seabird interaction problems," and separately identify those fisheries where these problems are "most urgent." The Department would then work with the Councils to develop new gear and gear modifications to minimize bycatch and seabird interactions, and the Secretary would administer a grants program, with authorized appropriations of $10 million annually for fiscal years 2003 to 2007, to promote this work.

With specific reference to seabird interactions, the Secretary would report to Congress on (1) the extent of the problem in U.S. fisheries; (2) efforts by industry and the Councils to address the problem; and (3) the extent of the problem in fisheries outside the United States. Finally, the Secretary would be required to take "appropriate action at appropriate international fisheries management bodies to reduce seabird interactions in fisheries."

The Department agrees that bycatch and seabird interactions are serious problems that require strong and urgent action by the agency, the Councils, and industry. With respect to seabirds, the United States actively participated in the United Nations Food and Agriculture Organization initiative that produced the 1999 International Plan of Action for the Reduction of Incidental Catch of Seabirds in Longline Fisheries, and has begun to implement a national plan of action on this issue. Accordingly, we supports this section.

Section 10. Fish Habitat Research and Protection

H.R. 4749 would amend the law's provisions relating to essential fish habitat (EFH) by narrowing the requirement to minimize adverse effects caused by fishing, and shifting the emphasis of habitat protection from EFH to Habitat Areas of Particular Concern (HAPCs). We appreciate the Committee's effort to provide guidance on the most appropriate way to focus limited resources on habitat protection. However, the current language is overly restrictive.

Sections 10(b) and (c) of H.R. 4749 would limit the current statutory requirement for every fishery management plan to "minimize to the extent practicable adverse effects on [EFH] caused by fishing." Section 10(b) would change the Act to require that Councils minimize adverse effects of fishing on EFH only if there is adequate scientific information about the value of the affected habitats, or if a Council determines that specific fishing effects on EFH jeopardize the ability of the fishery to produce maximum sustainable yield on a continuing basis. Councils would also be required to minimize to the extent practicable adverse effects on HAPCs caused by fishing. Unfortunately, we do not have the type of scientific information needed to document habitat

functions or the effects of fishing on habitat so conclusively. As a result, H.R. 4749 would effectively limit the requirement to minimize the effects of fishing to HAPCs, which are very small subsets of the habitats necessary to support healthy stocks of fish and sustainable harvests.

We are concerned that by limiting the fishing impacts provisions of the Act to apply only to such small areas, H.R. 4749 would create a loophole that allows potentially damaging fishing practices to proceed without any requirement for evaluating and minimizing impacts. We would be happy to discuss with the Committee how level 1 or 2 information would be sufficient to make sound policy decisions.

Importantly, the existing provision of the Magnuson-Stevens Act regarding effects of fishing on EFH significantly limits the potential for socioeconomic impacts to the fishing industry. The requirement to "minimize to the extent practicable" adverse effects on EFH caused by fishing reflects the intent of Congress that the Act not impose draconian restrictions on fishing to protect habitat. Under our final EFH regulations, when determining whether it is practicable to minimize an adverse effect from fishing, Councils should consider the nature and extent of the adverse effect on EFH and the long- and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the Nation.

While it may be helpful for Congress to provide additional guidance on the relevant factors to consider when evaluating practicability, NOAA Fisheries recommends retaining the basic framework whereby Councils must address the potential adverse effects of fishing throughout EFH. If Congress would like the Act to prioritize HAPCs compared to the rest of EFH, we suggest modifying section 303(a)(7) of the Act to state that every fishery management plan must "minimize to the extent practicable adverse effects on essential fish habitat caused by fishing, with emphasis on habitat areas of particular concern."

We are pursuing an administrative solution to the problem that Sections 10(b) and (c) of H.R. 4749 seem to be trying to address: how to ensure that the fishing impacts provision of the Act is being implemented in a way that focuses on the habitats most vulnerable to disturbance, and reduces the potential for future litigation. We and many of the Councils are developing environmental impact statements (EISs) to evaluate the effects of fishing on EFH and document that for each fishery management plan the agency has considered a reasonable range of alternatives for minimizing any adverse effects to the extent practicable. The evaluation is emphasizing those habitat areas that are most susceptible to damage by specific fishing practices. The first of these EISs will be published in draft form this year, and they will all be finalized by the middle of 2004.

Section 11. Demonstration Program for Oyster Sanctuaries and Reserves

H.R. 4749 would establish a demonstration program for oyster sanctuaries and reserves, with the following major elements: (1) the development and implementation of this native oyster demonstration program in the Chesapeake Bay, including the use of artificial structures or reefs as beds for oyster production; the development of a research plan for the placement of these artificial structures and reefs; (2) a requirement that the Secretary shall recommend State regulations prohibiting fishing in waters around the artificial structures or reefs; (3) a mandatory report to Congress on the demonstration program; and (4) appropriations of $5 million per year for each fiscal year from FY 2004 to 2009.

The Department generally supports this section, although we recommend several strikeouts and minor changes in bold:

o Section 11(a) should require the Secretary to develop a program for oyster sanctuaries or reserves in collaboration with (rather than "in conjunction with") the identified agencies and stakeholder groups. A spirit of collaboration is vital to the success of this effort.

o We recommend modifying Sections 11(b)-(e) of the bill to provide more flexibility regarding the types of structures to be developed to facilitate oyster production. Our concern is that by tailoring the program too narrowly, the bill might preclude flexibility in implementation. Specifically, we suggest the following changes:

(b) ~~ARTIFICIAL~~ STRUCTURES ~~OR REEFS~~- The program shall include the design, construction, placement, and restoration of artificial structures or**, including** reefs **and bars constructed of natural shell or alternative substrates,** to act as beds for oyster production. The placement of these structures ~~and reefs~~ should be designed to maximize the production of oysters while minimizing conflicts with existing uses such as fishing or navigation. The structures ~~and reefs~~ shall be placed in areas ~~which~~ **where they** will not be hazards to navigation. The Secretary shall work with interested parties to ensure that all sites are adequately marked on navigation charts as appropriate.

(c) RESEARCH PLAN- The Secretary shall develop a research plan for the placement of ~~artificial~~ structures ~~and reefs~~ under the program, including measurable goals and a monitoring program to determine the effectiveness of the structures ~~and reefs~~ in recovering ~~native~~ oyster populations.

(d) NO FISHING REGULATIONS- The Secretary shall recommend State regulations prohibiting fishing in the waters surrounding ~~artificial~~ structures ~~or reefs~~ placed under this section as necessary to ensure the reproduction of oysters on the structures ~~and reefs~~. The restrictions

may be seasonal in nature, and shall not apply in any area that is located more than 100 meters from such a structure ~~or reef~~.

o We also recommend deleting section 11(e), which would require that the program use only native oyster species. While native oysters would be preferred, in the event there are unexpected reasons why native oysters cannot or should not be used, we suggest retaining flexibility to use other oyster species. We understand that many user groups support keeping this option open.

Section 12. Individual Quota Limited Access Programs

Individual Fishing Quotas (IFQs) are one means of achieving certain fishery management objectives. Depending on the objectives of the plan, the goals of an IFQ program may be to "rationalize" the harvesting sector, reduce overcapacity, improve economic performance, maintain as much as possible owner-operator participants, promote safety, or mitigate the pressure to overfish. The issues associated with IFQs can be organized in three broad categories: (1) allocations; (2) industry payments; and (3) program review and administration.

H.R. 4749 would: allow the moratorium to end as scheduled; provide for transferable quota shares; stress the need to ensure equity in the distribution of quota shares; ban foreign ownership of IFQ shares; limit IFQ shares that may be owned by fishing communities; call for reviews of IFQ programs every five years; mandate that all new IFQs will sunset after ten years; require two referenda in developing each new IFQ; and provide for a system of IFQ fees that can amount to as much as five percent of ex-vessel revenues.

Basically, we believe that H.R. 4749 proposes generally fair solutions to these complex issues. Therefore, we support most of the section 12 provisions relating to IFQs. We will organize our comments according to the three major themes indicated above:

(1) Allocations, including initial allocations and subsequent transfers in secondary markets.

Allocations of harvest and processor shares in IFQ programs are probably the most difficult issue. Harvest shares in IFQ programs should be allocated to current and recent participants in the fishery, with the intent of maintaining, as much as possible, the participation of small-scale fishermen. To this end, the Department supports provisions that guarantee "fair and equitable" initial allocations, prevent the excessive consolidation of shares by a single or a few quota holders, and provide economic assistance to small-boat fishermen, captains and crew to help them purchase IFQ shares. With respect to foreign ownership, we propose that only U.S. citizens be eligible to own harvest shares in IFQ programs.

In addition to "harvest shares" for fishermen, recent proposals have urged quotas for the processing sector. Three options exist: (1) giving IFQ harvest shares to processors; (2) setting up

a parallel system of processor shares, conferring the opportunity to purchase fish from quota holders; and (3) maintaining the status quo, which is silent on the eligibility of processors for IFQ quotas of any sort. The Department recognizes that IFQ programs, like virtually any management measure, may have economic impacts on processors. We have concerns that processor shares may fundamentally alter the way that markets operate, and may have broad economic consequences. Nevertheless, we believe that a vibrant processing sector is an essential part of an overall sustainable fishery, and implementation of harvester IFQs may in some cases relatively disadvantage processors. H.R. 4749 introduces the new concept of processor IFQs, and their potential and impacts on the market are not clearly known. Therefore, we believe that, if this new authority is provided, Congress should require the Councils to carefully consider how a processor share program might impact the fishing community, the extent to which processor shares contribute to the conservation and management of the fishery, and other potential ways to mitigate economic impacts to this sector if processor shares are to be included in an IFQ program. In such a case, Congress may also want to consider whether ownership standards should be the same for both the harvesting and processing sector and should define the term "processor" to avoid confusion. The Department would be happy to work with the Committee to develop such a definition.

(2) Industry payments, including fees, windfall profits and resource rents, and auctions.

Because IFQs benefit an exclusive group of participants, we believe that these beneficiaries should pay for public services that directly support the IFQ program. Therefore, we support fee collections in IFQ programs. H.R. 4749's proposed system of three categories of fees can collectively total as much as five percent of ex-vessel revenue.

Another form of industry payment is an auction in which quota shares are allocated to the highest bidder either as cash or a share of catch revenues. Auctions can be an alternative means of allocating quota shares, and generate revenue beyond the costs of programs directly in support of IFQs. However, an auction of initial allocations would have to be carefully managed to ensure that the resulting distribution of quota shares does not undermine the social objectives of the program. We believe that auctions may be useful in selected IFQs, if the Council wants them, and, therefore, we support granting the Councils the right, or authority, to develop and implement an IFQ auction system.

(3) Administration, including referenda, reviews, sunsets, and enforcement.

The Department acknowledges the need for industry and Council support for new IFQs and, therefore, agrees that a referendum is appropriate. Similarly, we support the need for a formal mechanism to render a fair periodic review of performance of IFQ programs. Sunset provisions would force a Council to review and renew an IFQ program, and may therefore also be useful. However, in reviewing the provisions of H.R. 4749 addressing reviews and sunsets, NOAA

Fisheries notes that predictability is a critically important feature. By contrast, uncertainty can hamper business and investment decisions, and undermine the smooth and effective operation of the IFQ market.

o If Congress decides that two referenda are appropriate, the Department suggest that the first "vote" be a petition by qualified participants to develop a program, and the second should be a more formal referendum. The petition could have a lower threshold, since its purpose would be to demonstrate industry interest. The Department would be pleased to confer with Committee staff on specific requirements of the initial petition and the final referendum.

o We recognize the need for reviews of IFQ programs, and their possible termination under certain circumstances. Sunset measures, such as H.R. 4749's across-the-board ten-year provision, are even stricter. We recognize their potential value, but urges care in the use of this type of measure. The Councils already have the authority in section 303(d) to terminate or limit an IFQ program, and sunsets do not exist and have not been required in the existing four IFQ programs. Most significantly, sunset provisions introduce an element of uncertainty and therefore may unnecessarily deter investments and distort other business decisions made by participants in IFQ fisheries. A different alternative would be to limit the time period of specific quota allocations to individual fishermen, while allowing the underlying program to continue subject to ongoing Council review. Under this latter scenario, the IFQ program would at least survive, and former participants could seek to renew their quota holdings.

o Finally, the Department recommends deleting section 12(d)(i)(2)(C), which provides for "appropriate penalties for violations of individual quota systems, including the suspension or revocation of individual quotas for such violations." In our view, penalty authority is already in the Magnuson-Stevens Act. The phrase "appropriate penalties" contains no standard and is subjective. In addition, the agency has developed penalty schedules that have been in use for years and provide more specific guidelines. Finally, this provision would make these penalties a part of Secretarial regulations, whereas penalties are not presently a part of regulations. If punitive authority to suspend or revoke an IFQ is included in a reauthorized Magnuson-Stevens Act, this authority should be general in nature and not limited to any particular IFQ program.

In summary, the Department supports certain changes to the Magnuson-Stevens Act relating to IFQs. We support the provision in H.R. 4749 that would lift the moratorium on new IFQs. However, we believe IFQs should be structured and administered in ways that respect equity and are sensitive to social impacts, especially on small fishermen and fishing communities. We also support provisions in H.R. 4749 that allow for transferability of quota shares in new IFQ programs. The Department believes that processor shares should be permitted if a Council wants them and carefully considers their social and economic impacts, especially on fishermen and fishing communities. NOAA Fisheries believes fee collections are necessary, and a Council should be authorized to implement an auction system to allocate quota shares. H.R. 4749

provides for sunsets and requires two referenda. We do not support a sunset provision, and would prefer an initial petition and then a referendum.

Finally, the Special Provisions for Individual Quota Systems contained in section 12 of the bill raise certain constitutional concerns regarding the role of the Councils. For example, proposed new section 303(d)(2)(B)(i) appears to give the Councils the authority to revise fishery management plans establishing individual quota systems, without requiring Secretarial review and approval of such amendments, and proposed new section 303(d)(2)(B)(ii) appears to give the Councils the authority to renew, reallocate and reissue individual quotas, again without requiring Secretarial action to approve or implement such decisions. Similarly, proposed new section 303(d)(6) may authorize Councils to limit or terminate an individual quota system without Secretarial approval. To avoid Appointments Clause concerns, these and similar provisions should be revised to clarify that Council decisions with respect to the exercise of significant federal authority cannot take effect without Secretarial approval.

Section 13. Cooperative Education and Research

H.R. 4749 adds to the discretionary provisions of fishery management plans the authority to establish cooperative research programs that make use of private commercial or charter vessels. The Department agrees with the general need to work more closely with non-government individuals and entities on fisheries science matters, and supports this provision. We also suggest that this provision could be expanded to include cooperative testing of gear to reduce bycatch and assess environmental impacts.

Section 14. Report on Highly Migratory Species

H.R. 4749 calls for an annual report to the Congress on foreign fishing for Atlantic highly migratory species that is not conducted in compliance with the conservation measures of the relevant regional fishery management organization, in this case the International Commission for the Conservation of Atlantic Tunas (ICCAT). We believe that the proposed annual report is unnecessary because it is substantially redundant with, but less comprehensive than, the annual report required under Section 971j of 16 U.S.C. §16A, the Atlantic Tunas Convention Act. Section 971d of that Act requires the identification of nations whose fishing vessels have fished in a manner or under circumstances that diminish the effectiveness of an ICCAT conservation recommendation. Section 971f requires an annual report on the identifications made under Section 971d and, additionally, an identification of "...those fishing Nations whose harvests are inconsistent with conservation and management recommendations of the [ICCAT] Commission." The only element that the proposed report would add is "recommendations for addressing those nations identified under paragraph (1) and actions the United States might take to ensure [such] compliance by such nations." The Department would prefer to include such recommendations in the annual report to the Congress under section 971j.

Section 15. Prohibited Acts

H.R. 4749 prohibits the sale or purchase of any fish caught in recreational fishing. The Department agrees that recreational fishermen should not sell their catch, and generally supports the spirit of this provision, but believes that the proposed prohibition is too broad. NOAA Fisheries considers any fish sold to be commercial products, whether caught by a recreational fisherman or a commercial fisherman. Therefore, we recommend that fishery management plans include provisions that explicitly apply the management measures for the commercial fishery to all sold fish, whether taken by commercial or recreational fishermen.

Section 16. Membership of Fishery Management Councils

H.R. 4749 would add New York to the list of States under the jurisdiction of the New England Fishery Management Council, and require that each Regional Fishery Management Council (Council) have one additional member who is not "directly employed by, or receives a majority of his or her livelihood from, the commercial, charter, or recreational fishing community." The Department supports the inclusion of individuals who are not resource users as members of the Councils but has practical concerns about how best to achieve this objective. One problem is that the proposed addition of a new member would create an even number of total members in seven of the eight Councils, risking tie votes. Another concern is that this provision does not specify the roles of the Governors and the Secretary in recommending and appointing this new member. We would be pleased to work with the Committee to address these concerns.

Section 17. Miscellaneous Amendments to Purposes and Policy

H.R. 4749 would make two changes to the Magnuson-Stevens Act's statements of purposes and policy: (1) one purpose of the Act would be to "encourage ecologically sound development" and (2) one policy would be to "foster, restore, and maintain the diversity of fisheries." The proposed changes in the bill are underlined. We support ecologically sound development and the restoration of fisheries diversity, and have no objections to this provision.

Section 18. Foreign Fishing

H.R. 4749 would add two provisions to the considerations that must be taken into account in allocating harvest quotas in the U.S. Exclusive Economic Zone to foreign fishing nations. First, the United States would have to take into account foreign cooperation in "compliance with and enforcement of international fishing agreements and treaties" (in addition to the current "enforcement of United States fishing regulations.") Second, the United States would have to consider foreign cooperation in "fisheries research, conservation, and the identification of fishery resources." The Department supports both provisions.

Section 19. Driftnets

H.R. 4749 adds a new element to the policy of Congress on driftnet fishing, viz., compliance with any future United Nations action or resolution on this issue. The Department has no objection to the spirit of this provision, but inasmuch as all actions on driftnet fishing taken to date by the United Nations, or that are foreseen, are not subject to signature, we would prefer that the proposal be less restrictive by deleting the phrase: "... to which the United States is a signatory."

Section 20. Sources for Data in Fisheries Research

H.R. 4749 would add to the Magnuson-Stevens Act's provisions on fisheries research the requirement that such a program shall utilize both "fishery-dependent" and "fishery-independent" data sources. We already use both sources of fishery data, and has no objection to this provision.

Section 21. Miscellaneous Fishery Protections in Fishery Management Plans

H.R. 4749 would add to the discretionary provisions of fishery management plans the authority to designate "closed areas, gear restrictions, seasonal closures, time closures, gear restrictions, or other methods for limiting impacts on habitat, limiting bycatch impacts of gear, or limiting fishing impact on spawning congregations in specific geographic areas." These measures would facilitate the efforts of the Councils and the Secretary to minimize the adverse effects of fishing on EFH and HAPC, to reduce bycatch, and to control fishing mortality in spawning areas. We note that the Councils and Secretary already have the authority to use all these measures, and, therefore, we have no objection to this provision.

Section 22. Cooperative Marine Education and Research Program

H.R. 4749 authorizes the establishment of "cooperative agreements with universities and institutions of higher learning" to conduct research on a broad range of fisheries science, ecosystem and habitat issues. The Department agrees with the need to assist the research efforts of universities in these areas, and, therefore, supports the objectives of this provision. We also believe that the bill should authorize research on socio-economic issues as well as biological.

Section 23. Assessment of Cumulative Impacts of Conservation and Management Measures for a Fishery

H.R. 4749 adds to the required provisions of fishery management plans the obligation to assess, specify, and describe the cumulative impacts on participants and communities of conservation and management measures. We are obligated to examine cumulative impacts of fishery regulations. Under Executive Order 12866, Regulatory Planning and Review, agencies are required to tailor regulations taking into account, among other things, "the costs of cumulative regulations." In addition, when implementing the National Environmental Policy Act (NEPA), NOAA Fisheries has been directed to examine, among other things, "the cumulative impacts on target and non-target species." We acknowledge that E.O. 12866 and NEPA do not mandate analyses of exactly the same "cumulative impacts" as this proposed amendment, but we do believe that there is overlap between what we already do and the new charge envisioned by the amendment. If Congress desires, the Department would be happy to confer with Committee staff to determine more clearly the intent of the proposed amendment and possible changes in agency guidance and/or practice that could satisfy the need for closer study of cumulative impacts.

Section 24. Regional Stock Assessments

H.R. 4749 mandates that the Secretary conduct regional assessments of stocks of fish that are independently peer-reviewed, avoid delays in the management process, are as transparent as possible, and provide the regulated community with the opportunity to provide input.

We conduct fishery stock assessments in ways that substantively conform with the provisions of this section, and, therefore, we see no need for this amendment to the Magnuson-Stevens Act. That said, we acknowledge the critical importance of sound fisheries science and are willing to discuss with Committee staff various options for improving the quality and credibility of stock assessments.

Section 25. National Academy of Sciences Guidance and Standards regarding Best Scientific Information Available

H.R. 4749 requires that the Secretary shall "enter into an arrangement" with the National Academy of Sciences to develop guidance and standards for determining what should be considered the "best scientific information available," and publish the results.

The Department conducts scientific programs that are already based on and reflect the "best scientific information available", and, for that reason, we do not see the need for seeking additional guidance and standards on this matter from the National Academy of Sciences. At the same time, we recognize that this is an issue that may deserve further study, and, therefore, we

are prepared to examine this issue by means of a formal NOAA study and submit the results to the National Academy of Sciences for their comment and review.

Section 26. National Academy of Sciences Definition of Maximum Sustainable Yield

H.R. 4749 requires that the Secretary shall "enter into an arrangement" with the National Academy of Sciences to develop a definition of the term "maximum sustainable yield (MSY)... that considers environmental variability," and examine alternatives for calculating harvest levels in cases in which MSY cannot be calculated or is not appropriate.

We note that MSY is not defined in the Magnuson-Stevens Act, but is addressed in the regulations implementing the Act. In 50 CFR 600.310, which gives guidance on the administration of national standard 1, MSY is defined as "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions." We believe that this definition and the additional guidance on MSY-related issues are adequate, and, for that reason, we see no need for this amendment. However, we also recognize the importance of this concept and are prepared to consult with Committee and other Congressional staff on ways that the agency can improve the definition and/or the guidance on its implementation. If deemed appropriate and helpful, the Department would submit the results of this work to the National Academy of Sciences for review and comment.

Section 27. Highly Migratory Species Bycatch Mortality Reduction Research Program

H.R. 4749 requires the establishment of a "pelagic longline highly migratory species bycatch and mortality reduction research program." The major functions of this program would be to (1) test gear and gear configurations that effectively reduce highly migratory species mortality, especially for blue and white marlin; (2) place observers on pelagic longline vessels; and (3) conduct research on the impacts of time and area closures. The Secretary shall report to Congress on the findings of the above research, and the necessary regulatory documents and regulations. Research activities under this section would be funded by appropriations of $5 million annually for fiscal years 2003 through 2007.

The Department acknowledges the importance of reducing bycatch and mortality of highly migratory species, particularly blue and white marlin, in the pelagic longline fisheries of the Atlantic Ocean, and has put measures in place to do this. However, we are concerned by the emphasis prospectively placed in this section on broad area closures. This section appears to place the burden for conservation on only one sector of the fishery. Area closures must be based on sound science, and should not have unintended undesirable consequences, such as increasing sea turtle interactions. By contrast, poorly designed and administered area closures may shift fishing efforts in other area in ways that do more harm than good. The Department has serious concerns with this section, and questions whether it would be effective. It may be mutually helpful if our technical experts and Committee staff confer on certain aspects of this research program.

Section 28. Administration of Pacific Insular Area Fishery Agreements

H.R. 4749 amends the Magnuson-Stevens Act to specify that payments received by the Secretary for Pacific Insular Area agreements should be deposited directly (as opposed to indirectly, via the U.S. Treasury) into the Treasury of the Pacific Insular Area for which those funds were collected. The Department has no objection to the amendment.

Section 29. Authorization of Appropriations

H.R. 4749 would authorize the following appropriations below for the next five fiscal years: FY 2003 - $200.5 million; FY 2004 - $214.0 million; FY 2005 - $222.0 million; FY 2006 - $230.0 million; and FY 2007 - $238.0 million. These annual proposed appropriations are $15 million higher than the corresponding figures in the Subcommittee's original (April 19, 2002) draft bill.

We note that the President's FY 2003 request for the Magnuson-Stevens Act is $277.430 million. Accordingly, the Department proposes deleting the above amounts in H.R. 4749, and inserting the President's request for FY 2003, and "such sums as may be necessary" for the out years, i.e., FY 2004 through FY 2007. We also note that certain provisions of H.R. 4749 would require additional resources, and that the President's budget request for FY 2003 does not provide for this additional funding.