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VIA ELECTRONIC MAIL

Mr. Mark Millikin
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

**RE: Comments on Notice to Prepare an Environmental Impact Statement
Regarding Intent to Prepare Guidance on Annual Catch Limits**

Dear Mr. Millikin:

We are submitting these comments on behalf of the Fisheries Survival Fund ("FSF") in response to the call for comments in the Notice of Intent to prepare an environmental impact statement relating to the Magnuson-Stevens Act National Standard Guidelines for National Standard One. 72 Fed. Reg. 7016 (Feb. 14, 2007). The FSF represents the bulk of the full-time, limited access Atlantic sea scallop fishing fleet from Massachusetts to Virginia. We appreciate this opportunity to present these comments on the Notice of Intent.

As a general comment, FSF supports the National Marine Fisheries Service's decision to hold scoping sessions at all of the Regional Councils. The implementation of the Magnuson-Stevens Fishery and Conservation Management Act Reauthorization of 2006 ("Reauthorization Act") requirements to set annual catch limits ("ACL") and the institution of accountability measures ("AM") is of critical importance to the fishing industry and worthy of the attention NMFS is providing it.

The FSF must, however, express an overall concern about the restrictive nature of the NMFS proposal, and its tendency to mandate a one-size-fits-all approach. In general, the proposal NMFS has put forth in this Notice of Intent is incredibly restrictive and narrow when compared to the statutory reauthorization of the law on which the purported revisions to the guidelines are purportedly based. In contrast to the NMFS proposal, Congress passed a law that is remarkable in its expansive approach to fisheries management and its allowance for regional differences and flexibility in the use of differing management approaches.

These comments address detailed concerns FSF has with the direction and implications of some of the issues raised in the Notice of Intent. Below, FSF addresses the specific questions raised in the Notice, as well as raising some overarching concerns. Among the greatest problems identified is the notion of creating a "buffer zone" between the ACL and what is to be termed the "overfishing levels," which runs counter to the command of National Standard One requiring the achievement of optimum yield on a "continuing basis." 16 U.S.C. § 1851(a)(1). Similarly, the

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Notice appears to suggest that a broader, management-focused role for the Scientific and Statistical Committees ("SSC") should be considered, such as in suggesting AMs. Nothing in the law, however, provides the SSCs with such authority. Rather, management responsibilities continue to rest squarely with the regional management councils.

The entire ACL provision enacted into law is a broad requirement, lacking the specific mandates NMFS seems inappropriately bent on prescribing. Congress intentionally left ACL provision open so as to ensure management councils could use all of the management tools available to achieve the objective of the provision, which is to set an ACL for each fishery. A flexible mandate without specific requirements is one of the underpinning themes of the Magnuson-Stevens Act ("MSA"). From the inception of the MSA in 1976, Congress realized a one size fits all approach to fisheries management was not in the national interest, which is why the Congress created the regional councils to allow for different regions to manage fisheries in a way that best suited particular regions.

As to the general concerns, a prime example of the overly restrictive approach referred to above is the agency's the proposal to require a "payback" provision in fishery management plans to account for any overage of the ACL. The "payback" provision was included in the Senate version of the Magnuson-Stevens reauthorization, but it was never included in the House version of the bill. When the House and Senate negotiated and settled on a final bill for passage, the "payback" provision from the Senate bill was not included in final version of the bill that Congress passed into law.

Instead, both Houses of Congress agreed on much broader language. Indeed, even within the Senate, the Commerce Committee rejected language that would have mandated hard total allowable catch limits for every fishery. Rather, the Senate Commerce Committee reported out a bill that allowed regional fishery management councils to set ACL's using input or output controls, just as the enacted law allows. Thus, NMFS should not mandate hard TACs; equally, it should not establish a system that makes hard TACs the only practicable alternative (such as prescribing buffer zones that would greatly reduce an ACL if a hard TAC were not employed). The guidelines should not take away the flexibility in management approaches Congress sought to maintain, nor preempt successful management strategies such as days-at-sea management for the Atlantic sea scallop fishery.

In summary, FSF fears that NMFS's specific proposals in the Notice undermine the flexibility in setting and monitoring ACLs which Congress provided. NMFS would instead inappropriately set specific requirements where they are clearly not called for by the Reauthorization Act. FSF respectfully requests NMFS reevaluate its proposals to the better reflect the terms and spirit of the Reauthorization Act. Congress specifically did not require a one-size-fits-all approach to fisheries management and NMFS does not have the authority to unilaterally impose it.

Within the Notice of Intent, NMFS sets out a series of ideas on which it is seeking comment. What follows is FSF's response to the NMFS solicitation of comments:

1. NMFS asked for comments on what is the role of the Scientific and Statistical Committees ("SSC") and "other peer review" processes in setting ACLs and AMs.

The law provides a detailed framework for the roles of the SSC's and the Councils in setting the ACL and AM. 16 U.S.C. § 1852(g) as amended states:

Each scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices.

Id. 16 U.S.C. § 1852(h), as amended, states the Council shall:

develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g).

Id. The law unequivocally bifurcates the roles of the SSC and the Council in setting the ACLs. The law directs the SSC to recommend an overall level of fishing mortality that the Council cannot exceed, but the law only authorizes the Council to set the ACL at or below the recommended level.

As for the AMs, 16 U.S.C. § 1853(a) directs the Council to establish accountability measures. The Act does not authorize the SSC's to make any management decisions or set the AMs. The law only authorizes the SSC's to provide advice and assistance on issues pertaining to the scientific analysis of a fishery and not to the actual management measures. *See* 16 U.S.C. § 1852(g). The Act certainly does not authorize the SSC's to have any role in a decision that would affect allocations of catch, as this would deviate from the SSC's delineated role of providing scientific advice, and detract from their role as impartial advisors.

2. NMFS asked for comments on the relationship between the ACL and Optimum Yield ("OY").

The reauthorization of the Magnuson-Stevens Act did not change the existing language that requires conservation and management measures to achieve OY on a continuing basis. 16 U.S.C. § 1851(a)(1). Therefore, the Councils must set an ACL, which is a conservation and management measure, at a level that achieves OY on a continuing basis. This is a critical issue. As Congress did not amend the OY requirements in the Act, NMFS must be careful to continue

to abide by the preexisting requirements of the MSA as it moves to implement the new complimentary conservation provisions, such as the ACL provision.

3. NMFS solicited comments on what revisions are necessary to the existing overfishing definition to accommodate the overfishing limit (OFL).

The agency explains its rationale for creating the OFL as follows:

Under the NS1 guidelines, overfishing of the stock occurs when the maximum fishing mortality threshold (MFMT) is exceeded (50 CFR 600.310(d)(2)(i)). Thus, it is important to clarify the relationship between the ACL and the MFMT. While the MFMT is expressed as a rate of fishing, NMFS may recommend that FMPs be amended so that annual catch levels corresponding to MFMT—an overfishing level (OFL)—are specified along with ACLs in comparable units (e.g., weight or numbers of fish) to ACLs, to facilitate subsequent monitoring against the ACL. The OFL would be the maximum amount of annual catch from all sources (landings and discard mortality from all sectors) which does not result in overfishing.

72 Fed. Reg. at 7018. The rationale above says an OFL is needed because an ACL is presumably measured in an amount while the MFMT is a rate. FSF does not believe the translation of a unit of weight into a fishing rate is a significant hurdle that requires the formulation of a whole new term. Councils routinely set target or hard TACs in amounts and then translate the amount into a rate in order to establish appropriate management measures. The introduction of the concept of OFL will only lead to further confusion in fisheries management and provide little to no benefit from its creation.

FSF would also like to comment on the important assertion contained in the parentheses in the agency rationale quoted above to the effect that all mortality from landings and discards should count against the ACL. The Act is silent on what mortality should count against the ACL and the agency should not assume that landings **and** discards must count against the ACL. Councils may choose to count mortality in this fashion and NMFS may establish it as a preference, but NMFS has not authority under the law to mandate this form of accounting for mortality.

4. NMFS solicited comments on concerns over the variability in data currently available for each stock.

In this regard, FSF would like bring to NMFS's attention that upon the retirement of the *Albatross IV* there is no plan in place to conduct the Atlantic sea scallop survey. FSF is extremely concerned about the long term health of the sea scallop stock and the viability of the rotational management plan, currently in use, if there is no sea scallop survey. One of the most

profitable fisheries in the world is dependent upon the execution of an accurate yearly survey of the sea scallop stock.

5. NMFS solicited comments on what should be done about the variability in management approaches in reaching target fishing mortality levels.

FSF is concerned the Agency is soliciting comments on a topic that is not within the scope of its mandate under the MSA reauthorization. The Congress through the reauthorization of the Act specifically did not allow or disallow any particular sort of management tool. On the contrary, the Congress, unlike in past reauthorizations, did not prohibit the Councils from using any specific management tool. Indeed, early version of the Reauthorization Act included requirements for all fisheries to be managed by hard TACs, yet this specific language was never passed by a Congressional committee, let alone either house of the legislature. Congress debated the merits of prescribing a specific management tool and rejected the language. As a result, all management tools and conservation measures are at the disposal of the Councils. Every management tool has pros and cons, which the Council must weigh when it deliberates a FMP. However, it is not appropriate for NMFS to pre-select any specific management tool as there is no authorization under the Act to do so.

6. NMFS has solicited comments on setting a buffer between the ACL and the OFL and how large the buffer needs to be.

FSF is extremely concerned about the position NMFS has put forward in the scoping document. NMFS' stated rationale for the requirement of a buffer is:

NMFS believes that the extent of future management success using ACLs will depend largely upon ACLs being set sufficiently below the OFL for a fish stock, i.e., the size of the buffer needed between the OFL and ACL, to reduce the chance of exceeding the OFL.

72 Fed. Reg. at 7018 (emphasis added). This is an extremely problematic approach that is apparently based upon the precautionary principle, which is not a requirement of the Magnuson-Stevens Act. The fact is the proposed buffer between the ACL and the OFL is illegal under the MSA. As FSF stated above, the MSA still requires conservation and management measures to achieve OY on a continuing basis. To achieve OY on a continuing basis, the Councils must set the ACL at OY. If NMFS requires a buffer zone that artificially lowers ACL below OY, then it is requiring the Councils to set a conservation and management measure in a manner inconsistent with National Standard One by not setting management measures at a level to achieve OY on a continuing basis. Any requirement that is not consistent with the national standards set forth in the Act is a *prima facie* violation of the MSA.

Nor should NMFS use buffer zone measures as a means to force Councils to apply particular management regimes, such as hard TACs, or face the required imposition of major and crippling buffer zones for their ACLs. The presentations to the fishery management councils in this regard were particularly troubling.

As the Reauthorization Act as plainly states, Councils must establish ACLs that do not allow overfishing and FMPs must include measures to ensure accountability. 16 U.S.C. § 1853. The Act's language is purposely vague and open-ended in order to allow the Councils the maximum amount of flexibility in tailoring individual FMPs. NMFS is attempting to single handedly, and without any authorization, remove the flexibility placed within the law by Congress. FSF strenuously opposes this proposal to mandate buffer zones as it is impermissible under the law and contrary to Congressional intent.

7. NMFS has solicited comments on what is the appropriate probability that the ACL will prevent overfishing.

The Act is silent on what level of certainty is required for setting the ACL. In the absence of any statutory guidance judicial precedent is appropriate. Courts have consistently stated in opinions that a plan must have a 50 percent chance of success. NMFS does not have any authority to arbitrarily increase the judicial standard of 50 percent. The FSF strongly encourages the agency to adopt the judicial standard in the guidelines.

8. NMFS has asked for comments on limiting the extent of overfishing should it occur.

16 U.S.C. § 1853 requires Councils to set an ACL at a level that does not allow overfishing, including measures to ensure accountability. The intent of the Reauthorization Act is for the accountability measures to prevent overfishing. What NMFS is apparently proposing in this solicitation is an additional requirement, not required by law, to limit overfishing should it occur. FSF believes, as supported by the law, that any limit on the amount of overfishing is an issue for the Councils to individually decide on, taking into account all of the national standards and weighing the viability of all the available accountability measures. It is improper for NMFS to mandate or require limits when none are called for under the Act.

Parenthetically, FSF is troubled by the statement: "With regard to 'measures of accountability' ... required by MSRA section 104(a)(10), NMFS' initial interpretation is that they are part of the ACL mechanism and FMPs should contain AMs for each stock." 72 Fed. Reg. at 7018. Even though the Magnuson-Stevens Act defines a "stock of fish" as "species, subspecies, geographical grouping, or other category of fish capable of management as a unit," 16 U.S.C. § 1802(37), and the Notice itself ties the use of the term "stock" or "stock complex" to the MSA's definition of a

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fishery,¹ 72 Fed. Reg at 7018 (quoting 50 C.F.R. § 600.305(c)(12)), the context suggest that NMFS is viewing stocks at essentially a species or subspecies level. The proper term in this context should be “fishery” as that is the unit of management to which all of the requirements of the MSA apply.

This nomenclature is significant. In the Reauthorization Act, Congress did not change the definition of a fishery, nor in any way attempted to restrict the ability of Councils to manage assemblages of species as a unit for purposes of the law. This flexibility, which is inherent in the definition of a fishery as functional unit that can be defined, among others, in economic terms, is the basis for what has erroneously been termed the “mixed stock exception.” Rather than the exception, it is the rule, and the National Standard One guidelines should not subvert the law by essentially requiring management at the species or subspecies level.

In application, Councils retain flexibility under the MSA as amended to treat an assemblage of species caught in a mixed catch fishery as a single “fishery” and manage it according to the law. With respect to ACLs and AMs, this means that reference points can be set for the aggregated stock and these measures are applied to fishery as a whole, not to the individual species within the fishery. The National Standard One guidelines should be absolutely clear in this regard.

9. NMFS is seeking comments on establishing corrective actions to ensure accountability in a subsequent year for an overage of the OFL of a stock for the previous year.

The FSF is struck by the similarity of this agency proposal to the “payback” language in the Senate passed version of the Reauthorization Act. The Senate passed language required the Council to reduce the ensuing year’s ACL by the same amount of any overage of the prior year’s ACL. As NMFS is aware, the payback provision fell out of the bill during the negotiations between the House and Senate and was not passed into law. What ended up in the Act was the unspecific language in 16 U.S.C. § 1853 stating the Council shall take “measures to ensure accountability.”

Therefore, the Reauthorization Act authorizes a Council and NMFS to institute a payback provision if the ACL is exceeded. What the Act does not do is require a payback. It is solely up to the Council to decide whether or not to instate a payback provision as part of its accountability measures in a particular FMP. Generally speaking, however, it is inappropriate to use “payback” provisions in fisheries which are managed through hard TACs or other mechanisms, such as days-at-sea (“DAS”) designed to achieve a target fishing mortality level, when those measures

¹ Which is defined as “one or more stocks of fish that can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographic, scientific, technical, recreational, or economic characteristics; and any fishing for such stocks.” *Id.* §1802(13).

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are specified on an annual or multi-year basis. In such instances, the only reason target fishing levels are exceeded is due to the fact that the estimate of the TAC or number of DAS was incorrect. SSCs and the Councils will consider the actual fishing mortality rate achieved in the prior year or years when developing subsequent specifications for the fishery. Arbitrarily reducing ACLs by the amount of "overages" in such cases amounts to a capricious decision to fish at less than OY, which, as explained above, is a *prima facie* violation of National Standard One.

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This scoping process is the first in a series of important steps in the implementation of the Magnuson Stevens Reauthorization Act. FSF appreciates this opportunity to comment on the Notice of Intent to prepare an environmental impact statement and are hopeful these comments will guide the agency in implementing the Act. Please do not hesitate to contact us if you require any further information.

Sincerely,

David E. Frulla
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Attorneys for the Fisheries Survival Fund