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VIA ELECTRONIC MAIL

Mr. Mark R. Millikin
National Marine Fisheries Service
Office of Sustainable Fisheries
1315 East-West Highway, Room 13357
Silver Spring, MD 20910

RE: Comments on Annual Catch Limits Proposed Rule, RIN 0648-AV60

Dear Mr. Millikin:

We represent the Fisheries Survival Fund ("FSF"), an organization whose participants include the bulk of the full-time, limited access scallop fleet located from Virginia to Massachusetts. We appreciate the opportunity to comment on the proposed revisions to the National Standard 1 guidelines, in particular as to how they implement the congressional directive to require the implementation of annual catch limits and accountability measures for federally managed fisheries. *See* 73 Fed. Reg. 32526 (June 9, 2008).

In short, the proposed guidelines are woefully out of line with the National Marine Fisheries Service's ("NMFS") mandate and authority provided under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), as recently reauthorized. *See* Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 102 Stat. 3575-3665 (Jan. 12, 2007) ("Reauthorization Act"). In particular, the provision "recommending" institution of what the agency is referring to as "annual catch targets" and associated control rules completely undermines the clear directive Congress provides in National Standard 1 to achieve optimum yield on an ongoing basis.

Further, NMFS's proposal unnecessarily adds layers of confusion and complexity through the introduction of such extra-statutory concepts like "ecosystem component species" and "non-target species" – concepts which are, and which have been, successfully subsumed and accounted for in multispecies fisheries management and through adherence to the bycatch minimization requirements of National Standard 9 and 16 U.S.C. § 1853(a)(11). It is unfortunate that NMFS chose a course so overreaching, when regional fishery management councils are in dire need of guidance as they struggle to meet the mandated deadlines of 2010 and 2011 to

incorporate annual catch limits ("ACL") and accountability measures ("AM") for overfished fisheries and all other fisheries, respectively.

In light of this dire need for guidance on ACLs and AMs, FSF urges NMFS to scale back this proposal significantly to the essential task at hand, and postpone a fundamental and ambitious restructuring of the fisheries management process to some future date, if at all. Neither the reference in the MSA definition of optimum yield ("OY") to "marine ecosystems" with relation to the setting the appropriate "amount of fish" to harvest, nor the "finding" that some councils have "demonstrated ... progress in integrating ecosystem considerations in fisheries management," nor the call for "a study on the state of the science for advancing the concepts and integration of ecosystem considerations in regional fishery management"¹ provides authority for the changes NMFS seeks to implement here.

SUMMARY OF COMMENTS

- 1) **Eliminate the concept of Annual Catch Targets ("ACT") from the guidelines:** While the proposed guidelines appropriately equate maximum sustainable yield ("MSY") with the overfishing limit ("OFL"), the rules erroneously conflate OY with the non-statutory concept of the ACT. Rather, OY equates with the acceptable biological catch ("ABC"), which in turn is the level at which ACL should be set.
- 2) **Equate OY with ABC and ACL:** OY is a long-term series of catches that average to a level that constitutes OY. OY, for its part, is based on MSY, reduced to account for social and ecological factors, which can comfortably account for any management or scientific uncertainties. The proposed guidelines, however, specify that scientifically acceptable biological catch – which is generally set below OFLs, should not be harvested. Rather, they propose two further levels of reductions, first, the ACL and below that, the ACT. If this advice is followed, by definition sustainable harvest that could provide benefit to the Nation in terms of food production and recreational harvest would go uncaught in perpetuity. By definition, therefore, OY would never be achieved, in contravention of the plain terms of National Standard 1.
- 3) **Maintain an appropriate scientific role for scientific and statistical committees ("SSC"):** The proposed guidelines assign an inappropriate management role to regional SSCs. While the Reauthorization Act limits a council's authority in setting ACLs in excess of the "fishing level recommendations of its" SSC, 16 U.S.C. § 1852(h)(6), the only reasonable reading of this provision is that a council may not set an ACL in excess of the OFL as determined by the SSC. The proposed guidelines, however, purport to delegate to scientific advisors the authority to reduce their best estimate of the OFL, which is required to be established according to the best scientific information available, *see id.* § 1851(a)(2), to account for "scientific uncertainty." Rather, SSCs should advise

¹ Respectively, 16 U.S.C. § 1802(33)(A); *id.* § 1801(a)(11); and *id.* § 1882(f).

councils on those uncertainties, and allow the councils to make the determination as to how to incorporate that advice into their recommendations.

- 4) **Eliminate the concept of “ecosystem component species” and inappropriate references to non-target stocks:** The introduction of the concept of “ecosystem component species,” combined with the confusing and counterproductive discourse on non-target species adds an unnecessary and extra-statutory level of complexity which should be stricken in its entirety. Fish harvested for sale or personal use should be managed as part of a fishery management plan (“FMP”), to the extent that information exists with which to establish status determination criteria (“SDC”). Non-target species not retained are properly characterized as bycatch, and should be treated as such under the terms of the MSA. Managed species incidentally caught in other fisheries can be dealt with through joint amendments or framework actions, as is currently done in every region of which FSF is aware.
- 5) **Congress did not mandate that all fisheries be managed by hard quotas, and so NMFS should include guidance for the continuation of successful, non-quota management systems, such as that used to successfully manage the Atlantic sea scallop fishery.**
- 6) **So-called “forage fish” are stocks of fish under the MSA and should be managed in the same manner as any other fishery:** The MSA does not differentiate between fisheries for so-called “forage fish” and other fisheries. The requirements of MSA Title III apply to all fisheries equally, including the requirement to achieve optimum yield. The proposed guidelines should not purport to establish essentially arbitrary management rules for certain classes of fisheries.
- 7) **Add a preference for sector ACLs and AMs for fisheries with large recreational components:** Sections 600.310(f)(5)(ii) and (g) of the proposed guidelines dealing with sector ACLs and AMs, respectively, should include more specific guidance, even going so far as expressing a preference, for division of ACLs and sector-specific AMs for fisheries with large recreational components, given the large amount of uncertainty in recreational harvest and lack of effective entry controls and management.
- 8) **Calculating rebuilding periods:** The provision in section 300.310(j)(3) requiring all fisheries to be rebuilt in 10 years if that can be achieved with absolutely no fishing mortality is inconsistent with the law and extraordinarily harmful. NMFS should adopt the provisions for calculating rebuilding periods it outlined in the 2005 proposed National Standard 1 guidelines instead.

DETAILED COMMENTS

I. The Heart of the Proposed Guidelines Relating to ACLs and the Relationship Among MSY, OY, ABC, OFL, and ACL is Fundamentally Flawed, While Creating an Unacceptable Management Role for SSCs

In order to demonstrate how far afield the guidelines are from what the law requires, it is most instructive to review what the law says. National Standard 1 represents the primary purpose of the MSA, enshrining the command both to prevent overfishing and continually achieve “the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1). OY is based on MSA, and represents “the *amount of fish* which will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, while taking into account protection of marine ecosystems.” *Id.* § 1802(33) (emphasis added). The difference between OY and MSY (*i.e.*, the amount by which OY should be lower than MSY) should reflect “any relevant economic, social, or ecological factor.” *Id.* § (B). If a stock is overfished, OY should provide for rebuilding stock levels. *Id.* § (C).

None of these authorities were changed by the Reauthorization Act. However, Congress did prescribe that councils must “establish a mechanism for specifying annual catch limits in the plan,” or elsewhere, “at a level such that overfishing does not occur in the fishery, including measures to insure accountability.” Reauthorization Act, § 104(a)(9), codified at 16 U.S.C. § 1853(a)(15). The Reauthorization Act also introduced some new concepts, including ABC, which the SSC is required to estimate and recommend. The SSC has also been charged with specifying MSY and providing advice for preventing overfishing, achieving (where appropriate) rebuilding targets, while also providing other information and recommendations. *Id.* § 101(b)(1), codified at 16 U.S.C. § 1852(g)(1). Each council has been directed to set ACLs that are “not to exceed the fishing level recommendations of its [SSC] or the peer review process established under” the Act. *Id.* § (c)(3), codified at 16 U.S.C. § 1852(h)(6).

Starting with the last points first, Congress did not provide perfect clarity in specifying which SSC generated “fishing level recommendations” it constrained the councils from exceeding. MSA section 1852(g)(1) provides two reasonable options: ABC or MSY. In the proposed guidelines, NMFS settled on ABC, thereby allocating to the SSC – inappropriately FSF strongly believes – a discretionary management function that the law provides solely to the councils. Specifically, the proposal charges the SSC with recommending ABC, which is designed to be set below the OFL “to account for scientific uncertainty,” and which a council adopted ACL cannot exceed. 73 Fed. Reg. at 32543 (50 C.F.R. § 600.310(f)(3)-(5)). Determining “scientific uncertainty,” however, is a matter of policy, not science. Undoubtedly, members of the SSC (or peer review panel) are in the best position to explain the uncertainty in their estimates of MSY, OY, and other biological reference points, but there are no objective procedures for quantifying these uncertainties, for if there were, then that uncertainty could be reduced in the estimation of the point estimates.

The only acceptable reading of the MSA is that the estimate which councils cannot exceed is MSY, or result of applying an MSY control rule to prevailing stock conditions. As an alternative, it may be interpreted as exceeding the OFL, although ultimately, these reduce to essentially the same thing. What these numbers have in common is that they are scientifically determinable. By contrast, the MSA charges the councils with determining and specifying the information incorporated into the assessment of MSY and OY, as well any information necessary "for effective implementation of the plan." 16 U.S.C. § 1853(a)(3),(8). The assessment of these needs and the quality of the information used is thus a discretionary function given by Congress to the councils, not the SSC, which is solely charged with providing its "recommendations."

Thus, the guidelines should be refined to provide clarification that the "fishing level recommendation" councils may not exceed are either those estimates of MSY emanating from the control rule they themselves specify or the OFL, based on council-selected reference points. ABC should be redefined without reference to reductions for scientific uncertainty, while the councils should be instructed to consider such uncertainty in setting ACLs. The alternatives then would be either to equate ABC with OFL, or allow SSCs to recommend ABCs to councils that they feel reflect scientific uncertainty, but which councils are free to ignore so long as the ACLs they set do not exceed the OFL.

Turning to ACLs, and the non-statutory concept of ACT, the guidelines far exceed what the law authorizes. The primary touchstone in the law is the requirement to achieve OY on a continuing basis. As noted, OY is an amount of fish that is based on MSY, but reduced to consider social, economic, and ecological factors. Thus, Congress recognizes that ideally, one would strive to achieve MSY as a perfectly appropriate and even desirable management objective, but other factors – which can certainly include scientific and management uncertainties – may caution against setting those level of catch as high as a pure MSY-based management system may allow. Of course, if those uncertainties were not to exist, then the law allows NMFS to equate MSY and OY.

The guidelines, however, erode the concept of OY by equating it with a management reference point that is specified nowhere in the law; *i.e.*, the ACT. This sleight-of-hand cannot be tolerated. Tellingly, Congress included the requirement to set ACLs while effecting change to neither National Standard 1, nor the definition of OY. The intent, clearly, was to equate the ACL with OY, because if the two were not so equated, then the law would require *both* that OY be continually achieved and that catch levels be set below OY. These two interpretations cannot logically coexist.

This logical problem cannot be overcome by the fiat of equating OY with the ACT, because accepting this proposition relies on the assumption that Congress meant for ACLs to be set at levels *higher* than OY.² There is no basis in the statute or the legislative history of the Reauthorization Act to support this interpretation. Moreover, it relies on the farfetched

² Not to mention the unlikely congressional intention for councils to manage fisheries according to a referent found nowhere in the law.

assumption that Congress believed a higher "amount of fish" could be sustainably harvested than the amount which provides "the greatest overall benefit to the Nation." 16 U.S.C. § 1802(33) (the definition of OY). This is facially implausible, because both National Standard 1 and the new ACL requirement each contain the requirement that they be established to insure that overfishing is not occurring. Compare 16 U.S.C. § 1851(a)(1) with *id.* § 1853(a)(15). This parallel language alone suggests intent to equate the two concepts.

In short, the concept of ACT must be scrapped and the guidelines redrafted to equate ACLs with OY.

There is a further inconsistency with tying OY – a concept based on a long-term average series of catches – with ever fluctuating "uncertainties" in science and management. Clearly, scientific uncertainty can wax and wane with the acquisition of new information (one hopes it tends to wane, but recent experience with New England groundfish management suggests otherwise), while ability to monitor and manage fisheries should generally improve. And yet, the guidelines are purposely and inconsistently structured so that OY fluctuates with these temporal factors.

II. The Guidelines Create Unnecessary Confusion and Complexity Through the Introduction of New, Non-Statutory Concepts

The proposed guidelines interject an unwarranted and unwelcome level of uncertainty into the management process through the definition of "stocks in the fishery." See 73 Fed. Reg. at 32539-40 (50 C.F.R. § 600.310(d)). In this regard, the MSA is a model of simplicity. A fishery is defined as (among other things) "one or more stocks of fish which can be treated as a unit for purposes of conservation and management," on the basis of relevant criteria. 16 U.S.C. § 1802(13)(A). A stock of fish is defined as "a species, subspecies, geographical grouping, or other category of fish capable of management as a unit." *Id.* § (42). National Standard 1 applies to fisheries, as so defined and determined by regional councils through an FMP.

Thus, while councils may benefit from guidance on how to manage aggregate stocks of different species, grouped according to the criteria listed in the law,³ the proposed guidelines far exceed this task by instead introducing concepts of "ecosystem component species" and purporting to establish hard and fast rules about how each FMP is to deal with non-target species. The upshot is a morass of contradictory advice that will lead to significant overlap of analysis and management measures between FMPs for different species and extension of management to stocks of no commercial or recreational interest.

As the preamble to the proposed guidelines states, the definition of a fishery is broad. See 73 Fed. Reg. at 32529. However, NMFS goes too far in purporting to "encourage ecosystems approaches to fishery management" by usurping council authority to define what constitutes a fishery for purposes of management under the MSA. *Id.* While the preamble states

³ A good example being snapper-grouper complexes.

that “[t]he intent of this guidance is to articulate approaches taken under existing FMPs and to provide a framework for *thinking* about further FMPs and FMP amendments,” *id.* (emphasis added), the guidelines go on to require councils to include consideration of non-target species in an FMP, and suggest adding “ecosystem component species.” *See id.* at 32593 (50 C.F.R. § 600.310(c)(2)) (“Stocks in a fishery include: target stocks; non-target stocks that are retained for or personal use; and non-target stocks that are not retained for sale or personal use *and that are either determined to be subject to overfishing, approaching overfishing, or overfished, or could become so, according to the best scientific information available, without conservation and management measures.*”) (emphasis added).

The MSA could not be clearer: determining the scope of what is to be brought under management as part of a fishery is solely and exclusively the province of the regional fishery management councils. The law states the “Council ... shall” develop an FMP that “contain[s] a description of the fishery, including, but not limited to, ... the species of fish involved” 16 U.S.C. § 1853(a)(2). By purporting to define the scope of the fishery, NMFS is unlawfully usurping this statutory role. These provisions, furthermore, are bad policy. For instance, because the MSA requires that an FMP contain, among other things, descriptions of the fishery, assessments of “present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery,” overfishing criteria, etc.,⁴ the effect of making incidentally-caught species part of each FMP means that duplicative analysis must be contained within each FMP. Monkfish, for example, is a directed fishery managed under its own plan, and is also “in the” multispecies, scallop, summer flounder, and many other fisheries. This proposal makes no sense and is flatly illegal.

Nor can FSF discern any difference between non-target, non-retained species and “ecosystem component species” (which according its definition, may also be kept, but at *de minimis* levels, 73 Fed. Reg. at 32539 (50 C.F.R. § 600.310(c)(5)). Clearly, there are two relatively distinct categories: incidental catch that itself is part of a fishery managed under another FMP, and those species which are not managed incidentally encountered. The former category is currently handled well under the primary FMP and through interlocking actions and regulations. For instance, there are directed crab fisheries in the Bering Sea/Aleutian Islands, and series of rules under the general groundfish plan to account for and limit incidental catch by other sectors. The system works well.

As to the latter, National Standard 9 and MSA section 1853(a)(11) each work to insure minimization of such interactions. Practically speaking, NMFS and the councils barely have the resources to collect information and assess currently managed species, as well as any directed fisheries that might develop. South Atlantic and Gulf of Mexico snapper-grouper fisheries are currently managed through reference species not only due to geographic and economic (*i.e.*, they are coharvested) similarities, but primarily because NMFS lacks information to develop status determination criteria for the vast array of the managed species.

⁴ *Id.* § (2), (3), (10).

And yet, as the bolded language in the parenthetical quoted above notes, the new guidelines would impose a requirement to develop such criteria for all species that are neither targeted nor retained for sale or personal use. This is a natural extension of the command to develop criteria for any non-target species that is "subject to overfishing, approaching overfishing, or overfished, or could become so," because those are legal terms that only have meaning with reference to "objective and measurable criteria." 16 U.S.C. § 1853(a)(10). Besides wasting scientific, staff, council and agency resources developing such information for stocks of no commercial or recreational interest, the provisions of proposed section 600.310(d) will also likely increase demands to "manage" such species. In the end, such "management" would not likely look much different than existing measures designed to reduce bycatch, but involve significant amounts of council time and effort for no real effect.

The entire section is riddled with inconsistencies and impracticable and unworkable proposals. Given that it exceeds NMFS's authority, it should be scrapped in its entirety.

III. The Guidelines Must Not be Read to Preclude Current Atlantic Sea Scallop Management

Congress did not mandate the use of total allowable catches ("TAC"), that is to say, hard quotas, in every fishery. It specifically avoided use of that term in favor of "ACL" to allow flexibility in management approaches. The Atlantic sea scallop fishery is sustainably managed at high levels of abundance under an effort control and rotational management system without hard TACs. Rather, the scallop fishery is subject to area-specific quotas, a sub-sector individual quota system that ultimately will account for five percent of the fishery, and an overall catch limit which is met through these specific TACs combined with an allocation of days-at-sea to be used in generally open areas. This system has worked well in constraining catch within the allowable target catch while preventing overfishing because there is a close relationship between fishing mortality rates and the fishery input controls (primarily gear and fishing time restrictions, limits on crew to control the pace of harvest, and minimum ring sizes). Moreover, this management program maximizes scallop yield per recruit by focusing effort on larger scallops in a manner that a simple hard TAC would not similarly be able to accomplish.⁵

The guidelines should allow for the continuation of the current scallop management system, as well as provide alternative schemes to hard TAC management for other fisheries where such is appropriate (another example might be salmon fisheries where management is based on escapement). FSF's concern is that the phrase "ABC should expressed in terms of

⁵ That is to say, the input controls -- limitations on fishing time, gear, and shucking power -- create an incentive to focus effort on large, mature scallops that have spawned several times. The days-at-sea limitation also helps to minimize fishing time, helping to achieve both economic and conservation objectives. By contrast, a quota system would likely erode these advantages of current management by reducing management to simple pounds landed, which can be achieved by focusing on small scallops resulting in more scallops taken to achieve a fixed amount of landings.

catch, but may be expressed in terms of landings,” 73 Fed. Reg. at 32543 (50 C.F.R. § 600.310(f)(3)(i)), could be interpreted to preclude current scallop management or other alternative and effective management systems. We therefore urge NMFS to provide clarification and, to the extent it feels necessary, guidance for implementation of such alternatives.

IV. There is No Statutory Basis for Managing an Undefined Class of “Forage Fish” Differently From Any Other Fishery Managed Under the MSA

The guidelines propose, as an ecological consideration, “managing forage stocks for higher biomass than B_{MSY} to enhance and protect the marine ecosystem.” 73 Fed. Reg. at 32542 (50 C.F.R. § 600.310(e)(iv)(C)). The single mention of “forage” in the MSA is in a reference to an Atlantic herring study in section 319 of the Reauthorization Act. There is no authority for managing “forage” stocks – even to the extent that such could be sensibly defined, given that juveniles of most species constitute forage – any differently from any other stock. Beyond this, the best scientific information shows that even such “forage fish” as menhaden, herring, and mackerel, prey on eggs, larvae, and young of other fish and shellfish. Until the state of knowledge about the full range of ecological interactions are better understood, there is no scientific or, more pertinently, statutory basis for managing arbitrarily denoted “forage” fish any differently from any other managed fishery.

Nor can this provision be considered a shortcut to “ecosystem-based management.” Congress, through the Reauthorization Act, recognized that the current state of knowledge is likely not advanced enough to truly account for the complex web of ecological interactions in management when it required NMFS to survey and advance the science underpinning the basis for ecosystem management. See Reauthorization Act, § 210, codified at 16 U.S.C. § 1882(f). What this section calls for is a better understanding of “ecosystem process,” as well as providing means for incorporating stakeholder participation in ecosystem planning. The proposed guidelines short-circuit this disciplined approach to ecosystem management, imposing a blanket rule that does not appear to be scientifically justifiable. While many anti-fishing advocates call for severely curtailing or even eliminating so-called forage fisheries, NMFS is tasked with managing resources for maximum national benefits in accordance with the best available scientific information.

These ends are not met by calling for management of certain, undefined classes of fish for higher abundance relative to other species, particularly where the ecological impacts of this approach are not well understood. From a legal perspective, the command to achieve OY is absolute, and this advice is contrary to that prescription. This provision must be struck from the guidelines.

V. The Final Guidelines Should Recommend Sector-Specific ACLs and AMs for Fisheries with Significant Recreational Participation

There is an enormous and well-recognized asymmetry between the amount of control managers have over the ability to both limit harvest and estimate total annual catch as between the

commercial and recreational sectors (and even between licensed charterboat operators and private anglers). This is acknowledged in the Reauthorization Act, which calls for improvement of recreational catch and harvest data through the creation of “regionally based registry program for recreational fishermen.” Reauthorization Act, § 201, codified at 16 U.S.C. § 1881(g). The Act further mandates establishment of “a program to improve the quality and accuracy of information generated by the Marine Recreational Fishery Statistical survey, with a goal of achieving *acceptable accuracy and utility* for each individual fishery.” *Id.*, 16 U.S.C. § 1881(g)(3)(A) (emphasis added). Of course, currently there are no means of controlling entry into a fishery by private anglers and only weak tools, such as seasons and bag limits, to control effort.

On the other side, nearly every commercial fishery is controlled by some combination of limited access, gear restrictions, seasons, quotas, and a variety of other management restrictions. This sector is subject to mandatory reporting, verified through a variety of monitoring and enforcement controls, port sampling, dealer reporting, and at-sea observation. In short, there is a yawning gap in both the level of accountability and control as between the recreational and commercial sectors (with the charterboat sector falling somewhere between).

Recognizing these facts, it is a virtual certainty—confirmed by the experience with the Atlantic summer flounder fishery where rebuilding goals have been thwarted by chronic uncontrolled overfishing by the recreational sector—that without sector-specific ACLs and AMs, the commercial fishing industry will be unnecessarily punished by the management response to uncertainty and unconstrained harvests by the recreational sector in fisheries where a significant proportion of landings is accounted for by private anglers. That has certainly been the experience in the summer flounder fishery, and virtually every other fishery with significant recreational interest.

The MSA requires that the any “conservation or management measures which reduce the overall harvest in a fishery” “fairly and equitably” distribute the benefits and burdens of conservation and rebuilding. 16 U.S.C. § 1853(a)(14); *see also id.* § 1854(e)(4)(B). ACLs and AMs are management measures that have the effect of reducing harvest levels. Given that NMFS has made uncertainty a touchstone in determining the level of precaution that should be employed in setting ACLs (setting aside, for the moment, the propriety of this approach), the inability to control and limit recreational harvests should not lead to inequitable allocations and controls on the commercial sector and the fish consuming public that depends on it.

It would therefore be more than appropriate to use the guidelines to mandate, perhaps subject to justifiable exceptions, sector specific ACLs and AMs for commercial and recreational fisheries. The obvious place for such guidance is in subsections (g) and (h) of section 600.310.

VI. The MSA Preference for Rebuilding Within 10 Years Cannot be Read as Authority to Decimate Fishing Communities and Fishermen

The proposed changes to the section of the guidelines dealing with overfished fisheries, *see* 73 Fed. Reg. at 32545-46 (50 C.F.R. § 600.310(j)(3)), are a step backwards from the already inadequate guidance provided by NMFS, and far inferior to the method described in 2005 NMFS guidelines. *See* 70 Fed. Reg. 36240, 36245 (June 22, 2005) (explaining the “discontinuity” resulting from the current guidelines and explaining the proposal to address it). Specifically, NMFS proposes to require the absolute closure of a fishery, and presumably any fishery which catches the overfished species, for as much as 10 years if there is a fifty percent chance that the stock could be rebuilt in the absence of fishing mortality (“F”). *See* 73 Fed. Reg. at 32546 (50 C.F.R. § 600.310(j)(3)). The impacts on fishing communities of this proposal are immense. However, the fact still remains, as NMFS recognized a mere three years ago, that the scientific justification for this proposal is weak, and the resulting anomalies based on recognized imperfections in estimating rebuilding times are of great consequence.

As was stated in the prior proposed guidelines:

The best scientific estimate of T_{min} [the time to rebuild in the absence of F] always has a probability distribution due to the expected variability in biological stock productivity during the rebuilding period. Experience has shown that it is unreasonable use [sic] of this best scientific information to have a sharp difference in management response, and resultant impact on the fishery, when, for example, T_{min} has a 49-percent chance of exceeding 10 years, versus the management response when T_{min} has a 51-percent chance of exceeding 10 years. Accounting for this biological uncertainty in T_{min} , while taking into account the biological specifics of a stock or stock complex, requires a smoother transition in T_{max} calculation.

70 Fed. Reg. at 36245. Nothing in the 2005 analysis has changed in the intervening time, nor have any of the reasons for recommending the approach outlined in that proposal. FSF endorses this prior approach for establishing rebuilding timeframes. Specifically, the guidelines should incorporate instructions to councils to calculate T_{max} as the sum of T_{min} plus one mean generation time for the purposes of determining whether a stock can be rebuilt in 10 years or less.

This interpretation is perfectly in keeping with NMFS’s authority under the MSA; more so than what is currently being proposed. First of all, in setting the rebuilding period, NMFS is required to consider, among other things, “the needs of fishing communities,” 16 U.S.C. § 1854(e)(4)(A)(i). It is true, of course, that the ten year preference, expressed in the following subsection, does not similarly mention fishing communities. It does, however, provide an exception where “environmental conditions ... dictate otherwise.” *Id.* § (ii). Environmental conditions are not defined in the act, providing NMFS with considerable discretion in determining just what such conditions should be considered in determining the length of a likely rebuilding period.

Certainly, among the conditions prevailing in the marine environment is the existence of fishing activities. Unless every form of fishing, be it commercial, recreational, or subsistence, that has the possibility of encountering the species in question is completely banned, the "absence of fishing mortality" is an illusion. Such a harsh and widespread ban would adversely affect numerous fishing communities and businesses, and greatly, if not entirely, curtail numerous other directed fisheries. Such an outcome would be inconsistent with National Standards 1 and 8 and the other authorities requiring consideration of economic impacts on fishermen and fishing communities, particularly with respect to the incidentally-impacted fisheries. *See, e.g., id.* § 1853(a)(9), (13), (14).

This statement by Congress Don Young during consideration and adoption of the Reauthorization Act is also instructive:

I am also concerned that the provision requiring that harvest levels be set to prevent overfishing not be interpreted to shut down entire fisheries if one stock of a multi-species complex is experiencing overfishing. The purpose of the act is to provide a healthy fishery resource, but it is also to promote commercial and recreational fishing and support communities dependent on the fishery resources. The act should not be used as a tool for stopping all fishing activities in U.S. waters. The keys to achieving these goals are balance, flexibility, and common sense by the fishery managers. The provisions dealing with ending overfishing, rebuilding overfished fisheries, and setting harvest levels to prevent overfishing all need to be taken in the context of the National Standards and need to be viewed with an eye toward balance, flexibility, and common sense.

152 CONG. REC. H9233 (daily ed. Dec. 8, 2006) (statement of Rep. Young).

Given these factors, the solution to the "discontinuity" identified in the guidelines proposed in 2005 represents far better policy and more legally sound approach than what is currently being offered. FSF strongly recommends that NMFS adopt that approach.

VII. Comments on Accountability Measures

The proposed guidelines appear to view AMs primarily as punitive, *post hoc* adjustments made to deal with excess harvests and the failure to adhere to ACLs. *See, e.g.,* 73 Fed. Reg. at 32544 (50 C.F.R. § 600.310(g)(1)). While this is an element, the primary way to address the requirements of the law is through establishment of management systems, such as hard TACs or controls similar to those in the scallop fishery, that constrain effort to target levels. Frankly, as mentioned above, the biggest challenge in this regard is controlling recreational fishing effort, a topic that receives no attention in the proposed guidelines.

Rather than focusing on the establishment of systems of accountability, the guidelines establish series of hard and fast rules as to when AMs should be “triggered” or revised. For instance, they attach grave significance to instances in which ACLs are exceeded and establish hard and fast rules as to when “AMs should be re-evaluated to improve” their efficacy. *Id.* (50 C.F.R. § 600.310(g)(3)). What is lacking from this discussion is context. Certainly, there is a world of difference between the consequences of exceeding an ACL for a stock currently under a rebuilding plan and one that is currently not overfished and above B_{MSY} . For instance, in the North Pacific, it is not unusual for a fishery to exceed its TAC, but once it begins to approach OFL, then serious measures – up to closing all fisheries with the potential to take the species – attach.

There is no reason in law or policy to attach arbitrary consequences to exceeding ACLs in those healthy and sustainable fisheries when the total harvest does not exceed OFL nor constitute overfishing. Indeed, given that OY is an average, some catches will be above and some below that average. Intentionally skewing catches below long-term OY is to erode the concept of OY and insure that it will never be obtained.

Granted, the Bering Sea/Aleutian Islands and Gulf of Alaska groundfish fisheries are unique in that they are constrained by an overall OY cap that often results in a wide spread between ABC and the ACL. However, nothing in the proposed guidelines accounts for this situation, and so fishermen in the region are potentially subject to punishment and payback for the “crime” of harvesting sustainable yield. This is also a situation potentially facing FSF participants, given that scallop biomass is at historic highs.

Therefore, FSF recommends that the guidelines be adjusted to actually reflect guidance; that is to say, that it provide rules of thumb for appropriate management responses given the status of the fishery in question rather than mandate hard and fast rules. A good example is the requirement to reevaluate the management system if the “catch exceeds the ACL more than once in the last four years,” *id.*, because the “guidelines” broker no exceptions. This is important because although the MSA specifically states that these guidelines “shall not have the force and effect of law,” 16 U.S.C. § 1851(b), courts have held them binding as if they did have such effect.⁶

⁶ See *Natural Resources Defense Council v. NMFS*, 280 F. Supp.2d 1007 (N.D. Cal. 2003):

Congress expressly delegated authority to NMFS to set rebuilding periods for overfished species consistent with the requirements of the [Sustainable Fisheries Act]. In order to exercise that authority, NMFS had to interpret the SFA’s rather ambiguous rebuilding-period provision. While the [National Standard Guidelines] that codifies the agency’s interpretation of that provision does not have legal force of its own, it was plainly adopted in the exercise of the agency’s general authority to make rules concerning rebuilding.

Id. at 1014.

In sum, the guidelines should include more recommendations for approaches to AMs for the recreational sector, and more general, qualitative direction to councils for making adjustments to management measures with fewer specific directives.

VIII. Miscellaneous Comments

1. The Guidelines Lack "Flexibility": As suggested at various points above, the proposed guidelines lack flexibility necessary for meeting the variety of circumstances and challenges fishery management councils face. The section purporting to grant such flexibility, proposed section 600.310(h)(3), 73 Fed. Reg. at 32545, does nothing to rectify this problem. As the language states, conditions allowing for deviation from the largely mandatory terms of the proposal are "limited," while the prescribed examples are exceedingly narrow. These examples include "conservation and management of ESA-listed species, harvests from aquaculture operations, and stocks with unusual life characteristics." *Id.* Regional management councils were created with sole authority to meet identified conservation and management challenges. The guidelines should provide guidance to assist councils in this task, not – as the proposed guidelines do – seek to unlawfully circumscribe this authority.

2. "Mixed Stock" Exception: While purporting to provide flexibility to manage the bulk of stocks for OY in mixed species fisheries by allowing an exception for some stocks from the overfishing and rebuilding requirements, the guidelines actually make this exception less available than it is under the current guidelines. *See* 50 C.F.R. § 600.310(d)(6). The condition that "the resulting rate of fishing mortality will not cause any stock to fall below its MSST more than 50 percent of the time in the long term" swallows the entire exception. There is no circumstance under which this condition could, as an analytical matter, be met. This section should remain as it is currently.

3. Eliminate impossible analytical requirements: Based on draft comments by New England Fishery Management Council staff, FSF anticipates that some of these requirements and issues will be addressed in that council's comments. However, one noteworthy example of an overreaching and unnecessarily taxing requirement that should be eliminated will suffice. In proposed section 600.310(e)(3)(iv), the guidelines recommend "quantification" of social, economic, and ecological factors for the past present and future. 73 Fed. Reg. at 32542. It is inconceivable the amount of resources this endeavor would take, but it would certainly take resources away from other essential staff tasks without adding any apparent benefit to the functioning of the management system or quality of decisionmaking.

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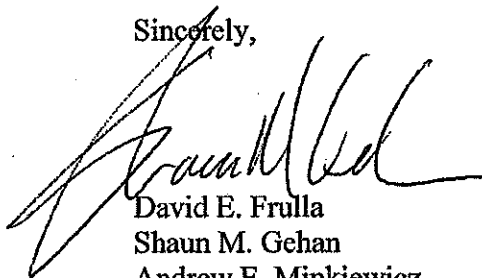
FSF appreciates this opportunity to comment. The organization strongly urges NMFS to seriously reevaluate these deeply flawed proposed National Standard 1 guidelines. Significant revisions are necessary in order to make this proposal consistent with the law. The agency should seriously consider drastically scaling back the proposal to the essential elements and

Mr. Mark R. Millikin
September 22, 2008
Page 15

advice that Councils will need to meet their duties under the Reauthorization Act and the MSA more generally.

Please do not hesitate to contact us if we can provide any further information.

Sincerely,



David E. Frulla
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