

# NORTHEAST SEAFOOD COALITION

September 19, 2008

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

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

---

The Northeast Seafood Coalition (NSC) is pleased to provide the following comments and recommendations on the Proposed Rule regarding implementation of the Magnuson-Stevens Reauthorization Act (MSRA) and revisions to the Magnuson-Stevens Act (MSA) National Standard 1 guidelines published in the Federal Register on June 9, 2008. NSC also presented written comments on April 17, 2007, in response to the Notice of Intent (NOI) and request for scoping comments. NSC's broad membership includes groundfish fishermen, dealers and processors throughout the Northeast Region.

A summary of our recommendations below is followed by our detailed comments.

Thank you for your consideration,

*Jackie Odell*

Jacqueline Odell  
Executive Director

# NORTHEAST SEAFOOD COALITION

## **Summary of Recommendations**

### **(1) Annual Catch Limits**

- Eliminate the Annual Catch Target (ACT) reference point as a requirement for all FMPs.

### **(2) Accountability Measures**

- Retain authority to use ‘post-season’ measures to address ACL overages including overage adjustments to reduce ACLs in the following fishing year.
- Develop the agency’s technological and analytical capabilities necessary to implement a catch-based management system and inseason monitoring and management measures for accountability in the NE groundfish fishery.

### **(3) Mixed Stock Exception**

- Maintain the ‘mixed stock exception’ set forth at section 600.310(m) of the proposed guidelines.

### **(4) International Fishery Agreements**

- Section 600.310(h)(2)(ii) of the proposed guidelines should provide specific clarification that guidance provided by the Transboundary Management Guidance Committee under the US-Canada Resource Sharing Arrangement is covered by the exception provisions set forth in MSA section 303(a)(15), (16 USC 1853 note), and section 304(e)(4).

### **(5) Rebuilding Timeframes**

- Build maximum flexibility into the guidelines at section 600.310(h)(3)(i) for implementing the rebuilding timeframe provisions of MSA section 304(e)(4)(A).
- Develop guidelines for establishing a new rebuilding timeframe when it is determined by a stock assessment during a rebuilding period that the fishery will not be rebuilt by the end of the rebuilding period even if the fishing mortality rate is set at zero.

### **(6) Revise Proposed Guidelines and Reissue Proposed Rule**

# NORTHEAST SEAFOOD COALITION

- The proposed guidelines should be substantially revised and improved. The revised guidelines should be reissued as a new Proposed Rule with the opportunity for public comment.

## **(1) Annual Catch Limits**

### **Discussion:**

The proposed guidelines create a system for setting reference points that is redundant, overly complex and creates excessive layers of precaution to account for uncertainties.

As one example, the proposed guidelines create a new reference point, the Annual Catch Target (ACT), to account for management uncertainty in achieving the ACL. There is no reference to, definition of, or requirement to set an ACT in the MSA. To the extent it can be quantified, management uncertainty, if any, should be accounted for by the Councils in setting the ACL at the appropriate level below the ABC. The setting of an ACT to address management uncertainty creates a redundant and unnecessary layer of management bureaucracy and complexity.

There is further redundancy in the proposed process for addressing scientific uncertainty. The Overfishing Limit (OFL) is the management expression of Fmsy; the fishing mortality rate that will over the long term on average produce MSY. Fmsy is the product of a scientific process (stock assessment) which already applies a substantial precautionary approach to account for scientific uncertainty and reduce risk. For example, the recent groundfish stock assessment (GARM III) applied specific tools to offset the retrospective pattern exhibited by several groundfish stocks. This has the net effect of reducing the OFL (and Fmsy). The level of probability in achieving rebuilding has also been increased from 50% to 75% for some stocks. These tools employed in the stock assessment process substantially reduce scientific uncertainty and risk.

The SSC is tasked with recommending the Acceptable Biological Catch (ABC) under section 302(g) of the MSA. The proposed guidelines state that the sole purpose of the ABC is to account for scientific uncertainty in the estimate of OFL as derived from Fmsy. However, as mentioned above, the scientific stock assessment process that determines Fmsy from which OFL is derived applies a precautionary approach through specific scientific methods to account for uncertainty including uncertainty in the Fmsy determination. Therefore, the proposed requirement for the SSC to account for scientific uncertainty in the setting of OFL is redundant to the precaution applied in the scientific stock assessment process.

# NORTHEAST SEAFOOD COALITION

Nevertheless, NSC supports retaining the SSC's role in reviewing stock assessments as well as its prerogative to determine whether the scientific stock assessment process sufficiently accounted for scientific uncertainty and, consequently, to set the ABC below the OFL if appropriate.

The Council should then account for both management uncertainty and "any relevant economic, social, or ecological factor" (as set forth in the definition of Optimum Yield (OY)) in setting the ACL. NSC reiterates its previous scoping comments on the NOI that in this sense the ACL is the annual management expression of OY.

To reiterate, consistent with the statute, the SSC should account for additional scientific uncertainty it believes was not sufficiently accounted for in the scientific stock assessment when setting the ABC. Next, the Council should address management uncertainty as well as OY considerations in setting the ACL. If this is done correctly, there is no need for the ACT.

## **Recommendations:**

- Eliminate the Annual Catch Target (ACT) reference point as a requirement for all FMPs.

## **(2) Accountability Measures**

### **Discussion:**

The proposed guidelines at section 600.310(g) suggest two principal Accountability Measures for respecting ACLs; 1) inseason monitoring and management measures, and 2) measures for when ACLs are exceeded such as ACL overage adjustments that reduce the ACL in the subsequent fishing year. The proposed guidelines at 600.310(g)(2) stress that inseason measures should be used "whenever possible".

NSC strongly supports the notion that inseason monitoring and management measures should be used whenever possible. However, the agency must recognize that with respect to New England groundfish, this is not possible. Therefore, it is critical to retain in the guidelines the "post-season" authority to address ACL overages such as through overage adjustments that reduce the ACL in the subsequent fishing year (section 600.310(g)(3)).

The NE Multispecies FMP covers 19 stocks and may be expanded to more than 20. It is an extraordinarily diverse fishery in a highly dynamic ecosystem that presents significant scientific and management challenges. The current effort-based (days at sea) 'input control' data collection and management system for this fishery has proven to be a poor predictor of actual catch and fishing mortality, has generated unacceptable levels of regulatory discard mortality and waste, and has left as much of the OY of valuable stocks unutilized in the water as it has put on the

# NORTHEAST SEAFOOD COALITION

dock. Large segments of the fishery and many fishery dependent communities are experiencing severe adverse economic impacts as a consequence of extreme fishing effort reductions.

NSC and many in NE groundfish community are very eager to transition to a catch-based management system that will correct these deficiencies and achieve the new MSRA requirements. The NEFMC is developing Amendment 16 to the groundfish FMP for implementation in fishing year 2010. This Amendment will establish a new system of sector-based management. This new output control system will rely on inseason monitoring and management measures to achieve and respect the sector allocations and overall stock ACLs.

However, despite the clear and strong desire of the agency expressed in the proposed guidelines to use inseason monitoring and management measures whenever possible—and despite the NEFMC’s development of a sector management system that must rely on inseason monitoring and management measures as soon as fishing year 2010—the agency simply does not have the requisite groundfish data collection and analysis capabilities to implement inseason AMs in the groundfish fishery.

## **Recommendations:**

- Retain authority to use ‘post-season’ measures to address ACL overages including overage adjustments to reduce ACLs in the following fishing year.
- Develop the technological and analytical capabilities necessary to implement a catch-based management system and inseason monitoring and management measures for accountability in the NE groundfish fishery.

## **(3) Mixed Stock Exception**

### **Discussion:**

Section 600.310(m) sets forth what is commonly referred to as the ‘mixed stock exception’. This illuminates and attempts to address what is perhaps the greatest fallacy of how fisheries are managed in the US, which is to have as our goal to achieve the MSY biomass for all managed stocks simultaneously. This is ecosystem madness and has doomed to failure the management of multispecies fisheries such as the New England groundfish fishery. It has also confounded the rebuilding and successful management of other single stock fisheries that are affected by strong predator-prey relationships such as the dogfish situation in the Mid-Atlantic and New England.

Fishery managers must be allowed to make intelligent choices regarding what level of fishing mortality and stock biomass to allow for any given stock in a multispecies fishery –or a fishery

# NORTHEAST SEAFOOD COALITION

strongly affected by predator-prey relationships. Such flexibility and discretion is central to achieving the definition of OY to provide the greatest overall benefit to the nation.

## **Recommendation:**

- Maintain mixed stock exception set forth at section 600.310(m) of the proposed guidelines.

## **(4) International Fishery Agreements**

- The MSA section 303(a)(15) requirement to establish ACL's takes effect in 2010 for fisheries subject to overfishing and in 2011 for all other fisheries (see 16 USC 1853 note). These implementation deadlines are subject to the exception when:

“otherwise provided for under an **international agreement in which the United States participates**”.

- The MSA section 304(e)(4)(A) rebuilding timeframe provisions require a time period for rebuilding to be specified that shall—
  - (i) be as short as possible, taking into account...recommendations of **international organizations in which the United States participates....**; and”
  - (ii) not exceed 10 years, except in cases where....management measures under an **international agreement in which the United States participates** dictate otherwise”
- The MSA section 304(e)(4) rebuilding provisions state that for a fishery that is overfished, rebuilding plans shall—

“(C) **for fisheries managed under an international agreement**, reflect traditional participation in the fishery, relative to other nations, by fishermen of the United States.”

The provisions cited above and set forth in MSA section 303(a)(15) and section 304(e)(4) are among the most important to fisheries management and to this proposed action to revise the National Standard guidelines.

It should be clear that by repeatedly including exceptions for bilateral and multilateral international fishery management efforts from domestic management requirements, Congress has fully recognized and embraced one of the most fundamental concepts underlying the development of US and international fishery policy and law. That concept is that the effective conservation and management of transboundary (and highly migratory) stocks of fish cannot be achieved

# NORTHEAST SEAFOOD COALITION

unilaterally under the MSA. Instead, effective conservation and management of these stocks can only be achieved through international cooperation throughout their range.

Indeed, the US and Canada have officially recognized and embraced this reality in practice by establishing the US-Canada Resource Sharing Arrangement, and working through the Transboundary Management Guidance Committee and its scientific arm, the Transboundary Resource Assessment Committee. This is a very serious forum that is essential to the effective conservation and management of some of the most important transboundary groundfish stocks: Georges Bank stocks of cod, haddock and yellowtail flounder. Additional stocks may be covered in the future.

To date, based on State Department and NOAA legal analyses, the US has misinterpreted Congressional intent by not including the US-Canada Resource Sharing Arrangement in the legal coverage and application of these MSA exception provisions. This is inconsistent with the apparent spirit and intent of the definition of “international agreement” set forth in MSA section 3(24).

Proper implementation of the MSA section 303(a)(15) ACL provisions and the section 304(e) rebuilding provisions, as well as the effective conservation and management of these transboundary stocks throughout their range under the US-Canada Resource Sharing Arrangement, cannot be achieved unless this forum is covered by the several MSA exception provisions cited above.

At its September 2008 meeting, the New England Fishery Management Council has expressly recognized this reality and requested the NMFS to provide through these proposed guidelines “a stock status determination using criteria for overfishing specified in the US/CA transboundary sharing agreement and a timeline for rebuilding a fishery consistent with the understanding.”

## **Recommendation:**

- Section 600.310(h)(2)(ii) of the proposed guidelines should provide specific clarification that guidance provided by the Transboundary Management Guidance Committee under the US-Canada Resource Sharing Arrangement is covered by the exception provisions set forth in MSA section 303(a)(15), (16 USC 1853 note), and section 304(e)(4).

## **(5) Rebuilding Timeframes**

### **Discussion:**

Our nation’s most expert fishery scientists have consistently and repeatedly advised the agency and Congress that, from a biological perspective, the length of the rebuilding period is simply not the critical goal of fishery conservation and management. Instead, the critical goal is to prevent

# NORTHEAST SEAFOOD COALITION

overfishing (ie. to fish at  $F_{msy}$  or below  $F_{msy}$  as necessary to account for scientific and/or management uncertainty). The reality is that managing a fishery at  $F_{msy}$  will on average over the long term rebuild a stock to the MSY biomass ( $B_{msy}$ ) and produce MSY. This is consistent with the goal of achieving OY as defined in the MSA.

The definition of  $T_{min}$  set forth in the proposed guidelines appears to be inconsistent with meaning of MSA section 304(e)(4)((A)(i). The proposed definition of  $T_{min}$  appears to be limited to just the term “as short of possible” (ie. when fishing mortality is zero). That is not what the statute says. Section 304(e)(4)(A)(i) says the rebuilding time frame should be as short as possible, but that in determining what is “as short as possible” several important additional factors should be taken into account which could substantially extend the minimum rebuilding time ( $T_{min}$ ). Thus,  $T_{min}$  should instead be calculated by considering the timeframe to rebuild when fishing mortality is zero as modified by these other important factors.

The consequence of this mis-interpretation of MSA section 304(e)(4)(A)(i) is to smother fishery managers and the entire management process with a biologically unnecessary and unjustified measure of success that is not achievable when other MSA mandates and national standards are considered.

Perhaps more than any other section of these proposed guidelines, the setting of rebuilding timeframes is the area where the agency should provide fishery managers with the highest degree of flexibility. Again, the truly critical goal of fishery conservation and management is to prevent overfishing, not to apply an artificial, overly ambitious and biologically meaningless timeframe to achieve rebuilding to what is often a highly-uncertain rebuilding biomass target. The process of setting and enforcing rigid rebuilding timeframes has repeatedly and unnecessarily confounded the efforts of fishery managers nationwide. These guidelines should take the opportunity to improve upon this situation, not make it worse.

With this in mind, it can also be argued that the proposed rigid interpretation and application of rebuilding timeframes is entirely inconsistent with the dual National Standard 1 goals of preventing overfishing and achieving OY on a continuing basis. The application of rigid artificial rebuilding timeframes that require fishing at a rate that is substantially below  $F_{msy}$  is inconsistent with achieving OY on a continuing basis according to the OY definition at MSA section 3(33). To reiterate, fishing at  $F_{msy}$  will on average over the long term rebuild a stock to the MSY biomass ( $B_{msy}$ ) and produce MSY. As previously stated, in our view the ACL is essentially an annual expression of OY. It is the annual catch that would be achieved by fishing at a rate that is reduced from  $F_{msy}$  to account for scientific uncertainty and/or “any relevant economic, social or ecological factor”. As previously stated in NSC’s scoping comments on the NOI, these proposed guidelines should not subvert the fundamental mandate to achieve OY on a continual basis.

Finally, there are scenarios that may occur during a rebuilding period which the statute is silent on and are also not addressed in the proposed guidelines. For example, the guidelines do not



# NORTHEAST SEAFOOD COALITION

address the situation in which during a rebuilding plan a stock assessment determines that a stock cannot be rebuilt by the T-target even if the fishing mortality rate is reduced to zero. This situation may occur particularly in a stock that demonstrates a high degree of retrospective pattern even though the total allowable catch (TAC) may have never been exceeded by the fishery. In this case, guidance should provide for a new rebuilding period (T-target) to be established that allows fishing consistent with National Standard 8.

## **Recommendation:**

- Build maximum flexibility into the guidelines at section 600.310(h)(3)(i) for implementing the rebuilding timeframe provisions of MSA section 304(e)(4)(A).
- Develop guidelines for establishing a new rebuilding timeframe when it is determined by a stock assessment during a rebuilding period that the fishery will not be rebuilt by the end of the rebuilding period even if the fishing mortality rate is set at zero.

## **(6) Revise Proposed Guidelines and Reissue Proposed Rule**

### **Discussion:**

In general, the proposed guidelines are not as well organized or as easy to follow and understand as they should be. Given that they are intended to facilitate the job of fishery managers by increasing not decreasing clarity, this is a real problem. There appear to be a number of instances where specific concepts are discussed in a redundant manner, and in some of those cases the guidance appears inconsistent and even contradictory. There are other proposed guidelines, such as the requirement to set an Annual Catch Target (ACT), which do not appear to have any basis in the MSA. Other provisions appear to be inconsistent with the plain reading of the statute (eg. T<sub>min</sub>). In still other cases, such as the case of the ACT, the proposed guidelines provide excessive layers of precaution and complexity that overly complicate fishery management. Finally, some of the concepts are not well defined and difficult to imagine how they would be put into practice in the real world of fishery management. For example, the purpose of an ACT is to address ‘management uncertainty’ which seems to be a very abstract and unquantifiable concept that the Councils are likely to struggle with.

NSC has chosen not to address each and every detailed instance where there appears to be question or problem with the drafting or construction of the proposed guidelines with the

# NORTHEAST SEAFOOD COALITION

expectation that the Councils and other experts in fishery management will address those very detailed concerns and that the agency would be more responsive to their input.

**Recommendation:**

The proposed guidelines should be substantially revised and improved. The revised guidelines should be reissued as a new Proposed Rule with the opportunity for public comment.