

# NORTHEAST SEAFOOD COALITION

April 17, 2007

**TO: Mark Millikin**  
**National Marine Fisheries Service / NOAA**  
**1315 East West Highway**  
**Silver Spring, MD 20910**

**RE: Scoping Comments on Annual Catch Limit DEIS**

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The Northeast Seafood Coalition (NSC) is pleased to provide the following scoping comments on the 'Notice of Intent' (NOI) regarding implementation of the Magnuson-Stevens Reauthorization Act (MSRA) and associated revisions to the National Standard 1 guidelines published in the Federal Register on February 14, 2007. NSC also presented oral comments at the scoping meetings in Silver Spring, MD on March 9, 2007, and at the New England Fishery Management Council (NEFMC) meeting on April 9, 2007. NSC's comments are presented primarily in the context of the Northeast Multispecies (groundfish) Fishery Management Plan (FMP). They address most of the "key issues" bullets identified in the NOI as well as several additional issues.

## 1) Prepare an EIS

- The NOI states: "After considering comments received during the scoping process, NMFS will either develop a draft environmental impact statement (DEIS) and proposed rule or an environmental assessment (EA) and proposed rule."
- NSC strongly urges the Agency to prepare a full EIS because this action represents a major federal action with significant impacts.
- Under CEQ's NEPA regulations (40 CFR 1508.27), and NOAA guidance for NEPA compliance, the determination of a significant impact is a function of both context (scope) and intensity. The impacts associated with the proposed action cover the full range of context; from local to 'society as a whole'. A review of the 10 specific considerations for evaluating the intensity of the impacts of the proposed action also strongly suggests they are significant.
- Preparation of an EIS would be constructive to the overall objective of developing the most effective NS1 guidelines that achieve the confidence of affected interests. A comprehensive EIS analysis would enhance the ability of the Councils and affected interests to understand and evaluate the proposed changes to the NS1 guidelines in terms of the unique fisheries in each region.

## 2) **Groundfish Data Collection and Analysis Capabilities**

- The NE Multispecies FMP covers 19 stocks and soon may be expanded to more than 20. It is a diverse fishery in a highly dynamic ecosystem. It presents significant scientific and management challenges.
- Although improvements could definitely be made, 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/fishing mortality, has generated unacceptable levels of regulatory discard mortality and waste, and has left as much of the Optimum Yield (OY) of valuable stocks in the water as it has put on the dock. Large segments of the fishery and many fishery dependent communities are experiencing severe adverse economic impacts as a consequence of extreme fishery restrictions.
- NSC and many in NE groundfish community are very eager to develop a catch-based management system that will correct these deficiencies and achieve the new MSRA requirements. The NEFMC has initiated Amendment 16 to the Plan and solicited proposals for ‘output control’ (catch-based) management systems to replace the current system.
- NSC has submitted and the Council is presently developing and evaluating a catch-based “Points System” for managing NE groundfish for this purpose. One of the accountability measures this system would utilize is an ‘in-season management measure’ system to achieve annual catch limits and optimum yield.
- In-season management measures are one of the two primary tools identified in the NOI to satisfy new MSRA requirements for Accountability Measures (AM) to achieve Annual Catch Limits (ACL). The technological and analytical capabilities needed to conduct timely monitoring of landings, and to use such data for the implementation of in-season management measures, are a prerequisite to the implementation of an effective catch-based management system.
- NMFS has made clear it does not have the technological or analytical capabilities to conduct timely monitoring of landings or implement in-season management for the NE Multispecies fishery. In other words, NMFS does not have the capability to implement a catch-based ‘output control’ management system for NE groundfish. NMFS must allocate new and existing assets to develop these critical capabilities in order to meet the new MSRA requirements.

- This point is also directly relevant to the consideration of how to establish AMs for multiple sectors where the ACL is subdivided for a stock. NSC believes each sector should be held individually accountable (through either in-season measures or through the subsequent pay-back of ACL overages) for its portion of the ACL. In-season AMs need to be tailored to the unique realities of each sector fishery including the quality and timeliness of the data monitoring system. Any sector ACL payback should be in proportion to the biological impact of the overage. Sectors that have achieved their respective ACLs should never be penalized through in-season or post-season (payback) measures because of ACL overages in another sector. The ACL payback mechanism provides the means to achieve the necessary biological accountability for a non-compliant sector while insulating compliant sectors from being held accountable for overages in the other sector. However, in any case, NMFS presently does not have the monitoring or analytical capabilities necessary to manage and hold accountable multiple sectors in the NE groundfish fishery. This point was also made by the NEFMC Executive Director at the April 9, 2007, scoping hearing in Mystic, CT.
- NSC has submitted an appropriations request to Congress to allocate to NMFS \$3 million in FY08 to initiate the development of the necessary monitoring and analytical capabilities to effectively implement a catch-based management system for NE groundfish that can meet the new MSRA requirements. NMFS should recognize its current limitations and actively support this request.

### **3) Scientific and Statistical Committees (SSCs)**

- NSC believes that a greater role for the SSCs in the Council process presents an opportunity to substantially improve upon the PDT process now in use in the NE region. NSC has found that the lack of transparency and accessibility of the PDT process is not conducive to the development of much needed innovation and improvement in NE groundfish management. NSC hopes that the SSC process will substantially improve this situation.
- Nevertheless, NSC does not believe that Congress intended for the SSCs to dictate ACLs and AMs to the Councils. Instead, SSCs should be tasked with presenting alternatives to the Councils accompanied by biological risk evaluations whenever possible, as well as their recommendations. The SSC should be advisory in its role.
- Councils should retain the discretion and authority they have held since enactment of the Magnuson-Stevens Act (MSA) to set such management parameters as ACLs and AMs (and any buffer). If the Council fails to submit measures that are consistent with

the MSRA and MSA requirements, then the Secretary should disapprove such measures under the authority of MSA section 304.

#### 4) **Buffer Between OFL and ACL**

- There does not appear to be any statutory mandate for establishing a ‘buffer’ where the ACL must always be set below the Overfishing Limit (OFL). NSC does not believe the NS1 Guidelines should fundamentally alter or add to the relevant statutory requirements or Congressional intent. In fact, the OFL concept is a NMFS initiative that was not specified by Congress in the MSRA or underlying MSA.
  - There are existing layers of precaution built into the process of specifying stock status determination criteria and setting control rules. NSC questions whether an additional layer of precaution should be mandated for setting the ACL below the OFL.
  - A higher priority objective for NSC is to have the Agency invest the resources necessary to improve scientific precision in monitoring and managing on a timely basis the output performance of the NE groundfish fishery rather than ‘planning for failure’ by mandating more even more precaution through a buffer. We need a long term solution rather than another patch (buffer) for the hole in the boat!
  - Nevertheless, NSC fully appreciates the need to provide a mechanism and guidance for managers to consider, at their discretion, the need for additional precaution in setting ACLs. Councils should consider if there is a need to incorporate a buffer as a means to anticipate and account for uncertainty in the science and ecosystem dynamics on a stock by stock basis. Again, this should remain entirely at the discretion of the Council process and not be a requirement in the guidelines. This is analogous to the underlying discretion to set OY at or below MSY.
- To the point of the relationship between the ACL and OY, NSC suggests the ACL is the annual expression of OY. If the Council chooses to set OY equal to MSY, then the ACL should be equal to the OFL. To the extent a Council chooses to set OY below MSY (based on “any relevant economic, social or ecological factor”), the ACL would be proportionately lower than the OFL (the catch value equivalent to  $F_{msy}$ ). Again, the ‘buffer’ between ACL and OFL is analogous to the difference between OY and MSY. NSC feels very strongly that in no case should any of the new MSRA requirements for ACLs and ending overfishing supercede or subvert the fundamental

MSA mandate to achieve OY on a continuing basis. NMFS should reflect this in the guidelines as well as an explicit reflection of the policy embodied in the MSA definition of OY.

- Further, in evaluating the degree of ‘uncertainty’ and, therefore, the size (if any) of a buffer between the ACL and OFL, the Councils should consider more than just the quality or variability in the data, or the historical performance of the fishery/management measures in achieving a specific OFL. The Councils should also consider the potential ‘down-side’ consequences (biological relevance) of exceeding an OFL relative to the biological status of the stock in question. If an OFL is exceeded by 10% for a stock that is at or above Bmsy, the consequences (biological risk) are likely to be small. Conversely, the same level of ‘overfishing’ may present much greater consequences (risk) for a stock at or below 50% Bmsy. This consideration should be reflected in the guidelines.
- Finally, as to the respective roles of the SSCs and the Councils, NSC believes that the Councils should retain the authority and discretion whether or not to establish a buffer (where the ACL is below the OFL). As previously stated, the SSCs should be advisory and tasked with providing the Council with risk-assessed alternatives and recommendations to be considered by the Council in setting ACLs, OFLs and AMs.

## 5) **Accountability**

- The NMFS Discussion Documents for the scoping hearings state that an ACL is an “annual numerical target catch level” that is “an annual value set in weight or numbers of fish”.
- NSC supports this interpretation in the sense that the performance of a management system/fishery should be held accountable to the ACL measured as a quantity of catch—not a fishing mortality rate target. ACLs measured in this way should be the benchmark for management success.
- This is particularly relevant to the NE Multispecies fishery because the current management system uses fishing mortality rate targets from which target Total Allowable Catches (TACs) are computed. However, the performance of the fishery is ultimately evaluated in terms of whether the fishery met stock specific fishing mortality rate targets set forth in Amendment 13 to the Plan.
- It is a fact that in recent years the NE Multispecies fishery (management measures) has rarely exceeded the target TACs established for each stock, and in nearly all cases

has consistently and substantially under-yielded the TACs (OY). However, subsequent retrospective scientific analyses have produced very large downward revisions of the target TAC for certain stocks. These after-the-fact revisions have generated draconian management responses, extreme economic hardship, wasted yield, and the incorrect perception by Congress and the public that NE fishermen and fishery managers were acting irresponsibly.

- Finally, to the issue of circumstances where a numerical ACL cannot be set, NMFS should include guidance for establishing a proxy for an ACL that provides a biologically relevant measure of fishing mortality relative to the overfishing threshold. This approach may be necessary for those ‘data poor’ stocks that comprise a portion of the NE Multispecies complex.

## 6) Administrative Procedures Act (APA)

- The NOI identifies ‘in-season management measures’ as one of two ‘Accountability Measure’ tools to ensure ACLs are respected.
- As in other fisheries, catch trajectories for NE groundfish stocks can be steep relative to the TACs (ACLs). Therefore, very timely in-season management responses will be needed in order to implement an effective catch-based management system now under development by the NEFMC.
- NSC is very concerned that the APA may present a significant barrier to the effective use of timely in-season management measures. The time required to satisfy APA requirements may substantially exceed the response time needed to implement effective in-season management measures in response to timely catch data.
- NSC urges the agency to evaluate what it can do to facilitate the use of in-season management measures in the APA context. Should the agency provide specific guidance for minimizing potential APA delays/barriers to the implementation of timely in-season management measures? Are there any waivers or other procedures that could be useful?

## 7) MSRA and Amendment 16 Implementation Schedules

- MSRA subsections 104(a) and (b) require the Councils to “**establish a mechanism** for specifying annual catch limits”... “**in fishing year** 2010” for fisheries subject to overfishing (emphasis added).

- NSC’s interpretation of this provision is that for, fisheries subject to overfishing, the Councils need to have a mechanism in place no later than the end of fishing year 2009 (for effect in 2010) that will specify annual catch limits either immediately or at some time in the future. Indeed, those annual catch limits when implemented must not allow overfishing to occur—but the provision does not require immediate implementation of the annual catch limit (or ending overfishing) in or by fishing year 2010. The operative term is “mechanism”.
- In the NE Multispecies FMP context, fishing year 2010 begins on May 1, 2010, and ends on April 30, 2011. Therefore, in order to comply with this provision, Amendment 16 would have to be implemented (and include a mechanism to specify annual catch limits) no later than April 30, 2010. Given the 6 month period for NMFS to approve and implement an Amendment (stated in the NOI), the NEFMC would need to submit Amendment 16 to the Secretary for approval no later than November 1, 2009, in order to comply with MSRA.
- The NEFMC’s current implementation schedule for Amendment 16 is to submit to the Secretary for approval in September 2008, more than 1 year in advance of the MSRA subsection 104(a) and (b) requirements. Amendment 16 is the NEFMC’s vehicle for implementing MSRA for NE groundfish.
- It should be noted—and NMFS should reflect this in their guidance –that Amendment 16 would not necessarily have to implement annual catch limits that prevent overfishing in fishing year 2010—but it would have to include a mechanism for specifying such annual catch limits at some point (in FY2010 or thereafter).
- Beginning on July 12, 2009, (30 months after enactment), MSRA subsections 104(c) and (d) provide Councils/NMFS with two years to implement management measures that will end overfishing immediately for stocks where overfishing is occurring.
  - NSC’s interpretation of these provisions is that the Councils/NMFS have until July 12, 2011, to implement measures that will end overfishing immediately.
  - Given the 6 month period for NMFS to approve and implement an Amendment (as stated in the NOI), the NEFMC would need to submit Amendment 16 to the Secretary for approval no later than January 12, 2011, to comply with these MSRA requirements. NSC recognizes that the timing requirements of

subsections (a) and (b) might supercede (trump) the timing of subsections (c) and (d), depending on the circumstances.

- In any case, there is a major problem with the NEFMC's current Amendment 16 implementation schedule (target date for submission = September 2008). This will require the Council to fully develop and issue for public comment its preferred management alternatives well before receiving the results of the NEFSC 2008 benchmark stock assessment in late August/early September of 2008, on which such management measures are supposed to be based. It is widely anticipated that this benchmark assessment will include major changes in the status of some or many stocks—but no one can possibly predict the size or scope of these changes in advance—at least not with sufficient certainty to develop effective management measures. It will also require the Council to take final action within one month of receiving the benchmark assessment. This is unnecessarily inconsistent with the MSRA implementation schedule, and it is certainly inconsistent with at least the spirit of the National Standard 2 requirement to utilize the best scientific information available.
- Again, the most conservative interpretation of the MSRA implementation schedule would require NEFMC submission of Amendment 16 no later than November 1, 2009. The Agency should provide guidance to all Councils and, specifically, to the NEFMC to clarify the MSRA implementation schedule requirements. NMFS should discuss this with NEFMC (soon !), and consider if it would be possible and desirable to conform the A16 implementation schedule to the MSRA schedule and avoid this major problem.