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New England Fishery Management Council
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John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

September 19, 2008

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

Dear Mr. Milliken:

The New England Fishery Management Council, its Scientific and Statistical Committee and staff appreciate the opportunity to comment on the June 9, 2008 proposed revisions to the guidelines for National Standard 1 (NS1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). As described by the National Marine Fisheries Service (NMFS), the agency considers this action necessary to provide guidance on how to comply with new annual catch limit (ACL) and accountability measure (AM) requirements for ending overfishing in fisheries managed through federal fishery management plans and clarifies the relationship between ACLs, maximum sustainable yield (MSY), optimum yield (OY) and other applicable reference points.

To facilitate a thorough review, the Council charged its staff with reviewing the proposed rule, convened a meeting of its SSC to solicit comments and finally reviewed and approved the following comments at a meeting of the full Council on September 3, 2008. While the details of these recommendations are provided in the appended table, the Council would like to reiterate several points that it considers critical to any revisions in the NS1 guidelines. These include the NEFMC's very serious concerns about:

1) the mandated addition of an annual catch target (ACT) as a requirement of fishery management plans (FMPs);
2) the option to define overfishing in terms of catch rather than a rate of fishing mortality;
3) the FMP requirement to include AMs as an in-season adjustment whenever possible;
4) the very burdensome, and in some cases duplicative, additional information requirements for FMPs;
5) the criteria for the exception to preventing overfishing in a mixed-stock fishery;
6) the need for the guidelines to allow a) stock status determinations using criteria for overfishing specified in the U.S./Canada Resource Sharing Understanding; and b) rebuilding timelines consistent with the Understanding, as well as exceptions to ACL and/or AM requirements for these stocks.

The Council's comments on the first three issues were developed in consultation with its SSC.

By way of further explanation concerning the above points, if an ACL is set correctly to account for management uncertainty, that process should be sufficient to prevent the Acceptable Biological Catch (ABC) from being exceeded. Therefore an ACT, which is not mentioned or required by the MSA, would be unnecessary and adds an extra layer of complexity and possible confusion. However, because we understand that some Councils or management authorities might prefer the use of such a mechanism, ACTs should remain an option for those who favor this approach.

Redefining overfishing in terms of catch also does not appear to be consistent with the MSA. There could be cases where catch is later found to be greater than F_{MSY}, but where the catch does not exceed the overfishing level (OFL) or ACL based on the best available science. This situation could occur where there is a strong retrospective pattern in stock assessments as has been the case for some important stocks in the Northeast. Also, defining overfishing in terms of fishing mortality or a proxy exploitation rate wherever possible does not prevent managers from using ACLs and target catches for the ongoing management of a fishery.

Another important issue is whether accountability measures (AMs) should be implemented in-season or whether they are measures to deal with the problem of exceeding ACLs. Some of the problem might be a matter of semantics. For example, an early fishery closure based on achieving a percentage of a catch target might be considered an integral part of a hard quota management system by some and an in-season accountability measure by others. However, the most important issue is how to deal with possible overages of ACLs. Our SSC has suggested that although ACLs should not be exceeded on a regular basis, adjustment of ACLs and the implementation of AMs should be based on actual fishery performance data.

A fourth major problem with the guidelines relates to the requirements for describing how certain information is collected and used, "including data collection methods, as well as any specific data collection methods used for all stocks, stock complexes, data collection and estimation methods used to quantify total catch mortality in each fishery, including information on the management tools used (i.e., logbooks, vessel monitoring systems, observer programs, landings reports, fish tickets, processor reports, dealer reports, recreational angler surveys, or other methods); the frequency with which data are collected and updated; and the scope of sampling coverage for each fishery, methods used to compile catch data from various catch data collection methods", etc.

The above information is available from NMFS through its data collection programs and various stock assessment processes. Requiring the inclusion of such information in fishery management plans would create a substantial additional burden on the Councils' FMP development process. Further, it is not clear if or how the inclusion of this information enhances the efficacy or usefulness of the FMP documents.

A fifth problem is the criteria for the exception to preventing overfishing in a mixed-stock fishery ("when harvesting one stock at its optimum level may result in overfishing of another stock when the two stocks tend to be caught together"). The criteria required to use this exception, which can be very important for managing mixed-stock fisheries, are impossible to meet and the exception cannot be invoked when a stock will remain overfished for more than 50 percent of the time. As a result of the above problems, the NEFMC recommends retaining the current exception for mixed stock fisheries.

A final shortcoming of the guidelines is that they provide flexibility in meeting NS1 requirements for fish stocks that are managed under international fishery management agreements, but not for the less formal U.S./Canada Resource Sharing Understanding. Because of the constraints imposed by NS1, U.S. managers find it difficult not to restrict the U.S. catch to lower mortality targets than may be applied to the Canadian catch. As a result, the U.S. must rely on voluntary cooperation from Canada not to put the U.S. fleet at a disadvantage. Further, the Understanding, a valuable conservation tool, could very well lose support in the U.S. whenever the Canadians opt to fish at higher levels in accordance with their management system.

This problem could be resolved by allowing fishing to be governed by the rates set through the Understanding process and to also allow timelines for rebuilding stocks to be consistent with fishing targets specified by the Understanding. It would further make sense that ACLs and AMs for these stocks not be required since they are managed under hard Total Allowable Catches, and although the Understanding contains provisions for accountability including penalties for overages, they might not be entirely consistent with those required under the NS1 guidelines.

Again, the attached table includes the full range of our comments on these and other aspects of the guidelines. If you or your staff have any questions or require further clarification about our comments on the proposed NS1 guidelines, please contact me or Executive Director Paul Howard on this matter.

Sincerely,

John Pappalardo
Chairman

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Revisions to National Standard 1 Guidelines on issues commented on by the NEMFC

(Comments addressed through revisions in guidelines are highlighted below)

Page	Section	Text from Proposed Guideline	Comment
32539	600.310 (b)(2)(v)(B)	(B) Each SSC shall provide its Regional Fishery Management Council recommendations for ABC as well as other scientific advice, as described in Magnuson-Stevens Act section. ~~The SSC may specify the type of information that should be included in the Stock Assessment and Fishery Evaluation (SAFE) report (see § 600.315).~~	The guidelines should be clearer about the roles of the SSC and the Council in determining information to be included in SAFE reports. As managers the Council must also be allowed to specify management information needed in the SAFE.
	600.310 (b)(2)(v)(C)	(C) The Secretary and each Regional Fishery Management Council may establish a peer review process for that Regional Fishery Management Council for scientific information used to advise the Regional Fishery Management Council about the conservation and management of the fishery (see Magnuson-Stevens Act section 302(g)(1)(E)). If a peer review process is established, it should investigate the technical merits of stock assessments and other scientific information used by the SSC. The peer review process is not a substitute for the SSC and should work in conjunction with the SSC.	At least in the northeast, the SARC and TRAC would have to include SSC members to comply with this provision.
	600.310 (b)(2)(v)(D)	(D) Each Regional Fishery Management Council shall develop ACLs for each of its managed fisheries that may not exceed the fishing level recommendations of its SSC <u>or peer review process</u> (Magnuson-Stevens Act section 302(h)(6)). The following language was added: (3) *Specification of ABC* ...The SSC must recommend the ABC to the Council.	The final recommendation for ABC should come from the SSC and not the peer review process. The peer review process or Council Plan Development Teams could provide alternatives and appropriate information about uncertainty, stock vulnerability, alternative candidates for ABCs, etc. for the SSC to consider. In relation to existing stock assessment peer review processes, the SSC's role should be interpretative and not to provide additional peer review to work that has already been peer-reviewed. This section says the peer review process can set fishing level recommendations. This does not seem consistent with the MSA, which places this authority squarely on the SSC. Nor does it seem consistent with an earlier paragraph that says the SSC cannot be replaced by the peer review process.
	600.310 (c)	(c) *Summary of items to include in FMPs related to NS1.* The Councils should evaluate and describe the following items in their fishery management plan … (5) <u>ACT control rule</u> ACTs are now optional	As recommended by its SSC, the NEFMC feels it is appropriate to list the ACT as a suggested component of a fishery management plan rather than require it as a legally mandated component of an FMP. Using an ACT as proposed in the guidelines is a way of trying to separately account for management uncertainty. Although the ACT may clearly distinguish management uncertainty from other sources of uncertainty, adding a target does not fundamentally improve the process. <u>It is more important to correctly adjust the ACL based on actual performance data than to create a separate target or ACT control rule based on theory to account solely for management uncertainty.</u> The list of items to include in FMPs related to NS1 is extremely long. Also, is it supposed to be included for all stocks that are "in the fishery", a very broad term? It is not clear that including the extra information will materially

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			improve management.
		(d) *Classifying stocks* in a fishery	• This type of classification is needed. • It would be useful to know all the stocks and species which are encountered by the gear(s) in a given fishery. • Stocks in a particular fishery should have a similar geographic distribution or be caught together in a fishery rather than simply share a similar biological classification. Stocks should not be grouped unless they have similar characteristics and vulnerabilities. • The classifications should be simpler. An ecosystem component species and a non-target species that is not retained seem to be the same. This distinction needs clarification. Furthermore, is it a useful distinction? • There may be ecosystem components that are important to consider; the Council should consider whether they should be included in an FMP. The definition of stocks that are "in a fishery" is very broad. It is broad enough there will be overlap with FMPs: Yellowtail flounder is "in the fishery" for the Scallop FMP (as scallops are for groundfish), etc. Since there is considerable information that must be in every FMP for stocks "in a fishery" there will be extensive, useless duplication in all management Council documents. Almost any species would not meet the criteria to be a stock "in the fishery" since the definition includes stocks that could become subject to overfishing without conservation and management measures. How could it be argued that ANY stock would not be overfished in the absence of management measures, if it is being caught? It is not clear why, after allowing the issue of stock complexes to be considered, this section takes it away for non-target species, which "should be identified at the stock level". The guidelines distinguish between target stocks that "fishers seek to catch for sale or personal use" and non-target stocks that "are retained for sale or personal use". This distinction is not meaningful in terms of management, because managers cannot adequately determine whether landings were intentionally or unintentionally caught, particularly if a fish is desirable enough to retain. It also isn't clear why making this distinction is important. There does not seem to be a clear definition of what is an "ecosystem component species." The preamble refers to ecosystem component species (ECS) as non-target fish species that are not considered part of the fishery, but are species with which the fishery may occasionally interact (catch). The regulatory text is different: generally not retained for any purpose. Does ocean pout count? Windowpane flounder? Does this mean if they are labeled as ECS, they don't require reference points? Does "vulnerable" mean that a species is frequently, sometime or infrequently caught in the
	600.310 (d)(2)	(2) *Stocks in a fishery.* Stocks in a fishery include: Target stocks; non-target stocks that are retained for sale 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 overfished, or overfished, or could become so, according to the best available information, without conservation and management measures. Stocks in a fishery may be grouped into stock complexes, as appropriate.	
32539	600.310 (d)(4)	Non-target species may be included in a fishery and, if so, they should be identified at the stock level.	
	600.310 (d)(5)	(5) "Ecosystem component (EC) species" are generally not retained for any purpose, although *de minimis* amounts might occasionally be retained. EC species may be identified at the species or stock level, and may be grouped into complexes.	

			gear or does it mean the fishery has some a lot or a little impact on the species in question? What is the difference between a non-target species that is not retained and an ecosystem component species?
32539	600.310 (c) 600.310 (d)(7)	(c) … Councils should also describe fisheries data for the stocks, stock complexes, and ecosystem component species in their FMPs. For all stocks and stock complexes that are "in the fishery," the Councils should evaluate and describe the following items in their FMPs and amend the FMPs, if necessary… (7) *Stocks or species identified in more than one FMP.* If a stock is identified in more than one fishery, Councils should choose which FMP will be the primary FMP in which management objectives, SDC, and other reference points for the stock are established.	This section seems to conflict with an earlier section. It says that for stocks in more than one fishery, status determination criteria (SDCs), etc. only need to be specified in the "primary" FMP. But earlier (600.310 (c)) this provision is not mentioned, implying that SDCs need to be spelled out in each FMP.
32540 32540	600.310 (d)(8)(9)	(8) *Stock complex.* "Stock complex" means a group of stocks that are sufficiently similar in geographic distribution, life history, and vulnerabilities to the fishery such that the impact of management actions on the stocks is similar. …Stock complexes may be comprised of: One or more indicator stocks, each of which has SDC and ACLs, and several other stocks; several stocks without an indicator stock, with SDC and an ACL for the complex as a whole; or one of more indicator stocks, each of which has SDC and management objectives, with an ACL for the complex as a whole (this situation might be applicable to some salmon species). (9) *Indicator stocks.* An indicator stock is a stock that is used to help manage and evaluate stocks that are in a stock complex and do not have their own SDC.	These two sections on stock complexes at first seem like they give some flexibility, only to take it away. Paragraph (8) says that for stock complexes, SDCs only need to be specified for indicator stocks, or for the complex. But paragraph (9) says that individual stocks should be examined periodically to determine whether the stock has become overfished. What is the metric – how can that determination be made if SDCs are not specified? What is the benefit of a stock complex if SDCs must be used to determine if an individual stock is overfished? When a Council establishes an SDC that enables it to determine annually the status of the stock, can NMFS produce the numbers for all stocks each year? There is no guidance on applying the standards of "objective" and "measurable" to determine if an SDC is adequate and consistent with the guidelines. If a Council uses the option comparing the fishing mortality rate to MFMT, to determine overfishing status, rather than the OFL, it won't know whether overfishing is occurring for at least 8 months after the end of the year, while it waits for an assessment. If the Secretary has the authority to disapprove an SDC because it is not operationally feasible, then NMFS should provide the Councils with a range of feasible options that meet their own standards and capabilities before Councils spend a lot of time setting up an SDC that are operationally unfeasible.

Revisions to National Standard 1 Guidelines on issues commented on by the NEMFC
(Comments addressed through revisions in guidelines are highlighted below)

	600.310 (e)(1)(i)(A)	(i) *Definitions.* (A) *MSY* is the largest long-term average catch or yield that can be taken from a stock or stock complex under *prevailing* ecological, environmental conditions and fishery technological characteristics (e.g., gear selectivity), and the distribution of catch among fleets.	On the recommendation of its SSC, the NEFMC strongly feels that technological considerations should not be included in the estimate of MSY; MSY should not be constrained by the current selectivity patterns of fishing gear or fishing practices. Constraining MSY by a particular set of fishery technological characteristics which result in a suboptimal selectivity pattern (e.g., retention of immature fish) could result in potentially large losses in yield. For example, if MSY had been defined in terms of the gear technology that was used in the early 1990s in the Atlantic Sea Scallop fishery, potential MSY would have been greatly underestimated. "Prevailing" has at least two definitions: 1) most frequent or common; predominant; and 2) generally current; widespread. Which one is meant here? Although it appears that the guidelines imply 'current' conditions, clarification is needed.
	600.310 (e)(1)(i)(C)	(C) *MSY stock size (B_{msy})* means the long-term average size of the stock or stock complex, measured in terms of spawning biomass or other appropriate measure of the stock's reproductive potential that would be achieved by fishing at F_{msy}.	This definition of MSY stock size leaves out the phrase "under prevailing …conditions" that is used for the definition of MSY, creating an inconsistency. When determining yields, scientists consider current conditions, but when determining the stock size that produces those yields, they do not.
	600.310 (e)(1)(iv)	(iv) *Specifying MSY.* Because MSY is a long-term average, it need not be estimated annually, but it must be based on the best scientific information available (see § 600.315), and should be re-estimated as required by changes in long-term environmental or ecological conditions, fishery technological characteristics, or new scientific information. MSY values should be accompanied by the uncertainty in the estimate **when possible.**	This section says MSY should be re-estimated as required by changes in long-term characteristics. This seems inconsistent with the earlier definition that MSY is based on prevailing conditions. The "prevailing" conditions (whether the most current, or most common) might frequently differ from "long-term" characteristics. Note that this says MSY values should be accompanied by the uncertainty in the estimate. The NEFMC does not have this information for many stocks at present.
32540	600.310 (e)(2)(i)(B)	(B) *Overfishing* (to overfish) occurs whenever a stock or stock complex is subjected to a level of fishing mortality or annual total catch that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis.	Based on guidance from its SSC, the NEFMC recommends that the indicator for determining overfishing should remain fishing mortality and not catch, as is an option in the proposed guidelines. See comments on 600.310 (e)(2)(ii)(A) below. The definition of overfishing has been modified to include exceeding an annual total catch that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis. This is not in the statute and it results from a fundamental misinterpretation of the MSA. The reference to annual total catch should be deleted.
	600.310 (e)(2)(ii)	(ii) *Specification of SDC and overfishing and overfished determinations.* SDC must be expressed in a way that enables the Council to monitor each stock or stock complex in the FMP and determine annually, if possible, whether overfishing is occurring and whether the stock or stock complex is overfished.	This says that SDCs must be specified in a way that it can determined annually if overfishing is occurring. the ability to do this annually has more to do with the resources that are available than with how SDCs are specified. This paragraph goes on to say that the Council should specify in the FMP how the SDC were chosen, how they relate to reproductive potential, etc. This information should be incorporated by reference, particularly since parameters might change in between multi-year adjustments.

Revisions to National Standard 1 Guidelines on issues commented on by the NEMFC

(Comments addressed through revisions in guidelines are highlighted below)

32541	600.310 (e)(2)(ii)(A)	Each FMP should describe which of the following two methods will be used for each stock or stock complex to determine an overfishing status. *(1) Fishing mortality rate exceeds MFMT.* *(2) Catch exceeds the OFL.*	On the recommendation of its SSC, the NEFMC strongly feels that redefining overfishing in terms of catch doesn't appear to comply with the MSA. There could be many cases where catch is found to be greater than F_{MSY} and exceeds overfishing as defined in the MSA but where catch did not exceed the OFL or ACL and vice versa.
	600.310 (e)(3)(B)	(B) In NS1, use of the phrase "achieving, on a continuing basis, the optimum yield from each fishery" means producing, from each stock, stock complex, or fishery: A long-term series of catches such that the average catch is equal to the OY, overfishing is prevented, the long term average biomass is near or above B_{MSY}, and overfished stocks and stock complexes are rebuilt consistent with timing and other requirements of section 304(e)(4) of the Magnuson-Stevens Act and paragraph (j) of this section.	This section expands on the definition of OY in ways that are not consistent with the plain language of the statute. According to this section, "achieving, on a continuing basis, the optimum yield from the fishery" now requires not only catches that are a long-term series of catches that are equal to OY, but that overfishing is prevented, biomass is near or above B_{MSY}, and overfished stocks are rebuilt. Presumably if any one of these is not met, then the Council fails to achieve OY. If overfishing ever occurs, or stocks are not yet rebuilt, OY cannot be achieved? None of this is explicitly in the statute. OY is not even defined in the statute as a long-term value. Moreover, some of these elements are beyond Council control. The statute defines OY for stocks in plain language and this guideline conflicts with that language.
	600.310 (e)(3)(B)(ii)	(ii) *General.* OY is a long-term average amount of desired yield from a stock, stock complex, or fishery. ~~The long-term objective is to achieve OY through annual achievement of ACT, which is described in paragraph (f) of this section~~	This ties OY to the annual catch target (ACT). ACT is not even mentioned in the statute. Moreover, the guidelines say that the long-term objective is to achieve OY through annual achievement of ACT without any rationale. If a stock rebuilds, and average long-term catches approach OY, and overfishing does not occur, it's immaterial whether or not the ACT was or was not exceeded at times.
32542	600.310 (e)(3)(B)(iv)	(A) *Social factors.* Examples are enjoyment gained from recreational fishing, avoidance of gear conflicts and resulting disputes, preservation of a way of life for fishermen and their families, and dependence of local communities on a fishery (e.g., involvement in fisheries and ability to adapt to change). Consideration may be given to fishery related indicators (e.g., number of fishery permits, number of commercial fishing vessels, number of party and charter trips, landings, ex-vessel revenues etc.) and non-fishery related indicators (e.g., unemployment rates, percent of population below the poverty level, population density, etc.). Other factors that may be considered include the effects that past harvest levels have had on fishing communities, the cultural place of subsistence fishing, obligations under Indian treaties, proportions of affected minority and low-income groups, and worldwide nutritional needs.	It is not clear whether OY must take into account the types of factors listed here in determining OY or whether mangers have the option to consider them. Is the requirement to discuss these factors only if they were used to determine OY? If managers have no choice and must identify all social and economic factors that might result from a specification of OY such as the preservation of a way of life for fishermen, encouragement of export markets and worldwide nutritional needs etc. whether or not they use them in determining OY, this requirement is unrealistic, burdensome and probably impossible to meet.
		(B) *Economic factors.* Examples are prudent consideration of the risk of overharvesting when a stock's size or reproductive potential is uncertain (see § 600.335(c)(2)(i)), satisfaction of consumer and recreational needs, and encouragement of domestic and export markets for U.S. harvested fish. Other factors that may be considered include	More emphasis should be placed primary economic considerations such as maximizing economic benefits (sum of consumer and producer benefits).

		the value of fisheries, the level of capitalization, the decrease in cost per unit of catch afforded by an increase in stock size, the attendant increase in catch per unit of effort, alternate employment opportunities, and economic contribution to fishing communities, coastal areas, affected states, and the nation.	
32542	600.310 (e)(3)(B)(iv)(C)	(C) *Ecological factors*....In addition, consideration should be given to managing forage stocks for higher biomass than B_{msy} to enhance and protect the marine ecosystem.	This section suggests managing forage species to stock sizes larger than B_{MSY} to "enhance and protect the marine ecosystem." Since at some point a stock above B_{MSY} does not produce MSY: 1) This requirement takes away the Council's flexibility to rebuild stocks to levels that produce optimum yield based on the factors described in 600.310 (e)(3)(B)(iv)(A) & (B). 2) The MSA does not require that stocks be rebuilt to levels that exceed B_{MSY} on a long-term average basis. 3) With improved science, theoretically the calculation of MSY could take into account forage needs.
32542	600.310 (e)(3)(B)(v)	(v) *Specification of OY.* The specification of OY must be consistent with preventing overfishing and should be reduced from MSY to account for scientific uncertainty in calculating MSY, and economic, social, and ecological factors such as those described in paragraph (e)(3)(iv) of this section. … …In order to achieve OY in the long term, catch targets (i.e., ACT) should be set below catch limits (i.e., ACLs) based on the degree of management control so that average catch (or average ACT) approximates OY (see paragraph (f)(6) of this section).	According to the statute, the OY is the catch that returns the greatest benefits to the nation. By definition it must be no more than MSY. But this section confounds those two ideas and suggests that OY should be determined, at least in part, by how well the management measures work. This is an error, and comes from a strained attempt to link OY to ACT. The definition of OY should remain as the catch that returns the greatest net benefits to the nation, without considering management uncertainty. That way it becomes a goal. If uncertainty is included in setting OY, there is the possibility that there will be insufficient incentive to correct those elements and increase yields. This section says that OY should be revisited if management measures cannot prevent overfishing. This seems wrong – while the measures need to be changed, why does OY change? Another problem is that earlier the guidelines emphasize that OY is a long-term average, but by linking it to ACT – an annual catch target – it implies that OY is determined annually. This seems internally inconsistent. It comes up in later sections as well.
	600.310 (e)(3)(B)(v)(A)	(A) The amount of fish that constitutes the OY should be expressed in terms of numbers or weight of fish~~. As a long-term average, OY cannot exceed MSY.~~	This section says that "as a long-term average, OY cannot exceed MSY." This might imply to some implies that it may be permissible for ACT (or OY) to exceed MSY in the short term. This is not consistent with the Amendment 13 court decision, which said that catches should/cannot ever exceed the MSY and comply with the law.
	600.310 (e)(3)(B)(v)(A)	(C) All catch must be counted against OY, including that resulting from bycatch, scientific research, and all fishing activities.	This establishes a standard that all bycatch must be measured, which might not be feasible. The phrase "based on available data" should be added so councils don't have to make estimates when there is no real information. If survey catches are insignificant, it might not be worth the effort to account for them, and they currently are not included in assessments as a source of mortality.
	600.310 (e)(3)(B)(v)(D)	(D) The OY specification should be translatable into an annual numerical estimate for the purposes of establishing any total allowable level of foreign fishing (TALFF) and	It is not possible to translate a long-term average into an annual amount.

		analyzing impacts of the management regime.	
	600.310 (e)(3)(B)(v)(F)	(F) An OY established at a fishery level may not exceed the sum of the MSY values for each of the stocks or stock complexes within the fishery. ~~If OY is specified at a fishery level, the sum of the ACTs for the stocks and stock complexes in the fishery should approximate OY.~~	This says that if OY is specified at the fishery level, the sum of the ACTs should approximate OY. First, in the case of a stock complex, there may not be individual ACTs. Second, if OY is a long-term average amount of desired yield from a stock (as defined earlier), why would the sum of ACTs approximate OY? They absolutely shouldn't if the stocks are rebuilding. Once again a long-term average is being confused with an annual value.
	600.310 (e)(3)(B)(v)(G)	(G) There should be a mechanism in the FMP for periodic reassessment of the OY specification, so that it is responsive to changing circumstances in the fishery.	There already are mechanisms for adjusting OY or the Council may use an OY control rule.
	600.310 (e)(3)(B)(vi)	(A) *DAH.* Councils and/or the Secretary must consider the capacity of, and **the extent to which, U.S. vessels will harvest the OY on an annual basis**. Estimating the amount that U.S. fishing vessels will actually harvest is required to determine the surplus.	This is yet another example where defining OY as a long-term average of desired yields conflicts internally with a part of the rule that refers to OY as an annual value. In this case, the problem is caused by language in the statute that requires a determination of how much OY is available for foreign fishing.
32543	600.310 (f)(1)	(f) *Acceptable biological catch, annual catch limits, and annual catch targets….* ACTs are is now optional.	This section talks about control rules, OFL, ABC, ACL, and ACT. Note that it is not clear why ACT exists at all. They say ACL is set "not to exceed" the ABC, ACT lower than ACL to account for management uncertainty. If there is an ACT, why should the ACL ever be different from the ABC? The guidelines should say here that ABC should not be exceeded and this can be done by setting the ACL at the right level (so there is no need for an ACT).
	600.310 (f)(2)(i)	(2) *Definitions.* (i) *Catch* is the total quantity of fish, measured in weight or numbers of fish, taken in commercial, recreational, subsistence, tribal, and other fisheries. Catch includes fish that are retained for any purpose, as well as mortality of fish that are discarded.	An earlier section says that all removals count against OY, including scientific research. For consistency and to avoid possible confusion, the same components of catch should be listed.
32543	600.310 (f)(2)(iii)	(iii) *ABC control rule* means a specified approach to setting the ABC for a stock or stock complex as a function of the scientific uncertainty in the estimate of OFL.	Developing an ABC control rule that explicitly defines how ABC will be set as a function of scientific uncertainty is a problem because it will be very difficult to do for each stock in a multispecies fishery.
	600.310 (f)(2)(iv)	(iv) *Annual catch limit (ACL)* is the level of annual catch of a stock or stock complex that serves as the basis for invoking AMs. ACL cannot exceed the ABC, but may be divided into sector- ACLs.	Based on the recommendation of its SSC, the NEFMC supports the idea that ACLs should serve as a basis for invoking AMs. The purpose of ACLs is to prevent overfishing and therefore they must be adjusted if not correctly set. AMs are the mechanism for adjusting ACLs and the buffer between ACLs and ABC to account for uncertainties in the assessment, environmental factors and in the ability of management to actually control fishing mortality. If there is more uncertainty, the buffer should be larger and if scientific information and management controls are more precise, the ACL can be set closer to the ABC. Also the size of the buffer should be contingent on the level of overages, if applicable. Because there always will be some uncertainty in these factors, the ACL will be less than the ABC. During development of ACLs for Multispecies Amendment 16, the NEFMC has differentiated between ACLs for the stock as a whole, ACLs for components of the fishery – both which have AMs – and "other sub-components" which are not ACLs and do not have AMs. It is not clear

			whether that approach is consistent with the proposed guidance. The guidelines should explicitly state that FMPs can contain a mix of subcomponents some with and some without ACLs and AMs.
	600.310 (f)(2)(v)	(v) *Annual catch target (ACT)* is an amount of annual catch of a stock or stock complex that is the management target of the fishery. A stock or stock complex's ACT should usually be less than its ACL and results from the application of the ACT control rule. If sector-ACLs have been established, each one should have a sector-ACT.	As stated above, it's appropriate to list the ACT as a suggested component of a plan rather than a legally mandated component of an FMP. An ACT is not necessary if ACLs and AMs are correctly set and implemented. Also it might not be possible to determine management uncertainty until it is calculated from performance data. In addition to being an unnecessary complication, the annual catch target (ACT) is based on the assumption that all management strategies are designed to achieve a specific catch level. While that might be true for TAC systems, it is not true for effort control systems. Effort controls are designed to achieve a desired fishing mortality rate. While a subtle difference, it is very real. Also this would require each sub-ACL to have a corresponding ACT which is very burdensome and complicated.
	600.310 (f)(2)(vi)	(vi) *ACT control rule* means a specified approach to setting the ACT for each stock or stock complex such that the risk of exceeding the ACL due to management uncertainty is at an acceptably low level.	This concept for an ACT control rule is problematic. It would be very difficult if not impossible to develop an approach that takes into account the risk of exceeding "management uncertainty", and to provide a formulaic response.
	600.310 (f)(3)	(3) *Specification of ABC....*For internationally-assessed stocks, an ABC as defined in these guidelines is not required.	How does this apply to Georges Bank cod, haddock and yellowtail flounder which are jointly assessed by the U.S. and Canada?
32543	600.310 (f)(3)	(3) *Specification of ABC....*For internationally-assessed stocks, an ABC as defined in these guidelines is not required.	It is not clear what part of the MSA this exception based on. Second, what does this mean – is it only when the assessment is done as part of an official international agreement, or do things like the US/Canada TRAC process count – do Atlantic sea herring, and Georges Bank yellowtail flounder, etc not need an ABC? And finally, if there isn't an ABC, how can ACLs be set?
	600.310 (f)(3)(ii)	(ii) *ABC for overfished stocks.* For overfished stocks and stock complexes, a rebuilding ABC must be set to reflect the annual catch that is consistent with the target fishing mortality rates in the rebuilding plan.	This section says that for a rebuilding stock, the ABC must be set to reflect rebuilding mortality rates. While this is reasonable, it conflicts with an earlier section that says ABC is set less than the OFL level to take into account scientific uncertainty. Another reason is to achieve rebuilding targets. This requirement creates some inconsistencies with the MSA and how NMFS has defined overfishing. According to the MSA, the purpose of ACLs is to prevent overfishing, defined by NMFS as exceeding the MFMT. However, the ACL cannot exceed the ABC, here required to achieve rebuilding, and which is potentially lower than the overfishing level. A simpler approach that would eliminate these inconsistencies would be to simply define overfishing as exceeding the rebuilding target when in a rebuilding program, although a disadvantage to this interpretation is that does not have a firm basis in the MSA.
	600.310 (f)(5)(iii)	(iii) *ACLs for State-Federal Fisheries.* For stocks or stock complexes that have a large majority of harvest in state or territorial waters, FMPs and FMP amendments should include an ACL for the overall stock that may be further	Setting ACLs for state fisheries is problematic on several levels. First, the MSA does not give Councils the authority to allocate to the states, as the states are quick to remind the New England Council. Second, the proposed rule emphasizes that an ACL has to have AMs and Councils have no

		divided. For example, the overall ACL could be divided into a federal-ACL and state-ACL.	authority to implement AMS in state waters. Another approach is needed that does not conflict with the law and that is internally consistent with the rest of the rule.
32544	600.310 (f)(6)(i)	(i) *Determining management uncertainty.* Two sources of management uncertainty should be accounted for in establishing the ACT control rule: Uncertainty in the ability of managers to constrain catch to the ACT and uncertainty in quantifying the true catch amounts (i.e., estimation errors). To determine the level of management uncertainty in controlling catch, analyses should consider past management performance in the fishery and factors such as time lags in reported catch. Such analyses should be based on the best available scientific information from an SSC, agency scientists, or peer review process as appropriate	This description of determining management uncertainty implies some sort of quantification that is then used to create ACT control rules. Who is going to do this and when will it be done? (Note it is supposed to be done by the "SCC, agency scientists, or peer review process"). How can an ACT control rule be developed until these analyses are done (assuming they can be)? Councils are supposed to consider uncertainty in quantifying catch as part of management uncertainty yet some assessment models assume catch is known without error.
	600.310 (f)(7)(ii)	~~(ii) *Relationship of ACT to OY*....Management measures for a fishery should, on an annual basis, achieve the ACTs and prevent the ACLs from being exceeded. The long-term objective is to achieve OY through annual achievement of ACT~~. ACTs are now optional.	Here the guidelines say the goal is to achieve OY in the long-term through the achievement of ACT, and to prevent ACLs from being exceeded. What the statute says is that the goal of this ACL process is to prevent overfishing. As long as the ACL is not set at the overfishing level, and AMs are effective, then there is no problem if ACLs are exceeded. If ACLs are properly set, and AMS are properly designed, exceeding the ACL will not result in overfishing. Exceeding an ACL that triggers an AM may not be a bad thing. For example, consider a hard TAC fishery. If the ACL results in closure and that can happen quickly enough to prevent overfishing, there is no biological problem. There may be social or economic impacts, but hat has to be determined on a case by case basis.
32544	600.310 (g)(1)	(1) *Introduction.* AMs are management controls that prevent ACLs or sector-ACLs from being exceeded (in-season AMs), where possible, and correct or mitigate overages if they occur. AMs should address and minimize both the frequency and magnitude of overages and correct the problems that caused the overage in as short a time as possible.	This section goes beyond what is stated in the statute. There is no legal requirement in the statute that says ACLs cannot be exceeded. The law requires that ACLs be set at level that prevents overfishing, and says there must be accountability measures. The MSA states that FMPs shall contain management measures that *(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.* This section imposes a much different requirement. This section also says that AMs "should correct the problems that caused the overages in as short a time as possible." This time requirement is not in the statute. It is also not clear that AMs can "correct problems that caused the overage." For example: let's say there's an effort control AM, and an overage is caused by misreporting. How does an effort control AM address that problem? The sole purpose of the AM should be to prevent overfishing.
	600.310 (g)(2)	(2) *In season AMs.* Whenever possible, FMPs should include in season monitoring and management measures to prevent catch from exceeding ACLs. In season AMs could include,	Based on comments from its SSC, the NEFMC recommends that the purpose of the AMs should be to adjust ACLs to prevent overfishing. Although ACLs should not be exceeded on a regular basis, adjustment of

		but are not limited to, closure of a fishery; closure of specific areas; changes in gear; changes in trip size or bag limits; reductions in effort; or other appropriate management controls for the fishery. If final data or data components of catch are delayed, Councils should make appropriate use of preliminary data, such as landed catch, in implementing in season AMs. Where timely catch data are available for a stock, FMPs should include in season closure authority to close the fishery on or before the date when the ACL for a stock or stock complex is projected to be reached.	ACLs through AMs will need to be based on performance data. Therefore, it is reasonable to implement AMs after reviewing annual data rather than making in-season adjustments. It is not clear here whether "should" means "must" or "may". Because this is such an important issue further clarification is needed. There is no requirement in the law to impose in-season measures and this requirement greatly limits a Council's flexibility. The guidelines also say FMPs should include in-season closure authority. Closures in the absence of ITQs will only generate derby fisheries. Nothing in the law supports this language. Additionally, if the ACT should be set lower when timely data is not available, but a lack of resources to adequately monitor fisheries could greatly reduce allowable harvests.
	600.310 (g)(3)	(3) *AMs for when the ACL is exceeded.* On an annual basis, the Council should determine as soon as possible after the fishing year if an ACL was exceeded. If an ACL was exceeded, AMs should be triggered and implemented as soon as possible to correct the operational issue that caused the ACL overage, as well as any biological consequences to the stock or stock complex resulting from the overage when it is known.	This section is perplexing. In spite of informal comments that ACLs need to be automatic, this section says that on an annual basis, the **Council** determines if an ACL was exceeded, and if so, then AMs should be triggered ASAP. This process implies that some sort of review must occur before implementation of the AMs, as well as an examination of the "problem" that caused the overage – which means nothing will happen quickly. That seems to defeat the whole concept of AMs. In addition, there is a new standard placed on AMs that is not supported by the statute. AMs are now supposed to address any biological consequences resulting from the overage when "it" is known. What is "it" – the overage or the consequences? How can an AM be developed that predicts those consequences? An example: In year 1 the ACL is not exceeded but in year 2 it is. Does the year 2 overage have any consequences at all? It may not – if the underage in year 1 resulted in an increased stock size. This section also says that for rebuilding plans, the AM should include an overage adjustment – the payback provision. The law doesn't require this and this explicit provision was removed from drafts of the law before it was passed. The idea of a payback is bad science. There is no guarantee a payback is necessary or is the right amount and it gives a false sense of security. The requirement to review the system if ACLs are exceeded more than once in the last four years is arbitrary. Why four? Why not five? Why not two? What if ACLs are never exceeded but overfishing/rebuilding targets are always exceeded; do we evade the need to reexamine ACLs?
32545	600.310 (h)(2)(ii)	(ii) *International fishery agreements.* Section 303(a)(15) of the Magnuson- Stevens Act applies "unless otherwise provided for under an international agreement in which the United States participates" … This exception applies to stocks or stock complexes subject to management under an international agreement, which is defined as "any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party" these	The guidelines for stocks managed under international agreements should also allow for a) stock status determinations using criteria for overfishing specified in the US/Canada Resource Sharing Understanding and b) a timeline for rebuilding a fishery consistent with the Understanding. Also ACLs and AMs for these stocks should not be required since they already are managed under hard TACs and the Understanding contains provisions for accountability but which might be inconsistent with those required under the guidelines.

		stocks would still need to have SDC and MSY.	
	600.310 (H)(3)(i)	(i) *Fisheries data.* In their FMPs, Councils should describe general data collection methods, as well as any specific data collection methods used for all stocks, stock complexes, and … This has been changed to "In their FMPs, or associated public documents such as SAFE reports as appropriate, Councils must describe general data collection methods,"	The Standardized Bycatch Reporting Methodology requirement should already fill this requirement to describe data collection. This is a huge burden – notice that is says the FMP must describe not only the data collection, but the "estimation methods used to quantify total catch mortality in the fishery." Does this mean Councils must describe the assessment methods in their FMPs? A lot of this is done by NMFS. Why does it have to be described in the FMP? It is not clear what problem the inclusion of this requirement solves.
32546	600.310 (h)(3)(i)(A)	(A) The "minimum time for rebuilding a stock" (T_{min}) means the amount of time the stock or stock complex is expected to take to rebuild to its MSY biomass level in the absence of any fishing mortality. In this context, the term "expected" means to have at least a 50-percent probability of attaining the B_{msy}.	This section defines Tmin – the minimum time for rebuilding – as the amount of time needed to rebuild in the absence of fishing mortality. This is critical for determining whether a stock must be rebuilt in ten years or not. We have all gotten used to the current definition. But – reading the law – the law says that "as short a time as possible" is supposed to not only take into account the absence of fishing, but is supposed to consider the "status and biology of any overfished stocks of fish, the needs of fishing communities, recommendations by international organizations, and interactions of the fish stock within the marine ecosystem." So an argument can be made that the determination of Tmin, as proposed here, ignores the plain language of the statute because it ignores this other factors when determining Tmin. If Tmin is not the parameter meant by the statute when referring to "as short a time as possible" , there is no legal justification at all for defining Tmin this way and it would be a limitation on rebuilding that was not defined by Congress.
	600.310 (j)(3)(i)(D)	(D) If T_{min} for the stock or stock complex exceeds 10 years, then the maximum time allowable for rebuilding a stock or stock complex to its B_{msy} is T_{min} plus the length of time associated with one generation time for that stock or stock complex. "Generation time" is the average length of time between when an individual is born and the birth of its offspring.	On advice from its SSC, the NEFMC recommends that the definition of generation time in Restrepo et al. (1998) should be used: In the context of stock rebuilding time horizons, the definition of generation time used could refer to an unfished state. We recommend that the default definition of generation time, G, be (Goodyear 1995): G=sum(aEN)/(sum(EN) [summed over a=1 to A] where a denotes age, A is the oldest age expected in a pristine (unfished) condition, E is the mean fecundity at age of females, and N is the average number of females per recruit alive at age a in the absence of fishing, i.e., N(a)=N1exp(-sum(M)) [summed over ages j to a-1]where M is the natural mortality rate. These expressions should be computed on an equilibrium per-recruit basis, i.e., setting N1 = 1. When fecundity data are not available, G can be computed by replacing E with an age-specific vector of maturity ratios times body weight (as commonly used to compute spawning biomass).
32456	600.310 (j)(3)(i)(E)(ii)	(ii) If a stock or stock complex reached the end of its rebuilding plan period and has not yet been determined to be rebuilt, then the rebuilding F should not be increased until the stock or stock complex has been demonstrated	This section provides guidance about setting F rates after the end of rebuilding period, but guidance also is needed when it becomes apparent during a rebuilding period that a stock cannot be rebuilt even at F=0 due to a change in circumstances.

		to be rebuilt.	
32547	600.310 (m)	(m) *Exceptions to requirements to prevent overfishing.* Exceptions to the requirement to prevent overfishing could apply under certain limited circumstances. Harvesting one stock at its optimum level may result in overfishing of another stock when the two stocks tend to be caught together ... The Council may decide to allow this type of overfishing if the analysis demonstrates that all of the following conditions are satisfied: (1) Such action will result in long-term net benefits to the Nation; (2) Mitigating measures have been considered and it has been demonstrated that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristic in a manner such that no overfishing would occur; and (3) The resulting rate of fishing mortality will not cause any stock or stock complex to fall below its MSST more than 50 percent of the time in the long term, although it is recognized that persistent overfishing is expected to cause the affected stock to fall below its Bmsy more than 50 percent of the time in the long term.	Although the inclusion of this exception is very important and needed for mixed stock fisheries, as currently worded, the criteria to allow this exception are impossible to meet and it is clear that the exception cannot be invoked when a stock will remain overfished for more than 50 percent of the time. Also, as proposed, this guideline would permit managers to allow overfishing to continue for a period on a stock that is not overfished, even if the stock declines in size. At the extreme, it would allow a stock to decline to less than its MSST and be declared overfished – as long as analysis says that this will occur less than half the time (over what period?). This creates an odd paradox: overfishing is allowed even though it adversely impacts a healthy stock and may even drive it to an overfished level, yet there is no provision proposed that allows extension of a rebuilding program in a mixed-stock fishery even if it can be demonstrated that the overfished stock will continue to grow and the net result is long-term benefits to the nation. This does not seem logical or in the best interests of the nation. As a result of the above problems, the NEFMC recommends retaining the current exception for mixed stock fisheries (see below). *"To allow overfishing of one stock in a mixed-stock fishery, a Council must meet three stringent conditions: (1) It must demonstrate by analysis that the action will result in long-term net benefits to the Nation; (2) it must demonstrate by analysis that a similar level of benefits cannot be achieved by modifying fleet behavior, gear selection or configuration, or other technical characteristic so that no overfishing would occur; and (3) it must ensure that the action will not cause any species or evolutionarily significant unit thereof to require protection under the Endangered Species Act."* 63 FR (24221). Also, the NEFMC believes that NMFS original characterization of this exception as currently worded is accurate: "*NMFS believes the guidelines strike the correct balance between preventing a stock from becoming overfished and achieving OY for the fishery as a whole.*" 63 FR (24221) Finally, as is stated in the response to comments for the publication of the current guidelines, the criteria for applying the current exception already are very stringent:33