

#5



New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116
 C.M. "Rip" Cunningham, *Chairman* | Paul J. Howard, *Executive Director*

MEMORANDUM

DATE: June 8, 2012
TO: Council
FROM: Paul J. Howard, Executive Director
SUBJECT: Summary of June 7, 2012

The Executive Committee met on June 7, 2012 at the Sheraton Colonial Hotel in Wakefield, MA. Messrs. Cunningham, Grout, Stockwell, Morris and Darcy and Ms. McGee participated in the meeting. Messrs. Howard and Kellogg and Meses. Roy and Fiorelli attended from the Council staff. Dr. Bill Karp, Paul Rago, Dr. Fred Serchuk and Dr. Jim Weinberg participated via conference call. Dr. Pierce was a member of the audience. The committee discussed the following agenda items:

1. *Discuss timelines and management actions:* Mr. Kellogg reviewed the draft timelines. Mr. Darcy informed the committee that NMFS is being sued by Oceana for inadequate observer coverage in the sectors.
2. *Discuss declaration of disaster in groundfish fishery:* Mr. Howard reviewed the motion made at the April Council meeting remanded to the Executive Committee. Mr. Cunningham stated his concern about lobbying. Mr. Stockwell stated that whether the Secretary determines there is disaster or not, one is coming so a game plan needs to be put in place. Mr. Grout suggested the Council needs to add their letter to the collection of letters the State governors have sent. It was suggested a letter be drafted and distributed through the Executive Committee, and to also include sturgeon and harbor porpoise impacts, to the Secretary. Mr. Morris suggested Council staff do a detailed economic analysis (as is feasible) in the groundfish fishery but Mr. Howard stated that doing such would stop everything else staff is working on. The State designees agreed to send the Council copies of their State letters.
3. *Discuss SSC schedule for 2012:* Mr. Kellogg reviewed the SSC schedule of meetings. The SSC is currently holding several meeting days due to a timing issue with the upcoming TMGC meeting. Mr. Cunningham suggested the SSC meeting dates be firmed up as soon as possible.
4. *Discuss TMGC issues:* Mr. Howard brought forward three issues 1) the GB yellowtail issue; 2) the timing of the SSC meeting and 3) TMGC membership. The Committee agreed that there were advantages and disadvantages about scheduling the SSC to make ABC recommendations for transboundary groundfish stocks either before or after the TMGC meets and that some of these depend on the TORs for the SSC and whether the Council would have a range of recommendations to consider for each stock. The Committee decided that the TORs would ask the SSC to provide a range of ABC recommendations for GB yellowtail flounder.

Concerning TMGC membership, Mr. Howard stated possible Federal Advisory Committee Act (FACA) issues may exist if we don't have either Council members and/or Advisory panel members on the TMGC. Mr. Stockwell explained that each country is limited to six (6) members: four from industry, one government official and one scientist. Ms. McGee asked if anyone on the U.S. side had complained about representation and there was one party that had brought his concern forward. Mr. Howard suggested an Advisory panel member be added to the Committee in August to replace Mr. Odlin's vacating seat. Ms. McGee suggested we wait to see Council appointments in August before a decision is made.

5. Discuss structuring a panel to work on the draft biological opinion for sturgeon: Mr. Howard stated that the Service will have the draft opinion in September and Council would like to have three (3) months to make sure Council doesn't have to revisit the BO. The Service will provide the draft BO to the Council mid-September for an approximate 3-month review. Mr. Morris suggested the Council establish an ad-hoc group now to provide some considerations on the BO prior to the Council receiving it in September and that this group include the Chairs of each Oversight committee impacted by the BO; Chairs of the APs and a few members of industry. The Service is hoping to finalize the BO by December 21. *See Encl (1).*

6. Discuss ANPR for National Standard 1 guidelines: Mr. Howard stated that one issue that needs to be addressed in the NS1 guidelines is the issue of shad and river herring being part of the herring plan. Ms. McGee recommended that the changes to the National Ocean Policy needing more flexible limits and targets for rebuilding be removed from the letter. She also stated that the language pertaining to the 'stocks in a fishery question' be made clearer in developing alternatives for bycatch caps and state that it is Council-supported, contingent on the outcome of the Herring amendment. She suggested we add a sentence stating that "the Council is interested in minimizing bycatch of a number of species that aren't under the jurisdiction of the States or ASMFC using measures other than ACLs". Mr. Grout also agreed to taking out the National Ocean Policy. Mr. Howard will provide a copy of the draft letter to the Council and comments are due to the Service by August 1. *See Encl (2).*

7. Discuss cod assessment timing and GOM cod TORs: Mr. Kellogg reviewed the cod TORs and stated that staff had no additions/changes. Dr. Weinberg stated that although it would not be possible to consider alternative stock structures during the SARC, it was important to acknowledge the ongoing work on cod stock structure that has already started. Recreational catch data from the MRIP program will be made available on an ongoing basis, but some of it will not be available until after the SARC. Dr. Rago stated that SSC member, Bob O'Boyle, will be chairing several working group meetings which will free up Center staff to handle the additional work required by the GOM cod assessment.

Mr. Kellogg stated that the assessment updates for groundfish stocks scheduled for 2013 would not be needed until 2014 for most stocks because the Council is currently developing specifications for fishing years 2013 and 2014 based on updates received in February 2012. Therefore, the Council would not need updates until the next set of specifications were developed in 2014; however, the Council staff would still need assessment updates for SNE/MA winter flounder and plaice during the first half of 2013 to revise these rebuilding schedules as requested by the Regional Office. Dr. Karp stated that this would cause a problem and no additional work can be taken on right now and Dr. Rago suggested that updated assessments might not be needed to revise these rebuilding schedules. Mr. Howard said that the alternative was to use 2010 data for fishing years 2014 and 2015 and that would be unacceptable. Dr.

Serchuk stated that another benchmark cod assessment still may be needed in 2013 or 2014. Dr. Karp stated that pushing things too far will affect the quality of the Science Center's work. Mr. Howard noted that the NRCC will make final decisions on the assessment schedule after an upcoming conference call.

8. Discuss criteria for PDT membership: Mr. Howard stated that what generated this discussion was that an industry member was being petitioned to join a PDT. Mr. Darcy suggested adding a criteria question asking "does the person have unique skills; do they bring something different to the PDT?" Mr. Cunningham suggested capping the PDT membership. Mr. Howard will revise the criteria and Ms. Fiorelli will provide the draft handbook changes to the June Council meeting.

9. Discuss idea of conference call with O/S cte chairs to discuss how APs could be better incorporated into the process: Mr. Howard stated that Marybeth Tooley had brought this issue up at the April Council meeting and that the Chairs of APs now participate at the Committee meetings in an effort to improve the Cte/AP relationship. Mr. Cunningham stated that we could do better, but there have been a lot of improvements in how the AP's are being used by Committees. We have and will continue to stress front-loading AP involvement and should let the Committee Chairs have some flexibility in how they use the APs. Mr. Stockwell stated that some committees are managing to turn-around what comes from the meetings very quickly while others haven't. Mr. Darcy stated that the action plan in the draft operating agreement there is explicit language on use of AP's. Mr. Howard recommended drafting a letter to the Cte Chairs and enclosure the FMP development process encouraging them to use the process and see what might be beneficial and what might not. Because of concern with the AP chairs speaking from the table during the Committee meetings, Ms. Fiorelli will add language to the PDT policy stating that "personal opinions/views must be made at the speaker table."

10. Discuss AP members serving on multiple panels: Mr. Howard reviewed the list of Advisory panel members serving on multiple panels. The Executive Committee felt that no changes need to be made to the current policy and members are eligible to serve on several APs. Mr. Cunningham will notify the party who had concerns with people serving on multiple panels of the committee's decision.

11. Discuss changes to the "Public Testimony" and "Authority of the Chairman" policies: Ms. Fiorelli stated that she had reviewed Roberts Rules of Order and it states that 'in order for anyone to vote on a committee, they need to be an ex-officio member of the committee'. The Council policy will be changed to reflect this language. Ms. Fiorelli then reviewed changes proposed to the Public Testimony policy. Ms. McGee suggested we still need a format so that speakers clearly identify themselves which will be reflected at future Council meetings. The placard provided at the Council meeting will be changed to include name, organization and # of vessels/people represented to the card.

12. Discuss EBFM/priorities: Mr. Howard discussed the National Conference being planned in 2013. Mr. Howard suggested slowing down the 6-year EBFM plan but continue to look at how to improve a broader view and interactions between different fish. Mr. Cunningham stated that we need guidelines from the Service on policy and process issues of how Councils will manage LME's jointly. Ms. McGee suggested we continue to take an ecosystem approach similar to how it's being handled in the Herring amendment. Mr. Howard recommended that the EBFM PDT continue on and that the Committee continue to meet to cement the goals and objectives and what the group thinks it wants to accomplish as a priority in 2013.

13. Discuss coral protection process: Mr. Kellogg discussed separating the omnibus action and remove deep sea coral from the omnibus amendment and that two documents would be clearer to understand. Ms. McGee asked how this would affect scoping but Mr. Kellogg stated that it would not affect it. The Habitat Committee will bring this issue forward at the June Council meeting.

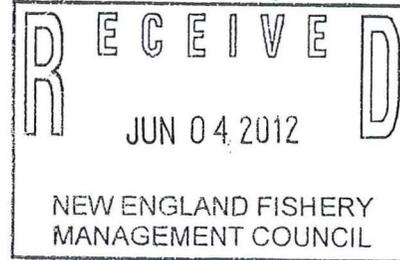
14. Discuss NMFS Confidentiality Proposed Rule: Mr. Kellogg stated that Council staff had concerns with the Proposed Rule and the short turnaround time for comments (currently due June 22). Staff had requested an extension from the Service which they plan on granting (90 days). Mr. Morris reviewed several highlights of the Proposed Rule. Staff will provide their comments to the Council at a future date.

15. Personnel issues: The Chair discussed having the Executive Committee serve as the Search Committee in hiring the new Executive Director. The Chair will work with Karen to prepare a survey to Council/staff and start the announcement process of posting/searching. The Search Committee will select 10 potential candidates on the initial cut and they will be interviewed by the committee. The 2nd cut will bring it down to 3 candidates, who will be interviewed with the entire Council in attendance. A ballot process is being planned for the final decision. Mr. Cunningham suggested 60 days for the posting period, but Mr. Grout suggested it be open longer. Mr. Howard asked if the survey would be completed prior to the solicitation process. He recommended that the same questions be asked to each person being interviewed. This would help compare applicants and as a more fair practice.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

JUN - 1 2012



Mr. Paul J. Howard, Executive Director
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

Dear Paul,

Your letter of May 1, 2012, at the behest of the New England Fishery Management Council, forwarded a request regarding NOAA Fisheries Service's coordination with the Council related to Atlantic sturgeon. The full request reads as follows:

- 1) To hold a joint meeting of the agency's protected species staff, ASMFC Sturgeon Technical Committee and for the NEFMC and MAFMC SSCs and for NMFS staff to provide this group a detailed update from NMFS staff on the Atlantic sturgeon listing under the Endangered Species Act;
- 2) For NMFS protected species staff to provide the New England and Mid-Atlantic Councils with:
 - a. A detailed description of the methodology, process, timeline, and description of any public process mechanisms that NMFS will use to formulate a so-called "batched biological opinion": specific to Atlantic sturgeon;
 - b. A detailed explanation of the baseline population data being used to estimate the condition of each DPS, the rationale that will be used to determine whether jeopardy exists for each affected fishery, and how the incidental take statements will be calculated in relation to the DPS population condition for each affected fishery;
 - c. A draft biological opinion on sturgeon following the precedent set with the Pacific Councils for the potential ESA listings involving North Pacific groundfish and Hawaiian swordfish fisheries;
 - d. A time period that will allow for adequate review of and public comment on the biological opinion.

Regarding the first part of the request, staff from NOAA Fisheries Service staff have provided detailed presentations on the Endangered Species Act (ESA) listing process and supporting science, the peer review of the status review report, and the management implications of the listing on the following occasions:

- Two meetings with NEFMC and MAFMC staff in late February/early March
- MAFMC Sturgeon Committee meeting – March 19th
- NEFMC Groundfish AP meeting – March 29th
- Monkfish AP meeting - April 3rd

ENCLOSURE (1)



cc: CBK, PELTN/614) AHC

- MAFMC Meeting – April 11th
- NEFMC Meeting – April 25th

The utility of convening both Councils SSCs and the Commission's Technical Committee was discussed at the recent meeting of the Northeast Region Coordinating Council as was sharing a draft of the batched consultation with both Councils prior to it being completed and signed. Based on the discussion, it was agreed that we would focus our effort on completing the draft batched biological opinion in order to make it available to both Councils and the general public. As soon as the internal review of the draft has been completed, we intend to post it on our website and notify the Councils of the link and the document's availability.

At the NRCC meeting, we indicated that we would make every effort to complete the draft and provide it to the public prior to the MAFMC's August meeting (August 14-16). We agreed to provide an update regarding our progress toward meeting this timeline the first week of July. Since the NRCC meeting, we have reviewed our schedules, workload, and timeframes for completing the three ongoing fisheries consultations (e.g., Atlantic scallops, American lobster, and the batched consultations). We no longer think it possible to complete the draft batched opinion prior to the MAFMC's meeting in August. We have had to adjust our timeline for completion and will make the draft available to the Councils and the public in early Fall prior to the NEFMC meeting in late September. Based on this schedule, we would anticipate accepting comments through the end of October; thereby, providing time for the MAFMC to review the document and discuss it at their October meeting. We will be in touch to work out the specific timeline and to ensure the Councils have ample time to review the document.

When the biological opinion is complete, I intend to move it quickly through final legal review and signature. The Councils, having critiqued and helped to refine the core sections of the document, will have a firm understanding of the basis for the conclusions. We anticipate based on the schedule above that the consultation will be complete and signed in late 2012 or early 2013. When we finalize the biological opinion, we can commence work with the Council on implementation of the conservation measures. At any time after completion of the opinion, should any new information become available, we may reinitiate the Section 7 consultation and revisit the conclusions.

We look forward to continuing to work with you and your staff on this important issue. Should you have any questions, please contact Kim Damon-Randall at 978.282.8485 or Kimberly.Damon-Randall@noaa.gov.

Sincerely,



Daniel S. Morris
Acting Regional Administrator

Cc: George Darcy, SFD
Mary Colligan, PRD



New England Fishery Management Council

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C. M. "Rip" Cunningham, Jr., *Chairman* | Paul J. Howard, *Executive Director*

May 1, 2012

Mr. Dan Morris
Acting Northeast Regional Administrator
NMFS/NOAA
55 Great Republic Drive
Gloucester, MA 01930-2298

Dear Dan:

At its April 24-26, 2012 meeting, the Council passed a motion concerning the listing of Atlantic sturgeon with the following requests for the NMFS Northeast Regional Office:

- 1) To hold a joint meeting of the agency's protected species staff, ASMFC Sturgeon Technical Committee and for the NEFMC and MAFMC SSCs and for NMFS staff to provide this group a detailed update from NMFS staff on the Atlantic sturgeon listing under the Endangered Species Act;
- 2) For NMFS protected species staff to provide the New England and Mid-Atlantic Councils with:
 - a. A detailed description of the methodology, process, timeline, and description of any public process mechanisms that NMFS will use to formulate a so-called "batched biological opinion" specific to Atlantic sturgeon;
 - b. A detailed explanation of the baseline population data being used to estimate the condition of each DPS, the rationale that will be used to determine whether jeopardy exists for each affected fishery, and how the incidental take statements will be calculated in relation to the DPS population condition for each affected fishery;
 - c. A draft biological opinion on sturgeon following the precedent set with the Pacific Councils for the potential ESA listings involving the North Pacific groundfish and Hawaiian swordfish fisheries;
 - d. A time period that will allow for adequate review of and public comment on the biological opinion.

If you have any questions concerning these requests, please don't hesitate to contact me.

Sincerely,

Paul J. Howard
Executive Director



New England Fishery Management Council

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DRAFT

Wesley Patrick, Policy Analyst
National Marine Fisheries Service, NOAA
1315 East-West Highway, Room 13436
Silver Spring, MD 20910

RE: Advance notice of proposed rulemaking (May 3, 2012); request for comments; consideration of revision to National Standard 1 Guidelines

Dear Mr. Patrick,

The New England Fishery Management Council welcomes the opportunity to comment on the Advance Notice of Proposed Rulemaking concerning the National Standard 1 Guidelines. Changes in National Standard 1 guidance are needed to allow regional fishery management Councils to respond to new management challenges, recognize the ecosystem implications of fisheries management, and accommodate the effects of climate change on Council- managed resources. Changes should include more flexible harvest limits and targets, as well as more flexible rebuilding timeframes consistent with contemporary productivity of fish stocks and the ecosystem. Also they should include MSY-based reference points that are pro-active rather than retrospective and that consider multispecies complexes rather than single stocks, with appropriate ecosystem-based limits and rebuilding time frames.

Comments on specific items are provided below each ANPR topic.

1. Stocks in a fishery. The MSA requires that Councils develop FMPs for fisheries that require "conservation and management" (MSA 302(h)(1)). The MSA provides the Councils with wide latitude in defining the scope of an FMP. Some FMPs include a relatively small number of species, focusing on the primary target species of the fishery. In other FMPs, a much broader range of species are included. The NS1 Guidelines establish and define Ecosystem Component (EC) species and provide that EC species may be included in the FMP but are not considered stocks in the fishery and thus are not required to have biological reference points or ACLs. There has been considerable discussion about the criteria for classifying EC species and the utility of the EC species concept. Thus, revision of the guidance may be warranted to further describe criteria for classifying stocks in a fishery and EC species.

The requirement to set biological reference points or ACLs for all stocks in a fishery can be problematic because of the variety of reasons for including a stock in this category, such as defining and protecting EFH. Also, although the NEFMC has and expects to continue to implement caps on the bycatch of various species or stocks because that may be the most effective way of controlling bycatch, there is a difference between limiting bycatch and formally setting ACLs.

ENCLOSURE (2)

ACLs or overall catch limits should be set only by the agency with the primary management authority for managing a species or stock to avoid potentially incompatible regulations and confusion. The NS1 Guidelines should clearly state that Councils should not be required to set ACLs for “stocks in a fishery” that are primarily under the jurisdiction of other management authorities such as NMFS, the state marine fishery commissions or individual states. For example, in the Northeast stocks including northern shrimp, river herring, American lobster and highly migratory species are not under the management jurisdiction of the New England or Mid-Atlantic Fishery Management Councils.

2. *Overfishing and multi-year impacts.* The current NS1 Guidelines provide that overfishing must be determined either by comparing catch to the overfishing limit (OFL) or by comparing fishing mortality to the maximum fishing mortality threshold (§ 600.310 (e)(2)(ii)(A)). Overfishing determinations are made for the most recent year for which there is information. Stakeholders have expressed interest in exploring alternative definitions of overfishing that would take a longer, multi-year view of the impact of fishing on the stock’s ability to produce maximum sustainable yield (MSY).

Multi-year overfishing definitions should be explored for several reasons. First, they could allow for a better use of fishery resources by avoiding sudden disruptions in industry operations due to changes in the science on which management is based. Second, multi-year overfishing definitions might be particularly useful for stocks for which annual catch data might be missing or unreliable or for which biological assessment information is poor (out-of-date, highly variable or exhibits consistent biases). Also, multi-year if overfishing definitions would better accommodate the natural variability in fish stocks or the ecosystem. Finally, there might be social and economic benefits in adopting multi-year overfishing definitions for stocks in multispecies fisheries where constraining the catch of one stock reduces the catch of other abundant stocks.

3. *Annual catch limits and optimum yield.* In some fisheries, implementation of the guidance on acceptable biological catch (ABC) control rules, ACLs, and AMs has resulted in real or perceived reductions in catch. Questions have been raised about the relationship between ACLs and the objective of achieving OY for a fishery. The MSA defines OY as being reduced from MSY to account for relevant economic, social, or ecological factors, and states that OY in an overfished fishery must provide for rebuilding the fishery (MSA 3(33)). There is interest from stakeholders in improving guidance to better address economic, social, and ecological considerations in the establishment of OY and to more clearly describe the relationship between ACL and OY.

The NS1 guidance should be improved to better address economic, social, and ecological considerations in the establishment of OY and to more clearly describe the relationship between ACL and OY.

4. *Mixed-stock fisheries and optimum yield.* Management of mixed-stock fisheries is challenging because some stocks are relatively more abundant or are more or less susceptible to overfishing than others. The MSA requires that overfishing be prevented, and that the OY for a fishery provide for rebuilding overfished stocks. Nonetheless, some stakeholders believe that ACL and rebuilding requirements prevent them from achieving OY of healthy stocks. Further guidance on how OY should be specified to balance the multiple considerations in mixed- stock fisheries may be warranted.

ACL and rebuilding requirements prevent achieving OY for healthy stocks in a mixed-stock fishery. Further guidance on how OY should be specified to balance the multiple considerations in mixed-stock fisheries is warranted. One option might be to allow rebuilding periods for individual stocks to be increased to allow a greater portion of OY in a mixed-stock fishery to be landed. The MSY/OY approach assumes that we will be able to create a system that replicates past ecosystems. The system is much too complex for that to be realistic.

5. *Scientific uncertainty and management uncertainty.*Some stakeholders believe that consideration of both scientific and management uncertainty causes ACLs to be overly precautionary.

Often it is not possible to separate scientific and management uncertainty. Although, it is not clear that this problem should result in overly precautionary ACLs, this concern should be explored and if needed, appropriate changes should be made to NS1 guidance.

6. *Data poor stocks.* Stocks without sufficient data to conduct a formal scientific stock assessment are considered to be data poor stocks. Establishing appropriate ACLs for data poor stocks can be challenging. The experience of the Councils and their SSCs in implementing ABCs and ACLs for data poor stocks may provide valuable information on which to base improvements in the NS1 Guidelines for data poor stocks.

The NEFMC agrees with the above statement and that NMFS should explore these issues together with the Councils and their SSCs. More specifically, Councils should be exempt from ACL requirements where catch is unknown or required only to set limits on landings when discards are not known with some level of confidence.

7. *Acceptable biological catch control rules* – The NS1 Guidelines require a Council to establish an ABC control rule for each stock and stock complex, based on scientific advice from its SSC (§ 600.310 (f)). ABC control rules are a specified approach to setting the ABC that addresses scientific uncertainty, and incorporate a policy decision on the acceptable level of risk that overfishing might occur. A variety of ABC control rules have been implemented and a review of those control rules could lead to improvements in the NS1 Guidelines. In addition, for some fisheries there is interest in implementing provisions that carry over unharvested allocations from one year to the next. Guidance may be needed on how to consider carry-over within ABC control rules.

The NEFMC agrees that a review of control rules could lead to improvements in the NS1 Guidelines; however, the guidelines should allow flexibility to develop control rules that take into consideration the quality of data and assessment information available for each stock. Also, we strongly agree that guidance is needed on how to consider carry-overs within ABC control rules.

8. *Catch accounting.* Questions have been raised by managers about the types of “catch” that must be considered within the ABC and ACL, particularly in regard to catch resulting from exempted fishing permits and scientific research activities. The definition of catch in the NS1 Guidelines includes 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. In the final rule response to comment number 35 (74 FR 3718; January 16, 2009), NMFS stated that this definition would include allocations for scientific research and mortality from any other fishing activity. Additional guidance may be needed to clarify how to account for all sources of mortality (e.g., bycatch, scientific research catch, etc.) when establishing ABCs and ACLs.

There should be better accounting for catch resulting from EFPs and scientific research, including federal surveys. NMFS, however, cannot require either a vessel or the institution conducting scientific research to report its catch, yet the MSA and associated guidelines require fishery management plans to account for all catch, including scientific research catch. The guidelines need to address how the Councils are to account for all catch when there is no mechanism for monitoring research catch in a timely manner.

9. *Accountability measures (AMs)* - AMs are management controls to prevent ACLs from being exceeded, and to correct or mitigate overages of the ACL if they occur. AMs must be tailored to the specific needs of a fishery, and are key to the success of ACL systems in ending and preventing overfishing. NMFS invites comments on the guidance for AMs.

If ACLs have been exceeded but the ABC has not been exceeded and scientific information shows that overfishing did not occur, Councils should have the option of requesting that reactive AMs not automatically be implemented. The purpose of ACLs is to prevent exceeding the ABC.

10. *ACL exceptions*. Under the MSA, stocks that have a life cycle of approximately 1 year and stocks subject to international agreements are not required to have ACLs. The NS1 Guidelines describe that the life cycle exception applies to “a stock for which the average length of time it takes for an individual to produce a reproductively active offspring is approximately 1 year and that the individual has only one breeding season in its lifetime” (§ 600.310 (h)(2)(i)). The NS1 Guidelines also describe that the international agreement exception applies to stocks that are subject to “any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is party” (§ 600.310 (h)(2)(ii)). NMFS invites comments on the guidance pertaining to these exceptions from the ACL requirements.

The exception for stocks subject to “any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party” should be broadened to cover stocks managed under less formal international understandings such as has been done through separate legislation exempting stocks included under the U.S./Canada Resource Sharing Understanding in the Northeast.

11. *Rebuilding progress and revising rebuilding plans*. The current NS1 Guidelines address how NMFS should respond if a stock reaches the end of its rebuilding plan and is not fully rebuilt, or its rebuilding status is unknown. However, the guidelines do not address the situation that occurs during the course of a rebuilding plan when rebuilding progress is determined to be inadequate. Inadequate progress can result from a number of factors, including: a. Management measures that do not adequately control the fishery. b. Environmental factors that limit stock growth. c. Significant changes in the rebuilding target (BMSY) resulting from a new stock assessment. NMFS intends to improve guidance on evaluating the progress of stocks in rebuilding plans and on revising the rebuilding plans in these situations.

These issues should be addressed. If a rebuilding plan is later found to be inadequate because of environmental factors that limit stock growth or changes in the rebuilding target resulting from a new stock assessment, there should be a mechanism to appropriately lengthen the rebuilding period. Finally, almost every new benchmark assessment results in revisions to important reference points due to a variety of factors (new models, changing data inputs like surveys, retrospective patterns, etc.). There needs to be systematic flexibility to deal with this reality, which is different than the flexibility needed to deal with changing environmental factors or ecosystems considerations.

Finally we encourage NMFS to work hand in hand with the Councils to revise National Standard 1 so that it can accommodate new mandates for ecosystem-based fisheries management and respond to the effects of climate change. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Paul J. Howard
Executive Director

time the list is submitted. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Where changes to the workforce are made after the submission of the certified list described in this paragraph, the Contractor shall, in accordance with paragraph (d) of this clause, not less than 10 days before completion of the services on a contract, furnish the Contracting Officer with an updated certified list of the names of all service employees employed within the last month of contract performance. The updated list shall also contain anniversary dates of employment, and, where applicable, dates of separation of each service employee under the contract and its predecessor contracts with either the current or predecessor Contractors or their subcontractors. Only Contractors experiencing a change in their workforce between the 30- and 10-day periods will have to submit a list in accordance with paragraph (d) of this clause.

(2) The Contracting Officer will provide the list to the successor Contractor, and the list shall be provided on request to employees or their representatives.

(3) The Contracting Officer will direct the predecessor Contractor to provide written notice (Appendix B to 29 CFR chapter 9) to service employees of their possible right to an offer of employment with the successor Contractor. Where a significant portion of the predecessor Contractor's workforce is not fluent in English, the notice shall be provided in English and language(s) with which employees are more familiar. The written notice shall be—

(i) Posted in a conspicuous place at the worksite; or

(ii) Delivered to the employees individually. If such delivery is via email, the notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.

(d)(1) If required in accordance with 52.222-41(n), the Contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor Contractors or their subcontractors. If there are no changes to the workforce before the predecessor contract is completed, then the predecessor Contractor is not required to submit a revised list 10 days prior to completion of performance and the requirements of 52.222-41(n) are met. When there are changes to the workforce after submission of the 30-day list, the predecessor Contractor shall submit a revised certified list not less than 10 days prior to performance completion.

(2) The Contracting Officer will provide the list to the successor Contractor, and the list shall be provided on request to employees or their authorized representatives.

(e) The Contractor and subcontractor shall maintain the following records (regardless of

format, e.g., paper or electronic) of its compliance with this clause for not less than a period of three years from the date the records were created.

(1) Copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any employee meeting(s) at which the offers were extended, a summary of each meeting, a copy of any written notice that may have been distributed, and the names of the employees from the predecessor contract to whom an offer was made.

(2) A copy of any record that forms the basis for any exemption claimed under this part.

(3) A copy of the employee list provided to or received from the contracting agency.

(4) An entry on the pay records of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division to each employee, the period covered by such payment, and the date of payment, and a copy of any receipt form provided by or authorized by the Wage and Hour Division. The Contractor shall also deliver a copy of the receipt to the employee and file the original, as evidence of payment by the Contractor and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(f) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause (52.233-1) of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: The Contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract. The Contracting Officer will refer any employee who wishes to file a complaint, or ask questions concerning this contract clause, to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. Contact email: displaced@dol.gov.

(g) The Contractor shall cooperate in any review or investigation by the Department of Labor into possible violations of the provisions of this clause and shall make such records requested by such official(s) available for inspection, copying, or transcription upon request.

(h) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the Contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the Contractor or its subcontractors, as provided in Executive Order 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

(i) The Contractor shall take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the

imposition of sanctions for noncompliance. However, if the Contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the Contractor may request that the United States, through the Secretary of Labor, enter into such litigation to protect the interests of the United States.

(j) The Contracting Officer will withhold, or cause to be withheld, from the prime Contractor under this or any other Government contract with the same prime Contractor, such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator, the Administrative Law Judge, or the Administrative Review Board, that there has been a failure to comply with the terms of this clause and that wages lost as a result of the violations are due to employees or that other monetary relief is appropriate. If the Contracting Officer or the Administrator, upon final order of the Secretary, finds that the Contractor has failed to provide a list of the names of employees working under the contract, the Contracting Officer may, in his or her discretion, or upon request by the Administrator, take such action as may be necessary to cause the suspension of the payment of contract funds until such time as the list is provided to the Contracting Officer.

(k) *Subcontracts.* In every subcontract over the simplified acquisition threshold entered into in order to perform services under this contract, the Contractor shall include a provision that ensures—

(1) That each subcontractor will honor the requirements of paragraphs (a) through (b) of this clause with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor Contractor and its subcontractors;

(2) That the subcontractor will provide the Contractor with the information about the employees of the subcontractor needed by the Contractor to comply with paragraphs (c) and (d) of this clause; and

(3) The recordkeeping requirements of paragraph (e) of this clause.

(End of clause)

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 120425420-2420-01]

RIN 0648-BB92

Fisheries of the United States; National Standard 1 Guidelines

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking; request for comments;

consideration of revision to National Standard 1 Guidelines.

SUMMARY: NMFS issues this advance notice of proposed rulemaking (ANPR) to provide background information and request public comment on potential adjustments to the National Standard 1 Guidelines, one of 10 national standards for fishery conservation and management contained in Section 301 of the Magnuson Stevens Fishery Conservation and Management Act. Since the guidelines were last updated in 2009, a number of issues regarding the application of the guidelines were identified by stakeholders and managers that may warrant their revision. This action provides the public with a formal opportunity to comment on the specific ideas mentioned in this ANPR, as well as any additional ideas and solutions that could improve provisions of the National Standard 1 Guidelines.

DATES: Written comments regarding the issues in this ANPR must be received by 5 p.m., local time, on August 1, 2012.

ADDRESSES: You may submit comments on this document, identified by "NOAA-NMFS-2012-0059", by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal: www.regulations.gov. To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter "NOAA-NMFS-2012-0059" in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.

- **Fax:** 301-713-1193, Attn: Wesley Patrick.

- **Mail:** Wesley Patrick; National Marine Fisheries Service, NOAA; 1315 East-West Highway, Room 13436; Silver Spring, MD 20910.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to another address or individual, or received after the end of the comment period, may not be considered. All comments received are part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in

the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Wesley Patrick, Fisheries Policy Analyst, National Marine Fisheries Service, 301-427-8566.

SUPPLEMENTARY INFORMATION:

Background

Section 301(a) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) contains 10 national standards for fishery conservation and management. Any fishery management plans (FMP) prepared under the MSA, and any regulation promulgated pursuant to the MSA to implement any such plan, must be consistent with these national standards. National Standard 1 (NS1) of the MSA states that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield (OY) from each fishery for the U.S. fishing industry.

Section 301(b) of the MSA requires that the Secretary establish advisory guidelines (which shall not have the force and effect of law), based on the national standards to assist in the development of fishery management plans. Guidelines for NS1 are codified in 50 CFR 600.310. NMFS revised the NS1 Guidelines on January 16, 2009 (74 FR 3178) to reflect the requirements enacted by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 for annual catch limits (ACLs) and accountability measures (AMs) to end and prevent overfishing.

From 2007 to 2012, the 46 Federal FMPs have been amended to implement ACLs and AMs to end and prevent overfishing. In the course of this work, a number of issues regarding the application of the NS1 Guidelines were identified that may warrant their revision. NMFS seeks public comments on these and any other issues related to NS1:

1. **Stocks in a fishery.** The MSA requires that Councils develop FMPs for fisheries that require "conservation and management" (MSA 302(h)(1)). The MSA provides the Councils with wide latitude in defining the scope of an FMP. Some FMPs include a relatively small number of species, focusing on the primary target species of the fishery. In other FMPs, a much broader range of species are included. The NS1 Guidelines establish and define Ecosystem Component (EC) species and

provide that EC species may be included in the FMP but are not considered stocks in the fishery and thus are not required to have biological reference points or ACLs. There has been considerable discussion about the criteria for classifying EC species and the utility of the EC species concept. Thus, revision of the guidance may be warranted to further describe criteria for classifying stocks in a fishery and EC species.

2. **Overfishing and multi-year impacts.** The current NS1 Guidelines provide that overfishing must be determined either by comparing catch to the overfishing limit (OFL) or by comparing fishing mortality to the maximum fishing mortality threshold (§ 600.310 (e)(2)(ii)(A)). Overfishing determinations are made for the most recent year for which there is information. Stakeholders have expressed interest in exploring alternative definitions of overfishing that would take a longer, multi-year view of the impact of fishing on the stock's ability to produce maximum sustainable yield (MSY).

3. **Annual catch limits and optimum yield.** In some fisheries, implementation of the guidance on acceptable biological catch (ABC) control rules, ACLs, and AMs has resulted in real or perceived reductions in catch. Questions have been raised about the relationship between ACLs and the objective of achieving the OY for a fishery. The MSA defines OY as being reduced from MSY to account for relevant economic, social, or ecological factors, and states that OY in an overfished fishery must provide for rebuilding the fishery (MSA 3(33)). There is interest from stakeholders in improving guidance to better address economic, social, and ecological considerations in the establishment of OY and to more clearly describe the relationship between ACL and OY.

4. **Mixed-stock fisheries and optimum yield.** Management of mixed-stock fisheries is challenging, because some stocks are relatively more abundant or are more or less susceptible to overfishing than others. The MSA requires that overfishing be prevented, and that the OY for a fishery provide for rebuilding overfished stocks. Nonetheless, some stakeholders believe that ACL and rebuilding requirements prevent them from achieving OY of healthy stocks. Further guidance on how OY should be specified to balance the multiple considerations in mixed-stock fisheries may be warranted.

5. **Scientific uncertainty and management uncertainty.** The NS1 Guidelines identify two types of uncertainty that should be addressed

when setting catch limits and accountability measures: Scientific uncertainty and management uncertainty (§ 600.310 (f)). Scientific uncertainty is related to the uncertainty of calculating the true OFL, and is addressed by a Council's Scientific and Statistical Committee (SSC) by setting ABC below the OFL. Management uncertainty is the uncertainty of controlling catch so that it does not exceed the ACL, and is addressed when setting AMs and in setting an annual catch target below the ACL. Some stakeholders believe that consideration of both scientific and management uncertainty causes ACLs to be overly precautionary. Further clarification on the consideration of scientific and management uncertainty may be warranted.

6. *Data poor stocks.* Stocks without sufficient data to conduct a formal scientific stock assessment are considered to be data poor stocks. Establishing appropriate ACLs for data poor stocks can be challenging. The experience of the Councils and their SSCs in implementing ABCs and ACLs for data poor stocks may provide valuable information on which to base improvements in the NS1 Guidelines for data poor stocks.

7. *Acceptable biological catch control rules.* The NS1 Guidelines require a Council to establish an ABC control rule for each stock and stock complex, based on scientific advice from its SSC (§ 600.310 (f)). ABC control rules are a specified approach to setting the ABC that addresses scientific uncertainty, and incorporate a policy decision on the acceptable level of risk that overfishing might occur. A variety of ABC control rules have been implemented and a review of those control rules could lead to improvements in the NS1 Guidelines. In addition, for some fisheries there is interest in implementing provisions that carry over unharvested allocations from one year to the next. Guidance may be needed on how to consider carry-over within ABC control rules.

8. *Catch accounting.* Questions have been raised by managers about the types

of "catch" that must be considered within the ABC and ACL, particularly in regard to catch resulting from exempted fishing permits and scientific research activities. The definition of catch in the NS1 Guidelines includes 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. In the final rule response to comment number 35 (74 FR 3718; January 16, 2009), NMFS stated that this definition would include allocations for scientific research and mortality from any other fishing activity. Additional guidance may be needed to clarify how to account for all sources of mortality (e.g., bycatch, scientific research catch, etc.) when establishing ABCs and ACLs.

9. *Accountability measures.* AMs are management controls to prevent ACLs from being exceeded, and to correct or mitigate overages of the ACL if they occur. AMs must be tailored to the specific needs of a fishery, and are key to the success of ACL systems in ending and preventing overfishing. NMFS invites comments on the guidance for AMs.

10. *ACL exceptions.* Under the MSA, stocks that have a life cycle of approximately 1 year and stocks subject to international agreements are not required to have ACLs. The NS1 Guidelines describe that the life cycle exception applies to "a stock for which the average length of time it takes for an individual to produce a reproductively active offspring is approximately 1 year and that the individual has only one breeding season in its lifetime" (§ 600.310 (h)(2)(i)). The NS1 Guidelines also describe that the international agreement exception applies to stocks that are subject to "any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is party" (§ 600.310 (h)(2)(ii)). NMFS invites comments on the guidance pertaining to these exceptions from the ACL requirements.

11. *Rebuilding progress and revising rebuilding plans.* The current NS1

Guidelines address how NMFS should respond if a stock reaches the end of its rebuilding plan and is not fully rebuilt, or its rebuilding status is unknown. However, the guidelines do not address the situation that occurs during the course of a rebuilding plan when rebuilding progress is determined to be inadequate. Inadequate progress can result from a number of factors, including:

a. Management measures that do not adequately control the fishery.

b. Environmental factors that limit stock growth.

c. Significant changes in the rebuilding target (Bmsy) resulting from a new stock assessment. NMFS intends to improve guidance on evaluating the progress of stocks in rebuilding plans and on revising the rebuilding plans in these situations.

Public Comments

To help determine the scope of issues to be addressed and to identify significant issues related to this action, NMFS is soliciting written comments on this ANPR. The public is encouraged to submit comments related to the specific ideas mentioned in this ANPR, as well as any additional ideas and solutions that could improve provisions of the NS1 Guidelines. In addition to considering revisions to the NS1 Guidelines, NMFS will consider whether it may be more appropriate to address some topics in technical guidance reports or policy directives than to change the guidelines codified at 50 CFR 600.310. NMFS welcomes comment on the appropriateness and utility of additional technical guidance reports and policy directives.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 27, 2012.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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