

# **Magnuson Stevens Act Reauthorization Scoping Comments**

## **Sierra Club National Marine Wildlife and Habitat Committee**

**1 April 2007**

### **GENERAL COMMENTS**

The National Marine Fisheries Service (NMFS) is seeking comments on the process for developing regulations to implement the recently adopted reauthorization of the Magnuson-Stevens Fishery Management Act (MSA) in general and on the specific measures relative to National Standard 1 (NS1). The following are the comments of the National Marine Wildlife and Habitat Committee Marine Wildlife and Resources Committee of the Sierra Club.

The rulemaking should result in clear, strong rules that ensure catch levels are based on unbiased scientific advice, end overfishing, allow timely rebuilding of overfished stocks, and hold managers accountable. These new legal requirements are critical. They are necessary because too often councils do not set annual catch limits, and when they do, the levels have been set without regard to scientific advice and have resulted in overfishing, harming fish and fishermen alike. Accountability is also lacking and the new rules reflect the need to create accountability in fisheries management.

Developing an environmental impact statement ensures a thorough evaluation of the new rule and development of alternatives for decision makers and the public to consider. Most important, an environmental impact statement ensures formal opportunities for the public to review and comment on the alternatives and for NMFS to formally respond to those comments.

To the extent possible, numeric annual catch limits should be required for each federally managed stock in a fishery management plan. Without a yardstick, it is impossible to tell whether overfishing is occurring.

Annual catch levels should account for projected estimates for landings and discard mortality from all sectors. The overfishing level should account for all fishing mortality, including landings and discards. The definition of overfishing should be changed to indicate that overfishing occurs whenever the total catch – across sectors, including landings and discard mortality – exceeds the overfishing level. The catch level, whether expressed in pounds or total number of fish, must be in the same units as the overfishing level to allow for simple and straightforward monitoring between catch and the overfishing level.

The reauthorized MSA requires councils to develop annual catch limits for each managed fishery that may not exceed the recommendations of either its science and statistical committee or a peer review process. This will ensure that the resulting catch levels are grounded in the best science possible and are sufficiently precautionary to avoid overfish-

ing and promote economic and ecologic sustainability. No non-numeric catch levels should be permitted.

The new regulations should be clarified to ensure that scientific advisors have demonstrated scientific expertise in fisheries science, marine ecology, economics, or social science through advanced academic training and publication of peer-reviewed scientific literature. Councils should appoint members who do not have any direct financial interest, and are not employed by anyone with a direct financial interest, in any fishery. The peer review process should be clarified to include minimum qualifications of reviewers, ensure that reviewers have relevant experience, and that reviewers are independent and have no financial interest.

Future management success using annual catch limits depends on such limits being set sufficiently below the overfishing level to avoid exceeding the overfishing level. This is a common sense approach that should be clearly linked to data quality. The poorer the data, the greater the buffer is necessary.

NMFS' own technical guidance notes that setting catch levels for stock complexes, assemblages, or other groupings runs a high risk of allowing overfishing to occur on an individual stock within the assemblage. The goal should be to obtain adequate information to set annual catch levels for all marine fish stocks managed by the federal government.

The rulemaking should remove the mixed stock exception that is currently in NS 1 because such an exception is inconsistent with the law's mandate to prevent overfishing. The mixed stock exception encourages unsustainable catch levels for depleted stocks thereby facilitating perpetual overfishing. The NS 1 rules should prohibit overfishing on all fish stocks.

In any business, managers are held accountable for the company's health. Yet, in fishery management no one is held accountable when management actions result in overfishing and oftentimes the same practices are allowed to continue year after year. The new accountability measures should send a clear, strong message: do not allow overfishing to occur. If overfishing occurs, managers should have multiple tools available to correct it during the fishing season.

To enhance accountability of Councils, all votes on catch limits and rebuilding plans, as well as on fishery management plans and amendments, should be roll call votes to provide for accountability. This will also provide for a better record of abstentions for conflict of interest

The rule should not eliminate or modify the existing 10-year rebuilding requirement. Congress clearly considered and rejected changes to this requirement in the reauthorization process. The Congress also added language to overturn the federal court decision which allowed overfishing during a rebuilding plan. The success of this provision in restoring fish stocks and fishing opportunities was demonstrated in a recent *Science* article. The new rule should fortify the existing law's requirement to restore overfished stocks "as soon as

possible,” specifically excluding increased catch of overfished stocks during rebuilding, for example.

One of the overarching recommendations of President Bush’s Commission on Ocean Policy called for fisheries management to move toward a more ecosystem-based management approach. Such an approach would provide direct benefits to the ecosystem and create a better mechanism for addressing conflicts between socioeconomic and biological goals. The rule should take a first step toward this goal by clearly identifying management of prey fish populations, which form the base of the ocean food chain, as distinct and fundamentally different from standard fishery management. The rule should develop an alternative process to ensure the sustainability of these species that are critical to the health of ocean fish and wildlife.

## **SPECIFIC SCOPING COMMENTS**

### **The role of the SSC and other peer review processes in setting ACLs and AMs**

The Scientific and Statistical Committees (SSCs) and other peer review processes can be extremely useful in providing the best possible stock assessment and economic impact information to the Councils, but should not be seen as a substitute for the judgment of the Councils in actually setting Annual Catch Levels (ACLs).

The model established by the Fishery Conservation and Management Act (FCMA) and its successor reauthorizations is an appointed body (the Council) taking scientific input (from the SSC) and industry input (from the advisory committees) and generating the best possible fusion. If the policy - setting aspect of that mission is pushed back onto the SSC it merely puts the SSC members under the pressure that should be reserved for the Council members and could influence the scientific quality of the SSC’s advice. Every effort should be made to assure the best possible quality of advice from the SSC and to assure that the Councils pay appropriate attention to that advice when setting ACLs.

### **Variability in data currently available for each stock (e.g., data rich, data poor, and stocks with data quality falling between data rich and data poor)**

Specifications of Optimum Yield (OY), ACL, and related numbers must be made in light of the quality of available data, with an increased conservation bias with decreased data quality. However, there are few, if any, “data rich” stocks. Hence, specification setting must be done with an eye toward uncertainty, even if measuring the extent of uncertainty may not be feasible.

### **Overfishing Issues**

NMFS posed a series of issues in the *Federal Register* notice that relate to questions of preventing overfishing, adjustment mechanisms should catch exceed target levels, etc. The very fact that these questions were raised is evidence that a full EIS must be done on the regulations that are to implement the new MSA language. Issues raised included:

- Setting ACLs for stocks with unknown status
- Circumstances in which a numerical ACL can not be set for a stock, and in such situations, recommendations for adequate and appropriate alternatives to setting a numerical ACL (e.g., prohibitions)
- Setting ACLs for stock complexes, stock assemblages, and similar stock groupings
- Variability in the accuracy of management approaches in achieving target fishing levels
- Setting a buffer between ACL and Overfishing Level (OFL) to prevent overfishing, and how to determine the size of the buffer needed
- Establishing the appropriate probability that an ACL will prevent overfishing for a stock
- Establishing recommendations for in season management authority and methods to be used as AMs to prevent overfishing
- Limiting the extent of overfishing, should it occur
- Establishing corrective actions to ensure accountability in a subsequent year for an overage of the OFL for a stock in a previous year
- Establishing AMs for various sectors of a stock, if an ACL is subdivided for a stock, and the need to still prevent exceeding the overall OFL for the stock

The best possible management system would assure that fishing mortality was managed within a year so actual catch in that year does not exceed allowed levels. However, there must also be provision for adjustments in year two for overages in year one. The key point is that the monitoring and adjustment processes must be identified in advance in the fishery management plan and implementing regulations so that corrective actions may be taken without delay.

For purposes of these scoping comments, the critical point is that the above matters require great care in crafting the implementing regulations, so a full EIS process is needed to develop the regulations implementing the MSA reauthorization legislation.

## **COMMENTS ON PRELIMINARY ACL AND AM ALTERNATIVES**

### **No action. Do not publish ACL and Annual Mortality (AM) guidelines.**

“No action” is a mandatory EIS alternative and has no utility in the current case. Without regulations (“guidance”) the Councils could submit virtually anything and FMP approval would be more of a political process than ever.

### **Alternative 2. Develop ACL and AM guidelines that provide performance standards that ACLs and AMs must meet, but do not provide guidance on specific mechanisms.**

The notion of performance standards assumes that standards can be set and compliance / success measured. This can work with such things as gasoline consumption by motor vehicles, because standards can be set, tests run, and results measured immediately. NMFS has already set the stage for failure of this notion for fisheries by raising the ques-

tion of data availability for fisheries matters (data poor species). The simple fact is measurements of success (if “success” could be defined) are virtually impossible in the near term, even if there were data rich species. How many year classes would need to recruit to a fishery for success of a particular strategy to be determined?

**Alternative 3. Develop ACL and AM guidelines that provide performance standards that ACLs must meet, and develop ACL and AM guidelines that provide specific guidance on one or more mechanisms to implementing ACLs and AMs that NMFS considers to meet the statutory requirement and the standards for Secretarial approval.**

The problem with this alternative is not only the measurement problems associated with Alternative 2, but the thought that the “specific guidance” on implementation mechanisms would directly lead to doing it NMFS’ way for Secretarial approval. There would be no room for innovation and, more troubling, NMFS may not have answers for all fisheries. If NMFS had the answers, would they not have suggested or imposed them years ago? Hence, at best, the result would be delay while NMFS figured out the implementing mechanisms.

***Proposed Alternative 4. Develop ACL and AM guidelines that provide performance standards that ACLs must meet, and develop ACL and AM examples that provide specific on one or more mechanisms to implementing ACLs and AMs that NMFS considers to meet the statutory requirement and the standards for Secretarial approval.***

This is like Alternative 3 but changes what NMFS might approve from “guidance” to “examples”, the “guidance” implies approvability criteria, while “example” is intended to imply suggestions. Hence, this alternative could be considered superior to Alternative 3 because it gives the Councils some freedom in devising strategies.

Additionally, the regulations must require that any deviation of OFL, ACL and/or AM from Maximum Sustainable Yield (MSY) be fully explained and justified. This would tie the whole system back to the basic biological benchmark of the MSA process.

## **Process Comments**

The *Federal Register* notice introduces a new vocabulary and set of acronyms into the fishery management process. This gives rise to the question of how the processes engendered by the reauthorization legislation fit within the dogma of the MSA as it existed prior to the reauthorization. Is the new process parallel to the old, does it fit within, or does it replace anything? It is suggested that a first order of business, before formulating alternatives, would be to flow chart the process with the requirements instituted by the reauthorization integrated.

Some of these questions are identified in the “Issues for Developing Guidance for ACLs and AMs” section of the *FR* notice. However, unless there is a clear pathway integrating

the MSA with the reauthorization amendments, there is the possibility that a relationship might have been missed. The purpose of raising this basic question is to reduce the probability of successful appeal of an FMP rebuilding strategy later. In simple terms, the process is becoming more and more complicated with each reauthorization, and each complication, while introduced for the best purposes, also potentially creates a loophole to be exploited.

## **CONCLUSIONS**

Given the time that passes between MSA reauthorizations, it is critical that the regulations implementing any reauthorization are as good as they can be. It is understood that NMFS is under a statutory time schedule to promulgate at least some of the regulations, but the best way to do that is within the context of a full EIS since it will allow fuller participation by all stakeholders as they are being developed rather than the possibility of delays generated by opposition to unilateral NMFS action.