



Marine Conservation Alliance

promoting sustainable fisheries to feed the world

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March 11, 2010

Alyeska Seafoods

Alaska Crab Coalition

Alaska Whitefish Trawlers
Association

Alaska Groundfish Data Bank

Alaska Pacific Seafoods

Alaska Scallop Association

Aleutian Pribilof Island
Community Development
Association

Akutun, Atka, False Pass, Nelson Lagoon, Nikolski, St. George

At-Sea Processors Association

Bristol Bay Economic
Development Corp.

Aleknagik, Clark's Point, Dillingham, Eggevik, Ekwok, Ekwook, King Salmon, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Toqtiak, Twin Hills, Ugashik

Central Bering Sea Fishermen's
Association

St. Paul

City of Unalaska

Coastal Villages Region Fund
Chefornak, Chevuk, Eek, Goodnews Bay, Hooper Bay, Kipruuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nighthute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tunutuliak, Tunurak

Groundfish Forum

High Seas Catchers
Cooperative

Icicle Seafoods

Mothership Group

PV Excellence
PV Ocean Phoenix
PV Golden Alaska

Norton Sound Economic
Development Corporation
Brevig Mission, Diomedes, Elm, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, White Mountain

Pacific Seafood Processors
Association

Alaska General Seafoods
Alyeska Seafoods, Inc.
Golden Alaska Seafoods, Inc.
North Pacific Seafoods, Inc.
Peter Pan Seafoods, Inc.
Premier Pacific Seafoods, Inc.
Supreme Alaska Seafoods, Inc.
Trident Seafoods Corp.
UniSea Inc.
Westward Seafoods, Inc.

Prowler Fisheries

Trident Seafoods Corp.

United Catcher Boats

Akutun Catcher Vessel Assoc.
Arctic Enterprise Assoc.
Mothership Fleet Cooperative
Northern Vector Fleet
Peter Pan Fleet Cooperative
Unalaska Co-op
UniSea Fleet Cooperative
Westward Fleet Cooperative

U.S. Seafoods

Waterfront Associates

Western Alaska Fisheries, Inc.

Yukon Delta Fisheries
Development Association

Alakanuk, Emmonak, Grayling, Kotik, Mountain Village, Nunam Iqua

Mr. William Michaels
National Marine Fisheries Service
Office of Science and Technology
F/ST4
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Michaels,

Re: 0648-AW62

On behalf of the Marine Conservation Alliance (“MCA”), I am pleased to submit comments regarding the proposed rule amending the guidelines for implementation of National Standard 2 of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). 74 Fed. Reg. 65724 (Dec. 11, 2009).

MCA was established in 2001 by fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses to promote the sustainable use of North Pacific marine resources by present and future generations based on sound science, prudent management, and a transparent, open public process. MCA supports research and education about the fishery resources of the North Pacific and seeks practical solutions to resource issues to protect the marine environment, promote sustainable fisheries, and minimize adverse impacts on the North Pacific fishing community. Our members collectively represent approximately 70% of the production of North Pacific fisheries off Alaska, which in turn accounts for over half of this nation’s fishery production.

In a letter dated December 17, 2008 (Attached) MCA responded to an Advance Notice of Proposed Rulemaking (“ANPR”) regarding possible revisions to the guidelines for implementing National Standard 2 of the MSA. We offered several suggestions for improving the proposal at that time, and, most importantly, cautioned against adoption of revised guidelines that could disrupt the successful approach used in the North Pacific for incorporating science into fishery management decisions. In our comments, we described the detailed and transparent process of developing scientific advice to the North Pacific Fishery Management Council (“NPFMC”), from stock assessment scientist, through Plan Team review and publication of the Stock Assessment and Fishery Evaluation (“SAFE”) documents, to final peer review by the Council’s Scientific and Statistical Committee (“SSC”). This is a rigorous and open process, and our concerns are that the Proposed Guidelines will undermine this successful

scientific review program rather than strengthen it. Specifically:

1. The Proposed Guidelines undermine the role of the SSC set forth at 16 U.S.C. 1852(g)(1)(A) as the peer review body for the Council. Consistent with this provision of law, the Proposed Guidelines should be clear that the SSC is the primary and final peer reviewer for scientific information brought before the Council. It is through this process that a determination of what constitutes the “best scientific information available” (BSIA) is made unless a Council, in its sole discretion, wishes to establish a supplemental peer review pursuant to the provisions of 16 U.S.C. 1852(g)(1)(E);
2. The Proposed Guidelines should follow the intent and letter of the MSA and be clear that each Council, working with the Secretary, will determine (a) if any optional external peer review of specific scientific issues is warranted, and (b) the terms of reference, and procedures, for any such optional peer review. The Proposed Guidelines must clarify that the terms for peer review in the proposed rule are for this optional external review, and not the SSC in its role as primary peer reviewer. The SSC is a statutorily established body under the MSA which provides for its composition and which sets forth disclosure and recusal standards; and
3. The Proposed Guidelines imply that the peer review process could apply to policy matters, including fishery management decisions, rather than scientific issues, thereby undermining the role of the Councils as primary policy making bodies. Establishing a parallel policy making process is contrary to the MSA and should be eliminated from the Proposed Guidelines. The proper role of peer review lies with purely scientific issues, not policy determinations.

In addition to the above concerns, there are several issues regarding the optional external peer review that need additional work, including conflict of interest provisions, timing of the optional peer review, selection of peer reviewers, preparation of SAFE documents, and other provisions. These are discussed more fully below.

Purpose of the Proposed Rule

The MSA sets forth ten National Standards with which fishery management plans shall be consistent. 16 U.S.C. §1851(a). Section 301(b) of the MSA further provides that the Secretary of Commerce (“Secretary”) “shall establish advisory guidelines (which shall not have the force and effect of law)” that are based on the National Standards in order to assist in the development of fishery management plans. 16 U.S.C. §1851(b). Thus, the guidelines being proposed (“Proposed Guidelines”), if finalized, are advisory and without the force and effect of law.

At several points, as discussed below, the Proposed Guidelines state what a Regional Fishery Management Council (“Council”) “must” do or what “must” be in a document. Use of the word/concept “must” is inconsistent with Section 301(b) of the MSA and should be struck from the Proposed Guidelines in every instance.

What Constitutes the Best Scientific Information Available?

National Standard 2 provides that conservation and management measures shall be based on the best scientific information available. 16 U.S.C. §1851(a)(2). Courts that have considered the issue of what constitutes the best scientific information under the MSA have found it extraordinarily difficult to articulate a definitive standard or to establish a bright line test. Instead, courts have engaged in a circumstance-specific analysis to determine if National Standard 2 has been satisfied.

Nevertheless, section 600.315(a)(6) of the Proposed Guidelines states that any evaluation of whether the best scientific information has been used “must be based” on seven factors: relevance, inclusiveness, objectivity, transparency and openness, timeliness, verification and validation, and peer review, as appropriate. MCA believes the standards of relevance, inclusiveness, objectivity, timeliness, and verification and validation are reasonable principles. MCA has questions about the use of “peer review” in this section. For example, if “peer review” in this context refers to the review of scientific information by the SSC as a Council’s primary peer review body, then this requirement may be appropriate. However, MCA does not believe that external peer review, outside the normal SSC process, should be a separate and possibly mandatory standard for ensuring the use of the best scientific information. Indeed, the MSA makes such peer review discretionary by providing that each Council “may” establish its own peer review process. 16 U.S.C. §1802(g)(1)(E). To the extent the Proposed Guidelines imply that only externally peer reviewed data can be used by a Council, the Proposed Guidelines are contrary to statute. Therefore, MCA recommends that external peer review (that done outside the SSC process) not be included as a separate element for establishing what constitutes the best scientific information but, consistent with the MSA, should be an optional tool for any of the Councils, and included as an option within the standard of verification and validation. Councils should be encouraged to use this optional tool as they deem appropriate, but especially in circumstances where there is significant controversy regarding scientific information on which decisions will be based.

The Proposed Guidelines state that transparency and openness are required elements for determining whether the best scientific information has been utilized. The transparency and openness standard established in the Proposed Guidelines states “the public should have access to each stage in the development of scientific information, from data collection to analytical monitoring, to decision making. Public comment should be solicited at appropriate times during the development of scientific information.” Proposed section 600.315(a)(6)(iv). This language suggests that for information developed by a researcher to qualify as the best scientific information, a researcher must have allowed general public comment on all phases of (1) his or her research design, (2) project implementation, and (3) data analysis.

The first issue that arises with respect to proposed section 600.315(a)(6)(iv) is whether comments by the general public, most of whom do not have advanced and specialized scientific degrees, will be constructive from an analytical scientific perspective. Research design and implementation are areas of technical expertise that may or may not benefit from such comment. Judgment needs to be exercised here to ensure that the process does not become so cumbersome as to delay or otherwise inhibit the scientific process or to politicize the research itself. In this

regard, MCA believes the nature and extent of public comment should be reconsidered.

A second and equally important issue is if public input is a factor in deciding what is the best scientific information under the MSA, why would it not also be a factor under other statutes that have a best scientific information standard such as the Endangered Species Act (“ESA”)? For example, NMFS is preparing a biological opinion under the ESA regarding the impact of fishing practices on Steller sea lions. It would be an understatement to note that the preparation of that opinion, including the scientific analyses relied upon in that opinion, utterly fails to meet the transparency and openness standard proposed to be established in the National Standard 2 guidelines. If transparency and openness is the standard by which we are to judge what constitutes the best scientific information, the immediate question is why is such a standard to be applied only under the MSA and not to statutes such as the ESA, Marine Mammal Protection Act, and National Environmental Policy Act?

Purpose of the Peer Review Process

The Proposed Guidelines at section 300.615(a)(6)(viii) provide that “[t]o the extent practicable, substantial fishery management alternatives considered by a Council should be peer reviewed.” The purpose of scientific peer review is to examine scientific data. It is not to review policy alternatives being considered by a Council. Nevertheless, this section, to which MCA strenuously objects, appears to contemplate the creation of a policy peer review process for evaluating the “substantial fishery management alternatives” being considered by a Council. The Proposed Guidelines appear to provide that a Council’s policy choices need to be peer reviewed under some parallel review process. Significantly, this parallel policy review process is included in proposed section 600.315(a)(6) setting forth the “principles” that “must” be used to evaluate whether the best scientific information has been used. This further suggests that any Council policy decision that is not peer reviewed is somehow not the best decision and can be challenged under National Standard 2. For NMFS to use National Standard 2 guidelines to establish a parallel policy review process to second guess the Council is arbitrary, capricious, and contrary to law. Congress vested the Councils with the authority to make the often difficult decisions of how best to manage fisheries. NMFS cannot use the National Standard 2 guidelines to amend the MSA to create some adjunct or parallel policy review process.

The Process of Peer Review

Section 600.315(b)(3) of the Proposed Guidelines provides the peer review process should be “transparent” in order to allow the public “full and open access” to the entire process. This paragraph requires that the date, time, and location of the peer review meeting is to be announced 14 days in advance in order “to allow public comments” during the peer review panel meeting. Although section 600.315(b)(1)(i) of the Proposed Guidelines states a peer review can take many forms including “individual letter or written reviews, and panel reviews,” section 600.315(b)(3) appears to preclude any individual review, instead requiring a committee process including a public hearing. Indeed, section 600.315(b)(3) implies that any debate and discussion by the peer review panel must be held in public, perhaps with conclusions offered in the form of motions to be debated and adopted by majority vote. For a panel peer review such a process may be appropriate. However, although this may be one manner by which a peer review might be conducted, the Proposed Guidelines should not specify or imply that this is the only acceptable

peer review process. Thus, MCA recommends that the Proposed Guidelines be amended to provide that the process by which the peer review is conducted may be individual or collective. That said, MCA does concur that the identity of the reviewers, the process used, and the results of the peer review should be made public.

Selection of Peer Reviewers

Section 600.315(b)(2) of the Proposed Guidelines provides that the selection of participants for a peer review must be based, among other things, on “a balance of viewpoints.” The Proposed Guidelines then state that peer reviewers “must be selected” based not only on their scientific expertise and experience, but also based on “a balance in perspectives.” MCA foresees a number of problems with this aspect of the Proposed Guidelines.

At the outset, and as discussed in the preceding section, the Proposed Guidelines imply that peer review of an issue can only be done by a committee simply because review limited to a single individual will never meet the standard for a “balance of perspectives.” A more fundamental issue is how one assures there is a “balance in perspectives.” First, who decides which perspectives merit inclusion on the peer review panel? One strong criticism of NOAA over the years has been the presumption that NOAA science is always right, and in many instances there has been concern that peer reviewers have been chosen to uphold that presumption. This criticism may be unfair, but it undermines the public’s faith in the scientific process and should be addressed. The Proposed Guidelines should include a process for selection of peer reviewers designed to eliminate this perception, which will in turn strengthen the public’s trust in the integrity of the peer review process.

Equally important, a balance of perspectives can only mean that those perspectives are balanced not only in the sense that each viewpoint is present, but also in the number of people on the panel with each perspective. Unless each perspective is represented by an equal number of people, the advice of the peer review panel becomes unbalanced by definition. For example, if the peer review panel has nine persons with one perspective and one person with the opposing perspective, balance has not been achieved given that a plausible result of such a peer review will be the statement that 90% of the peer review panel reached the same conclusion. Such a “stacking” of the peer review panel ensures an imbalance in perspective. Thus, the Proposed Guidelines must be amended to ensure a balance in perspectives regarding quality, number of perspectives, and number of reviewers.

This section of the Proposed Guidelines, when read with other sections, appears to be establishing a process requiring public hearings and testimony before a group with “a balance in perspectives” that is formed in order to review “substantial fishery management alternatives” being considered by a Council. As noted above, the creation of an alternative Council process under the guise of National Standard 2 guidelines violates the fundamental precepts and provisions of the MSA.

Selection of Peer Reviewers – Conflict of Interest

The Proposed Guidelines at section 600.315(b)(2)(ii) prohibit any person from serving on a peer review panel if that person has a conflict of interest. A conflict of interest is defined as a

financial or other interest including employer affiliations, consulting arrangements, grants, or contracts.

MCA submits that this limited definition of conflict of interest is inadequate in two respects. First, the definition of conflict of interest is framed exclusively in terms of financial interests. It fails to account for the fact that there is such a thing as an advocacy conflict of interest. Individuals affiliated in any way with an organization or entity advocating a particular policy or scientific position would also have a conflict of interest precluding service as a peer reviewer. An advocacy affiliation is just as much a judgment coloring factor as is a financial interest. Secondly, the Proposed Guidelines need to consider that any person who is or may be a recipient of any consulting agreement, grant, or contract from NMFS may have a conflict of interest in reviewing any data or scientific material prepared by NMFS. The Proposed Guidelines need to be amended to recognize these two factors.

The Proposed Guidelines in this section further provide that peer review responsibilities “should rotate” among qualified reviewers, although the Proposed Guidelines recognize a limited exception for essential expertise. MCA recommends that this section be revised to eliminate the presumption that past service on a peer review panel is a basis for exclusion from future service. The selection of peer reviewers should be based on expertise and qualifications exclusively.

Authority to Determine the Peer Review Process

The MSA provides that “[t]he Secretary and each Council may establish a peer review process for that Council...” 16 U.S.C. §1852(g)(1)(E). The Proposed Guidelines at 600.315(b)(1)(i) provide that the Secretary “and” the Council have the discretion to determine the appropriate peer review process for a specific information product. The issue that merits clarification is whether the Secretary has the authority to veto a peer review process and panel established by a Council or whether the Council may proceed as it deems appropriate subject to ultimate Secretarial review of the consistency of the fishery management plan with the MSA, the National Standards, and other applicable law. MCA submits the latter is the appropriate policy that should be codified in the Proposed Guidelines.

Relationship of the Scientific and Statistical Committee (“SSC”) to the Peer Review Process

The Proposed Guidelines at section 600.315(c) present several issues of concern. Paragraph (1) provides that SSC recommendations to the Councils “must” adhere to the standards set forth in section 600.315(a) of the Proposed Guidelines, including a peer review process. The Proposed Guidelines suggest that the SSC must have a peer review of all of its recommendations and that this peer review must comply with all of the peer review provisions set forth in the Proposed Guidelines. This is contrary to the provisions of the MSA establishing the SSCs and their terms of reference including disclosure and recusal. The Proposed Guidelines should be amended to eliminate any suggestion that SSC recommendations must be peer reviewed.

In making the preceding amendment, the Proposed Guidelines should also be changed to remove the implication that the SSC is not itself “balanced” with respect to scientific perspectives. In the case of the SSC established by the North Pacific Fishery Management Council (“NPFMC”), members meet the requirements of the MSA, and are generally limited to scientists employed by

the states, the federal government, international commissions, and universities. Thus, the question arises as to whether the SSC members, for example, the government members, are to be considered as having some “perspective” that needs to be balanced with other perspectives and, therefore, whether additional SSC members must be appointed. Section 600.315(c)(3) further provides that if the SSC itself or its individual members conduct or participate in a peer review, the SSC and its members must meet the conflict of interest standards set forth in the Proposed Guidelines. As noted above, the MSA already sets out terms of reference for the SSCs, including disclosure and recusal. These should be incorporated into the Proposed Guidelines, specific to SSC members, and the SSCs recognized as the primary peer review body for their respective Council subject to each Council’s use of the MSA’s discretionary external peer review.

Also, a strict reading of the Proposed Guidelines would appear to preclude any state or federal scientist who is an SSC member from reviewing data or other scientific materials prepared by the state or NMFS, as the case may be. As a general matter MCA agrees with this approach, although there may be specific instances where an exception may be warranted whereby an SSC member who is a state or NMFS employee with unique scientific qualifications would be part to the peer review process. The Proposed Guidelines should be amended accordingly.

In summary, to address these and other issues discussed above regarding the peer review process, MCA recommends that the Proposed Guidelines be amended to clearly specify that the SSC function as the primary peer review panel in all cases unless the Council decides otherwise. This would be consistent with the practice in the North Pacific where the SSC has provided the peer review for almost all the scientific analyses and information used by the NPFMC. The NPFMC SSC membership has a broad range of disciplines and a recusal process to ensure the integrity of its reviews. The elaborate peer review system created in the Proposed Guidelines is simply unnecessary as to the NPFMC.

Before leaving the SSC issue, MCA notes that section 600.315(c)(5) of the Proposed Guidelines provides that if the SSC makes a decision “inconsistent with the findings or conclusions of a peer review” then the SSC must justify its decision in writing. MCA has no objection to the principle that if the SSC elects to proceed with an outside peer review that the SSC explain its reasons for agreeing or disagreeing with the peer review panel. However, the structure of section 600.315(c)(5) clearly suggests that the peer review panel envisioned in the Proposed Guidelines is not just a scientific review entity, but is somehow an independent policy and review body with standing equal to that of the SSC and the Council. That policy and presumption in the Proposed Guidelines must be removed.

SAFE Report

Section 600.315(d)(3)(ii) of the Proposed Guidelines provides that each SAFE report is to include the recommendations and reports of the Council’s SSC regarding overfishing levels and acceptable biological catches. As noted in MCA’s December 17, 2008 comments on the ANPR, MCA believes this is an unnecessary step that has the potential for undermining the scientific process.

In the case of the NPFMC, advice on the status of stocks annual harvest specifications is based

on the work of the stock assessment program and the Plan Teams. It is the Plan Teams that meet and prepare the SAFE reports. These reports are usually large and detailed. They do go through a thorough and transparent review process as they are developed. They are not revised once published by the Plan Teams. Due to the timing of stock surveys and the preparation time for the assessment analyses, the final SAFE reports are generally available about two weeks in advance of the SSC and Council meeting where annual catch specifications are set for the following year. The SSC and Council meet concurrently, and it is at this time that the SSC provides its scientific advice to the Council after careful review of the SAFE reports.

The Proposed Guidelines describe the contents of the SAFE reports. Section 600.315(d). The issues identified in the Guidelines as required elements of any SAFE report overlap significantly with the issues to be analyzed by the SSC as it provides advice to its Council. Moreover, the description of the type of person who should be appointed to the SSC is strikingly similar to the identity of the individuals the Secretary may designate to develop the SAFE report. Section 302(g)(1)(C), 16 U.S.C. §1852, of the MSA provides that members of the SSC shall be federal employees, state employees, academicians, or independent experts with strong scientific or technical credentials and experience.

The overlap in function and type of membership that occurs is an important link between the Plan Teams, the SSC, and the NPFMC processes. It ensures that the individuals involved in the Plan Team and SSC have a broad range of disciplines, and come from institutions and agencies with expertise in the matters at hand. The topical areas are consistent, which is intended to ensure that the proper issues are covered. The end result is that the science process and its results incorporate the talents of several different individuals from the same discipline as well as individuals from different disciplines, thus promoting a robust scientific review of the data presented to the NPFMC.

In this framework, several layers of scientific review take place in the North Pacific, all in a transparent process. The SSC performs the final peer review in this scientific process by providing advice on overfishing limits, acceptable biological catch limits, and other ecosystem factors in its report to the NPFMC at the meeting where these limits are considered and are reflected in the SSC minutes. Throughout these proceedings the relevant documents and analyses are available to the public for comment, both at the SSC meetings and during NPFMC deliberations.

The Proposed Guidelines should track this process. Instead of requiring the SSC findings to be published in the SAFE report, MCA suggests that the Guidelines stipulate that each SSC be required to publish a report of its deliberations, and that this, along with the SAFE reports and the record of the Council deliberations, be published on each Council's website and be part of the official public record supporting the Council's recommendations to the Secretary for annual harvest specifications.

MCA also notes that section 600.315(d) of the Proposed Guidelines provides that a SAFE report is to summarize "the best scientific information available concerning the past, present, and possible future condition of the stocks [essential fish habitat], marine ecosystems, and fisheries being managed under Federal regulation." There are a couple of problems with this statement.

First, it appears that the Proposed Guidelines require that the SAFE report itself must be peer reviewed before it can be considered by a Council. MCA contends that this already occurs through the SSC process, and the Proposed Guidelines should be consistent with this practice, and not try to supplant the SSC as the peer review process for the SAFE reports.

The more fundamental problem with the provision in the Proposed Guidelines that each SAFE report will identify the best scientific information available is that it appears to make the SAFE Report, prepared by NMFS, the final arbiter of what constitutes the best scientific information that the Council may use. Since National Standard 2 requires the use of the best scientific information, is the intent and effect of the Proposed Guidelines that the SAFE report replaces the SSC in providing scientific advice to each Council? Such an interpretation is inconsistent with the MSA and with the preamble to the Proposed Guidelines that states “the SSCs are the scientific advisory bodies to the Councils.” 74 Fed. Reg. at 65726. The Proposed Guidelines need to be amended to clarify that a SAFE report is just that, a report, and that the scientific advisor to the Council, and the arbiter of what constitutes the best scientific information, is the SSC.

With respect to the contents of a SAFE report, the Proposed Guidelines contain the same provision found in the ANPR that a SAFE report shall include management measures necessary to rebuild an overfished stock. *See* section 600.315(d)(3)(B)(i). This could require scientists writing the SAFE report to anticipate all the potential tools and alternatives that a Council may use to address overfishing or rebuilding. In some cases, such as recommendations for setting overfishing limits or other biological parameters, this may be appropriate. But other management approaches may be highly allocative, such as trip limits or the use of quota share systems, and require the participation of a much broader audience. In these cases, consideration of such measures should be left to the Council process. Measures to address overfishing or rebuilding overfished stocks should be part of the process for developing a specific rebuilding plan for such stocks and should not be a requirement in the SAFE documents.

As a final comment, MCA would call NMFS’ attention to the February 2010 comments prepared by the NPFMC’s SSC on these Proposed Guidelines, as well as the proceedings of the National Workshop on Developing Best Practices for SSCs held in November, 2008. Both provide useful comments and insights that are relevant to improving these guidelines.

Conclusion

For the reasons set forth above, MCA believes the Proposed Guidelines need substantial revision. MCA urges NMFS to make these revisions before publishing any final guidelines. MCA would be pleased to meet with you or other NMFS officials at any time to discuss these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "David Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Benton

Attachment: MCA to NMFS ANPR National Standard 2 Guidelines, December 17, 2008



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Mr. William Michaels
NOAA Fisheries Service
Office of Science and Technology
1315 East West Highway, F/ST 4
Silver Spring, MD 20910

Dear Mr. Michaels:

Re: 0648-AW62

On behalf of the Marine Conservation Alliance ("MCA") I am pleased to submit comments regarding the Advance Notice of Proposed Rulemaking ("ANPR") with respect to possible rulemaking amending the guidelines for implementation of National Standard 2 of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). 73 Fed. Reg. 54312 (Sept. 18, 2008).

MCA was established in 2001 by fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses to promote the sustainable use of North Pacific marine resources by present and future generations – based on sound science, prudent management, and a transparent, open public process. MCA supports research and education about the fishery resources of the North Pacific, and seeks practical solutions to resource issues to protect the marine environment, promote sustainable fisheries, and minimize adverse impacts on the North Pacific fishing community.

The ANPR lists four areas on which the National Marine Fisheries Service ("NMFS") is seeking comments. MCA will respond to each of these areas in the sequence set forth in the ANPR.

STOCK ASSESSMENT AND FISHERY EVALUATION ("SAFE") REPORTS

The ANPR indicates that NMFS is considering revising the discussion of SAFE reports in the National Standard 2 Guidelines to require that any SAFE report include the scientific recommendations provided by the applicable Scientific and Statistical Committee ("SSC") established under the MSA. We believe this is an unnecessary step that has the potential of undermining the scientific process.

Pursuant to sections 302(g)(1)(A) and (B) of the MSA, 16 U.S.C. § 1852(g)(1)(A) and (B), each Regional Fishery Management Council ("RFMC") shall establish an SSC which shall provide its respective RFMC ongoing scientific advice regarding fishery management decisions. The MSA also provides that each SSC is to provide advice regarding the health and status of the fish stocks at issue, as well as an analysis of the economic and social impacts of management measures. 16 U.S.C. § 1852(g)(1)(B).

In the case of the North Pacific Fishery Management Council ("Council"), advice on annual harvest specifications is based upon the work of the stock assessment program and

the Plan Teams. It is the Plan Teams that meet and prepare the SAFE reports. These reports are usually very large and detailed. They are not revised once they are published by the Plan Teams. Due to the timing of stock surveys and the preparation time for the assessment analyses, the final SAFE reports are generally available about two weeks in advance of the SSC and Council meeting where annual catch specifications are set for the following year. The SSC and Council meet concurrently, and it is at this time that the SSC provides its scientific advice to the Council after careful review of the SAFE reports.

The National Standard 2 Guidelines describe the contents of the SAFE reports. The issues identified in the Guidelines as required elements of any SAFE report overlap significantly with the issues to be analyzed by each SSC as it provides advice to its RFMC. The SAFE reports are to include information concerning the biological conditions of fish stocks, the economic and social condition of fishermen and associated communities, and consideration of the associated marine environment and ecosystem factors. 50 C.F.R. § 600.320(e)(1).

It should also be noted that the description of the type of person who should be appointed to the SSC is strikingly similar to the identity of the individuals the Secretary may designate to develop the SAFE report. Section 302(g)(1)(C), 16 U.S.C. § 1852(g)(1)(C), of the MSA provides that members of the SSC shall be federal employees, state employees, academicians, or independent experts with strong scientific or technical credentials and experience. Similarly, the National Standard 2 Guidelines provide that in preparing the SAFE report, the Secretary or Council may utilize any combination of talent from Council, state, federal, university, or other sources. 50 C.F.R. § 600.320(e)(1)(i).

The overlap that occurs is an important link between the Plan Teams, the SSC, and the Council processes. It ensures that the kind of individuals involved in the Plan Team and SSC have a broad range of disciplines, and come from institutions and agencies with expertise in the matters at hand. The topical areas are consistent which is intended to ensure that the proper issues are covered. The end result is that the science process and its results incorporate the talents of several different individuals from the same discipline as well as individuals from different disciplines, thus promoting a robust scientific review of the data presented to the Council.

In this framework, several layers of scientific review take place in the North Pacific, all in a transparent process. The SSC provides the final peer review in this scientific process, providing advice on overfishing limits and acceptable biological catch limits in its report to the Council. These recommendations are in the report made to the Council at the meeting where these limits are considered and are reflected in the SSC minutes. Throughout these proceedings the relevant documents and analyses are available to the public for comment, both at the SSC meetings and during Council deliberations.

The Guidelines should track this process. Instead of requiring the SSC findings to be published in the SAFE report, MCA suggests that the Guidelines stipulate that each SSC be required to publish a report of its deliberations, and that this, along with the SAFE reports and the record of the RFMC deliberations, be published on each RFMC website and be part of the official public record supporting the RFMC recommendations to the Secretary for annual harvest specifications.

WHAT CONSTITUTES THE BEST SCIENTIFIC INFORMATION AVAILABLE?

National Standard 2 provides that conservation and management measures shall be based upon the best scientific information available. The vast majority of lawsuits arising under the MSA assert violations of National Standard 2. Despite the large number of cases, the courts have yet to establish a bright line test for what constitutes the best scientific information available. Instead, courts have examined the quality and quantity of the information available at the time of the relevant decision. Equally important, the

courts have found that NMFS is entitled to rely upon its own experts and, from the available and competing data, to select that which NMFS believes represents the best scientific information.

The requirement to use the best scientific information available is also found in the Marine Mammal Protection Act (“MMPA”), the Safe Drinking Water Act, and the Endangered Species Act (“ESA”). As is the case with the MSA, courts struggling to determine what constitutes the best scientific information available pursuant to these statutes have failed to establish a bright line test, and instead generally defer to the agency’s technical determinations.

Although MCA has not conducted an exhaustive analysis of each MSA National Standard 2 case, or of the cases arising under other statutes imposing a best scientific information standard, an overview of these cases demonstrates that judicial pronouncements are specific to the facts of the individual case. For example, plaintiffs asserting that National Standard 2 has been violated generally allege that NMFS has either ignored or failed to give proper weight to one or more studies. Such plaintiffs often assert that the great weight of scientific evidence is contrary to the position taken by NMFS. In response to both allegations, courts typically recognize that they are not charged with the responsibility of making independent scientific judgments regarding which of the competing studies do, in fact, represent the best scientific information available. Instead, courts seek to determine if NMFS has considered the relevant data and rationally explained its reasons for relying upon a particular set of the data.

Given the difficulty courts have had in divining a clear standard regarding what constitutes the best scientific information available, the question is whether NMFS, through amended National Standard 2 Guidelines, can articulate a definitive standard. MCA believes NMFS will experience the same difficulties as learned judges have experienced in attempting to establish a bright line standard. Thus, rather than attempt to develop a bright line test, NMFS may be well advised to identify factors to be considered.

Whether Study A or Study B represents the best scientific information available will depend upon numerous factors. For example, the probative value of studies reaching different conclusions could depend upon an assessment of the scientific methodology, sample size, duration of the study, qualifications of the research team, etc. These are highly technical and issue-specific questions that require study-by-study analysis. If NMFS seeks to amend the National Standard 2 Guidelines to clarify what constitutes the best scientific information available, realistically NMFS can only do so by identifying the factors that should be evaluated in determining, for example, whether the research design, research methodology, and implementation of the design and methodology are appropriate. In addition to these methodological issues, what constitutes the best scientific information has a temporal component. One factor in weighing the value of competing data is whether the information used for one study is more current and, therefore, more reflective of the presently existing environment.

Related to the design, implementation, and timeliness issues are questions regarding whether the research data supports the conclusions in the study. Furthermore, each study and, therefore, its conclusions will likely be subject to some level of uncertainty. The extent to which the report identifies levels of uncertainty, provides explanations, and assesses the relative strength of the conclusions given the level of uncertainty is also probative of the validity of the analysis and conclusions found in the study.

In considering the interrelated and difficult issues of what constitutes the best scientific information, NMFS should perhaps look to the landmark case *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), wherein the Supreme Court discussed the rules to be followed in determining whether expert testimony will be admitted as valid. The Court explained:

[The inquiry] entails a preliminary assessment of whether the reasoning or methodology is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.... The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

The Court went on to state that the factors to be weighed include whether the theory or technique employed in the study has been tested and accepted, whether the study was subjected to peer review, the known or potential rate of error, and whether the study is generally accepted in the relevant scientific community.

Regarding the relative validity of competing data, one issue that may be raised by some persons commenting on the ANPR is an alleged need to apply the so-called precautionary principle in the utilization of scientific data. At the outset, MCA notes that a review of the scientific literature demonstrates there are several iterations of the precautionary principle. In fact, there is no universally agreed statement of what constitutes the precautionary principle or its' application. Equally important, the MSA does not contain any language requiring the application of some type of precautionary principle. Finally, and most importantly, the precautionary principle relates to how the best scientific information is used as distinct from what constitutes the best scientific information. These are two very different issues. In that regard, the National Standard 2 Guidelines recognize that the absence of complete scientific information does not prevent the preparation and implementation of a fishery management plan. 50 C.F.R. § 600.315(b). This is consistent with the MSA which only provides that NMFS is to use the best scientific information available when making decisions. Courts have approved that position noting that regulation is permissible even where NMFS lacks complete information. *Blue Water Fishermen's Association v. Mineta*, 122 F.Supp.2d 150, 166 (D.D.C. 2000).

In short, the practice of determining what constitutes the “best scientific information” is complex, and requires flexibility. It is best done on a case-by-case basis by professionals familiar with the scientific issues at hand. In the context of the science process used by the RFMCs, the practice of having a professional SSC that serves as a peer reviewer of the data presented to the respective RFMC is, in our view, the best process for ensuring that scientific advice is based on consideration of all the information, taking into account assumptions and biases as well as uncertainty when determining what constitutes the “best scientific information available” in a given situation. Such a process is open to a variety of views, and transparent in its determinations.

THE PEER REVIEW PROCESS

Section 302(g)(1)(E), 16 U.S.C. § 1852(g)(1)(E), of the MSA provides that the Secretary and each RFMC “may establish a peer review process” for scientific information used to advise the RFMC about the conservation and management of the fishery. The ANPR states NMFS is considering language regarding the peer review process. Specifically, NMFS may include minimum criteria for peer review processes and may clarify the relationship between any peer review process established by the Secretary and the RFMC.

With respect to the minimum criteria, it is important to note that Congress has not mandated a peer review process. Instead, Congress has simply provided that this tool may be utilized at the discretion of the RFMCs and the Secretary. In this context there appear to be two levels of peer review, routine peer review of technical and scientific information provided to an RFMC, and more extensive peer review of specific scientific information or questions conducted by external reviewers.

In the first instance, the North Pacific Council's SSC has provided peer review of almost all the scientific analyses and information used by the Council in its deliberations. The Council's SSC membership has a broad range of disciplines and a recusal process to ensure the integrity of its reviews. MCA strongly supports retaining this central role of the SSC as the primary peer reviewer for the scientific analyses and information used by the Council in its deliberations.

In certain instances, a formal peer review of specific scientific issues or processes may be desirable. For example, a periodic external review of the scientific models and assessment programs used to determine stock status, or the data used to make determinations on factors affecting a protected species. In these instances where a different (ie: not the SSC) peer review process is utilized, there is wisdom to (1) establishing a system by which the individuals conducting the review are selected and vetted for possible conflicts of interest, (2) setting the minimum number of reviewers that will be deemed adequate for conducting a complete peer review, and (3) fixing the date by which the review process must be completed.

One of the most important issues to be addressed when establishing an external peer review process is the selection of the reviewers in such a way that they be vetted for potential conflicts of interest. Such individuals should not have a financial or other interest in the regulatory matters at issue. Equally important, such individuals should not be recipients of grants from NMFS or other federal agencies such that their judgment could be colored by their interrelationship with the NMFS or another agency. As such, the peer review needs to be convened and managed by an institution independent of NOAA and the RFMC involved in order to ensure impartiality. This is especially true in cases of controversial issues where even the perception of a financial relationship can taint the results and their acceptance by the affected public.

In order for this external peer review to be meaningful, MCA believes there should as a general matter be a minimum of three reviewers in each area requiring review, recognizing that from time to time this number may be greater or smaller depending on the circumstances of the review. It is also important that the reviewers conduct their review as independently as possible to prevent bias, although it may be appropriate after each review is completed to request commentary from the other reviewers. The request for additional commentary should be made by the RFMC or the Secretary in their discretion depending upon the issues involved and the comments received.

Finally, any peer review process must be completed sufficiently in advance so that the public, the RFMC, and the Secretary have the opportunity to analyze the comments by the reviewers in a timely manner before any required decision is made.

The ANPR also inquires whether it will be necessary to clarify the relationship between any peer review process established by the Secretary and the RFMC independent of each other. It would seem that the guidelines discussed in the preceding paragraphs would be applicable to a peer review process established by either the Secretary or the RFMC. A possible exception arises if the Secretary elects to rely upon scientific information and reports not considered by the Council and that are not part of the administrative record developed by the RFMC. This eventuality might also arise in the case of individuals submitting scientific studies to either the RFMC or the Secretary during the public comment process. If such independently developed studies are to be considered as part of the best scientific information available, then such studies should also be subjected to the established peer review process and should only be considered if they are submitted as part of the normal RFMC process for plans developed by an RFMC, and through the normal Secretarial process for plans developed by the Secretary.

OTHER COMMENTS

NMFS is soliciting comments on any other issues or clarifications that may be necessary to National Standard 2. MCA would like to call attention to two additional issues.

First, the guidelines call for each SAFE report to contain information regarding specific management measures that should be taken to rebuild overfished stocks. This could require scientists writing the SAFE to anticipate all the potential tools and alternatives that an RFMC may use to address overfishing or rebuilding. In some cases, such as recommendations for setting overfishing limits or other biological parameters, this may be appropriate. But other management approaches may be highly allocative, such as trip limits or the use of quota share systems, and require the participation of a much broader audience. In these cases, consideration of such measures should be left to the RFMC process. For the most part, measures to address overfishing or rebuilding overfished stocks should be part of the process for developing a specific rebuilding plan for such stocks and should not be a requirement in the SAFE documents.

Second, MCA would like to call attention to the first national meeting of the SSCs from around the country that occurred in November of this year. This meeting was very productive and should serve as a model for how to discuss and address various regional differences. MCA supports conducting such meetings on a regular basis, at least once a year, with the intent of using this forum to bring national consistency to the science programs and processes used by the SSCs, the RFMCs, and the Secretary.

MCA appreciates the opportunity to provide comments on this ANPR and looks forward to working with NMFS and other parties as NMFS considers these important issues.

Sincerely,



David Benton
Executive Director