Marine Conservation Alliance
promoting sustainable fisheries to feed the world

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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 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