



February 6, 2009

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

Re: Amendment 16 Annual Catch Limit and Accountability Measures

Dear Mr. Howard:

I write to address the annual catch limit (ACL) and accountability measure (AM) provisions contained in Groundfish Amendment 16, as required by the Magnuson-Stevens Reauthorization Act of 2006 (“MSRA”) (P.L. 109-479). Council staff, the groundfish committee, and the Council made significant progress in developing measures to implement the new ACL and AM provisions in the absence of final guidance from the National Marine Fishery Service (NMFS). As you know, on January 16, 2009, the National Marine Fisheries Service (NMFS) published the final rule revising the National Standard 1 Guidelines (“revised Guidelines”). 74 Fed. Reg. 3178 (January 16, 2009). This letter identifies a few important areas in Amendment 16 in need of additional attention by the Council in order to ensure effective implementation of the MSRA’s new legal requirements.

With enactment of the MSRA, Congress required an immediate and permanent end to overfishing in U.S. fisheries. To accomplish this, Congress required that FMPs be amended to include mechanisms to set annual ACLs “at a level such that overfishing does not occur in the fishery,” and “measures to ensure accountability” for the ACLs. 16 U.S.C. § 1853(a)(15). Congress also required rebuilding programs to “end overfishing immediately upon implementation.” 16 U.S.C. § 1854(e)(3)(4). As the Council makes its final decisions for the Amendment 16 DEIS and public hearing document, we encourage the Council to address the points raised in this letter, summarized below, in order to ensure effective compliance with the MSRA responsibilities.

- Accountability measures must clearly demonstrate that they include “in-season” monitoring and management measures to prevent catch from exceeding the ACL, and “postseason” measures that account for any overage and prevent it from recurring.
- Accountability measures must ensure that each “group” of fisheries participants – sectors, common pool, and recreational – be held harmless from overages by other groups of participants.
- The Council should require buffers when setting the ABC and ACLs to account for the inherent uncertainty in fisheries science and management.
- The Council should set ACLs at levels that ensure there is at least a 75 percent probability that the OFL (or ABC) will not be exceeded.

- The Council should establish a clear standard for monitoring performance and eliminate the distinction between sector and common pool monitoring requirements.

The revised Guidelines provide the NEFMC with the guidance necessary to meet the mandatory deadlines for establishing annual catch limits in fishery management plans (2010 for stocks subject to overfishing and 2011 for all other stocks). While the revised Guidelines themselves do not technically have the force of law, they represent NMFS’s interpretation of the MSRA’s provisions. Since NMFS ultimately must approve all FMPs, it has the legal authority to reject the plan if it is determined it violates the MSA. In making its final decisions for Amendment 16, we strongly urge the Council to carefully consider both the MSRA and the revised Guidelines in order to ensure full compliance with Magnuson-Stevens Act.

Accountability Measures

1. *Accountability measures must clearly demonstrate that they include in-season monitoring and management measures to prevent catch from exceeding the ACL, and postseason measures that account for any overage and prevent it from recurring.*

The revised Guidelines clarify that “AMs are management controls to prevent ACLs, including sector-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur. AMs should address and minimize both the frequency and magnitude of overages and correct the problems that caused the overage in as short a time as possible.” 50 C.F.R. § 600.310(g)(1).

While the revised guidelines recognize that a variety of measures can be used for in-season monitoring and management to prevent overages, it stresses that FMPs should have in-season closure authority allowing NMFS to close the fishery once the ACL is reached. *See* § 600.310(g)(2). Those fisheries without sufficient in-season management controls should use annual catch targets (ACTs) to prevent overfishing. *See id.* Postseason AMs must be triggered and implemented as soon as possible after the fishing year if it is determined the ACL has been exceeded. *See* 600.310(g)(3). AMs should correct both the cause and consequences of any overage, minimizing the frequency and magnitude of such occurrences and adjusting subsequent year’s ACLs to account for overages. *See id.*

Though Congress and NMFS recognized that there may be several ways to meet the AM requirements of the law, the analysis contained in Amendment 16 has identified only two approaches that meet these requirements; sectors and the “Hard” Total Allowable Catch (“hard-TAC”) backstop. The sector mechanism contained in Amendment 16 sets an effective standard for accountability. Sectors are required to take actions to slow fishing as the ACL is approached to ensure the ACL is not exceeded and to stop fishing when it is projected that the ACL is reached. *See* Amendment 16 §§ 4.4.7.3 and 4.3.3.4 (January 23, 2009). If overages do occur,

then sectors are required to pay them back, and each sector is held harmless from the actions of other sectors. *See id.* at 4.3.3.9.

Similarly, the common pool hard-TAC backstop does the best job of meeting the MSRA’s legal requirements for accountability by including measures that slow fishing as the ACL is approached to ensure the ACL is not exceeded and measures to stop fishing when it is projected that the ACL is reached. *See id.* at § 4.4.7.1.1. If overages do occur, then deductions will be made from the ACL for the following trimester ACL or following year ACL. *See id.*

It is important to recognize that the common pool hard-TAC backstop alternative also includes measures to reduce any incentives that could lead to a race to fish; a concern raised by some groundfish committee members. For example, there are 17 sectors in line to be approved through this amendment which will significantly reduce the total fishing effort available in the common pool. In addition, it divides the ACLs into trimesters and allows “underages” to be carried over within the fishing year. Further, the alternative requires improved monitoring and reporting, measures designed to pace the fishery as ACLs are approached, and all participants remaining in the common pool will continue to be regulated through DAS and other effort controls.

While no accountability measure will be designed perfectly out of the gate, the hard-TAC backstop alternative for the common pool is well-designed to comply with the new legal requirements and mitigates potential unintended consequences. The only other Amendment 16 AM alternative for the common pool, in this case “Differential/DAS Adjustment,” *see id.* at § 4.4.7.1.1, clearly fails to comply with the MSRA and the revised Guidance. This alternative is little more than a minor variation on the *status quo* (No Action), as it merely requires postseason adjustments to DAS to try to prevent overages from recurring again. There is nothing in the alternative, for example, designed to slow the fishery down as an ACL is approached or to stop fishing when it is projected that the ACL has been reached. In addition, there are no requirements to account for overages, including for rebuilding stocks. *See* 600.310(g)(3).

2. *The Council should ensure that each “group” of fisheries participants – sectors, common pool, and recreational – be held harmless from overages by other groups of participants.*

The Council’s discussion about accountability between fishery participants is reflected in section 4.3.3.9 of the Amendment 16 document. This section admirably recognizes that while it is appropriate for changes in stock condition to affect the amount of fish that a sector share (ACE) represents, sectors should not suffer if other sectors, or common pool vessels, exceed ACLs and create a need for mortality reductions. This section states that if a sector does not exceed its ACE in a given year, but other sectors or common pool vessels exceed the remaining ACL, the sector’s quota in the fishery will not be reduced (i.e., in absolute quota, not relative share). The section also makes clear that “if a sector exceeds its ACE, the sector’s quota will be reduced in the following year and the sector may be subject to enforcement action.” *Id.*

Unfortunately, simply holding a sector's absolute share harmless in the event the common pool exceeds its ACL is not sufficient to meaningfully fulfill the Council's intent in this section. It is understood well that there is significant potential for common pool overages to affect the condition of the stock. While it may be possible for a sector or sectors (and the recreational fishery) to be held harmless economically in the short term for a minor common pool overage by holding those sectors' quota steady the following year, this ignores the fact that without a hard-TAC backstop on the common pool there is potential for there to be significant and consecutive-year overages that will adversely affect the condition of the stocks and as a result all other fishery participants.

The approach as outlined also does not treat all fishery participants equitably since sectors must stop fishing when their catch limit is reached but the common pool might not. A sufficient and equitable approach would require meaningful management measures that will ensure that the common pool catch limit is not exceeded, and would clearly require that the common pool take responsibility for an overage in the event one does occur. This would also reflect the best reading of the intent of Congress and the revised Guidelines, which seek to prevent scientifically recommended catch limits from being exceeded, increase certainty that such catch limits will not be exceeded, and require accountability for those (rare) instances when an overage does occur. *See e.g.*, § 600.310(b)(3); § 600.310 (g)(1)-(3). The only option in the document that would effectively achieve both the Council's intent and that of Congress is to implement the hard-TAC backstop alternative for the common pool, as discussed above.

Annual Catch Limits

1. *The Council should require buffers when setting the ABC and ACLs to account for the inherent uncertainty in fisheries science and management.*

The revised Guidelines acknowledge both the inherent scientific and management uncertainty in setting ACLs so as to "prevent overfishing" and "end overfishing immediately" as directed by Congress. *See* 600.310(b)(3) and (f)(5). As described in the revised Guidelines and Amendment 16, the ACLs cannot exceed the ABC, which can not exceed the OFL. While it would be possible to set all catch levels equal to each other (that is, $ACL=ABC=OFL$), the revised Guidelines make clear that NMFS expects there to be buffers between catch levels in most cases, and if a Council sets them equal the Secretary may assume that overfishing will occur unless the Council includes sufficient analysis and justification for doing so. *See* 600.310(f)(3)(5).

The guidelines reflect the view that meaningful buffers are necessary to address scientific and managerial uncertainty inherent in determining the ABC and ACLs. The ABC control rule must take into account the uncertainty around MSY, must be based on scientific advice from the Council's SSC, and must describe how ABC will be set based from the overfishing level and account for scientific uncertainty. In order to ensure compliance with the MSRA requirements,

the Council should establish as part of its mechanism for setting ACLs a clear requirement that there be a buffer between the ABC and the OFL, and the ACL and the ABC.

2. *The Council should set ACLs at levels that ensure there is at least a 75 percent probability that the overfishing limit will not be exceeded.*

The revised Guidelines state that the ABC should be based on the probability that actual catch will result in overfishing, and that the probability that overfishing will occur cannot exceed 50 percent and should be a lower value. *See* 600.310(f)(4).

At its September 3-4, 2008 meeting in Providence, Rhode Island the Council passed a motion to estimate an F=0 rebuilding time and a timeframe between that result and 10 years based on the biology of the species with a 75 percent probability of success in achieving rebuilding. First, at this time this motion does not appear to be reflected in the Amendment 16 document. Secondly, the admirable concept contained in this motion should be brought into line with the revised guidelines. Specifically, the Council should set its ACLs so that there is a 75 percent probability that overfishing will not occur, or in the case of rebuilding stocks, that the ABC will not be exceeded. The NEFMC should manage New England's groundfish fishery with a probability of success greater than that provided by a coin-flip given the critical need to rebuild depleted stocks and return the fishery to long-term economic sustainability.

3. *The council should establish a clear standard for monitoring performance and eliminate the distinction between sector and common pool monitoring requirements.*

Effective implementation of the MSRA's ACL and AM provisions requires a timely and effective monitoring program. The revised Guidelines, among other things, require that FMPs describe general data collection methods, including, all sources of fish mortality (both landed and discarded), including commercial and recreational catch and bycatch, in other fisheries, data collection, estimation methods and management tools used, the frequency of collection and updates, the scope of sampling coverage, and the methods to compile catch data. *See* 600.310(i). The revised Guidelines also state that each FMP must require provisions for collecting data that enables the degree to which OY is achieved to be determined, that all catch must be counted against OY, and that FMPs should contain a mechanism to periodically reassess OY specification, *See* 600.310(c). As discussed above, the monitoring and reporting system must also allow for effective implementation of AMs, such as in-season measures designed to slow the fishery as ACLs are approached and timely implementation of post-season AMs.

Amendment 16, however, currently includes few measures necessary to improve monitoring and reporting in the common pool. Certain additional monitoring measures would be required under the hard-TAC backstop accountability alternative discussed above (ie., weighmaster and discard estimates), however, even with these measures common pool



monitoring would continue to lag behind the monitoring requirements contemplated for sectors. *See* Amendment 16 at 4.3.3.5.2. In particular, standards for sector monitoring and reporting by service providers are being considered that could significantly improve monitoring throughout the entire fishery. *See id.* at 4.3.3.5.3. Thus the Council should not only include this standard for sectors, but should simply eliminate the distinction between sector and common pool monitoring requirements so that monitoring in all parts of the fishery is improved in order to meet the Magnuson-Stevens Act's current legal requirements.

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Thank you for considering these comments. With eight groundfish stocks still subject to overfishing and 17 stocks still classified as overfished, it is critical that the Council take effective action now to fully implement the new ACL and AM provisions required by the MSRA. The final National Standard 1 Guidelines provide important guidance for implementing these provisions. Successfully transitioning to a fisheries management system that is based on scientifically determined annual catch limits that end overfishing and require accountability is fundamental to rebuilding stocks to healthy, sustainable levels and returning the fishery to economic stability.

Sincerely yours,

/S/
Roger Fleming, Esq.
Earthjustice

cc. NEFMC
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