

September 22, 2008

Via Federal e-Rulemaking Portal

Mark Millikin, Domestic Fisheries Division
National Marine Fisheries Service, NOAA
Office of Sustainable Fisheries
1315 East-West Highway, Room 13357
Silver Spring, MD 20910

Re: Comments of Oceana on Proposed Revisions to the Guidelines for National Standard 1, RIN 0648-AV60, 73 Fed. Reg. 3526 (June 9, 2008)

Dear Mr. Milliken:

Thank you for the opportunity to comment on the National Marine Fisheries Service's proposed revisions to its National Standard 1 guideline. As you know, this guidance is critical to the interests of Oceana and its members. Overfishing has wrought a devastating toll on our nation's marine resources and the people and communities that depend on them. The Magnuson-Stevens Reauthorization Act of 2006 was enacted in order to stop, once and for all, the injury caused by overfishing. For that reason, it is of the highest importance that the agency issue strong guidance that is faithful to the law to the regional fishery management councils to enable them to do their job of ending overfishing and restoring marine resources.

As this rule will affect all fisheries and fishery management plans nationwide, applying a categorical exclusion to the National Environmental Policy Act's requirement for analysis is grossly improper, as the cumulative impacts of this guidance, together with its implementing actions, will have highly significant environmental impacts. A full environmental impact statement must be completed for this rule.

This new rule should also ensure that fisheries management plans are required to Count, Cap, and Control fisheries for both target and bycatch species. Oceana feels this approach is essential to effectively manage our fisheries, end overfishing and prevent any further damage to marine ecosystems.

- By "Count" we mean: Count all sources of fishing mortality, including that of nontarget species and discards.
- By "Cap" we mean: Set fishing mortality to scientifically supportable limits—limits that lead to healthy fish populations, as opposed to populations that are just "not overfished."
- By "Control" we mean: Actively manage fisheries to end - and prevent – overfishing, and to minimize bycatch.

These principles are not important as ends in themselves, but as means to a goal: actually ending overfishing and preventing its occurrence. This guidance will be judged by its success in achieving that goal.

Oceana is encouraged by many aspects of the spirit and letter of the proposed guidance. Some general comments:

- We are pleased to see the statement that the primary goal of the MSA is ending and preventing overfishing “rather than account[ing] for it after it occurs.”
- We are happy to see that the proposed rule calls for accountability measures to kick in immediately and that their purpose is to prevent annual catch limits from being exceeded. We encourage a continued emphasis on prevention.
- We believe that the separation between uncertainties in fishery management and scientific uncertainties is an important distinction and will prove a good tool for moving forward with fishery management actions.
- We are pleased to see that bycatch is properly treated as a component of catch and as subject to the annual catch limit.

Oceana believes that the guidance could be improved by a more careful focus on the statutory language. Such a focus would lead to improved guidance clarifying that:

- Annual catch limits shall not be exceeded;
- Annual catch limits apply to all species caught in non-trivial amounts in a fishery;
- Annual catch limits apply to the United States component of international fisheries;
- The specification of optimum yield must consider the statutory factors; and
- Management measures must be sufficient to achieve optimum yield.

Oceana is also a member of the Marine Fish Conservation Network (Network). The Network is a coalition of 200 national and regional environmental organizations, commercial and recreational fishing groups, aquariums, and marine science groups dedicated to conserving marine fish and to promoting their long-term sustainability. The Network has submitted a thorough analysis of the legal and policy strengths and deficiencies of the proposed guidance. Oceana reiterates its support for the Network’s letter, but also writes separately to stress these important points.

COMMENTS

I. THE NEW GUIDANCE MUST BE FIRMLY GROUNDED IN STATUTORY REQUIREMENTS

The National Standard 1 guidance is intended to be guidance on the requirements of the Magnuson-Stevens Fisheries Conservation and Management Act, as amended by the 2006 Reauthorization Act. Such guidance is only worthwhile and persuasive to the extent that it is grounded in statutory authority both in its content and in its presentation. Oceana is concerned

that, in places, the content and presentation of the proposed rule strays from the statute. The guidance will be considerably strengthened if its preamble restates the key points of the statutory context. These key points include:

- The guidance applies to “fisheries” and “fishing,” terms which are given very broad definitions. 16 U.S.C. 1802(13) and (16).
- The guidance concerns National Standard 1 which has **TWO** key provisions:
 - Overfishing must be **PREVENTED**; and
 - Optimum yield must be **ACHIEVED**. *Id.* § 1851(a)(1).
- “Overfishing” is defined with reference to maximum sustainable yield (“MSY”). *Id.* § 1802(34).
- A council’s Scientific and Statistical Committee (“SSC”) provides advice on preventing overfishing and MSY. *Id.* § 1852(g)(1)(B).
- Regional councils must develop *annual* catch limits for each of their managed *fisheries* that *may not exceed* the fishing level recommendations of the SSC. *Id.* § 1852(h)(6).
- Annual catch limits must be set at a level such that *overfishing does not occur in the fishery*. *Id.* § 1853(a)(15).
- Fishery management plans (“FMPs”) must include measures to ensure accountability for complying with the annual catch limit.
- “Optimum yield” is defined with reference to considering
 - the greatest overall benefit to the Nation
 - food production
 - recreational opportunities
 - protection of marine ecosystems. *Id.* § 1802(33).
- To determine optimum yield, the statute requires determining the highest possible yield, MSY, and considering the following relevant factors to reduce that yield:
 - Economic factors
 - Social factors
 - Ecological factors
 - Rebuilding to a level consistent with producing MSY. *Id.*
- The SSC provides advice on acceptable biological catch and achieving rebuilding targets. *Id.* § 1852(g)(1)(B).

II. THE CLAUSE “AT A LEVEL SUCH THAT OVERFISHING DOES NOT OCCUR” DOES NOT CREATE AN EXCEPTION TO THE ANNUAL CATCH LIMIT REQUIREMENT

By not focusing on the statutory language that it is tasked with providing guidance on, the Fisheries Service went astray in its proposed guidance concerning the phrase “at a level such that overfishing does not occur” as used in the statutory provision concerning annual catch limits. 73 Fed. Reg. at 32528 (misinterpreting 16 U.S.C. § 1853(a)(15)). Rather than providing guidance on what the statute says, and what Congress appears to have required, the preamble to the proposed guidance launches on an abstract discussion of concepts, divorced from grounding in

either statutory language or actual fisheries management. Far from provoking the puzzlement that the proposed rule's preamble apparently intends to elicit, the statutory scheme is actually fairly straightforward.

- The SSC provides advice. 16 U.S.C. § 1852(g)(1)(B).
- The regional council develops an annual catch limit which may not exceed the fishing level recommendations of the SSC. *Id.* § 1852(h)(6).
- The FMP provides a mechanism for the council to set the annual catch limit in a way consistent with the recommendation of the SSC, so that overfishing does not occur. *Id.* § 1853(a)(15).

Thus, in the scheme set forth in the statute, the SSC makes a recommendation which the council takes up in the context of an FMP, which then provides a mechanism for setting an annual catch limit consistent with the SSC's recommendation.

There is simply no room in this statutory scheme for the agency's abstract speculations as to whether fishing can ever occur without a chance of occasional instances of overfishing or as to how long overfishing might occur before the annual catch limit requirement is violated. The agency's ambiguous musings are preempted by the statute's matter of fact approach to creating a procedure to prevent overfishing. The statute plainly directs the agency, in cooperation with the councils and through the FMP process, to develop an annual catch limit based on SSC advice. The statute plainly requires the SSC to provide advice on setting catch levels, such as recommendations on "acceptable biological catch," "preventing overfishing," and "maximum sustainable yield," that would establish a catch level that would not result in overfishing. *Id.* § 1852(g)(1)(B).

Thus, **at a minimum**, the statutory language requires that overfishing not occur by requiring that the annual catch *limit* not be exceeded. As is plain from the language, this requirement is an *annual* requirement. In contrast to this statutory language, which employs terms that could not be clearer such as "annual" and "limit," the agency contemplates that annual catch limits would be violated on a consistent basis. 73 Fed. Reg. at 32528 (discussing application of a performance standard over four-year periods). Congress could have adopted the strange and convoluted proposal set forth in the preamble, but it most plainly did not. Rather than indulging in flights of unconstrained creativity, the final guidance must return to the actual words of the statute and make clear that annual catch limits are, indeed, annual **limits**.

III. THE MAGNUSON-STEVENSON ACT'S BROAD DEFINITION OF "FISHERY" INCLUDES EACH FISH STOCK AFFECTED BY THE FISHING ACTIVITY

Oceana supports the intent of the proposed guidance to "encourage ecosystem approaches to fishery management," an intent which is commendable but not successfully carried out through the concept of "ecosystem component species." 73 Fed. Reg. at 32529. This concept is particularly important with respect to protected species, which are components of the ecosystem that have had little consideration under current Magnuson-Stevens Act guidance but would benefit substantially from the new protections in the Reauthorization. The proposed rule's

treatment of this new “ecosystem component” concept is not consistent with the statute, in part because the preamble’s discussion of the term “fishery” ignores key passages of statutory language, resulting in proposed guidance that is inconsistent with the statute. *See id.* The plain terms of the statute require the councils to set annual catch limits for all fish species affected by fishing, including protected species.

The proposed guidance, however, confuses the broad discretion a regional council has in defining a fishery subject to an FMP with what species and activities are thereby made subject to conservation and management. Specifically, the definition of “fishery” makes clear that a “fishery” may be defined with respect to “one or more stocks of fish which can be treated as a unit for purposes of conservation and management. 16 U.S.C. § 1802(13)(A). This definition indeed confers broad discretion.

But the statutory definition places a strict constraint on the regional council’s definition – the fishery not only includes the stocks of fish, it must also include “any fishing for such stocks.” *Id.* § 1802(13)(B). And “fishing” is broadly defined to sweep in “the catching, taking, or harvesting of fish,” any attempt to do so, or any activity that might reasonably be expected to do so. *Id.* § 1802(16). By sweeping into the definition of “fishery,” not only specifically identified fish stocks, but also fishing on them which affects other stocks through bycatch, the statute also brings to bear the requirement under National Standard 1 to prevent overfishing, on both the primary identified stocks and the stocks affected by the fishery through bycatch. This requirement is further supported by the statutory language requiring regional councils to develop annual catch limits not for managed fish stocks but for “*managed fisheries.*” *Id.* § 1852(h)(6) (emphasis added). The section of the statute that discusses implementing annual catch limits applies such catch limits not to specific targeted fish stocks but to the *entire fishery* even more clear by stating that annual catch limits, implementing regulations, or annual specifications must be set “at a level such that *overfishing does not occur in the fishery.*” *Id.* § 1853(a)(15) (emphasis added).

Accordingly, fishing on “ecosystem component,” (“EC”) species is, by the language of the statute, part of the fishery. The regional council, its SSC, and the FMP, must implement National Standard 1’s requirement to prevent overfishing by identifying annual catch limits for all species non-trivially caught by the fishery and ensuring, through accountability measures, that those limits are not exceeded. Bycatch of trivially caught species should be included in that species’ total mortality limit.

IV. ANNUAL CATCH LIMITS APPLY TO THE UNITED STATES COMPONENT OF INTERNATIONAL FISHERIES

In yet another example of failing to focus on the language used in the statute, the proposed guidance provides an exception to the annual catch limit requirement that is plainly inconsistent with the statutory language. The proposed guidance bases this invented exception on the language of Section 104(b)(1) of the Reauthorization Act. *See* 73 Fed. Reg. at 32531. Yet Section 104(b)(1) is not related to exceptions to the annual catch limit requirement, but instead to the *effective date* of that requirement. Section 104 states in full that

- (b) EFFECTIVE DATES; APPLICATION TO CERTAIN SPECIES.—The amendment made by subsection (a)(10) [annual catch limits]—
- (1) shall, unless otherwise provided for under an international agreement in which the United States participates, take effect—
 - (A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and
 - (B) in fishing year 2011 for all other fisheries; and
 - (2) shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species; and
 - (3) shall not limit or otherwise affect the requirements of section 301(a)(1) or 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851(a)(1) or 1854(e), respectively).

Congress chose, in crafting this language, to refer to “an international agreement,” not as an exception to the annual catch limit requirement, but rather as an exception to the *effective date* of the catch limits. A commonsense reading of the provision is that Congress recognized that the United States may already have committed to international agreements which control fishing levels in fishing years 2010 and 2011 and to the extent that such agreements already exist and are inconsistent with setting annual catch limits, they are not superseded by the statute. Congress did not say, however, what it could have said: that fisheries subject to future international agreements are exempt from the annual catch limit requirement in the future. Because Congress made no such exception, the guidance must not invent one.

Further confirming the commonsense reading of Congress’ words is the example of Paragraph (2) of the very same statutory section. Section 104(b)(2) clearly states that “the amendment made by subsection (a)(10) *shall not apply*” to certain fisheries, not including international fisheries. Reauthorization Act § 104(b)(2) (emphasis added). Thus there is no basis to the statutory argument made by the proposed guidance concerning creating an international fishery exception to the annual catch limit requirement.

V. THE GUIDANCE MUST MAKE CLEAR THAT COUNCILS MUST CONSIDER THE STATUTORY FACTORS IN DETERMINING OPTIMUM YIELD

Although the proposed guidance gives a great deal of helpful attention to the topic of determining optimum yield, the guidance still errs by not sufficiently attending to the language of the statute. *See* 72 Fed. Reg. at 32541-42. The guidance must stress that in setting optimum yield, councils are required to consider, and document that they have considered, the multiple statutory factors, including:

- the greatest overall benefit to the Nation;
- food production;
- recreational opportunities;
- protection of marine ecosystems;

- economic factors;
- social factors;
- ecological factors; and
- rebuilding to a level consistent with producing MSY.

It is particularly noteworthy that, in its discussion of economic factors, the guidance does not mention the well-established concept of maximum economic yield. 73 Fed. Reg. at 32542. The guidance should clarify that determinations of optimum yield should consider the maximum economic yield and, if optimum yield is set higher than the maximum economic yield, should explain the basis for that decision.

VI. THE GUIDANCE MUST BE CONSISTENT WITH THE STATUTORY LANGUAGE AND JUDICIAL DECISIONS CONCERNING ACHIEVING OPTIMUM YIELD

The proposed guidance departs from the statutory language by contradicting the plain meaning of the word “continuing.” Furthermore, the proposed guidance fails to set forth guidance from the courts on what is meant by “achieving” optimum yield.

The proposed guidance erroneously claims that the words “achieving on a continuing basis, the optimum yield from each fishery,” in National Standard 1, means producing “a long-term series of catches such that the average catch is equal to OY” 73 Fed. Reg. at 32532 (citing 16 U.S.C. § 1851(a)(1). Per Merriam Webster’s Collegiate Dictionary, Tenth Ed. (1995) definition, “continuing,” means “continuous, constant” or “marked by uninterrupted extension in space, time, or sequence.” *Id.* Thus, by the plain meaning of the English words in the statute, optimum yield must be achieved in a continuous, constant manner that is uninterrupted in time. The statement in the guidance that “continuing basis” means “on average” as opposed to “continuous,” or “uninterrupted,” is a simple, basic misunderstanding of the meaning of a word. This error must be corrected.

Furthermore, the proposed guidance is insufficient concerning what the regional councils must do to achieve optimum yield. *See, e.g.*, 72 Fed. Reg. at 32541. While the proposed guidance provides that FMPs must contain management measures to achieve optimum yield, *id.*, it does not set forth the additional guidance provided by the courts. Specifically, it is well known, and should be acknowledged by the guidance, that courts require management measures to have, *at a minimum*, a 50% advance chance of achieving a target such as optimum yield. *NRDC v. Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000). The conclusion that management measures will meet at least the 50% minimum must be supported by analysis or data. *Id.* at 756.

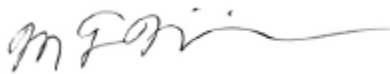
Moreover, the 50% minimum advance chance is not strict enough. Pursuing a 50% strategy every year would result in achieving optimum yield only 50% of the time – a rate of achievement inconsistent with the statutory requirement to achieve optimum yield on a continuing basis. Accordingly, the guidance should provide assistance to the councils concerning what level of data, analysis, and documentation is required to establish that

management measures will achieve optimum yield and what degree of confidence is required given the requirement to “achieve on a continuing basis.”

CONCLUSION

While Oceana is encouraged by some aspects of the proposed rule, the shortcomings of this guidance would result in ultimate failure in fulfilling the Congressional mandate to end overfishing. The changes outlined above must be implemented in order to carry out the will of the legislature and the nation’s constituency that they represent.

Oceana thanks you for this opportunity to comment and urge you to strengthen this guidance to accomplish your charge – to end and prevent overfishing, once and for all.



Michael F. Hirshfield, Ph.D.
Senior Vice President, North America, and Chief Scientist
Oceana