

North Pacific Fishery Management Council

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National Marine Fisheries Service, NOAA
ATTENTION: Wesley Patrick
1315 East-West Highway, Room 13436
Silver Spring, Maryland, 20910

SUBJECT: Comments on NMFS' Proposed Revisions to the National Standard Guidelines

Mr. Patrick:

This letter and the attached SSC comments comprise the North Pacific Fishery Management Council's formal comments on the proposed rule for revising the National Standard Guidelines (80 FR 2786). The Council appreciated your visit and presentation at our April meeting in Anchorage, which allowed for an initial exchange of ideas on the proposed changes and communicated to us your receptiveness to further improving the revised guideline language. What we provide in this letter consists of commentary on the portions of the proposed rule that we think are most likely to impact federal fishery management in the North Pacific. Additionally, where we believe alternative language would improve the intent of a proposed revision, provide greater clarity, or prevent unintended or undesired consequences, we provide specific alternative language in the attached SSC comments.

The Council is pleased to note that the revisions provide clarification in several areas:

- Confirmation of the validity of alternative approaches for characterizing /evaluating scientific uncertainty when determining ABC.
- Acknowledgement that stocks can be depleted outside of the effects of overfishing.
- Availability of additional options associated with stock rebuilding, especially as regards data-poor stocks.

The Council, however, also notes that the proposed guideline revisions may not accomplish their intended objectives where the new language is particularly vague or open-ended. In order to effectively communicate Secretarial interpretation of the national standards, the guidelines should be specific and direct without being overly prescriptive. The Council appreciates that this is a difficult balance to strike; however, we also note that any lack of clarity will illicit confusion about the compliance of existing Council FMPs and management measures. The following topics in the proposed rule are highlighted as needing additional clarity:

- The revisions referenced under Topic IV contain criteria for including stocks in FMPs that are very broad. These may limit discretion in determining which stocks should be placed in the FMP,

while de-emphasizing consideration of the costs of adding stocks to FMPs. The attached SSC comments provide an alternative streamlined approach that would be fully protective of target and non-target stocks, while also being more consistent with the language of the Act.

- The revisions referenced under Topic X leave unclear the adequacy or extent of analysis required for documenting how OY will produce the greatest benefits to the nation.
- The revisions referenced under Topic XIV provide important new guidance concerning flexibility in rebuilding timeframes, but they de-emphasize monitoring the progress of the stock relative to BMSY to such an extent that Councils may feel that the stock's biomass trajectory can be ignored entirely.

Finally, while the proposed rule preamble explains that the intent of the revised guidelines is not to require the Councils to amend their FMPs, many of the new provisions (e.g., expanding the number and types of stocks in the FMP, revisiting FMP objectives, changing how OY is assessed and documented in the FMP) may be interpreted as inconsistent with existing Alaska FMPs. It appears that these revisions would require, or at least strongly encourage, amendments to the FMPs. If that is the case, then this proposed rule would have impacts that are more than technical in nature. These impacts have not been analyzed in the RIR/IRFA prepared for the proposed rule. Before a final rule is prepared, either this analysis should be conducted or the proposed guidelines should be revised so that modifications to FMPs are explicitly stated as not required.

In conclusion, the Council notes that the differences between the topics initially considered in the ANPR and those in the proposed rule indicate that your interaction with the Councils informed the planned revisions. We hope that your consideration of the comments we provide here will elicit further improvements to the revisions. If you have any questions or concerns about the comments we have provided do not hesitate to contact us.

Sincerely,
Chris Oliver,
Executive Director



Attached:
"SSC Comments on Proposed Revisions ..."
Editorial comments on redline document

CC: Regional Fishery Management Councils

SSC Comments on Proposed Revisions to the Guidelines for National Standards 1, 3, and 7 of the Magnuson-Stevens Fishery Conservation and Management Act

Background

On January 20, 2015 NMFS published a proposed rule (80 FR 2786) for revisions to National Standards (NSs) 1, 3, and 7 with a June 30, 2015 comment deadline. The revisions are described by NMFS as a product of lessons learned since the implementation of annual catch limits (ACLs) and accountability measures (AMs). NMFS states that the purpose of the proposed changes is to facilitate compliance with requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) “without establishing new requirements or requiring Councils or the Secretary to revise their Fishery Management Plans.” The objectives of the revisions are “to improve and clarify the guidance within the NS guidelines, address concerns that have been raised during the implementation of [ACLs] and [AMs], and provide flexibility to address fishery management issues.”

In response to the proposed rule, the North Pacific Council formed a special working group to review the proposed rule and develop draft comments on the proposed revisions. Those comments were reviewed by the SSC during the April 2015 Council meeting; and the SSC and Council were also given a presentation on the proposed revisions by Wes Patrick of NMFS Headquarters. In its consideration of the draft comments and presentation, the SSC identified a few additional or complementary issues that it wished to communicate to the Council in addition to its endorsement of the working group’s comments. It appointed a subgroup of the SSC to work with the NS1 subgroup to blend all comments into a single report. After review by the whole SSC at the June 2015 meeting, the SSC offers this report to the Council for its review at the June 2015 Council meeting, where the Council will develop a comment letter to NMFS headquarters.

The SSC comments below are arranged according to the enumerated topics in the proposed rule preamble. Additional editorial remarks are also provided in an attached redline version of the proposed rule.

III. Goals and Objectives of Fishery Management Plans (FMPs).

Amended Section(s): 600.305(b)

Comments:

600.305(b)(2) - The proposed rule suggests that Councils “should reassess the objectives of the fishery on a regular basis.” “Fishery objectives” are not addressed or mandated by the MSA, but the Council routinely reviews the “management objectives” within its groundfish FMPs and is considering doing so for its other FMPs. Within the revised guideline language itself, the added text is vague and open-ended in terms of the expected periodicity of review. We recognize that, because of the wide spectrum of objectives in FMPs, it would be difficult to develop specific criteria to guide the frequency of reassessments. Appropriately developed FMP objectives should not have to be revisited very often. If,

however, the intent of this modification is to encourage action from Councils with outdated objectives in their FMPs, then this proposed change could accomplish that.

The term “objectives of the fishery” is different than that used in the preceding paragraph 600.305(b)(1) (“management objectives to be obtained in regulating the fishery”) and the following paragraph 600.305(b)(3) relating objectives to the management process and problems of a particular fishery, while proposed 600.310(e)(3)(iii)(B) that says “Councils should consider the management objectives of their FMPs...”.

Suggested Improvement:

Replace “objectives of the fishery” in paragraph 600.305(b)(2) with “FMP’s management objectives.”

IV. Stocks That Require Conservation and Management

Amended Section(s): 600.305(c), 600.305(d), 600.340(b)

Comments:

600.305(c) - This section is entirely new except for items (iii) and (vi)-(x) of the enumerated factors in paragraph (1) and one sentence in paragraph (2) regarding identification of ecosystem component (EC) species at either the species or stock level. Subsection (c)(3) is responsive to the Council’s/SSC’s interest in including stocks as EC in FMPs if they do not require conservation and management, while Subsection (c)(4) allows inclusion of stocks as EC in FMPs that do not directly manage those stocks, even if those stocks are overfished.

600.305(c)(1) - This paragraph includes a (non-exhaustive) list of ten factors that “should be used by a Council when deciding whether stocks require conservation and management,” six of which were taken from the existing guidelines for NS7 (existing paragraph 600.340(b)(2)). The first factor in the list reads, “the stock is an important component of the ecosystem.” Although paragraph 600.305(c)(2) states that “no single factor is dispositive,” the inclusion of ecosystem importance as the first factor listed in paragraph (1) and its identification in paragraph (2) as one of the first three factors to consider may give the impression that all important components of the ecosystem require specification of maximum sustainable yield (MSY), optimum yield (OY), acceptable biological catch (ABC), ACL, and status determination criteria (and all other MSA 303(a) required provisions). It is not clear what problem the addition of the list in paragraph (1) is intended to solve. If the goal is to provide the Councils with more flexibility to include stocks not currently managed under FMPs, this can be accomplished without adding a list that might easily be interpreted as requiring all stocks caught to be included in FMPs. Instead of simply providing more flexibility, this list may appear to remove any discretion by the Council to decide that a stock does not require conservation and management, thereby requiring the MSA 303(a) provisions for every stock caught in every Federal fishery.

600.305(c)(3) - The proposed rule deletes the four existing criteria for determining whether a stock can be included in the EC (must be a non-target, must not be overfished, must not be likely to become overfished, must not be generally retained), thus providing significant new flexibility. To this extent, the proposed rule is responsive to the SSC’s comment on the advanced notice of proposed rule (ANPR) that the guidelines should allow overfished stocks to be listed in the EC of an FMP if those stocks are

managed primarily under another FMP. However, paragraph (4) of the proposed rule suggests that such stocks should be identified as “other managed stocks” rather than being included in the EC. Paragraph (3) is also confusing in that EC species are defined as FMP species not requiring “conservation and management,” yet the same paragraph states that they can be the object of “management measures” designed to minimize bycatch, protect their role in the ecosystem, and “other.”

The proposed rule is not responsive to the SSC’s ANPR request for clarification regarding the need to protect species even if they are not “in” an FMP and the Council’s ability to do so without adding them to the species that are “in” the FMP.

While most of the existing provisions of the NS7 guidelines at 600.340(b) were moved to proposed 600.305(c), two concepts of the NS7 guidelines were deleted, 600.340(b)(1) and 600.340(b)(2)(vii):

- 600.340(b) Necessity of Federal management—(1) General. The principle that not every fishery needs regulation is implicit in this standard. The Magnuson-Stevens Act requires Councils to prepare FMPs only for overfished fisheries and for other fisheries where regulation would serve some useful purpose and where the present or future benefits of regulation would justify the costs....
- 600.340(b)(2)(vii) The costs associated with an FMP, balanced against the benefits...

The preamble to the proposed rule does not explain why these concepts were deleted. Unless the goal is to require specification of status determination criteria, EFH, and all MSA 303(a) required provisions for all species, the Council would benefit from having guidance that allows a balance of costs and benefits and consideration of whether management serves some useful purpose. This is particularly important with the addition of proposed 600.305(c)(1)(i) and (ii), which basically encompass everything caught in every fishery.

Overall, the proposed rule misplaces the emphasis on “stocks” requiring conservation and management, whereas the Act is explicit that a “fishery” is to be the subject of conservation and management. The following text describes an alternative approach to this issue that is simple, sensible, fully protective of both target and non-target stocks, and explicitly consistent with the language of the Act (note that this is intended as a description of an overall approach rather than as substitute text for a particular section of the proposed rule; adoption of this approach would probably require an extensive rewrite of several parts of the proposed rule):

“A management plan must be developed for a fishery if, absent Federal management, the fishery is not expected to be prosecuted in a manner that results in achievement of optimum yield, prevention of overfishing of the target stocks, and protection of the marine ecosystem (or results that are reasonably equivalent to these). All stocks targeted by the fishery must be identified in the FMP, with the understanding that references to ‘stocks’ in MSA 303(a) apply to those stocks only. References to ‘fishery’ in MSA 303(a) may be interpreted as applying to individual stocks or groups of stocks within the set of target stocks, or to any fishing for such stocks, to the extent that the context allows. In addition to containing all items required by MSA 303(a), the FMP must contain conservation and management measures sufficient to protect the marine ecosystem from the effects of the managed fishery. The ‘marine ecosystem’ is understood to consist of all non-target species impacted directly or indirectly by the fishery as well as all physical features of the marine environment impacted directly or indirectly by the fishery. While protection of the marine ecosystem is mandatory, Councils have flexibility in determining how to

accomplish this goal. For example, in providing protection to non-target species, reference points based on MSY may or may not be relevant or necessary. Listing a particular non-target species in the FMP is not a prerequisite for providing protection to that species; neither does failing to list non-target species exempt a Council from its obligation to protect them. Moreover, listing a non-target species in the FMP does not thereby create a requirement to include all MSA 303(a) items for that stock.”

Suggested Improvements:

600.305(c)(1) - Either strike the list of ten factors; or, if the list in paragraph (1) is to be retained, item (vii) of the existing list in paragraph 600.340(b)(2), which recognizes the need to consider the costs of including a stock in an FMP, should be added (it is deleted in the proposed rule). Also, consider moving (iv) to the top of the list because this should be the primary factor in determining whether a stock requires conservation and management. This new section could result in FMP amendments to add new stocks to FMPs and establish status determination criteria, and all other 303(a) required provisions, for stocks that meet these new broad criteria.

600.305(c)(2) - This paragraph should be revised to include the possibility of removing a stock from an FMP, to read “(2) When considering whether a stock should be added to or removed from an FMP...” This would make (c)(2) consistent with (c)(5).

600.340(b) - Retain provisions 600.340(b)(1) and 600.340(b)(2)(vii) in NS7 in order to preserve guidance that acknowledges that the decision to include a species in an FMP will involve evaluation of costs and benefits.

Rewrite the proposed rule from the perspective of the alternative approach described above.

V. Data Limited Stocks

Amended Section(s): 600.310(e)(2)(ii) , 600.310(h)(2)

Comments:

600.310(e)(2)(ii) - The proposed rule includes new options for proxies that can be used in place of the standard status determination criteria in cases where data are especially sparse or uninformative. The insertions represent improvements, as they acknowledge the reality that certain currently required reference points simply cannot be estimated in data-poor situations, and they identify achievable alternatives. Although these changes are not directly responsive to the SSC and Council comments on the ANPR, other language in the proposed rule does suggest that not all stocks require conservation and management.

VI. Stock Complexes and Indicator Stocks

Amended Section(s): 600.310(d)(2), 600.310(e)(1)(iii)

Comments:

600.310(d)(2)(i) - The current definition of “stock complex” is, “a group of stocks that are sufficiently similar in geographic distribution, life history, and vulnerabilities to the fishery such that the impact of management actions on the stocks is similar.” The proposed rule retains this definition (with some non-substantive modifications), but prefaces it with the phrase, “Where practicable.” While providing somewhat greater flexibility, the addition still implies that the current definition should normally apply, which seems a bit contrary to the argument used to modify the current definition in the first place (viz., that the methods used to identify stock complexes in practice often differ from the current definition; see preamble to the proposed rule).

600.310(e)(1)(iii) - The existing suggestion that MSY for a stock complex “should” be estimated on a stock-by-stock basis is proposed to be replaced by a suggestion that it be estimated for one or more indicator stocks or the complex as a whole. This is an improvement, given that non-indicator stocks are often data-poor, making estimation of MSY difficult if not impossible.

VII. Aggregate Maximum Sustainable Yield (MSY) Estimates

Amended Section(s): 600.310(e)(1), 600.310(e)(3)

Comments:

600.310(e)(1) - The proposed rule retains the requirement that each FMP include an estimate of MSY for the stocks and stock complexes that require conservation and management, and adds that MSY “may also” be specified for the fishery as a whole. “Also” implies that specification of MSY at the fishery level is in addition to, rather than a substitute for, specification at the stock/complex level. This goes beyond the requirement of the Act, which states simply that MSY must be assessed and specified for the fishery.

Suggested Improvement:

Replace “MSY may also be specified for” with “MSY may alternatively be specified for” at 600.310(e)(1).

VIII. Developing a Definition for “Depleted”

Amended Section(s): 600.310(e)(2)(i), 600.310(e)(2)(ii)

Comments:

600.310(e)(2)(i)(F) - The proposed rule allows for a distinction between “Depleted” and “Overfished” stocks that have fallen below the MSST. Attempting to clearly distinguish environmental impacts from fishery-induced impacts is a complex undertaking. Unless there is a clear reason why the actions of the Council would differ under these two definitions, it is not clear why additional nomenclature is needed. Previous comments by various SSCs and Councils have suggested the **replacement** of “overfished” with “depleted”, not the addition of “depleted”, because “overfished” gets used for stocks for which no overfishing ever took place. Given the difficulty of separating environmental effects from fishing effects on the status of the stock, the proposed rule’s attempt to tie the term “depleted” to stocks that meet stringent conditions that tie the low stock condition to environmental effects effectively creates the addition of the new term “depleted” that has no role in the process of setting ABCs and overfishing levels (OFLs) and of any fisheries management measures.

The definition of “depleted” in the proposed rule is: “An overfished stock or stock complex is considered depleted when it has not experienced overfishing at any point over a period of two generation times of the stock and its biomass has declined below MSST [minimum stock size threshold]. . . .” NMFS is attempting to address the ongoing concern that “the term ‘overfished’ implies that fishing is the sole cause for a decline in stock biomass, when other factors such as environmental conditions may be the leading cause for the stocks biomass decline. . . .” However, the proposed revision does not accomplish the purpose, because it says that only an overfished stock or stock complex can be considered depleted under the proposed rule. It would be better to add an option for a stock that has declined below MSST for reasons other than overfishing. It does not make sense to say that a stock is overfished when it has never been subjected to overfishing.

600.310(e)(2)(ii) - The proposed rule changes the definition of MSST by eliminating the requirement for rebuilding to BMSY within 10 years and instead adding this to a list of several new factors that “could” be considered when specifying MSST: life history of the stock, long-term natural fluctuations expected when fishing at maximum fishing mortality threshold (MFMT), socio-economic impacts associated with rebuilding to BMSY, international agreements, and “other” factors. While these changes would not necessitate revising the MSST specifications currently contained in the NPFMC’s FMPs, they would provide additional flexibility should the Council wish to revisit those specifications.

Suggested Improvement:

Change the new “depleted” sub-category of the “overfished” category to its own stand-alone category.

IX. Developing an Alternative Definition of Overfishing To Include a Multi-Year Approach

Amended Section(s): 600.310(e)(2)(ii)(A)

Comments:

Editorial improvements are suggested in the redline document.

X. Revising Optimum Yield (OY) Guidance

Comments:

600.310(e)(3) - The proposed rule says that OY may be specified at the stock, stock complex, or fishery level. The phrase “FMP level” should be added to this list, since many FMPs cover multiple fisheries. A similar change should also be made in other sections (e.g., MSY) where appropriate.

600.310(e)(3)(iii)(B) - The potential factors listed in (B)(1)-(B)(3) are too loosely defined to provide an operational guidance on what factors to consider. Item (B) is list of factors to consider when determining (A), hence is more appropriately nested under (A).

600.310(e)(3)(iv)(A) - The proposed rule strikes the existing sentence, “All catch must be counted against OY, including that resulting from bycatch, scientific research, and all fishing activities,” but this is inconsistent with the proposed rule’s new language requiring that all these sources of mortality be taken into account when making status determinations, (600.310(e)(2)(ii)(C)). It should also be noted that the issue of how to account for all sources of anthropogenic mortality, which was highlighted in the ANPR, is not addressed in the proposed rule.

Because the overall issue remains unresolved, the specific sub-issues identified in the SSC's associated ANPR comment are shown below:

“The guidelines state that all sources of fishing mortality must be accounted for. However, a number of points remain ambiguous, particularly with respect to removals from sources other than the directed fishery (hereinafter referred to as ‘other’ catches). Specifically, the guidelines should clarify each of the following points:

- When considering use of ‘other’ catches in assessment and management, it will be necessary to distinguish between:
 1. listing those catches but not using them for determination of catch limits,
 2. using those catches to estimate reference fishing mortality rates (F35%, etc.),
 3. using those catches to estimate reference harvest amounts (maxABC, OFL, etc.) given the reference fishing mortality rates, and
 4. including those catches in the total against which harvest specifications are compared.
- It will also be necessary to determine whether the use of ‘other’ catches should differ depending on the source of the removals (e.g., should research catches be treated differently from catches taken in non-directed commercial fisheries?).
- In the event that ‘other’ catches will be used to estimate either reference fishing mortality rates or reference harvest amounts, methods will need to be devised for doing so (e.g., does the calculation of F35%, etc., assume that ‘other’ catches are zero, that they are equal to the long-term average, or something else?).
- What to do about years for which ‘other’ catches were known to have occurred, but for which no direct estimate of magnitude is available (e.g., years in which surveys occurred but from which data no longer exist).
- What to do about sources for which ‘other’ catches were known to have occurred, but for which no direct estimate of magnitude is available (e.g., catches taken in recreational fisheries).
- Can Councils preempt scientific research by allocating the entire ACL to the commercial fishery?”

The proposed rule does not respond to the SSC's request for additional guidance on accounting for social and ecological effects. However, the existing text does include two fairly lengthy paragraphs on the types of social and ecological factors that might be appropriate to consider in the OY specification.

600.310(e)(iii) - The first sentence of the existing text reads as follows: “An FMP must contain an assessment and specification of OY, including a summary of information utilized in making such specification, consistent with requirements of section 303(a)(3) of the Magnuson-Stevens Act.” The proposed rule would add a requirement that each FMP “documents how the OY will produce the greatest benefits to the nation and prevent overfishing.” This change would require amendments to most, if not all, of the NPFMC's FMPs because they do not document how the OY will produce the greatest benefits to the Nation and prevent overfishing. Documenting how the OY will prevent overfishing seems contrary to NS1, which says, “conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery...” and inconsistent with the proposed guidelines at 600.310(f)(4)(iv) on the relationship between OY and the ACL framework.

The proposed rule is sufficiently vague in use of the phrase, “documents how the OY will produce the greatest benefits to the Nation and prevent overfishing,” that there are a number of possible problematic implications of this new requirement. The new language (unless loosely interpreted to be equivalent to the existing text) requires changes to the FMPs that could be both significant and operationally infeasible. We elaborate on these concerns below.

The MSA defines OY, in part, as the yield that “will provide the greatest overall benefit to the Nation” (section 3(33)), which sets a very high bar. The main problem with the new requirement in the proposed rule is not its use of the statutory definition, but rather its mandate for documenting how the statutory definition has been satisfied in each FMP together with its lack of any guidance on how this can be accomplished in practice. Any specification of OY in practice will necessarily be an estimate, and use of proxy values will often be required, just as in specification of MSY. NMFS should commit to providing technical guidance as to the types and use of allowable proxies for specification of OY. Without such guidance, the proposed text could be interpreted as broadening the positive (practical) determination of OY to include factors which we currently have no practical means of defensibly estimating; thereby creating a burden that is untenable.

Requiring that FMPs must “document,” as opposed to “summarize” (as prescribed in MSA), creates a regulatory burden that may not be appropriate for all FMPs. If the methods used to assess and specify OY are sufficiently simple in a given instance, it is conceivable that such documentation might reasonably fit within the FMP. However, it is easily conceivable that the methods used to assess and specify OY might be highly technical and span a great many pages, in which case it would be awkward to include full documentation within the FMP itself. Therefore, the language in the proposed rule should be amended to allow documentation either in the FMP itself or in other documents such as environmental assessments or regulatory impact reviews.

The MSA requires each FMP to “assess and specify” OY (section 303(a)(3)). Given this, it seems reasonable to assume that some sort of documentation would exist describing how the specified OY will provide the greatest benefit to the Nation. It is critical that we continue to make progress in accounting for previously unaccounted economic values in the specification of OY, but doing so without a clear, defensible methodology for many of the factors may put the cart before the horse and potentially undermine this objective. The proposed text goes beyond what should be its intent, namely, achieving more comprehensive documentation so that we might determine whether an alternative specification would produce greater “benefits to the Nation.”

Suggested Improvement:

The final rule should retain the existing text in 600.310(e)(iii) and NMFS should provide a technical guidance document describing in precise and pragmatic terms whether and how any existing OY specifications should be amended so as to satisfy the statutory definition.

In section 600.310(e)(3) the proposed rule should say that OY may be specified at the stock, stock complex, fishery level or FMP level.

In section 600.310(e)(3)(iii)(B) - Item (B) should be nested under (A). The potential factors listed in (B)(1)-(B)(3) should be concretely defined.

In section 600.310(e)(3)(iv)(A) retain the existing language, “All catch must be counted against OY, including that resulting from bycatch, scientific research, and all fishing activities,” and amend to account for all sources of anthropogenic mortality, as described in the SSC’s comments on the ANPR detailed above.

XI. Acceptable Biological Catch and Annual Catch Limit Guidance

Amended Section(s): 600.310(f)

Comments:

600.310(f)(1) - The proposed rule adds two new sub-paragraphs (v and vi) defining management uncertainty and scientific uncertainty. These additions are responsive to the first of the SSC's two comments on the corresponding issue in the ANPR.

600.310(f)(2)(i) - The proposed rule removes the requirement that ABC control rules be based on the P* approach and explicitly allows for use of "other appropriate methods." The preamble to the proposed rule goes so far as to mention decision theory as an acceptable alternative to the P* approach, and even cites a discussion paper on the subject that was prepared for the NPFMC SSC. This change is completely responsive to the SSC's comments on the ANPR, and constitutes total victory in a struggle that has spanned the last 8 years.

600.310(f)(2)(ii)(A) - The proposed rule allows a phase-in period for adoption of status determination criteria. The use of this option should be accompanied with an evaluation of the implications of this phase-in on stock status. If scientific information indicates that the stock has become much larger, a phase-in of 3 years may be prudent if there is much uncertainty in the information or if the stock is not assessed very often. NPFMC has used a 10-year staircase in one case, so rather than specifying a limit of 3 years, it would be better to examine the rationale in the evaluation. If scientific information indicates that a stock has unexpectedly decreased for whatever reason, a phase-in may be unwise. The burden of proof should be put on the evaluation to justify the phase-in in this case.

600.310(f)(2)(ii)(B) - The proposed rule allows for carry-over of total allowable catch (TAC) or catch to the next year if it does not result in catch exceeding ABC. The proposed rule should mention the problem with doing this carry-over when stocks are assessed annually. The problem is that the carry-over is based on the previous assessment, but the current year may have updated values of ABC and OFL. The current assessment automatically adjusts for any changes to stock condition resulting from the previous catch being lower than the previous TAC. Thus, no carry-over should be allowed when new information is available that indicates a change in stock condition.

600.310(f)(4)(i) - See comment under Topic XII below.

600.310(f)(4)(iv) - Clarification is needed in terms of conflicting characterizations of ABC in the second and sixth sentences of this paragraph. The second sentence implies that the only purpose of ABC is to prevent overfishing, while the sixth lists several other considerations that may go into determining the risk policy for an ABC control rule. The latter is more appropriate. If the only purpose of ABC is to prevent overfishing, this could be accomplished most simply by setting ABC equal to zero.

Suggested Improvement:

In the second sentence of 600.310(f)(4)(iv), replace "and is designed to prevent overfishing" with "that prevents overfishing within an established framework of risk and other considerations."

XII. Accountability Measures

Amended Section(s): 600.310(f), 600.310(g)

Comments:

600.310(f)(4)(i) and 600.310(g)(4) - Paragraph 600.310(f)(4)(i) of the proposed rule adds new language suggesting that “management uncertainty should be accounted for in the ACL” whenever the (optional) concept of annual catch target (ACT) is not used. This is a significant change that may warrant revisiting the ABC control rules currently specified in the Crab and BSAI and GOA Groundfish FMPs or, alternatively, formally adopting use of ACT terminology in the NPFMC’s FMPs. When the NPFMC’s FMPs were amended to bring them into compliance with the Magnuson-Stevens Reauthorization Act of 2006, TACs were not equated with ACTs, in part because the current guidelines require use of an ACT control rule whenever the concept of ACT is used, and this would be inconsistent with the Council’s current procedure for setting groundfish TACs. However, paragraph 600.310(g)(4) of the proposed rule relaxes the requirement for use of an ACT control rule, stating instead that such control rules “can” be used.

Suggested Improvement:

Given that the NPFMC’s groundfish FMPs use TAC as a functional equivalent of ACT, it would be helpful if the proposed rule used the phrase “ACT, or functional equivalent,” in places such as the second sentence of 600.310(f)(4)(i): “If an annual catch target (ACT), *or functional equivalent*, is not used, management uncertainty should be accounted for in the ACL.”

XIII. Establishing Annual Catch Limit (ACL) and Accountability Measure (AM) Mechanisms

Amended Section(s): 600.310(h)

Comments:

The proposed rule’s addition of data-limited cases to the set of circumstances under which “alternative approaches” is helpful, and simply acknowledges the reality that some things cannot be estimated without data.

Regarding the Council’s comment on the corresponding issue in the ANPR, the proposed rule does not provide a more straightforward exemption for salmon, although the exemption in the current guidelines is already explicit.

Suggested Improvement:

At 600.310(h)(2) the proposed rule mischaracterizes the spawning potential of Pacific salmon (“the spawning potential is concentrated in one year”). This could be fixed by inserting the phrase “of each run” after “potential,” or by retaining the current language (“the spawning potential for a stock is spread over a multi-year period”).

600.310(h)(2) “Flexibility in application of NS1 guidelines” is nested under (h) “Establishing ACL mechanisms and AMs in FMPs.” It would be more appropriately elevated to full paragraph status as 600.310(i), which would require renumbering subsequent paragraphs, or added as new paragraph 600.310(n). This change would make it clear that the Councils have flexibility under the complete set of NS1 guidelines, not just flexibility under (h).

XIV. Adding Flexibility in Rebuilding

Amended Section(s): 600.310(j)

Comments:

600.310(j)(3)(i)(A) - The proposed rule identifies the starting date for calculating the minimum time for rebuilding (T_{min}) as the first year that the rebuilding plan is expected to be implemented, which is a helpful clarification.

600.310(j)(3)(i)(B) - The proposed rule retains the existing discontinuity in the formula for the maximum rebuilding time (T_{max}), wherein T_{max} can be no greater than 10 years if T_{min} is slightly below or equal to 10 years, but T_{max} can be substantially greater than 10 years if T_{min} is even slightly above 10 years. Although the discontinuity is difficult to rationalize, it is also difficult to see how the Act can be interpreted otherwise. For stocks with T_{min} greater than 10 years, the proposed rule adds two new alternative methods for calculating T_{max} , which provides helpful flexibility, particularly in cases where estimates of generation time are unavailable or unreliable. But it would be helpful for guidance on which of the three approaches should be chosen if more than one can be calculated. Is it permissible to choose the longest of the three for management flexibility?

600.310(j)(3)(iv) and 600.310(j)(3)(v) - Paragraph 600.310(j)(3)(iv) of the proposed rule provides significant new text on determination of “adequate progress” under a rebuilding plan, which is an issue that the current guidelines do not address; thus the proposed rule is responsive to the SSC’s first ANPR comment on this issue. However, the new text does not address data-poor cases separately from the general case, so is not responsive to the SSC’s second ANPR comment.

The proposed rule emphasizes keeping catch below the level associated with the specified fishing mortality rate under the rebuilding plan (“Frebuild”). This is helpful in that it places the focus on something that managers can actually control, but it may also de-emphasize the progress of the stock biomass toward BMSY (which managers can at best control indirectly, and sometimes not at all), thereby resulting in insufficient scrutiny of the Frebuild estimates. For example, paragraph 600.310(j)(3)(v) states that revision of Frebuild is not necessary unless adequate progress is not being made, which implies that, if Frebuild is initially overestimated and catches stay below the level associated with the (overestimated) Frebuild, there may be no incentive to revisit Frebuild even if biomass makes no progress toward BMSY. A possible remedy might be found in the proposed rule’s option wherein progress “may also” be found to be inadequate if “rebuilding expectations of a stock or stock complex are significantly changed due to new and unexpected information about the status of the stock.” For example, if the unexpected information consists of a finding that biomass is not increasing as rapidly as expected under Frebuild, this clause could allow for a determination of inadequate progress, thereby necessitating a re-evaluation of Frebuild. However, it is not clear that such an interpretation is consistent with NMFS’ understanding that “the primary objective of a rebuilding plan should be to maintain fishing mortality at or below Frebuild.”

Suggested Improvement:

The proposed rule includes the following text at 600.310(j)(3)(iv): “The Secretary may find that adequate progress is not being made if Frebuild or the ACL associated with Frebuild are exceeded, and AMs are not correcting the operational issue that caused the overage and addressing any biological consequences to the stock or stock complex resulting from the overage when it is known (see paragraph (g)(3) of this section). A lack of adequate progress may also be found when the rebuilding expectations of a stock or stock complex are significantly changed due to new and unexpected information about the status of the stock.” These sentences should be modified by changing “may” to “will” in the first sentence, and replacing the second sentence with the following: “Each rebuilding plan should identify a reasonable level of statistical significance that will be used to evaluate progress of the stock toward BMSY. The Secretary will also find that adequate progress is not being made if the status of the stock relative to BMSY is significantly different from that projected in the rebuilding plan.”

Consider revising 600.310(j)(3)(vi) to read:“(vi) If a stock or stock complex has not rebuilt by Tmax or the Secretary finds that adequate progress is not being made, then the fishing mortality rate should be maintained at Frebuild or 75 percent of the MFMT, whichever is less, until the stock or stock complex is rebuilt.”

XV. Recreational Fisheries

Amended Section(s): 600.305(b)(2), 600.310(g)(3), 600.310(e)(2)(ii), 600.310(h)(2)

Comments:

Comments provided above on Sections III, V, XII. No comments are offered specific to recreational fisheries

National Standard 3

Amended Section(s): 600.320

600.320(e) - The proposed rule leaves this paragraph, which deals with analysis of management units, largely as it appears in the current guidelines. Although the NPFMC’s FMPs do not address the items enumerated in this paragraph, most of them are addressed in the analytical documents that support the FMP (EAs, RIRs, etc.). It is not clear why this analysis would belong in an FMP, and it could create excessively long FMPs.

Suggested Improvement:

Consider changing the beginning of the first paragraph from “An FMP should include discussion of the following:” to “The supporting analyses for FMPs should demonstrate:” This change would make the analysis paragraph for NS3 consistent with the analysis paragraph for NS7 (proposed 600.340(c)).

National Standard 7

See comments under IV above.