



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
1315 East-West Highway  
Silver Spring, MD 20910

THE DIRECTOR

APR 16 2002

RECEIVED  
APR 25 2002

N.P.F.M.C.

MEMORANDUM FOR: Distribution  
FROM: *W. Hogarth*  
William T. Hogarth, Ph.D.  
SUBJECT: Sustainable Fisheries Act Five-Year Review

Five years have passed since the implementation of the Sustainable Fisheries Act (SFA) amendments to the Magnuson-Stevens Act. Working with our Regional Fishery Management Council partners, the National Marine Fisheries Service (NMFS) has made considerable progress in implementing the requirements of SFA. Nevertheless, more work remains to be done in order to fully achieve the goals of the SFA.

The purpose of this memorandum is to outline implementation of an SFA Five-Year Review and to seek your input on specific details and timeframes for the review. The Office of Sustainable Fisheries will have the lead for this review, and will be responsible for producing a final report. However, the review will be conducted in cooperation with all of our Regions, Science Centers and Headquarters Offices, NOAA General Counsel, and the Regional Fishery Management Councils (Councils). The SFA Review will include the following specific tasks:

(1) SFA Requirements: Initial cursory review

- NMFS will contact the Councils and request them to identify SFA requirements that are not yet completed, e.g., overfishing definitions, rebuilding plans, bycatch provisions, essential fish habitat review, community studies, etc.
- Councils will be required to address these measures at their next council meeting and to establish a strategy and timeline for working with their respective Region(s) and Science Center(s) to complete this work.

(2) National Standards (NS) 1 and 2 and National Standard Guidelines (NSGs) on Overfishing and Rebuilding

- A panel of NMFS scientists is conducting a review of all overfishing definitions, targets and thresholds to evaluate their consistency with the NSGs. A report is under preparation and will be shared with Regions and Councils for their review, comment, and follow-up action.
- NMFS will contact those Councils whose FMPs warrant a fresh review and consider amendments to their plans to address concerns raised in the review, including timelines.
- NMFS will consider implementing the requirements through Secretarial action if necessary.
- NMFS may also consider holding a review of the NSGs to see if these warrant any modification.

THE ASSISTANT ADMINISTRATOR  
FOR FISHERIES



## (3) National Standard 9 - Bycatch

- NMFS will establish a Bycatch Workgroup, to be chaired by the Office of Sustainable Fisheries, and including representation from the Offices of Protected Resources, Science and Technology, and Habitat Conservation.
- The Bycatch Workgroup will review comments on the Oceana petition, as well as implementation of the 1998 bycatch plan recommendations and overall progress in reducing bycatch. A report from the Workgroup will be issued by August 1, 2002.
- As part of this report, the Bycatch Workgroup will review all FMPs to assess their consistency with bycatch provisions of the SFA, including data collection programs.
- Following the August report, NMFS will review the allocation of scarce observer program funding to ensure the best possible coverage of fisheries for which bycatch monitoring is a high priority.
- NMFS may also consider holding a review of the NSGs for NS 9 to see if the guidelines warrant any modification.
- F will review the role and workplan of the Section 202(h) Task Force on International Bycatch.

## (4) National Standard 8 - Communities

- In April 2002, NMFS, Council, and other social scientists will be reviewing five years of implementation of NS 8, which requires the evaluation of social and community impacts of fishery management measures. The report from this meeting will be made available for the SFA Review.
- The April workshop will address data and analytical issues, as well as possible revisions to agency guidelines, including the NSGs for NS 8, and NMFS socio-economic guidance materials.

I appreciate your cooperation in carrying out the tasks outlined above. While this will undoubtedly add to our overall workload, it is an important step in identifying priority tasks over the next year. This exercise will also assist us in considering possible areas for change in the reauthorization of the Magnuson-Stevens Act. As designated lead for the SFA Five-Year Review, the Office of Sustainable Fisheries will be responsible for overall coordination of these efforts, and for producing a final report that summarizes our findings.

## Distribution:

NMFS Regional Administrators  
 NMFS Science Center Directors  
 NMFS Office Directors  
 NOAA General Counsel  
 NOAA General Counsel for Fisheries  
 Fishery Management Council Chairs and Executive Directors



APR 11 2002

UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
1315 East-West Highway  
Silver Spring, Maryland 20910

THE DIRECTOR

RECEIVED

APR 23 2002

N.P.F.M.C

Mr. David Benton  
Chairman, North Pacific  
Fishery Management Council  
605 West 4th Avenue, Suite 306  
Anchorage, AK 99501-2252

Dear Mr. Benton:

I am enclosing the petition for rulemaking on bycatch in all U.S. fisheries that the National Marine Fisheries Service recently received from Oceania. We have just sent to the Federal Register a notice of receipt of this petition requesting public comment for a period of 60 days. Because of the importance and far-reaching nature of this issue, I am sending the petition to each of the Regional Fishery Management Councils and inviting their comments on it.

I would appreciate receiving your views on this very important matter. Please contact Jack Dunnigan in our Office of Sustainable Fisheries (301-713-2334). Thank you for your attention to this important issue.

Sincerely,

*Rebecca Lehl*  
for William T. Hogarth, Ph.D.

Enclosure



has proposed, in their application, a system of area closures triggered by dates, water temperatures and/or observed sea turtle interactions, to minimize the impact of the experimental fishery on threatened or endangered sea turtles. This proposal served as the basis for developing an interim final rule to protect sea turtles. This interim final rule (67 FR 13098; March 21, 2002), which is effective for 240 days starting from March 15, 2002, requires monkfish gillnet vessels to move their fishing operations steadily northward at specific points in time, based in part on sea surface temperature information. Participating vessels would be required to comply with the provisions of this interim final rule. In addition, the experimental fishery would terminate immediately if three loggerhead turtles are taken or one endangered sea turtle is taken. NMFS will take the necessary steps to ensure consistency with its obligations under the Endangered Species Act before issuing the EFPs.

EFPs would be issued to three vessels to exempt them from monkfish limited access permit eligibility requirements; DAS and reporting requirements; gear-marking requirements; incidental monkfish possession and landing limits; the minimum fish size requirement (for data collection only); and minimum gillnet mesh size, as required by the FMP (50 CFR part 648, subpart F).

Based on the results of this EFP, this action may lead to future rulemaking.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 12, 2002.

John H. Dunnigan,

Director, Office of Sustainable Fisheries,  
National Marine Fisheries Service.

[FR Doc. 02-9327 Filed 4-15-02; 2:41 pm]

BILLING CODE 3510-22-M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 600

[I.D. 040202C]

#### Magnuson-Stevens Act Provisions, Subpart H; General Provisions for Domestic Fishing

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of receipt of petition for rulemaking and request for comments.

**SUMMARY:** NOAA announces receipt of a petition for rulemaking under the Administrative Procedure Act. Oceana, a non-governmental organization concerned with the environmental health of the oceans, has petitioned the U.S. Department of Commerce to promulgate immediately a rule to establish a program to count, cap, and control bycatch in U.S. fisheries. The Oceana petition asserts that NMFS is not complying with its statutory obligations to monitor and minimize bycatch under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the Migratory Bird Treaty Act (MBTA). The petition seeks a regulatory program that includes a workplan for observer coverage sufficient to provide statistically reliable bycatch estimates in all fisheries, the incorporation of bycatch estimates into restrictions on fishing, the placing of limits on directed catch and bycatch in each fishery with provision for closure upon attainment of either limit, and bycatch assessment and reduction plans as a requirement for all commercial and recreational fisheries.

**DATES:** Comments will be accepted through June 17, 2002.

**ADDRESSES:** Copies of the petition are available, and written comments on the need for such a regulation, its objectives, alternative approaches, and any other comments may be addressed to William T. Hogarth, Ph.D., Assistant Administrator for Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301-713-2239. Comments may also be sent via fax to 301-713-1193, attn: Val Chambers. Comments will not be accepted if submitted via e-mail or Internet.

**FOR FURTHER INFORMATION CONTACT:** Val Chambers, telephone 301-713-2341, fax 301-713-1193, e-mail Val.Chambers@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The petition filed by Oceana states that wasteful large-scale bycatch of birds, mammals, turtles, and fish is occurring in the United States and worldwide. The petition cites scientific estimates of bycatch poundage and indicates bycatch of a much larger magnitude. The petition asserts that NMFS is allowing this wastage to continue by not meeting its legal obligations for bycatch under the MSA, ESA, MMPA, and the MBTA.

The petition cites specific legal responsibilities of NMFS for bycatch under each of these statutes and concludes that NMFS must count, cap, and control bycatch under the MSA, ESA, and MMPA and that NMFS must

monitor and report bycatch of seabirds that occurs in fishing operations and take steps to reduce seabird bycatch. For the MSA and related regulations and Federal Court interpretations, the petition cites national standard 9 and other requirements for minimizing bycatch and related mortality, including a standardized reporting methodology for bycatch. The petition concludes that any FMP or regulation prepared to implement an FMP must contain measures to minimize bycatch in fisheries to the extent practicable and argues that greater observer coverage is required. For the ESA, the petition cites the prohibition on taking endangered species and protection of threatened species, including recovery plans to guide regulatory efforts, as well as consultation requirements and incidental take statements. For the MMPA, the petition cites requirements for a regulatory system to avoid and minimize takes of marine mammals reducing mortality or serious injury to insignificant levels, as well as take reduction plans and monitoring of marine mammal takes. For the MBTA, the petition cites the prohibition on taking any migratory bird, including seabirds, except as permitted by regulations issued by the Department of the Interior, and cites Federal case law and Executive Order 13186 as requirements that NMFS ensure that fishery management plans approved by NMFS comply with the MBTA. The petition also refers to the NMFS-issued National Plan of Action for reducing seabird bycatch and the need to prepare a national seabird bycatch assessment.

The exact and complete assertions of nonconformance with Federal law are contained in the text of Oceana's petition which is available via internet at the following NMFS web address: <http://www.nmfs.noaa.gov/sfa/sfweb/index.htm>. Also, anyone may obtain a copy of the petition by contacting NMFS at the above address.

The petition specifically requests that NMFS immediately undertake a rulemaking to meet its obligations under the above statutory authorities and that such rulemaking include the following four actions:

"1. Develop and implement a workplan for placing observers on enough fishing trips to provide statistically reliable bycatch estimates in all fisheries. This task involves several steps (taking into account the diversity of vessel category, gears used, and fishing region): (a) determining how many fishing trips must be observed, where observers should be stationed, and other details; (b) identifying funding sources to support such

observer coverage, including taxpayer subsidies, taxing landings or user fees; and (c) hiring, training, and deploying the necessary observers.

"2. Incorporate reasonable estimates of bycatch into all total allowable catch levels and other restrictions on fishing.

"3. Set absolute limits on the amount of directed catch and bycatch (including non-fish bycatch) that can occur in each fishery, and close the fishery when the applicable catch or bycatch limit (whichever is reached first) is met.

"4. Within 12 months of initiating rulemaking, develop, approve, and implement bycatch assessment and reduction plans for commercial and recreational fisheries. Such plans should include, at minimum, (a) an assessment of the fishery according to its bycatch, including its types, levels, and rates of bycatch on a per-gear basis and the impact of that bycatch on bycaught species and the surrounding environment; (b) a description of the level and type of observer coverage necessary accurately to characterize total mortality (including bycatch) in the fishery; (c) bycatch reduction targets and the amount of directed and bycatch mortality allowed in each fishery to meet the target; and (d) types of bycatch reduction measures (such as closed areas, gear modifications, or effort reduction) that will be employed in the fishery, including incentives for those who use gears that produce less bycatch. Beginning 12 months after rulemaking commences, NMFS should not permit fishing in any fishery that lacks a functioning bycatch plan."

The Assistant Administrator for Fisheries has determined that the petition contains enough information to enable NMFS to consider the substance of the petition. NMFS will consider public comments received in determining whether or not to proceed with the development of the regulations requested by Oceana. To this end, NMFS, by separate letter, has requested each of the Regional Fishery Management Councils to assist in evaluating this petition. Upon determining whether or not to initiate the requested rulemaking, the Assistant Administrator for Fisheries, NOAA, will publish a notice of the agency's final disposition of the Oceana petition request in the *Federal Register*.

Dated: April 11, 2002.

John H. Dunnigan,

Director, Office of Sustainable Fisheries,  
National Marine Fisheries Service.

[FR Doc. 02-9462 Filed 4-17-02; 8:45 am]

BILLING CODE 3510-22-S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 654

[I.D. 031402C]

RIN 0648-AN10

#### Stone Crab Fishery of the Gulf of Mexico; Amendment 7

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of availability of Amendment 7 to the Fishery Management Plan for the Stone Crab Fishery of the Gulf of Mexico; request for comments.

**SUMMARY:** NMFS announces that the Gulf of Mexico Fishery Management Council (Council) has submitted Amendment 7 to the Fishery Management Plan for the Stone Crab Fishery of the Gulf of Mexico (FMP) for review, approval, and implementation by NMFS. Amendment 7 would establish a Federal trap limitation program for the commercial stone crab fishery in the exclusive economic zone (EEZ) off Florida's west coast, including the area off Monroe County, FL (i.e., the management area) that would complement the stone crab trap limitation program implemented by the Florida Fish and Wildlife Conservation Commission (FFWCC). In addition, Amendment 7 would revise the Protocol and Procedure for an Enhanced Cooperative Management System (Protocol) consistent with Florida's constitutional revisions that transferred authority for implementation of fishery-related rules from the Governor and Cabinet to the FFWCC. The intended effects are to establish a Federal program that would complement and enhance the effectiveness of the FFWCC's trap limitation program and, thereby, help to reduce overcapitalization in the stone crab fishery.

**DATES:** Written comments must be received on or before June 17, 2002.

**ADDRESSES:** Written comments must be sent to Mark Godcharles, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702. Comments also may be sent via fax to 727-570-5583. Comments will not be accepted if submitted via e-mail or Internet.

Requests for copies of Amendment 7, which includes a regulatory impact review and an environmental

assessment should be sent to the Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, Florida 33619-2266; phone: 813-228-2815; fax: 813-225-7015; e-mail: gulfcouncil@gulfcouncil.org.

**FOR FURTHER INFORMATION CONTACT:** Mark Godcharles 727-570-5305, fax 727-570-5583, e-mail Mark.Godcharles@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each Regional Fishery Management Council to submit any fishery management plan or amendment to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an amendment, immediately publish a document in the *Federal Register* stating that the amendment is available for public review and comment.

Fishery information available since the early 1980's indicates that the stone crab fishery, in terms of area fished, and numbers of participants and traps, has expanded to a level where the fishery has more participants and traps than necessary to harvest optimum yield. This excessive growth has reduced efficiency in the fishery and failed to increase annual harvest since the early 1990's. Since moratoriums were first implemented (60 FR 13918, March 15, 1995; 63 FR 44595, August 20, 1998), neither Florida nor NMFS has issued new permits for this fishery. On June 26, 2000, Florida adopted its trap certificate program which is designed to reduce the number of traps in the stone crab fishery to an optimal level over about a 30-year period. The FFWCC expects to implement this program by October 1, 2002.

Amendment 7 represents a continuation of cooperative State/Federal efforts to constrain overcapitalization in the stone crab fishery. The state/federal cooperative approach to managing the Florida stone crab fishery was initiated with the development and implementation of the FMP (final rule: 44 FR 53519, September 14, 1979). The fourth management objective in the FMP specified that regulations be developed with the ideal of promoting uniform and consistent management of the fishery in state and federal of the Gulf of Mexico waters off west Florida. In Amendment 7, the Council has proposed the following nine FMP changes to align Federal management of the stone crab fishery with the FFWCC trap reduction program: (1) Recognize, but not require,



2501 M STREET NW, SUITE 300 WASHINGTON, DC 20037 202.833.3900 WWW.OCEANA.ORG

28 February 2002

The Honorable Donald L. Evans  
Secretary  
U.S. Department of Commerce  
14<sup>th</sup> Street and Constitution Avenue, NW  
Room 5851  
Washington, D.C. 20230-0001

Dear Secretary Evans:

Large scale bycatch, the incidental catch of birds, mammals, turtles, and fish, plagues the marine fisheries of the United States and the world. Bycatch endangers vulnerable species and threatens the commercial viability of formerly prosperous fisheries. In order to address this problem in United States waters, Oceana requests, pursuant to 5 U.S.C. § 553(e), that the Department of Commerce, through the National Marine Fisheries Service (NMFS), initiate rulemaking to establish a program to count, cap, and control bycatch in the nation's fisheries. As discussed in detail below, federal law has required such a system for years, yet NMFS has failed to comply with those obligations to date. Further delay in complying with these legal mandates is unacceptable.

Scientists estimate that approximately 44 billion pounds of fish are discarded each year in commercial fisheries world-wide,<sup>1</sup> roughly equivalent to 25% of the world's total landings. This estimate includes only discarded fish bycatch, and excludes retained bycatch, bycatch from recreational fisheries and subsistence fisheries, and unobserved deaths. Additionally, this estimate does not include bycatch of marine mammals, seabirds, or other non-fish species. Therefore, the true amount of bycatch resulting from world fisheries is substantially higher than the current estimate. Applying this estimate to United States' fisheries and relying on data collected by NMFS and others, it is clear that billions of pounds of fish, marine mammals, seabirds, sea turtles, and other non-fish species are caught and wasted as bycatch each year in this country.<sup>2</sup>

Despite clear legal mandates requiring the avoidance and minimization of bycatch, NMFS is allowing this senseless waste of marine life to continue. To count, cap and control bycatch as required by law, NMFS should undertake the following actions immediately:

1. Develop and implement a workplan for placing observers on enough fishing trips to provide statistically reliable bycatch estimates in all fisheries. This task involves several steps (taking into account the diversity of vessel category, gears used, and fishing region): (a) determining how many fishing trips must be observed, where observers should be stationed, and other details; (b) identifying

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<sup>1</sup> Alverson, Dayton L. 1998. *Discarding Practices and Unobserved Fishing Mortality in Marine Fisheries: An Update*. From a Report Prepared For National Marine Fisheries Service, 29 Apr. 1998. Seattle: Sea Grant Washington.

<sup>2</sup> Oceana has published a report that provides further details on the bycatch problem. A copy is enclosed.

funding sources to support such observer coverage, including taxpayer subsidies, taxing landings or user fees; and (c) hiring, training, and deploying the necessary observers.

2. Incorporate reasonable estimates of bycatch into all total allowable catch levels and other restrictions on fishing.
3. Set absolute limits on the amount of directed catch and bycatch (including non-fish bycatch) that can occur in each fishery, and close the fishery when the applicable catch or bycatch limit (whichever is reached first) is met.
4. Within 12 months of initiating rulemaking, develop, approve, and implement bycatch assessment and reduction plans for commercial and recreational fisheries. Such plans should include, at a minimum, (a) an assessment of the fishery according to its bycatch, including its types, levels, and rates of bycatch on a per-gear basis and the impact of that bycatch on bycaught species and the surrounding environment; (b) a description of the level and type of observer coverage necessary accurately to characterize total mortality (including bycatch) in the fishery; (c) bycatch reduction targets and the amount of directed and bycatch mortality allowed in each fishery to meet the target; and (d) types of bycatch reduction measures (such as closed areas, gear modifications, or effort reduction) that will be employed in the fishery, including incentives for those who use gears that produce less bycatch. Beginning 12 months after rulemaking commences, NMFS should not permit fishing in any fishery that lacks a functioning bycatch plan.

Oceana is prepared to assist you in any way that it can to help ensure that NMFS takes these actions.

## **FEDERAL LAW REQUIRES BYCATCH MONITORING AND MINIMIZATION**

Counting, capping and controlling bycatch is required by several federal statutes and their implementing regulations. In particular, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the Migratory Bird Treaty Act (MBTA) require NMFS to count, cap and control bycatch.

### **I. MAGNUSON-STEVENSONS ACT**

#### **A. Statutory Language**

Congress added explicit bycatch reduction requirements to the MSA in the Sustainable Fisheries Act Amendments of 1996 (SFA), Pub. L. No. 104-297, 110 Stat. 3559 (1996). The SFA added national standard 9 to the MSA, requiring that “[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” 16 U.S.C. § 1851(a)(9). The SFA also added a requirement that fishery management plans (FMPs) minimize bycatch and bycatch mortality. *Id.* § 1853(a)(11). Therefore, any FMP or regulation prepared to implement an FMP *must* contain measures to minimize bycatch in fisheries to the extent practicable.

The SFA also added the requirement that FMPs “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.” 16 U.S.C. § 1853(a)(11). In order to “assess the amount and type of bycatch occurring in [a] fishery,” a reporting methodology must be reasonably reliable. What is more, the MSA authorizes the Secretary to “require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to [a fishery management] plan,” *id.* § 1853(b)(8), and gives the Secretary “general responsibility to carry out any fishery management plan or

amendment approved or prepared by him,” *id.* § 1855(d). The statute therefore gives the Secretary the authority to require observers and, where they are necessary to properly account for bycatch, requires him to do so.

Most fisheries in the United States rely on logbooks compiled by fishers to monitor the amount and type of marine organisms (including fish, marine mammals, sea turtles, and invertebrates) that are discarded during fishing trips. Especially in light of acknowledged bycatch underreporting in certain fisheries (including New England groundfish and pelagic longlining for highly migratory species), this system cannot be considered reasonably reliable. Thus, the MSA requires greater observer coverage than the extremely meager levels that currently exist.

## **B. Implementing Regulations**

NMFS has promulgated its interpretation of national standard 9 and the bycatch reporting requirements of the MSA in its national standard guidelines. With respect to reporting, the guidelines provide:

[a] review, and, where necessary, improvement of data collection methods, data sources, and applications of data must be initiated for each fishery to determine the amount, type, disposition, and other characteristics of bycatch and bycatch mortality in each fishery . . . . When appropriate, management measures, such as at-sea monitoring programs, should be developed to meet these information needs.

50 C.F.R. § 600.350(d)(1).

With respect to bycatch control requirements, the guidelines require that regional fishery management councils “consider the bycatch effects of existing and planned conservation and management measures.” *Id.* § 600.350(b). See also *id.* § 600.350(d)(2) (requiring analysis of bycatch effects of all measures). In undertaking the required analysis, the guidelines specify that “[t]he priority under [national standard 9] is first to avoid catching bycatch species where practicable. Fish that are bycatch and cannot be avoided must, to the extent practicable, be returned to the sea alive.” *Id.* § 600.350(d). NMFS goes on to list multiple factors that should be considered in evaluating the practicability of measures that could minimize bycatch.<sup>3</sup> See *id.* § 600.350(d)(3).

## **C. Federal Court Interpretations**

Two federal courts have already held NMFS in violation of the law for its failure to count, cap and control bycatch. The United States District Court for the District of Columbia recently found that the Northeast Multispecies FMP governing groundfish fishing in New England violated the MSA. The court held that “by keeping intact the status quo, [NMFS] refuse[s] to give effect to the clear will of Congress, which expressly directed [NMFS] to more accurately measure and reduce bycatch.” *Conservation Law Found. v. Evans*, No. 00-1134 (D.D.C. Dec. 28, 2001), slip op. at 21. Furthermore, the court found “that after the SFA was enacted, Defendants adopted no new measures to minimize bycatch and bycatch mortality. . . . Such an approach both ignores and frustrates the will of Congress.” *Id.* at 24.

Similarly, in August 2001, the United States District Court for the Northern District of California decided a case concerning the Pacific groundfish fishery. *NRDC v. Evans*, 168 F. Supp. 2d 1149 (N.D. Cal. 2001). In

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<sup>3</sup> The guidelines also appear to identify factors that should be considered if a council desires to implement “a management measure that does not give priority to avoiding the capture of bycatch species” because of the “net benefits to the Nation.” 50 C.F.R. § 600.350(d). Because the MSA sets a practicability standard, not a “net benefits” standard, see 16 U.S.C. §§ 1851(a)(9), 1853(a)(11), this section of the guidelines is unlawful. Oceana requests, as part of this petition, that the illegal guidance be rescinded.



that case, environmental groups challenged fishing quotas that were first based on the assumption that there was *no* bycatch of two severely overfished species, and then were amended by relying on data from a 15-year-old study. The court held that

[t]he 1996 SFA amendments to the MSA require that NMFS ‘establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery and ... minimize bycatch.’ NMFS has not done this. Evidence . . . points to increasing bycatch percentages for bocaccio and lingcod as landing limits necessarily decline to protect the species. NMFS has not accounted for this evidence of increased bycatch percentages in its specifications, instead using static estimates that are 15 years old. NMFS has not observed to [*sic*] its duty to obtain accurate bycatch data. Nor has the agency bothered to explain its decision to ignore these factors and not adjust . . . bycatch percentages in the face of evidence that it should . . . . They are thus “not in accordance with the law.”

*Id.* at 1154 (first ellipsis in original, citation omitted).

In sum, there can be no doubt that NMFS must count, cap and control bycatch pursuant to the MSA.

## II. ENDANGERED SPECIES ACT

The ESA requires NMFS to count, cap and control endangered and threatened species bycatch. The ESA prohibits any take (including bycatch) of endangered species, see 16 U.S.C. § 1538(a), and it also protects threatened species. After a marine species is listed as endangered or threatened, NMFS must prepare and implement a recovery plan to guide regulatory efforts to recover the species. *Id.* § 1533(f).

NMFS may allow endangered or threatened species bycatch resulting from a federally-authorized activity (such as fishing) through an incidental take statement generated after consultation. The ESA requires federal agencies to ensure that their activities do not jeopardize the continued existence of any endangered or threatened species. *Id.* § 1536(a)(2). Thus, in its role as fisheries regulator, when a fishery it authorizes is likely to affect a listed species by taking bycatch, or NMFS proposes to change the regulations for that fishery in a way that is likely to affect a listed species by allowing bycatch, NMFS must consult with the agency that regulates marine wildlife. *Id.* § 1536(a)(3). In its role as the agency that regulates marine wildlife, NMFS, upon being consulted by itself, is required to issue a biological opinion determining whether the fishery is likely to jeopardize the continued existence of the listed species. *Id.* § 1536(b)(3)(A). If NMFS finds jeopardy, it must set forth reasonable and prudent alternatives which would allow the fishery to go forward without jeopardizing the species. *Id.* Moreover, to permit takes NMFS must issue an incidental take statement specifying the impact of the fishery’s bycatch on the species, the reasonable and prudent measures that must be taken to minimize that impact, and the terms and conditions under which the fishery can go forward. *Id.* § 1536(b)(4)(C).

In sum, the ESA tightly regulates the incidental catch of endangered species. The statutory provisions outlined above require NMFS to count, cap and control bycatch of endangered and threatened species.

## III. MARINE MAMMAL PROTECTION ACT

The MMPA, 16 U.S.C. §§ 1361-1421h, establishes a “moratorium” on takes of marine mammals, *id.* § 1371. The Act includes an exception for commercial fisheries, allows incidental takes, but creates a regulatory system that strives to avoid and minimize takes. Specifically, the MMPA provides that “it shall be the immediate goal [of the MMPA] that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate” by April 30, 2001. *Id.* § 1387(a)(1).

The MMPA establishes a complex regulatory system to achieve this goal. The Act requires NMFS regularly to assess marine mammal populations, categorize fisheries according to how often they take marine mammals, develop conservation plans to rebuild depleted marine mammal populations to optimal levels, and produce take reduction plans for fisheries that take depleted marine mammals. 16 U.S.C. §§ 1383b, 1386, 1387. Within six months of implementation, take reduction plans must reduce take to levels less than the potential biological removal level, defined as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” *Id.* §§ 1362(20), 1387(f)(2). Within five years, take reduction plans must reduce take to insignificant levels approaching zero. *Id.* § 1387(f)(2). The MMPA requires NMFS to closely monitor marine mammal takes, *id.* 1387(d), and to issue a report by April 1998 describing the progress of the nation’s fisheries towards the zero mortality goal, *id.* § 1387(b)(3).

In short, NMFS must count, cap, and control bycatch of marine mammals in order to comply with the MMPA. It has failed to do so. Indeed, nearly four years after the 1998 deadline established by the MMPA, NMFS has not submitted the report on its progress. This delay not only violates the law, it demonstrates that the agency has failed to evaluate its progress in reducing marine mammal bycatch in commercial fisheries. Further, NMFS has failed to meet the requirement to reduce marine mammal bycatch to insignificant levels by April 2001.<sup>4</sup>

#### IV. MIGRATORY BIRD TREATY ACT

The MBTA, 16 U.S.C. §§ 703-712, prohibits taking any migratory bird, including seabirds, except as permitted by regulations issued by the Department of Interior. *Id.* §§ 703, 704. NMFS is required to ensure that its fishery management actions comply with the MBTA. 16 U.S.C. § 1854(a), (b); *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000) (MBTA applies to federal agencies). An applicable Executive Order requires NMFS to develop and implement, by January 2003, a Memorandum of Understanding with the Fish and Wildlife Service (FWS) that “shall promote the conservation of migratory bird populations.” Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds § 3(a) (January 10, 2001). For its part, the FWS states in its Waterbird Bycatch Policy Statement that its goal is the “elimination of waterbird bycatch in fisheries.” In sum, NMFS must monitor and report the bycatch of seabirds that occurs in fishing operations and take steps to reduce seabird bycatch.

In February 2001, NMFS issued a National Plan of Action for reducing seabird bycatch. That plan of action deferred taking any action to address seabird bycatch until a national seabird bycatch assessment had been done. Additionally, the document states that it is a voluntary document and does not appear to recognize that NMFS has any responsibility to protect seabirds under the MBTA.

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In sum, bycatch remains a serious problem in United States fisheries. Several federal laws require NMFS to count, cap and control all forms of bycatch. Pursuant to 5 U.S.C. § 553(e), we formally request that NMFS immediately undertake a rulemaking to fulfill these statutory objectives. We also formally request that this rulemaking include the actions described in the four-point outline at the outset of this letter.

Very truly yours,

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<sup>4</sup> Marine Mammal Commission (MMC). 2001. Annual Report to Congress 2000. Bethesda, MD: Marine Mammal Commission.

Stephen E. Rody  
President

Enclosure

Cc: The Honorable Conrad C. Lautenbacher, Jr.  
Under Secretary for Oceans and Atmosphere and NOAA Administrator

The Honorable William T. Hogarth, Ph.D  
Assistant Administrator for Fisheries