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VIA HAND DELIVERY

John Pappalardo
Chairman NEFMC

Re: Annual Catch Limit Implementation

Dear John:

As you know, we represent the Fisheries Survival Fund ("FSF"), which consists of the bulk of the limited access full time scallop fleet. The Groundfish Plan Development Team ("PDT") has recently analyzed the new requirements for setting annual catch limits in the Magnuson-Stevens Reauthorization Act ("MSRA"). FSF is concerned about the development of ACLs in the groundfish FMP as it will have a direct effect on the prosecution of the scallop fishery and set a precedent for the scallop FMP. This letter contains FSF's response to a series of questions the Groundfish PDT has posed to the Groundfish Committee regarding the development of ACLs. The PDT questions are included in the letter to provide context to each FSF answer, which is in **bold text**.

Fishing Mortality References

1. Some of the preliminary discussions on ACLs suggest that there may be changes in our interpretations of key terms such as "overfishing." As discussed in attachment (a), overfishing has been interpreted by NMFS, and as a result was defined in Amendment 13, as occurring when F_{MSY} (or its proxy) is exceeded for a period of one year or more, regardless of stock size. Since rebuilding mortality targets are often less than F_{MSY} , this means that it is possible to exceed a rebuilding target but not exceed F_{MSY} and not be overfishing. Since the M-S Act says that ACLs are to be set "at a level such that overfishing does not occur in the fishery", it follows that the ACL could be set higher than the desired catch and meet statutory requirements. This does not seem to be a prudent approach, nor does it seem to comport with M-S Act guidance to rebuild

overfished stocks as quickly as possible, subject to various constraints. Nothing prohibits setting the ACL at a more conservative level (such as the catch that results from the rebuilding target mortality), but NMFS discussions suggest there may be a change so that overfishing occurs when the fishing mortality called for by the MSY control rule is exceeded. This was the definition used in Amendment 9, and is the definition currently used in the Bering Sea and Gulf of Alaska groundfish FMPs.

FSF believes the PDT is unnecessarily focusing on the definition of overfishing in a rebuilding scenario. While the MSRA did institute the new requirements to establish ACLs, it did not modify the preexisting rebuilding requirements. Therefore, the Council still has the duty to rebuild an overfished stock as soon as practicable or within ten years, subject to certain exceptions. For an overfished species the ACL will be driven by the rebuilding plan as the Council must rebuild an overfished stock in accordance with the law. In the case of an overfished stock, the rebuilding requirement is preeminent to the long-term overfishing requirement during the rebuilding phase. These matters can be addressed without altering overfishing definitions or existing methodologies for establishing OFDs.

2. There has been little published which suggests how to link existing mortality targets with the proposed ACLs. To review Amendment 13, there are at least three mortality levels specified for each groundfish stock (except halibut), and for stocks in a rebuilding program there are four. Each of these different mortality levels could be used to calculate an associated catch.

- F_{MSY} (or its proxy): The mortality expected to produce MSY over the long-term. Under current interpretations, overfishing occurs when F_{MSY} is exceeded for a period of one year.
- F (control rule): For a stock greater than $\frac{1}{2} B_{MSY}$, the mortality expected to rebuild the stock to B_{MSY} within ten years. For a stock over B_{MSY} , this is equal to F_{MSY} .
- F_{target} : 75 percent of control rule mortality. OY for a stock is achieved when F_{target} is achieved. Because most stocks are in rebuilding programs, as a practical matter this reference has not been used.
- For stocks in a formal rebuilding program, $F_{rebuild}$ is defined as F_{target} , and OY is achieved for these stocks by fishing at the rebuilding mortality.

The variation in mortality targets that currently exists can continue to exist with ACLs. As explained above, under the MSRA, an ACL may not be set at a level that allows overfishing. It is still up to the Council to set the ACL for any given fishing year in line with its overall management objectives for a stock. There is no requirement in the law to create uniform ACLs throughout an FMP. Congress still reposes a considerable amount of flexibility in the councils.

3. Some ACL discussions seem to suggest that NMFS will require that Councils define three or four catch levels. An overfishing level (OFL) will be the catch that, if exceeded, is expected to result in overfishing. The Annual Catch Limit (ACL) should be set below the OFL in order to have an acceptable risk that overfishing will not occur. While with perfect knowledge the ABC could serve as the limit, a further reduction to the ACL may be appropriate due to the risk that management measures may not work as designed, or to account for other risks or uncertainties. The Annual Catch Target (ACT) is set below the ACL in order to reduce the possibility that AMs will be triggered (note that "triggered" implies AMs are always reactive – they do not need to be and could be proactive measures). Some think this structure is unnecessarily complex, and presupposes that uncertainties in setting catch limits can be clearly identified and neatly categorized.

The law, and that is all that is governing the Council's actions at this time in the absence of any controlling NMFS guidance, only requires the setting of an ACL. Setting an OFL maybe helpful to the Council in establishing an ACL, since the ACL can be equal to or less than the OFL. There is little merit or benefit to setting an ACT, further there is clearly no requirement to do so. The law still requires conservation and management measures to achieve OY on a continuing basis. To achieve OY on a continuing basis, the Councils must set the ACL at OY. If the Council requires an ACT that artificially lowers ACL below OY, then it is requiring the Council to set a conservation and management measure in a manner inconsistent with National Standard One by not setting management measures at a level to achieve OY on a continuing basis. Any requirement that is not consistent with the national standards set forth in the Act is a *prima facie* violation of the MSA. For their part, AMs may be either proactive or reactive measures (i.e. a hard TAC or a payback mechanism if the ACL is exceeded); that is up to the Council to decide, but the Council is not bound in any way to a system that sets an annual catch limit at an artificially low level below what can be sustainably caught. Rather, the Council must still strive to obtain OY.

4. On the surface, it would be easy to equate the catch from these mortality references to various catch levels. For stocks that are not in a rebuilding program: the catch associated with F_{MSY} could be the overfishing level (OFL), the catch associated with $F_{control}$ rule could be the ACL, and the catch associated with F_{target} could be the ACT. For stocks in a formal rebuilding program, the translation is not as simple. Is the catch associated with $F_{rebuild}$ the OFL, the ACL, or the ACT? Even if the issue with respect to rebuilding stocks can be sorted out, this approach glosses over the fact that these various mortality references are primarily based on biological uncertainty and do not explicitly incorporate other types of uncertainty that NMFS discussions suggest should be incorporated into the setting of ACLs. For example, the value of F_{target} (75 percent of F_{MSY}) is based on a NOAA technical memorandum that determined through deterministic simulations this value generally over time will result in small sacrifices in yield for large gains in stock size. While a stock is growing, yields may be further reduced – at B_{MSY} the

yield would be about 75% of MSY. But it does not incorporate any allowance for the uncertainties in specific management approaches or with specific stock assessments. An unanswered question is whether this target is sufficient to incorporate all likely sources of uncertainty. It is not clear whether the concept of F_{target} , with a long history of use in discussions of reference points, is made unnecessary by the concept of catch levels such as ACL or ACT.

In a rebuilding scenario, the ACL should equal Frebuild and the OFL should equal the F rate at which the plan determines overfishing occurs. As explained above, the MSRA does not change the rebuilding requirements in the law and the Council is still required to rebuild. The ACL is meant to represent the yearly level of harvest in the fishery; therefore, it should equal Frebuild when a fishery is in the midst of a rebuilding program.

Estimating Current Stock Size

5. Once mortality references are identified, future stock size must be estimated in order to develop a future catch stream. This requires periodic assessment updates. While GARM I (published 2002), GARM II (published 2005) and GARM III (to be published 2008) assess all groundfish stocks at a three-year interval, it is doubtful that this schedule will continue indefinitely. It is more likely that at some point stock assessments will return to a more typical SAW/SARC schedule, with benchmark assessments about every three years for individual stocks. Presumably the responsibility for generating stock size estimates will fall on the Groundfish PDT, which will do this work as part of the biennial adjustment cycle. Given the difficulties the PDT had in completing this work for just five stocks in the annual MSMC reports in the past, it is unrealistic to expect this group (with three biologists) to perform this task for all 19 stocks without NEFSC assistance.

Congress has created greater responsibilities for the Council under the MSRA; it is now up to the Congress to provide additional resources to the Council to perform these new tasks. However, FSF still believes the Council should strive to update its stock assessments on a frequent basis and when resources are not sufficient to do so it should make the lack of resources known to the public.

Allocating Catch to Different Components/Different Fisheries

6. Once ACLs are calculated, for some stocks the available catch will need to be allocated to other components of the fishery or to other fisheries. At a minimum, it might be necessary to allocate a small part of the ACL for incidental catches that might take place in other fisheries, but

a there are other instances where larger amounts should be allocated. There is even a question over what to call these sub-allocations – are they also ACLs that must be monitored and tracked by the NMFS, and if approached or exceeded they trigger AMs? As an example, the Committee developed a recommendation for allocating parts of six stocks to the commercial and recreational groundfish fisheries: are these ACLs?

The law requires the Council to establish a mechanism for creating ACLs in a FMP. No further guidance is given, therefore any claim that the Council must set an ACL for all sectors or only one ACL, with sub ACLs allocating the catch among the sectors, is not a statement of fact, but an expression of an opinion. Since the decision is the Council's to make, FSF would advise it to take the more manageable approach and set one ACL for a fishery that can be subdivided to distribute the catch among the various components of the fishery and to other fisheries. The Council has discretion, and should explore, whether to create sub ACLs, each with AMs, but analysis is needed. FSF expects the sub ACL approach will be the fairest to all and reduce externalities, but the Council should make a decision only after it has engaged in a thorough deliberation.

7. The complexity of this problem is illustrated by considering the scallop fishery, which catches several hundred metric tons of yellowtail flounder each year. What is the appropriate way to determine the amount to allocate to each fishery? Should it be based on a flat percentage of the yellowtail TAC (as is done for the closed area access programs), or should it take into account both scallop and yellowtail flounder abundance? How does rotational management affect these calculations? Should the overall allocation be tracked separately from the access area allocation?

FSF believes you have correctly identified many of the questions that the Council must ask when it is making an allocation of fish. At the end of the day, all allocation decisions are the province of the Council. The Congress has provided guidance to the councils for allocation decisions; present use, historical fishing practices, dependence on the resource, and economics. In the case of yellowtail flounder the fundamental question is, "what is the best use of this limited resource?"

8. Some discussions suggest that after the ACL is allocated to different components or fisheries, a separate ACT should be developed for each sub-allocation that takes into account the specific characteristics of these fisheries. In this model, a fishery with poor reporting or monitoring provisions might have an ACT set lower than a fishery with better provisions. As a concrete example, perhaps the ACT for the recreational groundfish fishery should be relatively lower than the ACT for the commercial component, or the ACT for sector vessels should be different than the ACT for common pool vessels. This greatly complicates administration, as all of these levels would need to be determined, justified, and monitored. In addition, it separates the setting of the ACT from a specific fishing mortality level.

The law does not require an ACT, nor is there any guidance requiring or even suggesting the Council must adopt one. In light of these facts, the FSF does not see any need or benefit to inserting further complications into what undoubtedly will already be a complicated process. Also, it is questionable if setting an ACT at an artificially level below OY is legal, since the fishery will not be achieving OY on a continuing basis as explained above.

9. A related issue is how accountability measures (AMs) are implemented for these sub-components of the ACL – particularly other fisheries. For example, should the groundfish FMP define what happens if the scallop fishery approaches, or exceeds, its ACL? If the scallop fishery exceeds an ACL, how does this affect the rotational management program? While this is complex enough for fisheries managed by one Council, it is even more complex for fisheries managed by two different Councils. Who develops AMs to limit groundfish catches in the fluke fishery, or vice versa? This is a broad policy question beyond the scope of the PDT.

The law requires the Council to develop measures to ensure accountability within the FMP to help ensure the ACLs are adhered to. As noted above, AMs can be either proactive or reactive; that is a decision for the Council. Because the law requires the Council to include AMs in the plan, arguably the FMP of the species being allocated could contain the AM. However, as a practical matter that is not a workable solution and it would easily overwhelm any FMP that attempts to manage every fishery that is allocated some amount of the stock. Therefore, FSF believes the practical and legally justifiable approach to this issue is to incorporate the AMs for other fisheries by reference in the FMP, but have the AMs set in the other fisheries' FMPs. These other FMPs, and the PDT and committee structure for the other species under management, would be better able to accommodate the need for accountability regarding a groundfish ACL with the management objectives for the other fishery.

For example, in the case of the scallop fishery, the groundfish FMP would allocate a portion of the yellowtail flounder catch to the scallop fleet and then refer to the scallop FMPs AMs for the yellowtail flounder bycatch. The scallop FMP would have to be amended by either an amendment or framework adjustment to establish the AMs for any bycatch allocations of yellowtail flounder. In FSF's opinion, this is the only workable solution to manage these fisheries, especially when bycatch allocations exist in fisheries that are under management in separate councils.

Council and Public Review

10. The administrative steps for defining ACLs will need to be clearly delineated in the Amendment. It is not clear what level of detail will need to be specified for the calculations. For

example, will the exact percentage of yellowtail flounder allocated to the scallop fishery need to be defined in the amendment document, or can a structure be developed that allows this value to be determined periodically without a formal management action?

FSF strongly encourages the Council to pursue a path that will lead to a better streamlined approach in addressing the myriad questions it will face in implementing the new requirement of ACLs. In that vein, the Council should analyze if it has the ability to fairly allocate catch in a periodic fashion and not have to rely on Council action for every minute detail of an FMP.

11. The M-S Act says that the Council must develop annual catch limits that may not exceed "fishing level recommendations" of its SSC or peer review process. The SSC is tasked with providing scientific advice, including recommendations "...for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets...", among other things. There is uncertainty over how these requirements will be implemented for groundfish management. The PDT assumes that the SSC must specify (or approve the specification of) the acceptable biological catch (ABC) for each stock. This would seem to be a relatively straightforward application of an approved mortality target to a stock size estimate. What must be defined is which mortality reference should be used for this calculation. It should also be clear where this ABC fits into the ACL framework: is it the OFL, the ACL, or the ACT?

The MSRA provides a detailed framework for the roles of the SSC's and the Councils in setting the ACL. 16 U.S.C. § 1852(g) as amended states:

Each scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices.

***Id.* 16 U.S.C. § 1852(h), as amended, states the Council shall:**

develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g).

***Id.* The law unequivocally bifurcates the roles of the SSC and the Council in setting the ACLs. The law directs the SSC to recommend an overall level of fishing mortality that the Council cannot exceed, but the law only authorizes the Council to set the ACL at or below**

the recommended level. Therefore, the SSC's ABC is analogous to the OFL and then it is up to the Council and only the Council to set the ACL weighing appropriate factors of risk and attempting to achieve OY. OY determinations involve policy decisions within the province of the Council.

12. Some NMFS discussions suggest that the ABC is the upper limit for the ACL. In this model, the ABC is set by taking into account biological uncertainty in the assessment and the limit reference point so that the risk of exceeding the limit reference point is "acceptable." It is not clear who determines what level of risk is "acceptable" – this would seem to be a legal/policy decision rather than a scientific question. The Council then sets the ACL and the ACT by taking into account other uncertainties.

Congress included the new section of law 302(h)(6) in order to prevent Councils from exceeding the *scientific* recommendations of the SSC on ABC. The MSRA has in no way removed any of the policy decision-making ability from the Council; it has only provided a ceiling to the ACLs. Nowhere in the MSRA is the SSC granted any policy making or additional powers. Rather, the MSRA merely makes the SSC's scientific recommendation to the Council binding as an overall limit. The MSRA does not then go on to empower the SSC to take into account any other policy considerations in recommending the ABC. All policy decisions are still clearly within the realm of the Council.

Defining ACL

13. The PDT offers the following structure for determining and setting ACLs in the multispecies FMP. In general, this approach suggests defining three catch levels: an overfishing level (OFL), an Acceptable Biological Catch (ABC), and an Annual Catch Limit (ACL), but if required it would be possible to incorporate a fourth term (Annual Catch Target, or ACT). The primary link between the catch levels and mortality references are through the mortality that defines overfishing and the mortality that defines the MSY control rule or rebuilding. In all cases, the appropriate mortality is applied to the best estimate of stock size. The recommendation is designed to account for the possibility that the definition of overfishing will change.

Catch	If overfishing is defined by:	
	F_{MSY} (Present interpretation)	$F_{control\ rule}/F_{rebuild}$ (Possible future interpretation)
OFL	Catch at F_{MSY}	Catch at $F_{control\ rule}/F_{rebuild}$
ABC	Catch at $F_{control\ rule}/F_{rebuild}$	\leq OFL
ACL	\leq ABC	\leq ABC

FSF believes the PDT's interpretation of the present system, as depicted by the left side of the above figure, is an accurate interpretation of the law as written and accurate implementation of Congressional intent. As discussed above, FSF does not believe it is necessary to consider a change to the definition of overfishing.

14. The OFL catch is determined by the point estimate of F_{MSY} , $F_{control\ rule}$, or $F_{rebuild}$. In all cases, ABC is set by taking into account biological uncertainty, while setting the ACL takes into account other sources of uncertainty and risk. The PDT will further develop the factors that will be considered in evaluating these uncertainties. It should be noted that in some cases the setting of the OFL already takes into account some sources of biological uncertainty.

First, as explained above, the Council need not change the overfishing definitions to implement ACLs. With that preface, it is appropriate to take into account factors other than biological uncertainty in setting an ACL, as long as the Council is making that determination and there has not been any accounting for biological uncertainty prior to the Council's decision. It is not appropriate to "double count" uncertainty, and the PDT and SSC must be vigilant against doing as much. Nor is there any requirement to build in a large buffer between the ABC and the ACL for management uncertainty. As explained above, the requirement for an FMP to achieve OY on a continuing basis is still paramount.

15. The PDT is not recommending that all of these values be directly tied to a specific mortality reference. This provides additional flexibility in setting these catches based on current conditions that may be subject to change, rather than locking in mortality references that can only be changed by framework action. Note that ABC and ACL can never exceed the overfishing level, so this approach is consistent with the statute. In addition, the ACL can never exceed the ABC which is recommended by the Council's Science and Statistical Committee (SSC). This structure also accommodates alternative strategies that may be developed in the future. For example, if the MSE approach mentioned in the discussion paper is adopted, it could be used to determine these catch levels, perhaps without a formal management action to adopt its use. A possible negative is that the differences between OFL, ABC, and ACL are not explicitly defined (in terms of a mortality level, or catch amount), which creates some uncertainty for managers and the public for how these relationships might change from year to year.

FSF believes this is an acceptable approach and not contrary to the law.

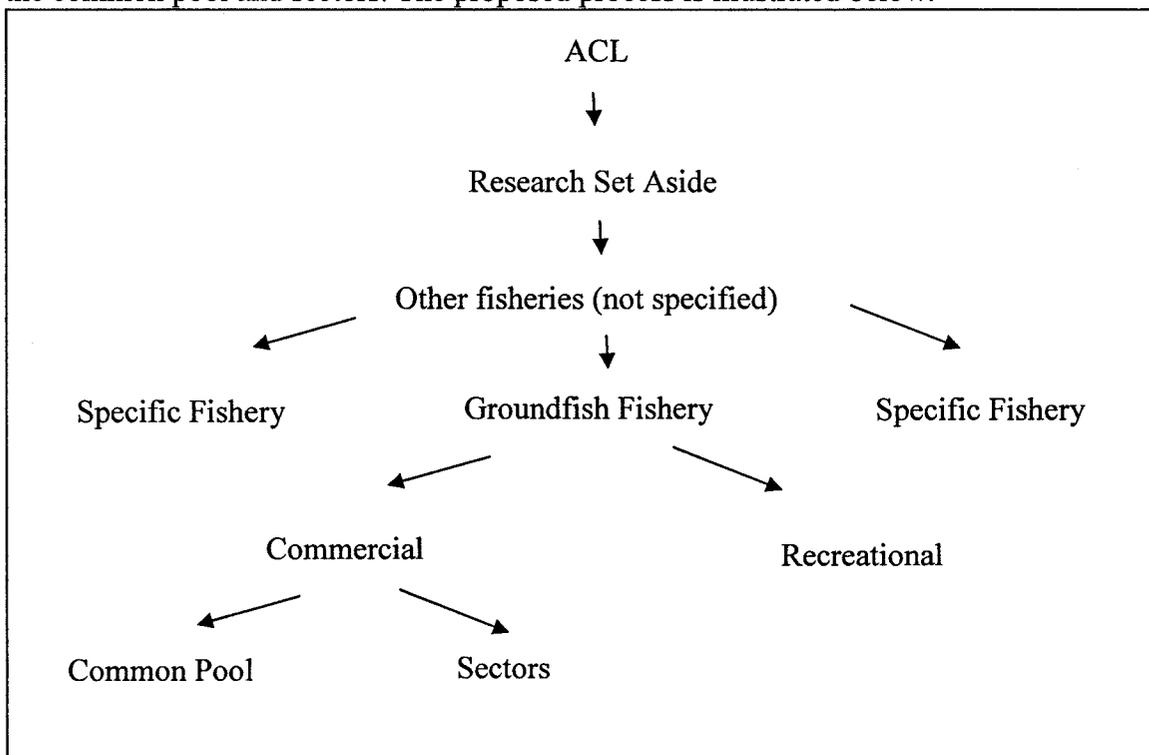
16. The proposal does not create a direct link between F_{target} and a specified catch level. In essence, rather than use F_{target} to determine the ACL, an ACL is determined that results in mortality that becomes F_{target} . This approach may be questioned since it is a departure from the

concept of mortality limits (thresholds) and targets that has long been used by fishery scientists and managers. In that concept, the target determines catch rather than the reverse as is proposed here.

This is a technical issue and if done correctly will not ultimately affect the levels of fish available for harvest.

Sub-Components of ACL

17. Once the ACL is defined, it should be adjusted to account for other fisheries, or allocated to sub-components such as other fisheries. The ACL for a stock is first reduced by the proposed research set aside, then again by an amount that allows for catches in other fisheries that individually catch small amounts. The remaining amount is then apportioned to specific fisheries that catch substantial amounts that need to be tracked. The groundfish fishery is subdivided into a commercial and recreational allocation, and then the commercial allocation is divided between the common pool and sectors. The proposed process is illustrated below.



FSF supports this concept for allocating catch and believes it meets the letter of the law.

18. It is not clear whether these sub-allocations are also called ACLs and require AMs. The PDT is not recommending that each sub-allocation also have an ACT.

As stated above, each of these allocations could be treated as a sub ACL and the AMs incorporated by reference to the various management plans that implement AMs for various fisheries. Also, as stated above the Council should refrain from setting an ACT at this time.

19. Because the proposed process is complex, some may argue that only one ACL needs to be set for each groundfish stock and it does not need to be subdivided. The logic behind this interpretation is that for each stock there is only one catch level needed to define overfishing and what is important is that this level not be exceeded, regardless how the total catch is distributed among sub-components. . This approach is simpler than what is proposed. This approach complicates the requirement to implement AMs and would create debates over which component was responsible for exceeding the ACL. For example, if there is only one ACL that is exceeded, can the scallop fishery avoid AMs by blaming the overage on the groundfish fishery?

While certainly setting only a single ACL and then accounting for all the catch is a simpler management method, it is not the proper solution. An FMP with one ACL will create a derby style fishery when there are several competing users for the allocated amount of fish. There would also be a lack of accountability within a one ACL system where the negative effects of a particular sector's actions would not be borne directly by that sector, creating externalities for all the other participants in the sector.

* * * *

We appreciate the efforts of the PDT to bring these important questions forward with regards to the development and implementation of ACLs. We hope the Council finds FSF's comments helpful and instructive. We look forward to working with the Council towards implementing a workable management regime under the MSRA.

Sincerely,

/S/

David E. Frulla
Shaun M. Gehan
Andrew E. Minkiewicz