

and commercial information, we solicit comment from the public, other governmental agencies, the scientific community, industry, and any other interested parties. Title 50, CFR 424.16(c)(3) requires the Secretary of Commerce to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to change the listed status of a species under the ESA. Requests for public hearing must be made in writing (see **DATES** and **ADDRESSES**). Such hearings provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in such ESA matters.

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing to the best scientific and commercial data available. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation v. Andrus*, 657 F 2d 829 (6th Cir.1981), we have concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act. (see also NOAA Administrative Order 216 6.)

Executive Order (E.O.) 12866, Regulatory Flexibility Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this rule is exempt from review under E. O. 12866.

Paperwork Reduction Act

This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of these circumstances is applicable to this proposed listing determination. In keeping with the

intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual State and Federal interest, this proposed rule will be given to the relevant state agencies in each state in which the Caribbean monk seal formerly occurred, and each will be invited to comment.

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: June 3, 2008.

Samuel D. Rauch, III,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

For the reasons set out in the preamble, we propose to amend 50 CFR part 224 as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531 1543 and 16 U.S.C. 1361 *et seq.*

2. Amend § 224.101(b) by removing the term "Caribbean monk seal (*Monachus tropicalis*);".

[FR Doc. E8-12808 Filed 6-6-08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 070717348-7766-02]

RIN 0648-AV60

Magnuson-Stevens Act Provisions; Annual Catch Limits; National Standard Guidelines

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes revisions to the guidelines for National Standard 1 (NS1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). This action is necessary to provide guidance on how to comply with new annual catch limit (ACL) and accountability measure (AM) requirements for ending overfishing of fisheries managed by federal fishery

management plans (FMPs). It also clarifies the relationship between ACLs, maximum sustainable yield (MSY), optimum yield (OY), and other applicable reference points. The intent of this action is to facilitate compliance with requirements of the Magnuson-Stevens Act to end and prevent overfishing, rebuild overfished stocks and achieve OY.

DATES: Comments must be received by September 8, 2008.

ADDRESSES: You may submit comments, identified by 0648-AV60, by any of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal e-Rulemaking portal: <http://www.regulations.gov>;

- **Fax:** 301-713-1193, Attn: Mark Millikin;

- **Mail:** Mark R. Millikin, National Marine Fisheries Service, NOAA, Office of Sustainable Fisheries, 1315 East-West Highway, Room 13357, Silver Spring, MD 20910 (mark outside of envelope "Comments on Annual Catch Limits proposed rule");

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, Wordperfect, or Adobe PDF file formats only.

Copies of the Regulatory Impact Review (RIR)/Regulatory Flexibility Act Analysis (RFAA) for this proposed rule are available from Mark R. Millikin at the address listed above. The RIR/RFAA document is also available via the internet at <http://www.nmfs.noaa.gov/msa2007/catchlimits.htm>.

FOR FURTHER INFORMATION CONTACT: Mark R. Millikin, Senior Fishery Management Specialist, 301-713-2341.

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I. Overview of Proposed Revisions

NMFS fulfills the requirements of section 301(b) of the Magnuson-Stevens Act—"The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on national standards, to assist in the development of fishery management plans," with its national standard guidelines that appear at 50 CFR 600.310 through 50 CFR 600.355. NMFS is proposing revisions to the NS1 guidelines to address, among other things, new requirements for fisheries undergoing overfishing, to have ACLs and AMs to end overfishing by 2010, and all fisheries to have ACLs and AMs in place to prevent or end overfishing by 2011, and beyond. A stock or stock complex may not require an ACL and AMs if it qualifies for a statutory exception under the Magnuson-Stevens Act. Other proposed revisions to the NS1 guidelines include: (1) A description of the relationship between MSY, OY, overfishing limits (OFL), acceptable biological catch (ABC), ACLs, and annual catch targets (ACTs); (2) guidance on how to combine the use of ACLs and AMs for a stock to prevent overfishing when possible, and adjust ACTs or ACLs, or both, and AMs, if an ACL is exceeded; (3) allowing for inclusion of ecosystem component (EC) species in FMPs and, in such cases,

guidance for how to classify which stocks are "in the fishery" and which species are ecosystem components; (4) replacing MSY control rules with ABC control rules and replacing OY control rules with ACT control rules; (5) new requirements for scientific and statistical committees (SSC); (6) changing the timeline to prepare new rebuilding plans; (7) revised guidance on how to establish rebuilding time targets; and (8) advice on action to take at the end of a rebuilding period if a stock is not yet rebuilt.

II. Acronyms

ABC—acceptable biological catch
 ACL—annual catch limit
 ACT—annual catch target
 AM—accountability measures
 ANPR—Advance Notice of Proposed Rulemaking
 B_{msy} —MSY stock size
 EC—ecosystem component species
 EEZ—Exclusive Economic Zone
 F_{msy} —MSY fishing mortality rate
 FMP—fishery management plan
 MFMT—maximum fishing mortality threshold
 MSA—Magnuson-Stevens Act
 MSRA—Magnuson-Stevens Fishery Conservation and Management Reauthorization Act
 MSST—minimum stock size threshold
 MSY—maximum sustainable yield
 NOI—Notice of Intent
 NS1—National Standard 1
 OFL—overfishing limit
 OY—optimum yield
 SDC—status determination criteria
 SFA—Sustainable Fisheries Act
 SSC—scientific and statistical committee
 T_{max} —maximum time allowable for rebuilding a stock
 T_{min} —minimum time for rebuilding a stock
 T_{target} —target time for rebuilding a stock

III. Background

The MSA serves as the chief authority for fisheries management in the U.S. Exclusive Economic Zone (EEZ). Section 301(b) of the MSA requires that "The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans." Guidelines for the national standards are codified in subpart D of 50 CFR part 600. The guidelines for national standards were last revised through a final rule published in the **Federal Register** on May 1, 1998 (63 FR 24212), by adding revisions to the guidelines for National Standards 1 (optimum yield), 2 (scientific information), 4 (allocations), 5

(efficiency), and 7 (costs and benefits); and adding new guidelines for National Standards 8 (communities), 9 (bycatch), and 10 (safety of life at sea).

The guidelines for NS1 were revised extensively in the final rule published on May 1, 1998, to bring them into conformance with revisions to the MSA, as amended in 1996 by the Sustainable Fisheries Act (SFA). In particular, the 1998 revisions to the NS1 guidelines addressed new requirements for FMPs brought about by SFA amendments to MSA section 304(e) (rebuilding overfished fisheries).

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), which President Bush signed into law on January 12, 2007, included new requirements regarding preventing and ending overfishing and rebuilding fisheries. Therefore, NMFS is proposing revisions to the NS1 guidelines at 50 CFR 600.310, to integrate these new requirements with existing provisions related to overfishing, rebuilding overfished stocks, and achieving optimum yield.

IV. NMFS's Proposed Rule for Further Revisions to NS1 Guidelines in 2005

NMFS published an advance notice of proposed rulemaking (ANPR) in 2003 (68 FR 7492, February 14, 2003), and a proposed rule in 2005 (70 FR 36240, June 22, 2005), in the **Federal Register** to propose further revisions to the NS1 guidelines. NMFS sought to improve the utility of the 1998 guidelines in assisting the regional fishery management councils, and the Secretary of Commerce (Secretary) in the case of a Secretarial Amendment or a Secretarial FMP (denoted collectively hereafter as "Councils," as 50 CFR 600.305(c)(11) provides that "Council" includes both the regional fishery management councils and the Secretary when preparing FMPs or amendments), when establishing or revising status determination criteria (SDC) for overfishing and overfished definitions for stocks, and constructing or revising rebuilding plans for overfished stocks.

Although NMFS received many public comments on the ANPR and the 2005 proposed rule, NMFS decided not to pursue publication of a final rule when it learned that Congress was preparing an amendment to the MSA that seemed likely to revise how to manage stocks undergoing overfishing and stocks that need a rebuilding plan. Congress's efforts culminated in passage of the 2006 MSRA.

V. NMFS's Initial Action on MSRA Requirements for ACLs

NMFS published a notice of intent (NOI) to prepare an environmental impact statement (EIS) and commencement of a scoping period for ACLs and AMs in the *Federal Register* on February 14, 2007 (72 FR 7016), with a comment period ending date of April 17, 2007. NMFS held nine scoping sessions, one associated with each of the eight Regional Fishery Management Councils' meetings and one at NMFS Headquarters in Silver Spring, MD. Comments that NMFS received are contained in "Summary of Comments Received on NMFS Proposal to Develop Guidance on ACLs and AMs, July 2007," that is available at the NMFS Web site: <http://www.nmfs.noaa.gov/msa2007/catchlimits.htm>.

The NOI indicated that an environmental assessment or EIS would be prepared for this action. However, NMFS has decided that, for purposes of compliance with the National Environmental Policy Act, a categorical exclusion is appropriate for this action. The proposed action would provide general guidance on ACL and AM and other requirements, but there is considerable diversity in federally-managed fisheries and FMPs. Thus, any analysis of the environmental, economic, and social impacts of the NS1 guidelines would be highly speculative. Potential environmental, economic, and social impacts cannot be meaningfully analyzed until the Councils apply the guidelines to specific fisheries and FMPs. At that time, the Councils would prepare an EIS or EA, as appropriate.

VI. MSRA Ending Overfishing Requirements

Section 104(a)(10) of the MSRA established new requirements to end and prevent overfishing, including ACLs and AMs. Section 303(a)(15) was added to the MSA to read as follows: "establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability." ACLs and AMs are required by fishing year 2010 if overfishing is occurring in a fishery, and they are required for all other fisheries by fishing year 2011.

In practical terms, given the time it takes to prepare and implement an FMP amendment, if the status of one or more stocks in a fishery at the end of 2008 is "subject to overfishing," Councils should submit ACL and AM

mechanisms and actual ACLs for that fishery to be effective in fishing year 2010. If overfishing is determined to be occurring in a fishery in 2009, Councils should submit ACL and AM mechanisms and actual ACLs for that fishery to be effective in fishing year 2010, if possible, or in fishing year 2011, at the latest. All fisheries must have ACL and AM mechanisms and actual ACLs by the fishing year 2011, and beyond. The Secretary should amend Secretarial FMPs, to comply with ACL and AM requirements on the same timetable. Section 305(c) of the MSA, which was unchanged by MSRA, also provides authority to the Secretary to promulgate emergency regulations or interim measures necessary to address an emergency or overfishing for any fishery without regard to whether an FMP exists for such fishery.

NMFS recognizes that the phrase, "at a level such that overfishing does not occur" in section 303(a)(15) of the MSA is subject to different interpretations, as reflected in the varying comments received during scoping. On the one hand, the phrase could be interpreted to mean that overfishing is strictly prohibited at any cost. On the other hand, section 303(a)(15) refers to a "mechanism" for setting ACLs, including AMs, which seems to imply a more dynamic process that allows for adjustment of management measures as a fishery is carried out. The only way to ensure absolutely no overfishing occurs is to stop fishing. As long as fishing occurs, there is a chance for occasional instances of overfishing due to scientific uncertainty of data, influence of non-fishing factors, and management uncertainty. Continued overfishing for a period of years (chronic overfishing), presents the greatest danger to the health of fish stocks, and often leads to stocks becoming overfished. NMFS has noted that overfished stocks with chronic overfishing seem to seldom rebuild, whereas overfished stocks that are rarely subject to overfishing have a better chance of rebuilding.

Taking the above considerations into account, NMFS believes that the ACL requirement should be interpreted to provide for some flexibility given scientific and management uncertainty and other factors, but at the same time, must address overfishing and facilitate rebuilding. Chronic overfishing can be prevented by ensuring that the combination of ACLs and AMs decrease the risk of future overfishing each successive time an ACL is exceeded. NMFS thus proposes a performance standard such that if catch of a stock exceeds its ACL more often than once in the last four years (*i.e.*, more often than

25 percent of the time), then the system of ACLs, ACTs and AMs should be re-evaluated to improve its performance and effectiveness (see § 600.310(g)(3) in this proposed action). NMFS believes that allowing a higher frequency of the ACL being exceeded would not safeguard enough against overfishing. A Council could choose a higher performance standard (*e.g.*, a stock's catch should not exceed its ACL more often than once every five or six years) for a stock that is particularly vulnerable to the effects of overfishing.

VII. Reasons for Overfishing and Expectations for ACLs to Prevent/End Overfishing

The "NMFS Fourth Quarterly Report for 2007 Status of U.S. Fisheries" indicates that 41 stocks managed by federal FMPs were undergoing overfishing as of December 31, 2007. Stocks become listed as "overfishing" or remain in an overfishing status for a variety of reasons, including:

1. The goal of the FMP may be to end overfishing over several years by gradually reducing fishing mortality rates instead of ending overfishing immediately.
 2. Management measures have proven ineffective at ending overfishing (*e.g.*, lack of inseason closure authority for the fishery or management measures are aimed at achieving a target catch that is set too close to the catch amount that results in overfishing, or both).
 3. Management measures to address overfishing have not been implemented yet.
 4. Recent change in scientific advice (*i.e.*, the Council has not had sufficient time to amend the FMP and no automatic measures exist in the FMP to make necessary adjustments to end overfishing in the subsequent fishing year).
 5. Bycatch mortality in other fisheries has not been addressed adequately or is poorly known.
 6. Data sufficient to verify whether or not overfishing is occurring are not available, so the existing overfishing determination is retained.
 7. International fishing pressure is responsible for the large majority of overfishing.
 8. Fishing pressure in state or territorial waters is responsible for the large majority of overfishing, federal action alone is not sufficient to end overfishing, and managers in the various jurisdictions are unable thus far to agree on a concerted approach for preventing overfishing.
- NMFS believes that the ACL and AM requirements will address overfishing that results from reasons 1, 2, 3, and 4

above. Better scientific data, along with adequate ACLs and AMs, should enable Councils to prevent overfishing for reasons 5 and 6. Stocks that are undergoing overfishing for reason 7 would be exempt from the ACL requirement (see §§ 600.310(h)(2)(ii) and 600.310(k) of this proposed action for discussion of international fisheries). There may be circumstances where managers in various jurisdictions are unable to agree on an ACL and AMs that would end or prevent overfishing for a fishery described under reason 8. In such cases, these proposed guidelines would require an ACL for the overall fishery, but AMs would be implemented only for the portion of the fishery under federal management authority.

VIII. Definition, Interpretation, and Application of the Term "Fishery" and Its Relevance to ACLs

The MSA, as amended by MSRA, requires that a Council shall develop ACLs "for each of its managed fisheries" (see MSA section 302(h)(6)) and as noted earlier, that each FMP have a mechanism for specifying ACLs "at a level such that overfishing does not occur in the fishery" (see MSA section 303(a)(15)). Consistent with these sections of the MSA, the proposed NS1 guidelines provide that ACLs and AMs are needed for each "fishery" under federal FMP management, unless covered by a statutory exception.

The MSA defines "fishery" broadly, and this definition did not change with the passage of the MSRA. A "fishery" is "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational and economic characteristics," and "any fishing of such stocks" (see MSA section 3(13) and 50 CFR 600.10). The term "fishery" can mean different things in different contexts. For example, when dealing with biological concepts such as determining a status of overfishing or overfished, the NS1 guidelines generally apply at the "stock or stock complex" level (See, e.g., 50 CFR 600.310(c)(1), (d) (defining MSY and "overfish" with regard to "stock or stock complex") and § 600.305(c)(12) (explaining that "stock or stock complex" is used as a synonym for "fishery" in NS guidelines). In other instances, such as managing a fishery for OY, the term "fishery" is viewed more broadly (see 50 CFR 600.310(f) (referring to OY at the "fishery" and not the "stock or stock complex" level)).

Given the broad definition of "fishery," the Councils have had, and continue to have, considerable

discretion in defining the "fishery" under FMPs. Some FMPs include only one or a few stocks whereas others include several or hundreds of species. Looking at existing FMPs, the primary reasons why stocks are included in FMPs are because people seek to harvest them for sale or personal use (i.e., the fish are the target of fishing activity), or they are caught incidentally in the pursuit of harvesting one or more other stocks and could experience overfishing or become overfished without conservation and management measures. These reasons are consistent with the stated purposes of the MSA, which includes the preparation and implementation of FMPs "which will achieve and maintain, on a continuing basis, the optimum yield from each fishery" (see MSA section 2(b)(4)). OY is defined with regard to "the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems" (see MSA section 3(33)).

While the focus of FMPs has been stocks managed for OY, in recent years, some FMPs have included other stocks in an effort to incorporate ecosystem approaches to management. Congress acknowledged this increased attention to ecosystem approaches in the "Findings" section of the Act (see MSA section 2(a)(11) (acknowledging that a number of Councils have demonstrated significant progress in integrating ecosystem considerations under existing authorities of the MSA)). In addition, MSRA added a new section 303(b)(12) that provides that an FMP may "include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations."

NMFS wants to encourage ecosystem approaches to fishery management and believes that clarification of what constitutes the "fishery" would be helpful. As such, NMFS is proposing guidance pertaining to "stocks in the fishery" and "ecosystem component (EC) species," which are described in detail below. The intent of this guidance is to articulate approaches taken under existing FMPs and to provide a framework for thinking about future FMPs and FMP amendments. The Councils would have the discretion to determine, on a case-by-case basis, whether changes in their stock classifications under current FMPs are needed.

A. Stocks in the Fishery

As a default, all stocks currently identified in an FMP are considered "stocks in the fishery." "Stocks in the fishery" would include target stocks (i.e., stocks that fishers seek to catch for sale or personal use, including "economic discards" as defined under MSA section 3(9)), non-target stocks that are retained for sale or personal use, and non-target stocks that are not retained for sale or personal use and that are either determined to be subject to overfishing, approaching overfished, or overfished, or could become so, according to the best scientific information available, without conservation and management measures (see Figure 1 and § 600.310(d)(2) of this proposed action). Stocks and stock complexes in the fishery should have quantitative SDC, MSY, ABC, ACL, and ACT (collectively called "reference points" throughout this section) and AMs (see Table 1 for reference points needed for different types of stocks, and see § 600.310(b)(2)(iv) of this proposed action), although some stocks in the fishery may not require ACLs and AMs if they are covered by a statutory exception (see § 600.310(h)(2) of this proposed action). Hereafter, in these guidelines, "stock" or "stock(s) and stock complex(es)" refer to "stocks in the fishery."

B. Ecosystem Component Species

Beyond the "stocks in the fishery," a Council may, but is not required to, include EC species in an FMP. Such species would include non-target fish species that are not considered part of the "fishery" but rather species with which the fishery may occasionally interact (i.e., catch) (see § 600.310(d)(5) of this proposed action). A Council may choose to include EC species for purposes of incorporating ecosystem approaches to fishery management, data collection, etc. Identification of EC species must be done through an FMP amendment process (see § 600.310(d) of this proposed action). Such species are appropriate to consider when addressing specification of OY and conservation and management measures for the fishery (see MSA sections 3(33) (referring to taking into account the marine ecosystems in OY definition), and 3(5) (referring to avoiding irreversible or long-term effects on fishery resources and the marine environment and ensuring multiplicity of options)). Because EC species are not considered to be "in the fishery," specification of reference points, ACLs, and AMs are not required (see Table 1). However, a Council should consider

