DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 120416013–6270–03]

RIN 0648–BB92

Magnuson-Stevens Act Provisions; National Standard Guidelines

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

ACTION: Final rule.

SUMMARY: This final action revises the guidelines for National Standards (NS) 1, 3, and 7 of the Magnuson-Stevens Fishery Conservation and Management Act (MSA or The Act) and to the General section of the NS guidelines. This action is necessary to improve and clarify the guidance within the NS guidelines. The purpose of this action is to facilitate compliance with requirements of the MSA to end and prevent overfishing, rebuild overfished stocks, and achieve optimum yield (OY).

DATES: This rule is effective October 18, 2016.

ADDRESSES: Copies of supporting documents prepared for this final rule, such as the proposed rule and public comments that were received, can be found at the Federal e-Rulemaking portal: *http://www.regulations.gov* by searching for RIN 0648–BB92.

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SUPPLEMENTARY INFORMATION:

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I. Overview of Revisions to the NS Guidelines

The MSA serves as the chief authority for fisheries management in the U.S. Exclusive Economic Zone (EEZ). The Act sets ten national standards (NS) for fishery conservation and management, and requires that the Secretary of Commerce (the Secretary) establish advisory guidelines based on the NS to assist in the development of fishery management plans. Guidelines for the NS are codified in subpart D of 50 CFR part 600. This final action amends the General section of the NS guidelines and the guidelines for NS1, NS3, and NS7.

Since 2007, fisheries management within the U.S. has experienced many changes, in particular the development and implementation of annual catch limits (ACLs) and accountability measures (AMs) under all fishery management plans to end and prevent overfishing. Due to a number of concerns raised during the implementation of ACLs and AMs, NMFS initiated a revision of the NS guidelines in 50 CFR 600.305, 600.310, 600.320, and 600.340 in order to improve the utility of the guidelines for managers and the public. NMFS published an Advance Notice of Public Rulemaking (ANPR) on May 3, 2012, (77 FR 26238, May 3, 2012) to solicit public comments on potential adjustments to the NS guidelines. The comment period on the ANPR was extended once (77 FR 39459, July 3, 2012), and then reopened (77 FR 58086, September 12, 2012), and ended on October 12, 2012. In March 2013, NMFS published a report that summarizes the comments received on the ANPR (*http://www.nmfs.noaa.gov/sfa/laws_policies/national_standards/ns1_revisions.html*). In addition to the ANPR, issues related to the NS guidelines were discussed at several other public forums. NMFS proposed revisions to the General section of the NS guidelines and the guidelines for NS1, NS3, and NS7 on January 20, 2015 (80 FR 2786, January 20, 2015). Further background is provided in the above-referenced **Federal Register** documents and is not repeated here. The proposed rule described the objective of the proposed revisions, which is to improve and streamline the NS1 guidelines, address concerns raised during the implementation of ACLs and AMs, and provide flexibility within current statutory limits to address fishery management issues.

NMFS solicited public comment on the proposed revisions to the guidelines through June 30, 2015, and during that time made presentations on the proposed revisions to seven of the eight Regional Fisheries Management Councils (Councils) and held one public meeting on March 25, 2015 (Silver Spring, Maryland). NMFS received more than 102,000 comments on all aspects of the proposed revisions. Many of the comment letters were form letters or variations on a form letter. In general, the fishing industry and the Councils supported the majority of the provisions in the proposed action meant to provide flexibility within the current statutory limits but stated that many of the new provisions required additional guidance in the final action. In general, the environmental community opposed the proposed revisions, stating that they would reverse recent successes in U.S. fisheries management and did not address pertinent issues such as ecosystem-based fisheries management (EBFM), forage fish, and climate change.

II. Major Components of the Proposed Action

Some of the major items covered in the proposed guidelines included the following: (1) Add a recommendation that Councils reassess the objectives of their fisheries on a regular basis; (2) consolidate and clarify guidance on identifying whether stocks require conservation and management; (3) provide additional flexibility in managing data limited stocks; (4) revise the guidance on stock complexes to encourage the use of indicator stocks; (5) describe how aggregate maximum sustainable yield (MSY) estimates can be used; (6) develop a definition for a depleted stock; (7) provide increased stability in fisheries by providing guidance on the use of multi-year overfishing determinations; (8) revise the guidance on optimum yield (OY) to improve clarity and better describe the role of OY under the ACL framework; (9) clarify the guidance on acceptable biological catch (ABC) control rules, describe how ABC control rules can allow for phase-in adjustments to ABC, and allow for carry-over of all or some of an unused portion of the ACL; (10) revise the guidance on AMs to improve clarity; (11) clarify the guidance on establishing ACL and AM mechanisms in FMPs; (12) clarify the guidance on adequate progress in rebuilding and extending rebuilding timelines; and (13) provide flexibility in rebuilding stocks.

III. Major Changes Made in the Final Action

The approaches proposed under items #1, 3–5, 8, and 10–11 above are retained in this final action. The main substantive change in the final action pertains to the proposed definition for

depleted stocks (#6). NMFS proposed adding the term ''depleted'' to the NS1 guidelines to describe those stocks whose biomass has declined as a result of habitat loss and other environmental conditions, as opposed to fishing pressure. However, separating out the impacts of environmental factors from the impacts of fishing on a stock is a difficult task and public comments reflected concern that the proposed definition for depleted stocks was overly restrictive and would not definitively distinguish between stocks primarily impacted by environmental factors and stocks primarily impacted by fishing pressure. Thus, the final action does not include the proposed definition of depleted stocks and instead retains the current requirement that stocks whose biomass has declined below its MSST are considered to be overfished, regardless of the factors (fishing-related or otherwise) responsible for the stock's decline. A Council may use the term ''depleted'' to further describe the status of an overfished stock that has been impacted to some extent by environmental factors in addition to (or in the absence of) fishing pressure.

In response to public comment, this final action also clarifies text on stocks that require conservation and management (#2), multi-year approaches to overfishing stock status determinations (#7), phase-in and carry-over ABC control rules (#9), adequate progress determinations for rebuilding plans (#12), and discontinuing rebuilding plans (#13), and makes minor clarifications to other text. Further explanation of why changes were or were not made is provided in the ''Response to Comments'' section below. Details on changes made in the codified text are provided in the ''Changes from Proposed Action'' section.

IV. Overview of the Major Aspects of the Final Action

A. Stocks That Require Conservation and Management

NMFS received numerous comments on proposed § 600.305(c), which contains new guidance to Councils on determining, pursuant to their obligation under MSA section 302(h)(1), whether stocks require (or, are in need of) conservation and management. The MSA establishes that each Council should prepare an FMP for each fishery under its authority that requires conservation and management. 16 U.S.C. 1801(b)(1). Because not every fishery requires federal management, NMFS believes that consolidated, streamlined guidance on determining which stocks are in need of conservation and management and thus, federal management, will be beneficial to managers. Further background and rationale for this proposed revision to the guidelines was provided on pages 2788–2789 of the proposed rule. *See* 80 FR 2788–2789, January 20, 2015.

Sections V and VI (Responses to Comments and Changes from Proposed Rule) provide a detailed explanation of changes made from the proposed to final action. Here, NMFS highlights a few of those changes. Final § 600.305(c)(1) provides—unchanged from the proposed action—that stocks that are predominately caught in Federal waters and are overfished or subject to overfishing, or likely to become overfished or subject to overfishing, are considered to require conservation and management. 16 U.S.C. 1853(a)(1)(A) (requiring that FMPs contain conservation and management necessary to prevent overfishing and rebuild overfished stocks). However, the final action clarifies that Federal management is not limited to such stocks (*i.e.,* predominantly caught in Federal waters and overfished or subject to overfishing, or likely to become so). To determine if other stocks require conservation and management, the guidelines contain a non-exhaustive list of factors (*see* § 600.305(c)(1)(i)–(x)) that Councils should consider when determining whether a stock requires conservation and management.

The final action adds an explanation at § 600.305(c)(3) that, when considering adding a stock to an FMP, no single factor is dispositive or required. One or more of the factors may provide a basis for determining a stock is in need of conservation and management. When considering removing a stock from an FMP, final § 600.305(c)(4) provides—as proposed—that Councils should consider each of the ten factors. NMFS received many comments on § 600.305(c)(1)(x) in particular. Section 600.305(c)(1)(x) speaks to the consideration of other existing management regimes when determining whether Federal management is necessary. In response to comments, the final action deletes the phrase ''could be or'' from § 600.305(c)(1)(x), which implied that the mere possibility that other management regimes may exist is an appropriate consideration for determining whether a stock requires conservation and management, which was not the intention behind the proposed revisions.

Finally, while nothing in the proposed revisions changed previous guidance on the optional usage of ecosystem component (EC) species, NMFS clarifies in the final action that Councils may still use EC species at their discretion and re-inserts a definition of EC species. However, the definition of EC species in the final action does not include criteria for designation because a Council is free to designate any stock, that is determined not in need of conservation of management, as an EC species at their discretion. Criteria for the designation of EC species is no longer necessary because the factors listed in § 600.305(c)(1)(i)–(x) of this final action clarify which stocks are in need of conservation and management and therefore cannot be designated as EC species. Because the designation of EC species may be done to accomplish several different goals, NMFS does not believe it is appropriate to prescribe specific guidance on the requirements for managing and monitoring EC species.

B. Multi-Year Approaches to Overfishing Stock Status Determinations

Another major aspect of the revised NS1 guidelines is the inclusion of guidance on a method for determining the overfishing status of a stock based on a multi-year approach. The MSA defines overfishing as a ''rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the MSY on a continuing basis.'' 16 U.S.C. 1802(34). Thresholds for deciding whether a stock is subject to overfishing can be determined either by comparing rates of fishing mortality (F) to the maximum fishing mortality threshold (MFMT) or catch to the overfishing limit (OFL). *See* § 600.310(e)(2)(i)(B)–(D).

Pursuant to MSA section 304(e)(1), NMFS must report annually to Congress and the eight Councils on the status of all Federally-managed fish stocks. 16 U.S.C. 1854(e)(1). Overfishing status determinations are typically made based on the most recent year for which there is information. When utilizing the F-based approach, the estimate of F for the most recent year for which there is data is often more uncertain than the estimates of F in prior years (NRC 1998). In addition, the extent to which the effort or catch exceeded the threshold for overfishing has not traditionally been considered when determining whether the stock was subject to overfishing. Small amounts of excess effort or catch in a single year may not jeopardize a stocks' ability to produce MSY over the long term, thus an overfishing stock status determination based on that single year's reference point may not be the most appropriate characterization of stock status. To

address this issue, the proposed revisions introduced a multi-year approach (that may not exceed 3 years) to allow Councils to examine whether the extent to which a stock has surpassed its overfishing threshold actually jeopardizes the stock's ability to produce MSY on a continuing basis. *See* § 600.310(e)(2)(ii)(A)(*3*) of the proposed action. Using a multi-year approach to determine overfishing stock status is best used when managers believe the most recent year's data point may not reflect the overall status of the stock. Further background on the proposed multi-year overfishing stock status determination provision was provided on pages 2791–2792 of the proposed rule. *See* 80 FR 2791–2792, January 20, 2015.

Public comments reflected confusion regarding proper use of this provision. Thus, the final action clarifies that, under certain circumstances, a Council may determine that it is appropriate to use a multi-year approach for overfishing status determination criteria (SDC). Such circumstances may include, but are not limited to, situations where there is high uncertainty in the estimate of F in the most recent year, cases where stock abundance fluctuations are high and assessments are not timely enough to forecast such changes, or other circumstances where the most recent catch or F data does not reflect the overall status of the stock. The final action clarifies that a Council must identify, within its FMP or FMP amendment, the circumstances (such as those listed above) in which a multi-year approach to overfishing SDC will be used. The final action also emphasizes that a multi-year approach is to be used only for retrospective stock status determinations, *i.e.,* determinations that NMFS makes to fulfill statutory reporting requirements. 16 U.S.C. 1854(e)(1). The provision may not be used to establish annual catch limits. For example, if the catch of a stock in a single year was well below its ACL, a Council may not justify setting the next year's catch level above the OFL based on the multi-year approach. NMFS provides additional explanation and clarification on this issue in the responses to comments below.

C. Acceptable Biological Catch (ABC) Control Rules

An ABC control rule accounts for scientific uncertainty in the OFL and for the Council's risk policy when establishing an ABC. The proposed guidelines would allow Councils to develop an ABC control rule that would phase-in changes to the ABC over a period of time not to exceed 3 years, so long as overfishing is prevented. *See* § 600.310(f)(2)(ii)(A) of the proposed action. NMFS also proposed allowing Councils to carry-over some of the unused portion of the ACL from one year to increase the ABC for the next year, based on increased stock abundance resulting from the fishery harvesting less than the full ACL. The proposed NS1 guidelines clarified that Councils establishing phase-in and/or carry-over provisions in their ABC control rules would need to specify when each provision can and cannot be used and how each provision prevents overfishing, based on a comprehensive analysis. *See* § 600.310(f)(2)(ii). Further background and rationale on the proposed revisions to establish phase-in and carry-over ABC control rules was provided on page 2794 of the proposed rule. *See* 80 FR 2794, January 20, 2015.

NMFS received a variety of public comments expressing concern that phase-in and carry-over provisions would increase the risk of overfishing. The final action emphasizes that Councils should conduct a comprehensive analysis of every ABC control rule—which would include those with phase-in and/or carry-over provisions—that shows how the control rule prevents overfishing. *See* § 600.310(f)(2)(i) and (ii) of final action. The final action also clarifies that, for stocks that are overfished and/or rebuilding, Councils should evaluate the appropriateness of carry-over provisions for such stocks. Finally, the final action contains language recommending that Councils should consider the reason for ACL underages when deciding whether to allow carry-over.

D. Adequate Progress Determinations for Rebuilding Plans

MSA section 304(e)(7) requires the Secretary to review rebuilding plans to ensure that adequate progress toward ending overfishing and rebuilding affected fish stocks is being made. 16 U.S.C. 1854(e)(7). NMFS received several comments in response to the ANPR requesting additional guidance on adequate progress determinations and thus, NMFS proposed guidance to clarify that the review of rebuilding progress could include the review of recent stock assessments, comparisons of catches to the ACL, or other appropriate performance measures. NMFS also proposed that the Secretary may find that adequate progress in rebuilding is not being made if: (1) $F_{rebuild}$ or the ACL associated with $F_{rebuild}$ are being exceeded and AMs are not effective at correcting for the overages; or (2) when the rebuilding expectations of the stock or stock complex have significantly changed due to new and unexpected information about the status of the stock. *See* § 600.310(f)(3)(iv). Public comment raised concern that these criteria do not consider biomass trends, which would allow adequate progress determinations to be made for stocks where, despite maintaining catch at or below $F_{rebuild,}$ the biomass is failing to increase. Having considered public comment, NMFS has decided to keep the proposed criteria for adequate progress determinations in the final action. As mentioned in the proposed action, the 2013 National Research Council (NRC) report on rebuilding highlighted that the primary objective of a rebuilding plan should be to maintain fishing mortality at or below $F_{rebuild}$. By doing so, managers can avoid issues with updating timelines that are based on biomass milestones, which are subject to uncertainty (*see* § 600.310(j)(3)(i)(A)) and changing environmental conditions that are outside the control of fishery managers. NMFS emphasizes in the final action that, despite the uncertainty associated with biomass trends, there is a strong relationship between F-rates and biomass trends. Stocks that consistently experience fishing mortality above $F_{rebuild}$ generally experience declining or little increases in biomass, while stocks that consistently experience fishing mortality equal to or below $F_{rebuild}$ generally experience increasing biomass. Cases where stock biomass is not increasing despite maintaining catch levels at or below $F_{rebuild}$ levels would be unexpected. Such cases would likely trigger the second criteria for determining that adequate progress is not being made (*i.e.,* new and unexpected information has significantly changed the rebuilding expectations of the stock). Thus, NMFS is confident that the criteria for adequate progress determinations (see § 600.310(j)(3)(iv) of the final action), address and cover situations where a rebuilding plan fails to properly constrain fishing mortality rates as well as situations where a rebuilding stock's biomass is failing to increase. NMFS believes that further guidance on this issue is not necessary to include within the NS1 guidelines.

E. Adding Flexibility in Rebuilding Plans

Calculating T_{max}

The NS1 guidelines provide guidance on determining the minimum (T_{min}), maximum (T_{max}), and target (T_{target}) time to rebuild a stock to a level that supports MSY (B_{msy}). In the past, Councils have had difficulties

calculating T_{max} based on the original data-intensive method (*i.e.,* T_{min} + one generation time) that requires data on life history, natural mortality, age at maturity, fecundity, and maximum age of the stock (Restrepo, et al. 1998). In order to allow Councils to make T_{max} calculations despite variable information and data availability amongst stocks, NMFS proposed specifying three methods to calculate T_{max} within the guidelines: (1) T_{min} plus one mean generation time (status quo); (2) the amount of time the stock is expected to take to rebuild to its B_{msy} if fished at 75 percent of the MFMT; or (3) T_{min} multiplied by two. Further background and rationale on the proposed revisions to the guidance on the calculation of T_{max} was provided on pages 2795–2796 of the proposed rule. *See* 80 FR 2795–2796, January 20, 2015.

NMFS received many comments on the proposed additional methods to calculate T_{max}, and some commenters stated that if Councils use the method that yields the longest T_{max} estimate, the resulting rebuilding plan would not be effective nor meet the statutory requirement that rebuilding plans rebuild a stock in as short a time as possible. 16 U.S.C. 1854(e)(4)(A)(i).

After taking into consideration public comment, NMFS has decided to keep the additional T_{max} calculation methods, but has revised the final action to provide additional guidance on how to determine which method to use. First, NMFS added language to the final action to emphasize that, where T_{min} exceeds 10 years, T_{max} establishes a maximum time for rebuilding that is linked to the biology of the stock. As such, NMFS also highlighted that decisions regarding which T_{max} calculation method to use should be driven by the best scientific information available with consideration of relevant biological data and the scientific uncertainty of that data (rather than the outcome of the calculation). Councils must also work with their Scientific and Statistical Committees (SSCs) (or agency scientists or peer review processes in the case of Secretarial actions) to determine which T_{max} calculation method to use. Finally, NMFS also provided examples of cases where, given data availability and the life history characteristics of a stock, it may be appropriate to use one of the alternative methods instead of the status quo calculation method (T_{min} plus one mean generation time).

Furthermore, while Councils may use T_{max} as a measureable upper bound on the duration of rebuilding time periods, Councils must set a target time for rebuilding (T_{target}) that is as short as possible, taking into consideration certain statutory factors. *See* § 600.310(j)(3)(i). Thus, Councils must demonstrate that their adopted T_{target} is the shortest time possible for rebuilding and Council action addressing an overfished fishery should be based on $T_{target.}$

Discontinuing Rebuilding Plans

Due to scientific uncertainty in the biomass estimates of fish stocks, occasionally a stock is identified as overfished, but is later determined to have never been overfished. In the past, NMFS' approach has been that, once a rebuilding plan has been implemented, the rebuilding plan cannot be discontinued until the stock has been rebuilt to B_{msy}, regardless of new information about the status of the stock when it was originally declared overfished. To address this issue, NMFS proposed to allow a rebuilding plan to be discontinued if both of the following criteria are met: (1) The Secretary retrospectively determines the stock was not overfished in the year that the overfished determination was made; and (2) the biomass of the stock is not currently below the MSST. *See* § 600.310(j)(5) of the proposed action. Further background and rationale on the proposed revisions to the guidance on the discontinuation of rebuilding plans was provided on pages 2796–2797 of the proposed rule. *See* 80 FR 2796–2797, January 20, 2015.

Based on public comments, this final action adds that the stock must be shown to have never been overfished in subsequent years following the original overfished determination, including the current year. This revision effectively covers the two criteria, thus the final action deletes the proposed second criteria. *See* § 600.310(j)(5) of the final action. Should new information demonstrate that the stock was overfished in a subsequent year, a rebuilding plan is still necessary and rebuilding timeframes should be adjusted accordingly. It should also be noted that discontinuation of a rebuilding plan that meets the criteria listed within the final action is not mandatory or automatic; a Council may choose to retain a rebuilding plan for conservation and management purposes.

V. Response to Comments

Management Objectives of FMPs

Comment 1: NMFS received several comments regarding the proposed provision to regularly re-assess FMP management objectives. Some comments requested clarity regarding the flexibility of the term ''regular''—whether it meant reassessments could be completed on an as-needed basis, or whether the Council needs to specify a numerical period (*e.g.,* every 5 or 7 years). Some commenters suggested that opportunities for reassessments already exist within standard Council processes (*e.g.,* creating FMP amendments; biennial reviews) and that the regularity of objective reassessments should be at the Council's discretion based on workload and resource constraints. Commenters also requested that the guidelines specify ''triggers'' for FMP reassessments, especially to encourage reassessment of outdated objectives. Commenters also supported evaluations of whether management is achieving FMP management objectives. Another commenter requested that the provision be expanded to include a periodic review of fishery monitoring systems that provide data for implementing FMPs in addition to FMP management objectives. Finally, with regard to the result of the proposed reassessments, one commenter requested that the guidelines outline a process for instances when a reassessment finds the FMP management objectives are no longer valid.

Response: NMFS believes that a prescribed time period for reassessments is not appropriate and provided rationale for this decision in the proposed action preamble. Nothing raised in the comments has caused NMFS to revise this rationale. NMFS chose not to prescribe a set time period for ''a regular basis'' in order to provide the Councils with the flexibility to determine this time frame themselves. While no time frame is prescribed, Councils should provide notice to the public of their expected schedule for review. Given the scope and complexity of such a task, NMFS does not expect Councils to reassess their FMP objectives every few years; rather some longer time frame which staggers the review of each FMP may be more appropriate. *See* 80 FR 2787, January 20, 2015.

If, following reassessment, a Council finds that an FMP's management objectives are no longer meeting the needs of the fishery and do not properly address relevant social, economic, and ecological factors, NMFS encourages Councils to adjust their management objectives. As with the issue of time periods for review, NMFS believes that it is important to preserve Council flexibility in determining how best to make these adjustments and therefore declines to establish a single process to address issues raised in the reassessments. NMFS urges Councils to

evaluate whether management measures are meeting FMP objectives, especially within the context of evaluating the changing needs of the fishery.

Finally, while NMFS agrees that the fishery monitoring systems and data collection programs set up to deliver the necessary data for FMP implementation are crucial to successfully meeting FMP management objectives, a review of these systems and programs does not need to be included in the reassessment of an FMP's management objectives.

Comment 2: One commenter suggested that NMFS replace ''objectives of the fishery'' in § 600.305(b)(2) with ''FMP's management objectives'' to make the language consistent with the rest of the guidelines.

Response: NMFS agrees, and has made the suggested edit in the final action.

Comment 3: Commenters requested more guidance on what Councils should consider when creating and assessing FMP management objectives. Specifically, commenters requested that the guidelines include additional guidance on how management objectives should tie into objectives related to the MSA; its national standards; and the ecological, economic, and social factors of OY specifications. Commenters also requested guidance on how conflicting objectives should be resolved in favor of the conservation mandate in NS1. While one commenter requested the guidelines encourage reassessments to respond to changes in ecosystem components (*e.g.,* protected species), other commenters requested that the requirements for reassessments be kept at a minimum to preserve resources and flexibility.

Response: NMFS believes that the proposed guidelines set appropriate parameters for the reassessment of FMP management objectives while leaving the exact considerations for management objectives up to the discretion of the Councils. The MSA itself ''guides'' (or rather, drives) the development of FMPs, as it sets forth conservation and management mandates and requirements, including the national standards, with which FMPs must be consistent. With regard to ecosystems, NMFS believes that the Council has discretion and flexibility to efficiently respond to changes in ecosystems during their reassessments of FMP management objectives. Thus, NMFS does not believe any further guidance is needed within the NS1 guidelines.

Comment 4: One commenter suggested adding language to § 600.310(e)(3)(iii)(B)(*1*) of the proposed action on the enjoyment and participation gained from recreational fishing when some stocks are managed for abundance rather than maximum harvest. The commenter also suggested adding language to § 600.310(e)(3)(iii)(B)(*2*) of the proposed action on necessary shifts in mixed use allocations to achieve maximum economic and public use benefits.

Response: NMFS does not believe that § 600.310(e)(3)(iii)(B)(*1*) needs to be revised as suggested. OY is derived from MSY, which is the largest long-term average catch or yield that can be taken from a stock or stock complex, thus ''abundance'' of a stock is a consideration addressed through the description of OY within the guidelines. *See* § 600.310(e)(1)(i), (e)(3)(i)(A) (defining MSY and OY). NMFS agrees that allocation of fishery resources is one of the issues that may need to be considered when re-assessing an FMP's management objectives. NMFS explicitly highlighted allocation as a consideration for reassessments of management objectives in the proposed action. *See* 80 FR 2787, January 20, 2015. However, NMFS disagrees that further allocation examples need to be added to the economic and social factors a Council can consider when setting OY and their management objectives. The NS1 guidelines set forth examples of different considerations for each factor, and NMFS believes the examples provide sufficient guidance.

Stocks That Require Conservation and Management

Comment 5: NMFS received numerous comments on the newly proposed section on stocks in need of conservation and management. *See* § 600.305(c). Many commenters perceived the revisions as an impermissible narrowing of the obligations imposed by the MSA. Some commenters urged that, to the extent that NMFS is offering guidance on whether stocks are in need of conservation and management, that any factors considered should be solely based on the MSA's definition of ''conservation and management'' at 16 U.S.C. 1802(5) and that it was inappropriate to bring in other statutory provisions such as National Standards 3 and 7 as part of that analysis. In contrast, others believed that by prescribing a list of factors to consider when determining that stocks are in need of conservation and management that NMFS has inappropriately curtailed the discretion afforded to the Councils to make that determination. Commenters suggested alternative approaches for Councils to take to determine whether conservation and management is necessary. Commenters also suggest that in addition to answering whether a stock is in need of conservation and management, they should also consider why that stock may be in need of conservation and management and how that stock should be best managed (if at all). In particular, one commenter requested that NMFS provide additional information on the deletion of two provisions from the NS7 guidelines published in 1998 (§ 600.340(b)(1); 600.340(b)(2)(vii); (*see* 63 FR 24234, May 1, 1998)) from the proposed action. The commenter suggested the provisions should be incorporated into § 600.305(c)(1) to allow Councils to balance the costs and benefits of management and consider whether management serves some useful purpose. Finally, some commenters noted that Councils have the ability to implement protective measures for species that are not necessarily included as stocks in an FMP.

Response: An FMP must be prepared for a fishery that requires conservation and management. 16 U.S.C. 1852(h)(1). In proposing § 600.305(c), NMFS did not intend to narrow this requirement to merely those fisheries that are overfished or subject to overfishing. Instead, as explained in the proposed action, NMFS sought to clarify that, while not every stock requires federal management, stocks that are overfished or subject to overfishing (or likely to become so) and that are predominately caught in federal waters *must* be included in an FMP. In addition, a Council may find that other stocks within its jurisdiction require conservation and management as well. Beyond stocks that are overfished or subject to overfishing (or likely to become so), NMFS provides a list of non-exhaustive factors within the guidelines that Councils should consider when determining whether a stock requires conservation and management.

As MSA section 1852(h)(1) is broadly worded, the proposed regulatory guidance was intended to assist Councils in making determinations under this section. To make sure that NMFS' intent is clear, the final action includes clarifying edits to emphasize the agency's approach with regard to overfishing/overfished stocks and other stocks.

As discussed further in response to comment 7, the factors are drawn in the first instance from the statutory definition of ''conservation and management.'' 16 U.S.C. 1802(5). The proposed action cited to that definition,

and the final action adds the citation for the definition. Although the definition of ''conservation and management'' speaks generally to actions that are required to rebuild fisheries, designed to assure a supply of food and recreational benefits, and meet other goals, that definition and section 1852(h)(1) do not provide clear direction on when a stock is in need of conservation and management. Thus, NMFS believes that it is appropriate to consider the statute as a whole, including the National Standards and relevant definitions and provisions, to provide constructive guidance to the Councils on section 1852(h)(1). *See* FR 2786, 2788–278980, January 20, 2015 (discussing National Standard 3 and 7 guidelines and relevant MSA provisions in preamble to proposed action).

The factors incorporate the general principle from the 1998 NS7 guidelines at § 600.340(b)(1) that not every fishery needs Federal management. *See* 63 FR 24234, May 1, 1998. NMFS does not agree with adding a factor on balancing costs associated with an FMP against benefits: This was a criteria under § 600.340(b)(2)(vii) of the 1998 guidelines for deciding whether a fishery ''needs management through regulations implementing an FMP.'' Section 600.305(c) of this action provides guidance on the threshold determination of whether to add a stock to an FMP or remove a stock from an FMP, based on whether a stock requires conservation and management. The factors do not speak to what regulatory measures, if any, may or may not be needed for the stock. Costs and benefits should be evaluated when specific regulatory measures are being considered. For clarification and streamlining purposes, § 600.340(b)(2)(vii) was deleted from the proposed and final revisions to the NS7 guidelines, as § 600.340(c) addresses analysis of costs and benefits.

NMFS disagrees that the factors curtail Council discretion. The list of factors is non-exhaustive, and Councils may take into account any additional considerations that may be relevant to the particular stock. *See* responses to comments 7 and 8 for further discussion of the factors. NMFS realizes that the proposed text may have implied that a Council must analyze all ten factors before adding a stock to an FMP. Thus, NMFS has revised final § 600.305(c)(3) to state that one or more of the factors may provide the basis for adding a stock to an FMP. Response to comment 8 provides a more detailed explanation of other clarifications made in final § 600.305(c)(3) and (4) regarding use of the factors when adding a stock to or removing a stock from an FMP.

NMFS agrees, particularly with respect to stocks that may require conservation and management to address biological or ecological concerns, that the cause of those concerns would be a useful consideration for the Councils. The final guidance does not preclude such considerations, and in fact provides a framework for a Council to consider these very relevant questions. Furthermore, based on factor 3, which considers whether an FMP can improve or maintain the condition of the stocks, NMFS has added language within § 600.305(c)(3)–(4) that emphasizes that if the amount and/or type of catch that occurs in Federal waters is a significant contributing factor to the stock's status, such information would weigh heavily in favor of inclusion of the stock within an FMP. *See* § 600.305(c)(3)–(4).

Finally, NMFS agrees that Councils may implement discretionary measures for species, even if they do not ''require conservation and management'' pursuant to section 302(h)(1). Section 303(b)(12) of the MSA provides that Councils 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. 16 U.S.C. 1853(b)(12). Additionally, in implementing measures to comply with National Standard 9's requirement that an FMP's conservation and management measures minimize bycatch and bycatch mortality to the extent practicable, Councils can take measures that conserve and protect bycatch species even if those bycatch species are not, themselves, included as stocks in a fishery under an FMP. *Id.* 1851(a)(9).

Comment 6: Some commenters expressed concern with the proposed text at § 600.305(c)(1) regarding stocks that are ''predominately caught'' in Federal waters. Commenters stated that the limiting ''predominately'' language is not part of the MSA and would improperly exclude stocks from management.

Response: The ''predominately caught'' language in § 600.305(c)(1) does not exclude any stocks from management. As explained in the response to comment 5, MSA section 302(h)(1) and other related MSA provisions do not provide clear direction on when to include stocks in an FMP. NMFS proposed the text regarding overfished/overfishing stocks predominately caught in Federal waters to provide clear guidance on when stocks *must* be included in an FMP. MSA section 1853(a)(1)(A), among other provisions, supports this approach, as it requires that FMPs contain conservation and management measures ''necessary and appropriate'' to prevent overfishing and rebuild overfished stocks. 16 U.S.C. 1853(a)(1)(A). If a stock is not predominately (*i.e.* mainly, or for the most part) caught in Federal waters, a Council may lack the authority, and thus ability, to adopt measures that would prevent overfishing and rebuild overfished stocks. It would not make sense, in that case, to require a Council to automatically include the stock in an FMP.

''Conservation and management'' and ''fishery'' are defined in terms of practical use or benefit and the ability to manage, which supports the inclusion of predominately in 600.305(c). ''Conservation and management'' refers to regulations, measures, etc., which are *required* [*i.e.,* considered essential; indispensable] to rebuild, restore, or maintain, and which are *useful* [*i.e.,* having a beneficial use; being of practical use] in rebuilding, restoring, or maintaining any fishery resource and the marine environment. 16 U.S.C. 1802(5). ''Fishery'' refers to ''one or more stocks of fish which *can be treated as a unit* for purposes of conservation and management . . .'' *Id.* § 1802(13) (emphasis added). ''Stock of fish,'' which is referenced in the definition of ''fishery,'' means a species, subspecies, geographical grouping, or other category of fish *capable of management as a unit. Id.* § 1802(42).

As noted above, NMFS does not believe it is appropriate to require inclusion of overfishing/overfished stocks in an FMP, if a Council lacks the authority or ability to adopt measures that will prevent or end overfishing or rebuild the stocks. NMFS proposed, and is retaining in this final action, use of the phrase ''predominately caught in Federal waters'' to address this concern. A similar phrase—fishing ''engaged in predominately within the exclusive economic zone and beyond that zone''—is one of two factors that allow NMFS to regulate a fishery within the boundaries of a State. *Id.* § 1856(b)(1)(A). While section 1856(b) is about preemption, it provides further support for the ''predominately caught'' approach under § 600.305(c)(1). Section 306 recognizes the efficacy of federal management when a fishery is engaged in ''predominately'' in federal waters. Likewise, § 600.305(c) includes ''predominately'' based on efficacy considerations.

NMFS notes that, even if a stock is not required to be included in an FMP (*i.e.,* stock is not overfishing/overfished and predominately caught in Federal

waters), a Council may still determine that a stock requires conservation and management based on consideration of one or more of the factors in paragraphs § 600.305(c)(1)(i) through (x). *See* response to comment 8 for further explanation of use of the factors when adding a stock to an FMP.

Comment 7: NMFS received numerous comments regarding the specific factors included in paragraphs § 600.305(c)(1)(i) through (x) of the proposed action. One commenter argued that factor (i)—whether the species plays an important role in the ecosystem—should be modified to focus on whether the species' role in the ecosystem is potentially affected by fishing. Additionally, many commenters believed that factors iv–vi, which took into consideration economic or social implications of management decisions were inappropriate because they improperly brought those considerations into a matter that should be solely focused on the conservation needs of a stock based on the best available science. Factor iv—the stock is a target of a fishery—was particularly polarizing with some commenters expressing that it should be the primary factor considered by Councils while others were urging that it be removed from the list as irrelevant. NMFS also received mixed reactions to factor (x)—the extent to which the fishery could be or is already adequately managed. Some called for factor (x) to be removed and, in particular, the phrase ''industry self-regulation'' to be removed because, for example, no other management regime has proven as effective as Federal management under the MSA and there is no description of what ''adequate management'' under industry self-regulation would entail. Other commenters stressed the importance of factor (x).

Response: NMFS disagrees that the first nine factors require revision. Potential effects on a species from a fishery is addressed in factor (ii) and, beyond the factors, a Council may take into account any additional considerations that may be relevant to the particular stock. Whether a fishery targets a stock (factor (iv)) is a relevant consideration: If a fishery is targeting a stock in federal waters, it is likely that the stock will be vulnerable to the impacts of fishing mortality and that there may be conflicts over the allocation of that stock. With regard to factors (iv) through (vi), the definition of ''conservation and management'' indicates that whether a stock requires measures to rebuild, restore, or maintain any fishery resource and the marine environment is as important to consider as whether measures are needed to ensure a multiplicity of options available with respect to future uses of these resources. 16 U.S.C.1802(5). Many of the factors that commenters objected to are intended to prompt consideration of the necessity and appropriateness of Federal management. 16 U.S.C. 1853(a)(1)(A). NMFS believes that the factors, as written, allow significant discretion for the Councils to evaluate the specific facts presented by a wide variety of stocks and fisheries to determine the necessity and utility of federal management.

With respect to factor (x), NMFS continues to believe that MSA section 302(h)(1) does not require preparation of FMPs for all fisheries in the EEZ. Among other things, the MSA recognizes the authority of a State to regulate fisheries within its boundaries and authorizes a State under certain circumstances to regulate its vessels outside state boundaries. Furthermore, the MSA mandates that the conservation and management measures for stocks under an FMP, where practicable, minimize costs and avoid unnecessary duplication. 16 U.S.C. 1851(a)(7) (National Standard 7) and 1856(a)(3) (state jurisdiction); *see* also 80 FR 2786, 2788–2789, January 20, 2015 (discussing these and other provisions in preamble to proposed action). Thus, if a Council determines (and the Secretary concurs) that a particular industry self-regulation structure constitutes an adequate management structure consistent with the national standards, other provisions of the Magnuson-Stevens Act, and other applicable law, an industry self-regulation structure that minimizes costs and avoids unnecessary duplication of management measures is a relevant consideration under § 600.305(c). Therefore, NMFS retains factor (x) in this final action. However, in response to public comment, NMFS is revising factor (x) to delete the words ''could be or'' from ''[t]he extent to which the fishery is already adequately managed . . .'' NMFS agrees with commenters that the mere possibility of other management regimes should not be considered as a relevant factor when determining whether federal management is required.

Comment 8: Commenters requested further guidance in applying the factors under § 600.305(c)(1). Some commenters requested that the final guidelines make clear which factors weighed in favor of inclusion, but should not be used to justify exclusion. Other commenters suggested that NMFS provide greater guidance on how to weigh the factors relative to each other, for example ''tiering'' the factors based on their relative specificity and significance.

Response: Section 600.305(c)(2) of the proposed action explained that, when considering adding a new stock to an FMP or keeping a stock within an FMP, Councils should prepare an analysis of the factors to assist in determining which stocks require conservation and management. NMFS has modified this text in the final action to clarify the process for adding and removing stocks from an FMP (final § 600.305(c)(3) and (4), respectively). In § 600.305(c)(3), NMFS explains that, when considering adding a stock to an FMP, no single factor is dispositive or required. An analysis of all ten factors is not required to add a stock to an FMP. One or more of the factors, and any additional considerations that may be relevant to the particular stock, may provide the basis for determining that a stock requires conservation and management.

For clarity, NMFS revised the phrase ''keeping an existing stock within an FMP'' (proposed § 600.305(c)(2)) to ''removing a stock from, or continuing to include a stock in, an FMP'' (final § 600.305(c)(4)). The final action explains that, when considering such action, Councils should analyze all ten factors. Factors (i) through (ix) are all factors that counsel for inclusion of stocks, and factor (x) counsels against inclusion. *See* Section VI of this preamble for more details on changes to § 600.305(c). A Council's analysis should clearly demonstrate why, on balance, the factors considered (which may include factors beyond the list included in the final action if relevant to the particular situation) support the ultimate conclusion to remove a stock from an FMP. Given the wide range of potential scenarios that Councils may face when evaluating the conservation and management needs of various fisheries, NMFS does not believe that it would be advisable to offer more prescriptive guidance on how to balance the factors against each other. In some cases a particular factor may have more significance than in another case, depending on the circumstances of the fishery.

Comment 9: Some commenters raised concerns regarding application of the factors listed in § 600.305(c)(1) of the proposed action within the context of data limited situations. One commenter recommended that NMFS include guidance regarding how to address the factors in a data limited situation. Another commenter suggested that NMFS allow Councils to categorize all data poor stocks as EC species and therefore exempt from ACLs.

Response: The MSA does not distinguish between requirements for stocks that have robust data available and those for which data is lacking—accordingly, NMFS and the Councils cannot exempt stocks from ACLs and other mandatory requirements solely due to the availability of data for those stocks. As discussed in response to comment 5, all stocks that require conservation and management must be included in an FMP. This is true regardless of the data available for those stocks. NMFS notes that National Standard 2 requires that all conservation and management measures must be based on the best scientific information available. 16 U.S.C. 1851(a)(2). Recognizing the challenges posed by data limited situations, NMFS has adopted several measures (*see* §§ 600.310(e)(2)(ii); 600.310(h)(2) of the final action) that are intended to provide additional flexibility in applying the NS1 guidelines in data limited situations.

Comment 10: Some commenters sought additional guidance on how to deal with management of stocks that either straddle multiple areas of Council jurisdiction or shift from one jurisdiction to another, for example due to the impacts of climate change.

Response: The proposed guideline revisions moved language discussing management of stocks that straddle multiple Council jurisdictions from the National Standard 1 guidelines to the General section, but did not propose any substantive changes to that provision. *See* § 600.305(c)(6). This provision is based on MSA section 304(f), which provides that for fisheries that occur in the geographical area of authority of more than one Council, the Secretary may either designate a lead Council to prepare an FMP or require joint preparation of such an FMP. 16 U.S.C. 1854(f). The guideline provision is designed to complement this statutory requirement by explaining that the primary FMP should contain reference points for stocks. In addition to this guidance, the newly revised guidance for reassessing an FMP's management objectives can also potentially provide an avenue for a Council to address a shift in occurrence of a stock, or the previous designation of a lead FMP. *See* § 600.305(b)(2). NMFS does not believe that any further revisions are necessary at this time.

Comment 11: Several commenters sought clarification on the impact of the proposed provisions on stocks in need of conservation and management and the concept of EC species. NMFS received several comments on the revised discussions of EC species, in particular expressing concern about the proposed deletion of the 2009 NS1 guideline definition of EC species and non-target species. Commenters sought additional guidance on the proper criteria for designating an EC species and the management and monitoring requirements for EC species.

Response: NMFS introduced the concept of EC species in the 2009 revisions to the NS1 guidelines. In those guidelines, NMFS explained that the ''in the fishery'' and ''EC species'' classifications address the fact that while FMPs typically include target species (and some non-target species that require conservation and management), other FMPs include hundreds of species which may or may not require conservation and management in an effort to advance ecosystem management in the fishery. *See* 74 FR 3179, January 16, 2009. By adopting the ''EC species'' classification, NMFS sought to encourage Councils to continue to pursue ecosystem approaches to management. Even when a species does not require ''conservation and management,'' a Council may include it as an EC species in an FMP. Unlike stocks in the fishery, EC species designation does not trigger all of the mandatory provisions of the Magnuson-Stevens Act, such as FMP requirements under section 303(a).

In this final action, NMFS is providing further guidance on the question of what stocks require conservation and management. Nothing in these proposed provisions changes previous guidance on the optional usage of EC species. To make clear this intent, NMFS has made minor modifications in this final action to more closely follow the language discussing EC species in the 2009 action. Additionally, NMFS has re-inserted a definition of EC species. *See* § 600.305(d)(13) of final action. This definition, however, does not rely on the previously established criteria for designation. The criteria included in the 2009 guidelines were intended to prevent stocks that were in need of conservation and management from being re-designated as EC species. *See, e.g.,* response to comment 17, 74 FR 3186, January 16, 2009. There is no need to retain the 2009 criteria, because the final action provides factors for determining whether a stock is in need of conservation and management, and includes clarifying language that makes clear that stocks in need of conservation and management cannot be designated as EC species. In response to numerous comments, NMFS has reinserted a definition for ''non-target stocks,'' with minor modifications from the definition in the 2009 guidelines, to ensure consistency with the remainder of the NS1 guidelines. *See* § 600.305(d)(12) of final action.

Because the designation of EC species is discretionary and may be done to accomplish several different goals, NMFS is not providing further specific guidance on EC species. Determining whether the EC species designation is appropriate requires a case-specific look at stocks or stock complexes in light of § 600.305(c) as well as the broader mandates and requirements of the MSA. NMFS has worked closely with Councils who have decided to pursue EC species designation and will continue to provide support and guidance going forward.

Data Limited Stocks

Comment 12: While many commenters supported the clarification that, when it is not possible to specify MSY or MSY proxies for a data limited stock, a Council may use alternative types of SDCs, other commenters requested additional technical guidance on using alternative types of SDCs. *See* § 600.310(e)(2)(ii). Some commenters also provided suggestions to improve the provision, including: acknowledging the limitations of alternative types of SDCs (particularly with regard to addressing stocks with ''model uncertainty''); addressing circumstances when reference points such as MSY and OY cannot be determined; requiring an analysis of the regional applicability of different data limited methodologies; acknowledging that the alternative SDCs listed in the guidelines are not the only alternatives available; and including a definition for ''data limited stocks'' within the guidelines. Some comments stated that § 600.310(h) of the proposed action improperly exempted Councils from setting annual ACLs for data limited stocks and requested the guidelines clarify that all reference points required by the MSA are required to be established for data limited stocks that require conservation and management.

Response: The list of examples of alternative SDCs within § 600.310(e)(2)(ii) is not exclusive, and Councils may explore other alternate types of SDCs. Any alternative approach adopted by a Council, in consultation with their SSC, must be based on the best scientific information available and identify overfishing and overfished thresholds. *See* § 600.310(b)(2)(v) (describing SSC role in providing scientific advice to the Council). Section 600.310(e)(2)(ii) provides that, when specifying SDCs, a Council must provide an analysis of how the SDCs were chosen, how they relate to the

reproductive potential of the stock within the fishery, and how the alternate type of SDCs will promote the sustainability of the stock on a long-term basis. Thus, NMFS believes that the guidelines provide sufficient guidance on the use of alternate types of SDCs for data limited stocks while retaining adequate flexibility to allow Councils to determine the most appropriate alternate type of SDCs on a case-by-case basis.

With regard to the comments proposing improvements to alternative SDC text, NMFS notes that specification of MSY and OY are statutory requirements (16 U.S.C. 1853 (a)(3)), and the intent of § 600.310(e)(2)(ii) is to help address circumstances where data are not available to specify SDCs based on MSY or MSY based proxies. Because stock assessment models are used to set reference points within the ACL framework, model uncertainty is best addressed when accounting for scientific uncertainty within the ABC reference point. While an analysis of the regional applicability of different data limited methodologies may be useful to a Council, it may not always be necessary or informative and NMFS does not believe such an analysis needs to be prescribed as part of the NS1 guidelines. With regard to defining ''data limited stocks,'' the characteristics of such stocks are so wide-ranging that a definition would not be meaningful and could lead to additional confusion when applying the NS1 guidelines. Finally, as discussed in the preamble to the proposed action, § 600.310(h)(2) does not provide an exemption from any statutory requirements, including the requirement to establish ACLs. *See* 80 FR 2790, January 20, 2015. NMFS discussed data limited stocks under § 600.310(h)(2) in order to ensure consistency with the revisions made under § 600.310(e)(2)(ii).

Comment 13: One commenter requested that the guidelines be edited to ensure that alternate types of SDCs are appropriately referenced throughout the guidelines. For example, proposed § 600.310(e)(2)(ii)(B) states that MSST or reasonable proxy must be expressed in terms of spawning biomass or other measures of reproductive potential. The commenter suggested that language should be added to the description of SDC to determine overfished status (§ 600.310(e)(2)(ii)(B)) to clarify how Councils should accommodate alternative types of SDCs.

Response: NMFS does not agree that revisions are needed. A Council must provide an analysis of how its SDCs relate to the reproductive potential of the stock. If an alternate type of SDC is adopted, the alternate SDC is considered a reasonable proxy to determine overfished status within the context of § 600.310(e)(2)(ii)(B) and will be expressed in terms of the stock's reproductive potential.

Stock Complexes & Indicator Stocks

Comment 14: Some commenters opposed the proposed changes to the guidelines that encourage the use of indicator stocks within stock complexes, and recommended removing the changes. Commenters expressed concern that, if species with disparate vulnerabilities are grouped together within a stock complex, the risk of overfishing on weaker stocks would increase while others advised NMFS against using overly precautionary indicator stocks that may prevent OY from being achieved. Other commenters requested additional technical guidance and recommended that Councils consider the current status of each stock as well as the costs and benefits of stock complex-based management when establishing stock complexes. NMFS also received numerous suggestions to strengthen the language on stock complexes and indicator stocks, including explicitly requiring the use of indicator stocks within stock complexes; using ''must'' instead of ''should'' in § 600.310(d)(2)(C) in order to require that Councils, in consultation with their SSC, choose the most vulnerable stock within a complex as the indicator stock; and requiring that all Councils take additional precaution when establishing stock complexes where high levels of scientific uncertainty exist.

Response: NMFS believes the guidelines are clear that, if an indicator stock is used in a stock complex, it should be representative of the typical vulnerability of the stocks within the complex. In cases where stocks within a stock complex have a wide range of vulnerabilities, the guidelines are also clear that, either the stocks should be reorganized into different stock complexes that have similar vulnerabilities or the indicator stock should represent the more vulnerable stocks within the complex. *See* § 600.310(d)(2)(ii)(C) of final action. Thus, NMFS believes the use of indicator stocks in a stock complex will not increase the risk of overfishing other stocks within the complex and, in cases where the status of the stocks within a complex is generally unknown, the use of an indicator will likely reduce the probability that stocks within the complex experience overfishing. NMFS believes the use of SDCs and ACLs for indicator stocks and/or stock complexes will ensure the dual requirements of NS1 are met: preventing overfishing while achieving, on a continuing basis, OY. *See* § 600.310(e)(2)(ii); 600.310(f)(4).

NMFS also believes that the guidelines give sufficient guidance on using stock complexes and indicator stocks, and give Councils the flexibility to weigh the costs and benefits of utilizing these management tools. While the MSA does not address management of stock complexes, NMFS believes the use of stock complexes and indicator stocks in accordance with the guidelines can serve a useful role in managing data poor stocks and/or stocks that cannot be targeted independently of one another. Finally, NMFS recommends the use of indicator stocks in order to reduce the likelihood of overfishing in cases of high scientific uncertainty among stocks within a complex (*see* 80 FR 2790, January 20, 2015) and also recommends Councils use more conservative management measures in cases where it is not possible to use the most vulnerable stock within a complex as an indicator. Given that the MSA is silent on the issue of stock complex management, NMFS does not believe that the use of the term ''must'' rather than ''should'' is justified.

Comment 15: NMFS received comments expressing concern that relying on indicator stocks can lead to a false sense of security and recommending that ACLs are set for each individual stock within a stock complex instead. Others expressed concern that monitoring available qualitative and quantitative information for each stock within a complex may not be sufficient to monitor each stock's overfishing status and recommended that Councils consider each stock's vulnerability in addition to considering whether each stock is being sustainably managed. NMFS also received recommendations that the guidelines require SSCs to review monitoring data on each stock within a complex and that the guidelines encourage B_{msy} values for stocks within each stock complex to be calculated to reflect its productivity within the current ecological context.

Response: NMFS disagrees that stock-by-stock management is preferable to stock complex management in all cases. Stocks with insufficient data to measure a stock's status relative to SDCs or stocks that cannot be targeted independently of one another may be best managed as a stock complex in order to base management on informed reference points. NMFS does agree that monitoring the status of each stock within a complex based on the best scientific information available is important. However, a stock within a

stock complex may not have sufficient information available to determine its status relative to SDCs, and thus, in these cases, the Councils should monitor the stock to determine whether it is being sustainably managed and to look for any indications that the stock might be subject to overfishing. The guidelines are clear that a Council must consider the vulnerability of each stock within a stock complex when establishing or reorganizing stock complexes. *See* § 600.310(d)(2)(i). Furthermore, each SSC shall provide its Council ongoing scientific advice for fishery management decisions, including reports on stock status and health. 16 U.S.C. 1852(g)(1)(B). Thus, the SSC must give scientific advice on the ongoing management of stocks within a stock complex and NMFS does not believe that the NS1 guidelines need to specifically address this issue. Finally, NMFS agrees that current ecological conditions and ecosystem factors need to be taken into account when specifying MSY for both stocks and stock complexes and believes the current language within the definition of MSY (''prevailing ecological, environmental conditions'') adequately reflects this need. *See* § 600.310(e)(1)(i)(A).

Comment 16: Several commenters expressed concern regarding the term ''where practicable'' within § 600.310(d)(2)(i). Commenters stated that the modified definition of stock complexes is not necessary or justified and the term ''where practicable'' conflicts with the intention of the modified definition while weakening the standard for stock complexes. Some commenters also expressed concern that the modified definition could allow Councils to ''hide'' stocks that are undergoing overfishing within a complex or avoid managing ''choke'' stocks in a multi-species fishery. Therefore, several commenters recommended removing the ''where practicable'' language from the provision. Other commenters recommended that, if a Council uses stock complexes, they must complete a comprehensive analysis showing how overfishing will be prevented.

Response: As addressed in response to comment 78, the term practicable (*i.e.,* reasonably capable of being accomplished; feasible) is used appropriately within § 600.310(d)(2)(i). The MSA does not mandate a particular method for establishing stock complexes, and thus, NMFS has provided guidance on this issue, based on the agency's expertise. The term ''where practicable'' within this provision does not conflict with or weaken the intended use of stock complexes. The guidelines are clear that, where practicable, stock complexes should consist of stocks with similar geographic distribution, life history characteristics, and vulnerabilities to fishing pressure and that the most vulnerable stock should be used as the indicator stock within a complex in order to fulfill the requirements of the MSA. As emphasized in comment 15, it is important that Councils monitor the status of all individual stocks within a complex to ensure they are sustainably managed and to look for indications of overfishing. While there may be insufficient data to ascertain whether some stocks within a complex are subject to overfishing on an individual basis, if a stock within a complex *is* found to be subject to overfishing, further overfishing on the stock must be prevented. Furthermore, such a finding that overfishing is occurring does not require prior specification of SDC, but can be based on the best scientific information available. If NMFS determines that a stock within a complex appears to be subject to overfishing, the agency notifies the appropriate Council. Finally, as described in § 600.310(d)(2)(i), a Council should consider the vulnerabilities of individual stocks and provide a ''full and explicit description of the proportional composition of each stock in the stock complex'' when establishing a stock complex within a FMP. Thus, the guidelines are clear that the establishment of stock complexes within FMPs should be adequately documented based on a thorough analysis of stock vulnerabilities.

Aggregate MSY

Comment 17: Commenters requested additional clarification on the intended use of aggregate MSY estimates, in particular requesting further clarification on the relationship between the aggregate MSY approach and the ACL framework and rebuilding targets. Several commenters requested that NMFS provide additional technical guidance on the use of aggregate MSY to specify OY, and, in the absence of such guidance, recommended that NMFS remove the option to use aggregate MSY from the guidelines. Commenters were concerned that without such guidance, aggregate MSY could be used in a way that would increase the risk that individual stocks would be subject to overfishing. In addition, one commenter suggested that the guidelines be revised to clarify that the aggregate MSY estimates could be used as a substitute for stock (or stock complex)-specific MSY estimates. Further explanation was also sought with respect to the intended meaning of the word ''common'' in proposed § 600.310(e)(1)(iv). Finally, two comments pointed out that using aggregate MSY to track-long term environmental changes may be difficult as it can be difficult to distinguish between long-term and temporary environmental changes.

Response: Aggregate MSY is an optional tool that Councils can use at their discretion to specify fishery-level OYs and further facilitate the Councils' use of EBFM. Aggregate MSY estimates are not an appropriate substitute for stock-specific MSY estimates that are necessary to inform the development of the required stock-specific reference points in the ACL framework. Fundamentally, aggregate MSY is an additional limit on the management system that encourages more conservative EBFM-based measures. Even when aggregate level MSY is estimated, stock-specific MSY must still be used to inform single stock management. Other annual reference points (within the ACL framework) must also be specified in order to prevent overfishing from occurring in single stocks. In light of the above, and because aggregate MSY is merely an optional tool that can be used in addition to stock-specific reference points, the final guidelines retain the aggregate MSY provision.

The term ''common'' in § 600.310(e)(1)(iv) was intended to provide further context as to how aggregate MSY can be estimated using multi-species, aggregated, and ecosystem modeling. Upon further consideration, the phrase ''common biomass (energy) flow'' is not considered a widely used phrase within relevant scientific fields, and thus the term ''common'' is not included within the final action to avoid confusion. However, the final action retains the phrase ''biomass (energy) flow'' to clarify that the models used for estimating aggregate MSY should account for the flow of energy through the aggregate group of stocks under consideration. A Council's SSC should assist a Council using an aggregate MSY to use the best scientific information available with regards to biomass (energy) flows.

Finally, aggregate MSY is not intended to be used to track long-term environmental or ecological conditions. Instead, aggregate MSY is intended to ensure that fishery management measures are reflecting how environmental variability within the ecosystem is impacting fisheries as a whole.

Definition for ''Depleted'' Stocks

Comment 18: While NMFS received some comments supporting the proposed definition for ''depleted'' stocks, the majority of comments received opposed the proposed definition and/or requested additional technical guidance on its use. Commenters expressed a wide-array of concerns, including that: The proposed definition is overly restrictive, especially with regard to long-lived species; and the definition would not adequately distinguish between stocks that are depleted due to environmental factors and stocks that are overfished due to fishing pressure. NMFS also received many suggestions to improve the proposed definition.

Response: In light of public comment, NMFS agrees that further consideration is needed regarding how to distinguish between stocks whose current poor status is due to fishing pressure and stocks that have been negatively affected by environmental factors. Thus, NMFS has deleted the definition for ''depleted'' stocks in the final action. The final action retains the existing requirements within the guidelines that all Councils define stocks whose biomass has declined below its MSST as overfished. Even though the guidelines do not include ''depleted stocks,'' a Council may use the term to further describe the status of an overfished stock that has been impacted to some extent by environmental factors in addition to (or in the absence of) fishing pressure.

MSST

Comment 19: NMFS received a number of comments expressing concern about two revisions connected to the terms overfished and MSST (maximum stock size threshold). The proposed action revised the definition of overfished to state that a stock or stock complex is considered 'overfished' when its biomass has declined below MSST. *See* § 600.310(e)(2)(i)(E). MSST was in turn defined as the level of biomass below which the capacity of the stock or stock complex to produce MSY on a continuing basis has been jeopardized. *See* § 600.310(e)(2)(i)(F). In addition, the proposed guidelines also included revised language regarding the specification of MSST, which stated that MSST should be specified between ½ B_{msy} and $B_{msy.}$ To inform this decision, the proposed guidelines provided a list of potential considerations, including the life history of the stock, the natural fluctuations in biomass associated with fishing at MFMT over the long-term, the time needed to rebuild to B_{msy} and associated social and/or economic impacts on the fishery, the requirements of internationally-managed stocks, and other considerations. *See* § 600.310(e)(ii)(B).

Some commenters objected to the proposed changes to the definitions of overfished and MSST, arguing that NMFS improperly replaced the pre-existing, statutory-based definition with a new, less supportable definition. Commenters expressed concern with linking a determination that a stock is overfished with a Council-specified MSST because, according to commenters, MSSTs are not always properly specified or updated. Other commenters believed that connecting MSST to ''overfished'' was too restrictive and that a preferable definition would connect the ability of a stock to return to its B_{msy} level in the absence of a rebuilding plan (rather than linking to the ability of the stock to produce MSY on a continuing basis).

Other commenters took issue with the proposed change to the provision regarding the specification of MSST. Some commenters felt that the language from the 2009 action set a clearer standard and that the proposed language made the MSST specification depend on criteria that are not easily quantifiable. Especially concerning for some were the ''social and/or economic'' considerations. Commenters argued that the proposed revisions increase the likelihood that stocks declared overfished will not be able to rebuild within ten years. Others felt that the factors in the proposed revisions provided needed additional flexibility to the Councils should they wish to revisit MSST specifications.

Response: As NMFS explained in the preamble to the proposed action, the changes to the definitions of ''overfished'' and ''MSST'' are minor changes intended to improve clarity and reduce redundancy with no resulting changes in how the terms overfished and MSST are used. *See* 80 FR 2791, January 20, 2015. While definitions for both overfished and MSST were provided within the 1998 guidelines, the 2009 guidelines established that a stock or stock complex is considered overfished when its biomass has declined below a level that jeopardizes the capacity of the stock or stock complex to produce MSY on a continuing basis. The 2009 action then defined MSST as the level of biomass below which the stock or stock complex is considered to be overfished. Read together, these provisions relied on MSST as the determining threshold of whether a stock was overfished. MSST was, and continues to be in this final action, the threshold by which an overfished determination is made. The revisions eliminate ambiguity by referring directly to MSST in the definition of overfished. This final action is consistent with the MSA as it incorporates the statutory definition of ''overfished'' (*i.e.,* level of biomass that ''jeopardizes the capacity of a fishery to produce [MSY] on a continuing basis'') into the definition of MSST. *See* 16 U.S.C. 1802(34) and § 600.310(e)(2)(i)(A) (clarifying that MSA ''overfished'' definition relates to biomass). NMFS does not believe the suggestion to link the definition of MSST to the ability of a stock to return to its B_{msy} level in the absence of a rebuilding plan would be consistent with the statutory definition of ''overfished.''

NMFS disagrees that the revisions to the MSST specification provision would prevent stocks from being classified as overfished. The 2009 guidelines provided two options for specifying MSST: one-half the MSY stock size, or the minimum stock size at which the stock could rebuild to the MSY level within 10 years if the stock was fished at MFMT. The guidelines stated that MSST should be set equal to the greater of the two options. *See* § 600.310(e)(2)(ii)(B) (2009). NMFS revised the provision to set a clearer standard for MSST specifications, allow for a broader range of considerations, and allow Councils increased flexibility to re-visit and update MSST specifications, based on the changing conditions of a fishery. By providing that MSST should be between ½ B_{msy} and $B_{msy,}$ this final action affords Councils the ability to adopt an MSST consistent with overfished thresholds used by some regional fishery management organizations for stocks that are internationally-and Federally-managed. The revisions also allow Councils to retain MSST definitions in existing FMPs that were based on the 1998 NS1 Technical Guidance, but were not reflected within the 2009 guidelines (Restrepo et al., 1998). NMFS believes that MSST definitions based on the 1998 Technical Guidance continue to be sound from a scientific perspective and consistent with the MSA and approaches under the NS1 guidelines. Finally, the increased flexibility within the proposed changes to MSST specifications increases the probability that MSST thresholds are utilized for data limited stocks.

NMFS also disagrees that the MSST specification provision will decrease the likelihood that overfished stocks will be able to rebuild within 10 years. Although the provision no longer includes a reference to 10 years in the

formulaic calculation of MSST, this does not alter the MSA's requirement that a rebuilding period shall ''not exceed 10 years,'' subject to certain exceptions. 16 U.S.C. 1854(e)(4)(A)(ii).

Furthermore, based on public comment, NMFS has removed the phrase ''social and/or economic impacts on the fishery,'' from the list of factors that could inform MSST. MSST is a biological reference point and is based on the level of biomass below which the capacity of the stock to produce MSY on a continuing basis is jeopardized. Thus, it is not appropriate to consider social and economic impacts when determining MSST.

Finally, NMFS disagrees that reliance upon quantitative data invariably yield more accurate or precautionary MSST values. Councils should consult with their SSCs to ensure that the information used to specify MSST, whether quantitative or qualitative, is the best scientific information available.

Comment 20: Some commenters asserted that the definition of MSST is inconsistent in the guidelines. As an example, when explaining the relationship of SDCs to environmental and habitat change, the guidelines assume that there are cases where environmental changes cause a stock or stock complex to fall below its MSST without affecting its long-term reproductive potential. *See* § 600.310(e)(2)(iii)(A). One commenter stated that this section is inconsistent with the revised definition of MSST, which refers to a level below which the capacity of the stock to reproduce MSY has been jeopardized.

Response: NMFS disagrees that there is any inconsistency in § 600.310(e)(2)(iii)(A). That section is unchanged in this action, and as explained in the response to comment 19, the definition of MSST fundamentally has not changed. MSST means the level of biomass below which the capacity of the stock or stock complex to produce MSY on a *continuing basis* has been jeopardized. Thus, the focus is on producing MSY in the long-term. The purpose of § 600.310(e)(2)(iii)(A) is to address the reality that there may be short-term, environmental changes, but recognize that such changes do not normally jeopardize the ability of a stock to produce MSY on a continuing basis. For example, El Niño increases mortalities and reduces growth within certain stocks, but after the short El Niño period ends, stocks should regain their health and ability to produce MSY on a continuing basis.

Multi-Year Overfishing Stock Status Determinations

Comment 21: NMFS received many comments on the multi-year approach to determining the overfishing status of a stock or stock complex. Many commenters expressed concern that the method may delay action and allow an overfishing trend to go unaddressed. Comments also requested the final action include technical guidance on how to apply this method. Other commenters asked whether the provision allows stock status determinations to be completed every 3 years, and whether using a multi-year approach for overfishing status determinations could impact reference points for future catch levels. Other commenters suggested: emphasizing the multi-year approach as an optional tool; endorsing the use of the catch to OFL method over the F to MFMT method; replacing the proposal with more support for the annual catch specification process and adequate AMs; allowing the SSC to determine an appropriate multi-year time period; and encouraging other overfishing determination methods that reduce lag time.

Response: The existing NS1 guidelines provide for two methods for specifying SDCs to determine overfishing status: F rate exceeds MFMT or catch exceeds OFL. *See* § 600.310(e)(2)(ii)(A)*(1)*-*(2)*. As discussed in the proposed action preamble (*see* 80 FR 2791, January 20, 2015), the multi-year approach in § 600.310(e)(2)(ii)(A)*(3)* is an optional method for specifying overfishing SDCs that is intended to allow consideration of ''the extent to which F exceeded the MFMT or catch exceeded the OFL.'' Small amounts of excess effort or catch in a single year may not jeopardize a stock's ability to produce MSY over the long term, and an overfishing stock status determination based on that single year's data point may not be the most appropriate characterization of stock status. To further clarify how to apply the multi-year approach, the final action clarifies the relationship between subparagraphs § 600.310(e)(2)(ii)(A)*(1)*–*(3)* and includes further detail on the circumstances in which the multi-year approach should be used. Section 600.310(e)(2)(ii)(A)*(3)* of the final action explains that, while an FMP should specify which of the methods established in § 600.310(e)(2)(ii)(A)*(1)* and (2) will be used to determine overfishing status, a Council may utilize a multi-year approach to determine overfishing status in certain circumstances. If a Council should develop a multi-year approach to determine overfishing status, the Council should identify in its FMP or FMP amendment, the circumstances when a multi-year approach is appropriate and will be used. Such circumstances may include situations where there is high uncertainty in the estimate of F in the most recent year, cases where stock abundance fluctuations are high and assessments are not timely enough to forecast such changes, or other circumstances where the most recent catch or F data does not reflect the overall status of the stock. *See* § 600.310(e)(2)(ii)(A)(*3*) of the final action.

Regardless of which SDC specification method is used, the MSA requires that NMFS report annually to Congress on the status of stocks. 16 U.S.C. 1854(e)(1). Thus, a multi-year approach to overfishing stock status determinations would not allow Councils to ignore available information and wait for additional years' information before evaluating stock status, nor would it allow an overfishing trend to go unaddressed or impact the timeliness of a Council and/or agency response to overfishing.

NMFS acknowledges that wording in proposed § 600.310(e)(2)(ii)(A)(*3*) may have caused confusion regarding whether this provision may impact reference points for future catch levels. Thus, NMFS revised § 600.310(e)(2)(ii)(A)(*3*) to emphasize that a Council may only use a multi-year approach to ''retrospectively determine overfishing status.'' Stock status determinations are relevant to NMFS' annual reporting requirement under 16 U.S.C. 1854(e)(1), mentioned above. The multi-year approach may not be used in establishing ACLs and ABCs, because annual reference points must be designed to prevent overfishing and cannot exceed the OFL in any year. For example, if the catch of a stock in a single year was well below its ACL, a Council may not anticipate using a multi-year approach to overfishing status determinations in order to justify allowing next year's catch levels to be set above the OFL. To further clarify this point, NMFS has added language within § 600.310(e)(2)(ii)(A)(*3*) explaining that the multi-year approach to determine overfishing status may not be used to specify future annual catch limits at levels that do not prevent overfishing. In addition, NMFS has reinserted the term ''annual basis'' within the definition of MFMT. *See* § 600.310(e)(2)(i)(C) of the final action. NMFS notes that, if the catch of a stock in a single year was well below its ACL, a Council could consider

using a carry-over ABC control rule. *See* comment 34 for further discussion.

In this final action, NMFS adds in § 600.310(e)(2)(ii)(A)(*3*) that: ''A multi-year approach must compare fishing mortality rate to MFMT or catch to OFL.'' In that same subparagraph, NMFS has also deleted reference to a comprehensive analysis to determine whether a multi-year approach will jeopardize the capacity of the fishery to produce MSY on a continuing basis. As the multi-year approach may only be applied to *retrospective* stock status determinations, the proposed comprehensive analysis needed to use a multi-year approach is not necessary.

NMFS disagrees that one method for specifying SDCs to determine overfishing status is invariably superior to another. Councils should select a method using the best scientific information available. NMFS agrees that robust annual catch specification processes and accountability measures can reduce the likelihood of overfishing. However, there are circumstances where NMFS believes a multi-year approach is a useful tool to protect a stock while providing stability to the fishery. In addition, NMFS believes the proposed action preamble (*see* 80 FR 2792, January 20, 2015) provides sufficient rationale for choosing 3 years as a maximum time period for multi-year approaches to overfishing status determinations. Finally, the existing guidelines recommend Councils take action to allow SDCs to be ''quickly updated'' and reduce lag time in § 600.310(e)(2)(ii).

Comment 22: Several commenters asked how phase-in provisions will interact with the multi-year overfishing stock status determinations.

Response: As detailed in comment 21, a multi-year approach to determining a stock's overfishing status cannot be used to influence future annual catch reference points, such as ABCs, ACLs, etc. Thus, a multi-year approach to determining a stock's overfishing status would not influence a Council setting an ABC based on a phase-in ABC control rule. For instance, a Council may not anticipate the use of a multi-year approach to overfishing status determinations to rationalize a phase-in ABC control rule designed to allow overfishing in some years and underages in others.

OY & Catch Accounting

Comment 23: While several commenters supported the addition of a paragraph clarifying the relationship between OY and the ACL framework, *see* § 600.310(f)(4)(iv) of the proposed and final action, some believed the proposed language could be clarified and strengthened. One comment stated that the OY concept is redundant when management is based on the ACL framework. Others stated that additional guidance is needed in order to address OY factors within the ACL-setting process. One comment reflected confusion regarding whether ACLs can be set above the F_{msy} in order to achieve a long-term average OY. Commenters also requested that the guidelines define the ACL in relation to OY and encourage the use of ABC to generate OY values.

Response: NMFS disagrees that managing under an ACL framework renders the OY concept redundant. National Standard 1 requires that conservation and management measures prevent overfishing ''while achieving, on a continuing basis, the optimum yield from each fishery.'' 16 U.S.C. 1851(a)(1). When the MSA was amended to introduce ACLs, this OY requirement remained unchanged. NMFS believes that guidance in § 600.310(f)(4)(iv) on addressing OY factors within the ACL framework is sufficient. As described in that section, ACLs (or ACTs if used) can be reduced from the ABC based upon the OY-based ecological, economic, and/or social (EES) considerations (as described in § 600.310(e)(3)(iii)(B)) in addition to reductions accounting for management uncertainty. Furthermore, EES trade-offs could also be evaluated when determining the risk policy for an ABC control rule. Thus, the ACL framework can support achieving OY.

ACLs and other annual reference points are annual limits and cannot be defined in terms of OY, which is a long-term average. While the ACL framework supports achieving OY, OY (as well as annualized OY values) and the ACL framework are two separate concepts which cannot be defined in terms of one another. Thus, an ACL may not be set to exceed the stock's ABC/OFL reference points in order to achieve OY and correspondingly, annual catch reference points such as ABC cannot be used to specify OY.

Comment 24: One commenter stated that the second and sixth sentences within proposed § 600.310(f)(4)(iv) conflict and suggested a revision to the second sentence to clarify the relationship between the need for the ABC to prevent overfishing while also taking into account the ABC control rule's risk policy.

Response: NMFS disagrees that the second and sixth sentences within proposed § 600.310(f)(4)(iv) directly conflict, however, NMFS has made the suggested clarifying revision in this final action.

Comment 25: Some commenters opposed the concept of annualized OY values and stated that having both annual and long-term average OY values is confusing. Some commenters requested clarification on whether annualized OY values can exceed MSY in order to achieve long-term OYs and how annualized OYs can address tradeoffs associated with mixed stock fisheries. Other commenters recommended the use of a control rule to ensure that relevant OY factors and management uncertainty are being considered when using the ACL or ACT as an annualized OY.

Response: Annualized OY values are an optional tool for managers to use if it benefits the conservation and management needs of a stock, stock complex, or fishery, including as an example, a mixed stock fishery. A stock, stock complex, and/or fishery thus can have both an OY and an annualized OY value. MSY is a long term average with a corresponding annual value: The OFL. While an annualized OY could be higher than the MSY if stock biomass is high, it cannot exceed the OFL. NMFS also notes that, while ACLs (or ACTs) can be conceptually compared to annualized OY values, they have different definitions and cannot be automatically equated to each other (*see* response to comment 23). Finally, the 1998 NS1 guidelines permitted the use of an OY control rule (*see* 63 FR 24232, May 1, 1998), and the current NS1 guidelines in the final action do not exclude the possibility of using an OY control rule. However, if an OY control rule is used, the annual catch of a stock must still be constrained through the application of the ACL framework.

Comment 26: Two commenters suggested that, in addition to specifying OY at the stock, stock complex, or fishery level, managers should also be able to specify OY at the ''FMP level.''

Response: NMFS does not believe that the proposed revision is appropriate or needed. OY is supposed to be specified for the ''fishery.'' 16 U.S.C. 1851(a)(1) and 1853(a)(3). In addition, the MSA defines the term ''fishery'' broadly, thus providing flexibility to the Councils in how they describe fisheries in their FMPs.

Comment 27: Commenters requested additional guidance on EES factors, especially the social and ecological effects of management actions. One commenter stated that it is inconceivable to imagine how social and economic factors could lead to a reduction from MSY. Other commenters recommended that the guidance clarify

that if OY is set very close to MSY, the Secretary may presume that the Council failed to adequately consider OY factors. Commenters also recommended that the guidelines be updated to include additional examples of ecosystem, climate change, protected species, and forage fish considerations within § 600.310(e)(3)(iii)(B). One commenter suggested nesting the list of potential EES factors under § 600.310(e)(3)(iii)(A) instead of (B). Other commenters suggested legislative action to allow OY to be the result of either reductions or *additions* from MSY based on EES factors and opposed the use of the term ''trade-offs'' when referring to EES factors.

Response: NMFS received extensive public comment on the use of EES factors during the development of the 2009 guidelines and thus, because NMFS did not propose any substantive changes to the guidance on EES factors in the proposed action, NMFS continues to believe that the NS1 guidelines set forth examples that provide sufficient guidance on using EES factors. The guidelines include examples of factors that clearly relate to ecosystems, climate change, and forage fish, as well as social and economic factors that may lead to a reduction in MSY. NMFS disagrees that it is ''inconceivable'' for OY to be reduced from MSY based on social and economic factors. For example, OY could be lowered from MSY to match a limited market demand or to provide more stability in annual catches within a fishery over the long-term. While a Council must address each factor (ecological, economic, and social), the exact method that a Council uses to consider EES factors and the amount the OY is reduced from the MSY is at the Council's discretion. With regard to OY and MSY, NMFS disagrees that setting OY close to MSY means that OY factors were not adequately considered. If estimates of MFMT and current biomass are known with a high level of certainty, if management controls can accurately limit catch, and if no reductions are necessary for EES factors, it is possible to set an OY very close to MSY. *See* § 600.310(e)(3)(iv). NMFS is keeping text at § 600.310(e)(3)(iii)(B)(*1*)–(*3*) under subparagraph (B), because subparagraph (B) clarifies the process for assessing and specifying OY based on EES factors. In order for the EES factors to be used to increase OY from MSY, a legislative change would be needed, as OY is defined based on MSY ''as reduced by any relevant economic, social, or ecological factor.'' 16 U.S.C. 1802 (33)(B). Finally, as stated in § 600.305(b)(1), trade-offs among EES factors are an expected component of fishery management objectives.

Comment 28: One commenter stated that the OY concept does not appear to consider subsistence uses for U.S. fisheries.

Response: NMFS disagrees. Subsistence fishing is explicitly mentioned in the list of potential social factors to be considered when specifying OY. *See* § 600.310(e)(3)(iii)(B)(*1*).

Comment 29: Commenters expressed concern that the guidelines provide too much room for interpretation of what might constitute an acceptable qualitative description of OY and requested additional technical guidance, as well as increased data collection efforts to increase the availability of quantitative data. Other commenters recommended restoring language that recommends OY should be considered quantitatively when possible and adding language recommending the use of proxies when quantitative, stock-specific information on EES factors is not available.

Response: As discussed in the proposed action, NMFS believes one impediment to Councils addressing EES factors when specifying OY is the perception that the Councils must quantify their analysis of these factors. *See* 80 FR 2792, January 20, 2015. Thus, NMFS clarified in the proposed revisions to the guidelines that a Council may provide a qualitative description of OY. NMFS clearly indicated that qualitatively describing OY is only acceptable when it is not possible to specify OY quantitatively. *See* § 600.310(e)(3)(iv)(A). NMFS believes that the guidelines provide sufficient guidance on what constitutes an acceptable qualitative description of OY. Section 600.310(e)(3)(iii) requires that an FMP assess and specify OY, and that the assessment include, among other things, an explanation of how the OY specification will produce the greatest benefits to the nation and prevent overfishing, consistent with the MSA and taking into consideration the EES factors relevant to the particular stock, stock complex, or fishery. Councils may specify OY based on MSY proxy values as provided under § 600.310(e)(3)(iv)(B)), and NMFS believes that when insufficient information is available to consider stock-specific EES factors, proxy values may be used if they are considered the best scientific information available. Finally, NMFS agrees that more quantitative data would improve OY specifications. *See e.g.,* 74 FR 3199, January 16, 2009 (addressing similar comments regarding data collection in response to comment 80 of 2009 NS1 guidelines).

Comment 30: NMFS received several comments on the revisions to § 600.310(e)(3)(iii) that clarify how Councils account for their OY specifications within their FMPs. Comments included recommendations to revise the guidelines to reflect that specification of OY is an MSA requirement, to add language to require the identification of all relevant EES factors considered in setting OY, and to articulate the influence of the factors on setting OY within FMPs. Another commenter expressed concern that the proposed changes would require Councils to ''document'' as opposed to ''summarize'' (as prescribed within the MSA) OY specifications within FMPs, creating a regulatory burden that may not be appropriate if the technical documentation spans many pages. The commenter suggested the guidelines be revised to allow documentation either in the FMP itself or within other documents such as environmental assessments or regulatory impact reviews. Another commenter recommended that the language be revised to acknowledge changing circumstances of not just targeted fish stocks, but other components of the ecosystem (*e.g.,* protected species) as well.

Response: In accordance with MSA section 303(a)(3), all FMPs must contain an assessment and specification of OY and summaries of the information utilized in making the specification. However, the MSA does not prescribe what types of information or factors should be taken into consideration. NMFS agrees that the proposed language may be interpreted as an additional requirement to provide a thorough technical documentation of OY specifications within an FMP. Thus, in the final action, NMFS has deleted references to documentation while retaining the requirement that OY specifications and assessments are adequately summarized within FMPs. NMFS believes that the section is worded broadly enough to encompass consideration of changes to other components of the ecosystem, such as protected species, in addition to targeted stocks.

Comment 31: NMFS received several comments regarding the definition of OY, including: Requests for clarification on the meaning of term ''near B_{msy}'' within the definition of OY and whether or not the term ''near'' implies maintaining the stock above MSST; and a request that the production of bait from our fishery resources be included within the definition of OY. Another

commenter recommended removing the definition of OY entirely.

Response: Achieving OY on a continuing basis is required under National Standard 1, thus, a definition of OY within the NS1 guidelines is appropriate and helpful. One of the characteristics used to describe OY in the guidelines is ''maintains the long-term average biomass near or above B_{msy}.'' *See* § 600.310(e)(3)(i)(B). The term ''near'' is used to emphasize, that while the biomass of a stock, stock complex, or fishery may be above or below the desired long-term average in any given year, a Council should rely on its SSC's advice to determine the level at which a stock's biomass is sufficiently ''near'' B_{msy} to ensure the desired long-term average biomass can be achieved. With regards to whether the term ''near'' B_{msy} implies maintaining a stock above MSST, NMFS notes that OY and MSST are not directly comparable. OY is a long term desired amount of yield (catch) from the fishery that corresponds to a desired level of long-term average biomass of a stock. MSST is a stock abundance reference point. If a stock's biomass is below its MSST, a stock is determined to be overfished and a rebuilding plan must be initiated to rebuild the stock from below its MSST to its $B_{msy.}$ In contrast, as stated above, the biomass of a stock may be above or below the desired long-term average in any given year, as long as the Council relies on its SSC's advice on whether the stock's biomass is sufficiently ''near'' B_{msy}. Additionally, NMFS believes that the definition of OY given within the guidelines is sufficiently broad to cover the production of bait and other considerations.

Comment 32: Some commenters supported the deletion and replacement of text on accounting for catch against OY (previously at § 600.310(e)(3)(v)(C)) with the addition of text on accounting for all sources of mortality (where practicable) in the SDC section (§ 600.310(e)(2)(ii)(C)). Other commenters stated that moving the text created inconsistent guidance and, because OY is defined in the MSA as an ''amount of fish,'' the only reasonable interpretation of the statute is to specify OY based on catch. Others requested additional guidance on catch accounting in general. Another commenter believed the change indicates that bycatch does not need to be measured or counted against OY, which the commenter characterized as the ''the total amount of catch permitted in a fishery.'' Other commenters believed that all sources of mortality must be accounted for when setting SDCs and thus, the proposed ''where practicable'' language should be removed and recommended changing ''should'' to ''must'' within § 600.310(e)(2)(ii)(C). One commenter did not believe that mortality resulting from scientific research should be included. Others recommended that the Councils must consider catch accounting when determining the status of the stock, setting catch levels, and determining OY.

Response: Section 600.310(e)(3)(v)(C) of the 2009 guidelines stated that all catch must be counted against OY, including that resulting from bycatch, scientific research, and all fishing activities. NMFS proposed deleting this text and inserting text on accounting for all sources of mortality (where practicable) in § 600.310(e)(2)(ii)(C) (SDC specification), because in practice, mortality (including fishing-related catch) is typically accounted for when evaluating stock status with respect to reference points. NMFS believes that accounting for all fishing activities while evaluating stock status with respect to reference points (*i.e.* ACLs) is more informative to managers. NMFS agrees that OY must be specified as an amount of fish and that, because stock status is based upon a consideration of all sources of fishing mortality, OY specifications (which include considerations of stock status) will be influenced by catch accounted for at the SDC level. NMFS disagrees with the comment that stated that § 600.310(e)(2)(ii)(C) indicates that bycatch does not need to be measured or counted against OY and that characterized OY as the total amount of catch permitted in a fishery. First, NMFS notes that the ''total amount of catch permitted in a fishery'' is an inaccurate characterization of OY, which is described within the guidelines as the long-term average amount of desired yield from a stock, stock complex, or fishery. *See* § 600.310(e)(3)(ii). Second, § 600.310(e)(2)(ii)(C) states that Councils should consider all sources of fishing mortality when evaluating stock status with respect to reference points, which will impact annual catch reference points and may influence OY specifications. NMFS believes that language in § 600.310(e)(2)(ii)(C) sufficiently explains that, where practicable, all sources of mortality should be accounted for; this would include fish that are retained for any purposes, mortality of fish that have been discarded, mortality of fish resulting from scientific research, and mortality from any other fishing activity. Further, NMFS believes that use of the term ''where practicable'' is appropriate, because as explained in the proposed rule preamble (*see* 80 FR 2793, January 20, 2015), the term recognizes that data on scientific research catch may not always be available. *See* response to comment 78 for further discussion of ''where practicable.'' Thus, NMFS believes that additional guidance on accounting for all sources of mortality (where practicable) in the SDC section (§ 600.310(e)(2)(ii)(C)) is not necessary within the guidelines.

Carry-Over & Phase-In ABC Control Rules

Comment 33: Many commenters supported including phase-in and/or carry-over provisions within ABC control rules (*see* § 600.310(f)(2)(ii) of proposed action), but requested that the guidelines specify explicit criteria to be considered within the comprehensive analysis required to use these provisions. Commenters expressed concerns that, without explicit technical guidance and criteria guiding Councils on how to use these provisions, phase-in and/or carry-over provisions would increase the risk of overfishing for some stocks. Commenters also requested that more research on the impacts of these approaches be conducted and that the guidelines clarify that the Councils should complete a comprehensive analysis each time one of the provisions is used. Other commenters requested clarification on the SSC's role in the decision-making process for phase-in/carry-over provisions. Finally, several commenters suggested that phase-in and carry-over provisions be addressed in the ACL setting process rather than in the ABC control rule.

Response: This action clarifies that all ABC control rules must be based on a comprehensive analysis that shows how the control rule prevents overfishing. *See* § 600.310(f)(2)(i) of this final action. This action also emphasizes that the comprehensive analysis of the ABC control rule includes examining—if there is a carry-over and/or phase-in provision in the ABC control rule—when the carry-over and phase-in provisions can and cannot be used and how those provisions prevent overfishing. *See* § 600.310(f)(2)(ii) of this final action. For instance, a Council may decide that, due to a stock's life history, characteristics, and/or other vulnerabilities, phase-in/carry-over provisions will not be used if the stock is under a rebuilding plan. NMFS does not believe that research is needed on phase-in and carry-over approaches before including them in the NS1 guidelines, but future research on both

approaches (*e.g.,* stock-specific best practices) would inform the best scientific information available for such control rules. As explained above, the guidelines require a comprehensive analysis, based on the best scientific information available and SSC advice, that phase-in or carry-over provisions will prevent overfishing. Given the above-described guidance, NMFS does not believe that further guidance and criteria for the comprehensive analysis of ABC control rules are necessary.

With regard to the SSC, the 2009 NS1 Guidelines explained that ''[t]he Council should use the advice of its science advisors in developing [the ABC] control rule,'' (*see* 74 FR 3178, 3192, January 16, 2009), and this final action continues to support that statement. The definition of ''control rule'' explicitly provides that a control rule is ''. . . established by the Council in consultation with its SSC.'' *See* § 600.310(f)(1)(iv). In addition, NMFS is re-inserting into § 600.310(f)(3) of this final action language from the 2009 guidelines that states that ''[t]he SSC must recommend the ABC to the Council.'' NMFS does not believe further clarification regarding the role of the SSC is needed.

Finally, NMFS disagrees that phase-in and carry-over provisions should be addressed through the ACL setting process, rather than ABC control rules. ACLs cannot exceed ABCs, and are the level of annual catch based on management uncertainty that serve as the basis for invoking AMs. In contrast, the ABC control rule is an established policy for establishing an ABC that accounts for scientific uncertainty in the OFL and for the Council's risk policy. NMFS believes that scientific uncertainty and the Council's risk policy are the two factors that are most relevant to the decision of whether to use phase-in and/or carry-over provisions. It should be noted that, carry-over can impact ACL specifications, as explained in response to comment 34 and in the final action. However, NMFS maintains that carry-over provisions are most appropriately addressed through ABC control rules that are based on scientific uncertainty and the Council's risk policy because carry-over ABC control rules instruct Councils on how to account for increased stock abundance resulting from the fishery harvesting less than the full ACL as well as articulate when the carry-over provision can and cannot be used and how it prevents overfishing.

Comment 34: Several comments were received related to the use of carry-over provisions. Some commenters expressed concern that carry-over provisions are not appropriate when a stock is overfished and/or in a rebuilding plan or when stock abundance is over-estimated. One commenter suggested that fisheries that are primarily prosecuted through recreational effort may not be appropriate candidates for carry-over provisions. One commenter stated a preference for lower, guaranteed carry-over amounts. Another commenter asked whether catch that is currently subject to a phase-in provision is eligible for use within a carry-over provision. Finally, one comment stated that the last sentence within proposed § 600.310(f)(2)(ii)(B) created confusion regarding how a carry-over provision could be used in cases where the ACL has been reduced from the ABC.

Response: NMFS agrees that, in addition to preventing overfishing, the Councils should consider the vulnerability of stocks that are overfished and/or in rebuilding plans when considering using a carry-over provision. NMFS has added in this final action that Councils should evaluate the appropriateness of carry-over provisions for stocks that are overfished and/or rebuilding. *See* § 600.310(f)(2)(ii)(B) of the final action. NMFS also agrees that the cause (*e.g.,* management inaccuracy or scientific uncertainty) for an ACL underage should be considered when using carry-over provisions. For instance, if a fishery is closed early in anticipation of an ACL exceedance but, once the data is finalized, the results show the fishery's ACL was never exceeded, carry-over provisions may be appropriate. In contrast, if managers believe that ACL underages are linked to low abundance and there is uncertainty in data collection, then carry-over provisions may not be appropriate. As such, NMFS has added additional clarifying language to § 600.310(f)(2)(ii)(B) of the final action.

Carry-over provisions are intended to allow the fishery to catch unused portions of the previous year's ACL while preventing overfishing. They may be appropriate if the ACL for the second year was established based on an analysis that assumes the full ACL for the first year is caught. If in reality the full ACL in year one is not caught, then more fish may be available in year two, and it may be appropriate to adjust the ACL in year two upwards. NMFS acknowledges that the wording in the last sentence of proposed § 600.310(f)(2)(ii)(B) may have caused confusion and clarifies within the final action on this section that carry-over provisions could allow an ACL to be adjusted upwards as long as the revised ACL does not exceed the specified ABC.

Regarding ''guaranteed carry-over provisions,'' the final action explains that a Council must articulate within its FMP when carry-over provisions of the control rule can and cannot be used and how the provision prevents overfishing, based on a comprehensive analysis. *See* § 600.310(f)(2)(ii) of final action. Finally, some portion of unused catch from ACLs that are currently subject to a phase-in provision could be carried over, as long as the Council demonstrates that overfishing will be prevented.

Comment 35: Commenters raised several questions about how to use carry-over provisions when new information leads the OFL and/or ABC to change. One commenter believed that, in order to ensure that carry-over provisions would not result in overfishing, the amount of allowed carry-over should be calculated based on the OFL from the first year (*i.e.,* the year of the ACL underage). However, another commenter believed that carry-over should not be allowed when new information is available that indicates a change in stock condition. Another commenter asked whether or not any further carry-over is justified if the catch in the second year equaled the original ACL, but fell below the revised ACL due to prior carry-over. Commenters also requested that the guidelines establish a naming convention for reference points associated with carry-over provisions.

Response: If new information results in a revised ABC, carry-over provisions can be used as long as overfishing is prevented and the approach used is consistent with the provisions established within the FMP. If a stock's current reference points (*e.g.,* ABC, ACL) were revised based on carry-over from the previous year and catch fell below the revised ACL, the Council may apply another carry-over provision for the next year. However, as is the case for all carry-over provisions, the resulting ABC recommended by the SSC must prevent overfishing, and must consider the scientific uncertainty associated with the Council's risk policy and take into account other considerations under § 600.310(f)(2)(ii)(B) of the final action. Finally, Councils may establish naming conventions for reference points associated with carry-over provisions at their discretion.

Comment 36: Several comments were received related to phase-in provisions. Commenters requested that the guidelines explicitly prohibit practices of using phase-in provisions to ''front-load'' high catch levels in the first year when increases are appropriate; or, delay decreases in catch levels for two years without taking any real action (*i.e.,*

back-loading). Commenters also expressed concern that phase-in provisions could be used to delay action when new information suggests the health of the fish population has changed. Two commenters stated that the phase-in provision was not worth the trouble of implementing because it can only apply to the difference between the OFL and ABC. One commenter asked how the phase-in tool is applicable to the interim measures under § 600.310(j)(4) of proposed action. One commenter asked if a Council could theoretically use the 2-year time period allowed to develop a rebuilding plan (16 U.S.C. 1854(e)(3)) in addition to a 3-year phase-in approach to delay reducing catches to at or below the ABC for 5 years. Two commenters expressed concern regarding how the use of phase-in would affect the evaluation of adequate progress within a rebuilding plan. 16 U.S.C. 1854(e)(7). Finally, one commenter felt that market impacts should not be considered when deciding whether to use phase-in provisions while another commenter requested that ecosystem factors be considered.

Response: NMFS believes that the guidelines address the ''front-loading'' and ''back-loading'' concern, and do not require further revision in this regard. As discussed in comment 33, the Councils are required to specify in the FMP, based on a comprehensive analysis, when a phase-in provision can and cannot be used, and how it prevents overfishing. The Councils must provide an adequate record that supports how each application of the phase-in provision is consistent with the FMP. Arbitrary ''front-loading'' or ''back-loading'' approaches will not satisfy these requirements. Furthermore, phase-in provisions cannot be used to allow for overfishing. NMFS has added language to the final action that explicitly states that the phased-in catch level cannot exceed the OFL in any year. See § 600.310(f)(2)(ii)(A) of the final action. In accordance with MSA section 304(e)(3), if a stock is determined to be undergoing overfishing, whether or not subject to a phase-in provision, new catch limits must be set to end overfishing immediately, unless MSA section 304(e)(6) is applied. Additionally, a Council may designate other indicators of stock health in its ABC control rule to be considered when applying a phase-in provision.

NMFS believes that there are benefits to using phase-in provisions, particularly for stocks with large degrees of scientific uncertainty (which accordingly should have large buffers between the OFL and ABC). Such stocks are most likely to experience a dramatic shift in reference points from one assessment to another, and thus, NMFS believes that phase-in provisions will give managers additional flexibility and increase stability within fisheries.

Section 600.310(j)(4) of the final action is based on MSA section 304(e)(6), which authorizes NMFS to take interim measures to reduce, but not necessarily end, overfishing during the development of an FMP or FMP amendment needed to rebuild overfished stocks. 16 U.S.C. 1854(e)(6) (authorizing interim measures for 180 days plus an additional 186 days). As such measures likely would deviate from the ABC control rule in an existing FMP, or from a new ABC control rule that is developed, the interim measures would not be included as part of any phase-in that might be adopted in an ABC control rule in a new FMP or FMP amendment.

The guidelines do not preclude a Council from considering the use of a phase-in provision for stocks under a rebuilding plan. However, in addition to preventing overfishing, the Councils should consider the vulnerability of stocks that are overfished and/or in rebuilding plans when considering using a phase-in provision. NMFS has added in this final action that Councils should evaluate the appropriateness of phase-in provisions for stocks that are overfished and/or rebuilding. See § 600.310(f)(2)(ii)(A) of the final action. A Council may determine that certain stocks subject to rebuilding plans are particularly vulnerable and should not have phase-in provisions within their ABC control rules. If a Council makes use of a phase-in provision, the provision must allow a stock to meet its specified timeframe for rebuilding (16 U.S.C. 1854(e)(4)). Thus, a rebuilding ABC must be set to reflect the amount of catch consistent with the designated fishing mortality rate (*i.e.,* $F_{rebuild}$) in the rebuilding plan. See § 600.310(f)(3)(ii). If a phase-in approach is used for a stock under a rebuilding plan, it would not impact the evaluation of whether the stock has made adequate progress toward rebuilding.

Finally, under § 600.310(f)(2)(ii)(A), a Council may consider the short-term effects of a phase-in ABC control rule on a fishing industry, as well as long-term ecosystem effects. NMFS believes that economic, social, and ecological trade-offs are all relevant considerations when determining an ABC control rule risk policy. The fact that these considerations are important in fishery management is reflected in the National Standards and other MSA provisions.

Comment 37: Several commenters offered suggestions for improvements to the phase-in provision. For example, one commenter suggested that NMFS consider alternative timeframes for using a phase-in ABC control rule based on the life history characteristics of the stock. Another commenter recommended NMFS replace the phase-in provision with a provision allowing, in the case of stocks subject to overfishing, the phase-in of catch levels below the OFL to end overfishing. Other commenters recommended that NMFS limit the use of the phase-in provision to the ''slow up/full down'' approach described in the preamble to the proposed rule. *See* 80 FR 2794, January 20, 2015. One commenter suggested that having frequent stock assessments would eliminate the need for phase-in provisions. Finally, another commenter suggested revising the guidelines to explicitly state that phase-in provisions apply to both increases and decreases in catch limits.

Response: NMFS limited the use of the phase-in provision to three years (instead of a stock-specific time period based on life history) because a shorter time frame may not be that helpful in stabilizing catches, while a longer time frame that spans multiple stock assessments may prevent necessary changes to catch levels from occurring in a timely manner. *See* 80 FR 2792, 2794, January 20, 2015 (referring to explanation in Section IX of proposed action preamble that many stocks are assessed every 1, 2 or 3 years). A three year time period is enough time to smooth out dramatic changes in annual catch levels while avoiding delays to address needed changes in catch levels. *See* 80 FR 2794, January 20, 2015. Additionally, NMFS believes it is more appropriate to base the allowable time period for phase-in provisions on the flow of new information, rather than the stock's life history characteristics because phase-in provisions are used to mediate management responses to new information.

The OFL is the threshold above which a stock is determined to be subject to overfishing. Thus, NMFS does not believe that phasing-in changes to the OFL is appropriate, given that any catch level above the OFL would subject the stock to overfishing and the MSA requires preventing overfishing. While NMFS supports the use of the ''slow up/full down'' approach as an appropriate option to consider for phase-in provisions, NMFS believes that the Councils should have the flexibility to design their own phase-in provisions, based on a comprehensive analysis that prevents overfishing.

NMFS agrees that having frequent stock assessments may reduce the need for phase-in provisions. However, the phase-in provision will address the current levels of uncertainty and accommodate reduced uncertainty in the future, as improvements in the stock assessment process are made. Finally, NMFS does not believe that revisions are needed to the language on phase-in provisions to explicitly refer to increases and decreases in catch levels. The text refers generally to ''changes to ABC,'' thus allowing for potential application of phase-in provisions in both directions.

ABC Control Rules—Risk Policy and Role of SSC

Comment 38: NMFS received several comments regarding a Council's risk policy for ABC control rules. Several commenters requested that the guidelines define risk policies, require their use, and provide more specific and transparent technical guidance on establishing risk policies. Commenters also expressed concern that the term ''at least 50 percent'' within § 600.310(f)(2)(i) of the proposed action could be interpreted as a recommendation of the level of acceptable probability that overfishing will be prevented, rather than a lower bound and sought additional guidance on how much overfishing risk is prudent and legal. Other commenters recommended that the agency formally evaluate risk policies; that ABC control rules must lower fishing mortality as stock size declines (not just consider doing so); and that risk policies only consider biological and ecological factors. One commenter also opposed risk policies that utilize the ''P* approach'' to set buffers that account for scientific uncertainty, stating the approach provides a mechanism for Councils to ''reverse engineer'' their risk policies to obtain desirable catch levels.

Response: NMFS believes sufficient guidance is given within the NS1 guidelines to allow Councils to establish well-documented ABC control rules and risk policies, as supported by a comprehensive analysis (*see* response to comment 33). NMFS strongly recommends the use of risk policies in order to properly establish measures (*i.e.,* ABCs) that are consistent with the dual mandates of NS1 (preventing overfishing while achieving, on a continuing basis, OY) and other MSA provisions. As described in the preamble to the final 2009 NS1 Guidelines, a 50 percent probability that the catch equal to the stock's ABC will not result in overfishing is a lower bound, not a default value. *See* response to comment 63, 74 FR 3195–96, January 16, 2009. ABC control rules that are more risk adverse may be prudent, depending on the OY considerations (*i.e.* ecological, economic, and social trade-offs) that a Council may consider. *See* § 600.310(f)(4)(iv) of final action.

The Secretary reviews ABC control rules and the Council's risk policy when conducting its review of FMPs or FMP amendments, as required under MSA section 304(a). A risk policy for ABC control rules is a policy decision made by the Council, based on the fishery management objectives (ecological, economic, and social) identified within the FMP. NMFS believes that social and economic factors, as well as biological and ecological ones, are relevant when developing risk policies in light of a Council's fishery management objectives. The fact that these considerations are important in fishery management is reflected in the National Standards and other MSA provisions.

While the guidelines recommend Councils consider reducing fishing mortality as stock size declines below B_{msy} and as scientific uncertainty increases, that action may not be appropriate in every case. Finally, as described in § 600.310(f)(2)(i) and discussed in comment 40, the SSC applies the Council's ABC control rule and risk policy (which are established within its FMP) when recommending an ABC to the Council. Thus, the guidelines are clear that risk policies are established within FMPs and are not capable of being modified to attain a desirable ABC recommendation for a single year.

Comment 39: Several commenters supported the addition of definitions for scientific and management uncertainty. *See* § 600.310(f)(1)(v)–(vi) of proposed action. In addition, NMFS received several comments requesting additional guidance on how to set appropriate, transparent, and quantifiable scientific and management uncertainty buffers to reduce the risk of overfishing and/or achieve OY. Some commenters recommended that the guidelines require all sources of scientific and management uncertainty be described and considered. Some commenters requested the guidelines require scientific uncertainty buffers to account for uncertainty in the relationship between environmental factors (including protected resources) and stock biomass, while others expressed that accounting for those types of uncertainty is overly precautionary. Commenters also requested the guidelines: Clarify the definition of ABC; cross-reference the definitions of scientific and management uncertainty throughout § 600.310(f); and require proxies to be used to account for types of uncertainty that are known to exist but not typically accounted for in standard error values.

Response: NMFS believes that § 600.310(f) of the final action provides sufficient guidance to the Councils on appropriately accounting for scientific and management uncertainty to meet the requirements of NS1 while providing Councils with adequate flexibility to address the particular levels of uncertainty for their stocks. While all sources of scientific and management uncertainty should be considered, NMFS acknowledges that consideration and quantification of uncertainty is limited by data availability. As stated in § 600.310(f)(1)(vi), uncertainty regarding the relationship between environmental factors (including protected resources) and stock biomass can be accounted for through the consideration of ''longer-term uncertainties due to potential ecosystem and environmental effects.'' Potential sources of scientific and management uncertainty are listed in § 600.310(f)(1)(v) and (vi) of the final action. The extent to which those sources of uncertainty are considered is at the discretion of the Council, thus NMFS believes the guidelines are not overly prescriptive or overly precautionary.

Furthermore, the definitions for ABC, scientific uncertainty, and management uncertainty are clearly established within the guidelines and do not need to be cross-referenced. Finally, the guidelines clearly state that when scientific uncertainty cannot be directly calculated, a proxy for uncertainty itself should be established based on the best scientific information available. *See* § 600.310(f)(2)(ii).

Comment 40: NMFS received several comments expressing concern that proposed revisions to § 610.310(f) will minimize the SSC's role in setting the ABC and ABC control rules. Commenters stated that the proposed definition of ''control rule,'' in combination with the deletion of the phrases ''The SSC must recommend the ABC to the Council'' and ''based on scientific advice from its SSC'' from § 600.310(f)(3) of the proposed action will weaken the requirement that Councils cannot exceed the SSC's fishing level recommendations and are inconsistent with NS2. Commenters recommended restoring the existing language related to the SSC's role in setting ABCs and ABC control rules, revising the definition of ''control rule,'' and adding additional plain language guidance on the relationship between

the SSC and the ABC, as well as other parts of the ACL framework. Another commenter requested clarification on whether an SSC can recommend an ABC that exceeds the catch that results from the application of the control rule.

Response: As discussed in the 2009 final action (*see* 74 FR 3181, January 16, 2009), the statute is clear that the SSC is required to recommend the ABC to the Council. 16 U.S.C. 302(g)(1)(B), 302(h)(6). However, NMFS agrees that this statutory requirement should be clearly stated within the NS1 guidelines and NMFS has re-instated the phrase ''The SSC must recommend the ABC to the Council'' within § 600.310(f)(3) of the final action. The role of the SSC in the establishment of ABC control rules is accurately described within § 600.310(f)(1)(iv), and the guidelines clearly emphasize using the best scientific information available (NS2) in the specification of the ABC within § 600.310(f)(3). Thus, NMFS believes the NS1 guidelines provide sufficient guidance on the role of the SSC within the ABC-setting process. Finally, the SSC may recommend an ABC that differs from the result of the application of the ABC control rule, based on factors such as data uncertainty, recruitment variability, declining trends in population variables, and other factors. However, if a different value is recommended, the SSC must provide a well-documented and adequate record for the deviation.

Comment 41: NMFS received requests for additional plain-language descriptions of the relationships between ABC, ACL, and OFL. One commenter recommended clarifying that ABC and ACL should be set in terms of catch, rather than landings.

Response: The relationships between ABC, ACL, and OFL were clearly described in the 2009 action. *See* 74 FR 3180, January 16, 2009. NMFS agrees that, wherever practical in the management context, ABC and ACL should be set in terms of catch, rather than landings. However, there are fisheries for which data on bycatch (discards) is not available in the same time-frame as data on landed catch. In these cases, Councils may express an ABC (and, correspondingly, ACL) in terms of landings as long as estimates of bycatch and any other fishing mortality not accounted for in the landings are incorporated into the determination of ABC. *See* § 600.310(f)(3)(i).

Accountability Measures

Comment 42: One commenter suggested adding ''or functional equivalent'' to the discussion of annual catch targets (ACTs) in § 600.310(f)(4)(i) and § 600.310(g)(4).

Response: NMFS agrees and has included the suggested language in § 600.310(f)(4)(i) of the final action and the phrase ''or the functional equivalent'' in § 600.310(g)(4) of the final action.

Comment 43: NMFS received many comments on the relationship between ACLs and AMs. Some commenters requested the guidelines recommend applying AMs with increasing severity as catch overages approach the OFL while others emphasized that Councils should be given deference in deciding how to implement AMs. Other comments included: Suggested revisions to require AMs to prevent overfishing (as opposed to preventing ACL overages); confusion regarding how to implement AMs based on multi-year averaging; recommendations to encourage the use of overage adjustments to counter the biological consequences of ACL overages; recommendations to require overage adjustments for rebuilding stocks unless the overage is due to higher than expected recruitment and abundance; and recommendations that the guidelines include examples of SDCs and AMs that address habitat-based criteria. Finally, one commenter suggested that in cases where an ACL is exceeded due to higher than expected recruitment, the corresponding ABC should be revised based on the higher observed recruitment and ACLs should be reset accordingly.

Response: AMs are management controls to prevent ACLs from being exceeded and to correct or mitigate overages of the ACL if they occur. The proposed action did not make any substantive changes to the guidance on the relationship between AMs and ACLs. Based on experience in implementing §§ 600.310(f)(4); 600.310(g), and after taking into consideration public comments, NMFS does not believe that any further revisions to the guidelines are required. As discussed in the 2009 final action, the decision of how to establish and implement AMs for each fishery is at the discretion of the Council. Also as discussed in the 2009 final action, NMFS interprets the MSA as requiring AMs to prevent the ACL from being exceeded (as opposed to preventing the ABC or OFL from being exceeded). *See e.g.,* response to comment 59, 74 FR 3194, January 16, 2009 (addressing similar comments). Consistent with that, NMFS recommends that, whenever possible, Councils establish AMs that allow in-season monitoring and adjustment to the management of the fishery. Section 600.310(g)(5) of the final action allows Councils, in cases where fisheries lack timely and/or consistent data, to establish AMs based on comparisons of average catch to average ACL. *See e.g.,* response to comment 65, 74 FR 3196, January 16, 2009 (addressing similar comments).

The guidelines clearly state within § 600.310(g)(3) that biological consequences on the status of the stock (*i.e.,* its ability to produce MSY or achieve rebuilding goals) must be accounted for when designing and implementing AMs. While NMFS encourages Councils to use overage paybacks when appropriate to compensate for ACL overages, NMFS believes that Councils should design and implement AMs based on the particular conditions and needs of the fishery. In addition, AMs are controls to prevent ACLs from being exceeded, and do not consider non-fishing factors that affect stock health, such as habitat-based criteria. Such considerations should be accounted for in OY specifications. Finally, as described in the preamble to the proposed action, a Council may consider if higher than expected recruitment played a role in catches exceeding the ACL when deciding on the appropriate AM to implement. *See* 80 FR 2795, January 20, 2015. The ABC is not a type of inseason AM and may not be revised during a fishing season based on catches that exceed the ACL. Nevertheless, data showing higher than expected recruitment may be accounted for by a Council's SSC when specifying the ABC for subsequent fishing seasons based on the Council's ABC control rule.

Comment 44: One comment suggested that NMFS, as opposed to the Councils, should be responsible for inseason management. The commenter also expressed concern that § 600.310(g)(3) expands the purpose of AMs into a punishment for overages by requiring an automatic reduction of ACLs in the case of overages. The commenter asked whether the provision provides a similar exception for stocks that are not in rebuilding plans as stocks that are in rebuilding plans.

Response: Councils must establish appropriate AMs within their FMPs, which are subject to review and approval by NMFS. 16 U.S.C. 1853 (a)(15); 1854(a). Based on the AMs established by a Council's FMP, NMFS may have implementation responsibilities. For example, NMFS may provide data to the Councils in support of inseason monitoring and adjustment for each fishery, as well as implement any necessary inseason AMs (*e.g.,* fishery closures) should certain

conditions be met. Furthermore, if an ACL is exceeded, the existing guidelines do not require that the ACL be automatically reduced in the following year. The guidelines explain that Councils may determine the most appropriate AM to use in response to an ACL overage based on a variety of factors. While NMFS strongly recommends that full overage adjustments should be applied to stocks in rebuilding plans (due to their increased vulnerability), the guidelines acknowledge that there may be cases where the best scientific information available shows that a reduced overage adjustment (or no adjustment) is needed to mitigate the effects of overages for a rebuilding stock. Such cases are expected to be rare. Councils have the flexibility to determine the most appropriate AM for stocks. Because overage adjustments are not required for stocks that are not in rebuilding plans, it is not necessary to add additional exceptions into the guidelines. *See* § 600.310(g)(3). Section 600.310(g)(3) was adopted in the 2009 NS1 Guidelines, and this action did not propose any revisions to the text. Based on experience in implementing § 600.310(g)(3), and after taking into consideration public comments, NMFS does not believe that further revisions to the section are required.

Comment 45: One commenter asserted that § 600.310(g)(6) of the proposed action, which states that fisheries that have harvest in state or Federal waters must have AMs for the portion of the fishery in Federal waters, is in conflict with § 600.310(g)(1), which states that AMs must prevent the ACL from being exceeded.

Response: Federal management authority is limited to the portion of the fishery under Federal jurisdiction. Therefore, the 2009 NS1 guidelines only require AMs for the Federal fishery, and this approach is unchanged in this final action. NMFS continues to strongly recommend collaboration with state managers (and other applicable managers) to develop ACLs and AMs that prevent overfishing of the stock as a whole. *See e.g.,* response to comment 71, 74 FR 3197, January 16, 2009 (addressing similar comments).

Comment 46: NMFS received many comments on the proposed revision within § 600.310(g)(3) that clarifies that no additional AMs are necessary for stocks whose ACL is zero and the AM for the fishery is a closure. Commenters expressed concern that stocks with ACLs equal to zero are particularly vulnerable and the provision could be construed to exempt a Council from implementing adequate AMs that prevent the ACL from being exceeded as well as exempt the fishery from the requirements of NS9 and NS1 guidelines catch accounting requirements (§ 600.310(e)(2)(ii)(C)). Commenters also stated that the provision is in conflict with the decision in *Oceana* v. *Locke,* 831 F. Supp. 2d 95 (D.D.C. 2011). Finally, commenters requested additional clarification on the meaning of the term ''small'' within the phrase ''only small amounts of catch or bycatch'' within § 600.310(g)(3).

Response: The final action retains the clarification within § 600.310(g)(3) that, if an ACL is set equal to zero and the AM for the fishery is a closure of the fishery, additional AMs are not required if (1) only small amounts of catch or bycatch occur, and (2) that catch or bycatch is unlikely to result in overfishing. The provision is an optional tool that will only apply to a limited set of cases where there is no way to account for the small amounts of bycatch occurring and, therefore, it is not pragmatic to establish AMs to try to account for such small amounts of bycatch that are unlikely to result in overfishing. In order to utilize this provision, Councils must provide a well-documented record supporting that the stock meets both of the above-mentioned criteria. Additional AMs are not required when the catch or bycatch is unlikely to result in overfishing and is at such a low level that it is not practicable to require additional AMs. *See* response to comment 78 for further discussion of the term ''practicable''.

NMFS disagrees that the provision is contrary to § 600.310(e)(2)(ii)(C) of the NS1 guidelines or NS9. Section 600.310(e)(2)(ii)(C) provides for accounting for all sources of mortality ''where practicable,'' when evaluating stock status with respect to reference points. *See* response to comments 32 and 78 for further discussion of that section and the term ''practicable.'' NS9 is a separate statutory requirement (16 U.S.C. 1851(a)(9)) from the ACL/AM requirement (16 U.S.C. 1853(a)(15)), and in any event, NS9 requires that measures, ''to the extent practicable,'' minimize bycatch and bycatch mortality. 16 U.S.C. 1851(a)(9).

NMFS also disagrees that the provision conflicts with *Oceana* v. *Locke.* In that decision, the court held that when sector-specific sub-ACLs are established, sector-specific sub-AMs may be necessary. The court found that NMFS could not demonstrate that overfishing would be prevented when there were no sub-AMs specified that could address overages of specified sub-ACLs. Sector-ACLs are not required under the NS1 guidelines. However, as explained in the response to comment 80, § 600.310(f)(4)(ii) now provides that, if sector-ACLs are used, then sector-AMs should also be specified. That section emphasizes that ''ACLs in coordination with AMs must prevent overfishing.'' *See* § 600.310(f)(4)(i). Section 600.310(g)(3) reinforces the requirement to prevent overfishing by clarifying that, in cases where an ACL is set equal to zero and the AM for the fishery is a closure, additional AMs are not required if catch or bycatch is unlikely to result in overfishing. Thus, the approach under § 600.310(g)(3) is consistent with *Oceana* v. *Locke.*

Comment 47: NMFS received several suggestions to modify the language in both § 600.310(f)(4)(i) and § 600.310(g)(4). Comments included: The agency should be required to provide catch data within 60 days of the end of the fishing year; revise the use of the word ''should'' from the description of in-season AMs; replace ''for the next year'' with ''as soon as possible'' within § 600.310(f)(4)(i); and repeat that management uncertainty should be accounted for at the ACL level if an ACT is not used in § 600.310(g)(4). Finally, while some commenters requested that the guidelines clarify that sector-AMs should be applied when sector-ACLs are used, others opposed sector-ACLs and AMs and recommended that the guidelines replace ''sector-AMs should also be specified'' with ''sector-AMs may also be specified.''

Response: First, while NMFS aims to provide catch data to the Councils as soon as possible, a specific deadline to provide catch data for all fisheries is not realistic, given the various mitigating circumstances that arise. As discussed within § 600.310(g)(2), Councils should plan to make appropriate use of preliminary data, if needed to implement inseason AMs. Second, while NMFS strongly recommends the use of inseason AMs, NMFS is not requiring them to be used (*i.e.,* not changing ''should'' to a ''must'' in the description of inseason AMs), because inseason AMs are not a statutory requirement, and NMFS believes that Councils should have discretion to consider different types of AMs. Third, ACLs are set on an annual basis and, because AMs are management measures to help prevent fisheries from exceeding ACLs, AMs should be applied on an annual basis as well. Lastly, NMFS believes that the guidance adopted in the 2009 NS1 Guidelines regarding accounting for management uncertainty within the ACL-setting process and using sector-AMs is sufficient. After considering public comments, NMFS

has determined that no additional guidance on these topics is necessary in the NS1 guidelines.

ACL & AM Mechanisms—Life Cycle Exemption

Comment 48: Several comments were received regarding NMFS' proposal to revise the life cycle exception to apply to ''a stock for which the average age of spawners in the population is approximately 1 year or less.'' *See* § 600.310(h)(1)(i) of proposed action. Some commenters felt this modification to the exception was still too restrictive. One commenter proposed that the exception should apply to stocks for which the average age of spawners is 2 or 3 years. Others felt the exception was not restrictive enough. One commenter said that the life cycle exception should only apply to an ''unfished population.'' They expressed concern that excessive fishing could truncate the life cycle of the stock to the point that it qualifies for the exception. Another recommended expanding the life cycle exception in the MSA to include species with life cycles of 1–2 years but then limiting it to those species that also experience a rate of natural mortality that far exceeds the effects of fishing mortality. Finally, one commenter asked for more guidance on how to apply the exception.

Response: The MSA provides a statutory exception to the requirements for ACLs and AMs for ''a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species.'' 16 U.S.C. 1853 note (Pub. L. 109–479 104(b)). The 2009 NS1 guidelines explained that this statutory exemption applies to a stock for which the average length of time it takes for an individual to produce a reproductively active offspring is approximately 1 year and that the individual has only one breeding season in its lifetime. *See* 74 FR 3210, January 16, 2009. In this action, NMFS is revising the exception to apply to ''a stock for which the average age of spawners in the population is approximately 1 year or less,'' as this is a more scientifically correct description of a species that has a life cycle of approximately 1 year. As explained in the preamble to the proposed action, NMFS believes that the 2009 NS1 guidelines' reference to one breeding season in a lifetime was overly restrictive, because some short lived species have multiple breeding cycles in a lifetime. NMFS cannot change the reference to 1 year in the NS1 guidelines, because that is based on the statutory text for the exception, which is quoted above.

NMFS does not agree with limiting the exception to ''unfished populations'' or to stocks that experience a rate of natural mortality that far exceeds the effects of fishing morality. The exception itself does not include these limitations, and NMFS does not believe that they are necessary, given that the exception will not apply if ''the Secretary has determined the fishery is subject to overfishing of that species.'' 16 U.S.C. 1853 note.

NMFS continues to believe that the National Standard 1 guidelines should not include overly prescriptive guidance as to which stocks meet the criteria for the exception; this is a decision that is best made by the Councils, subject to Secretarial review and approval under MSA section 304(a). To the extent that questions arise as to the application of the exemption, NMFS will provide case-specific guidance to the Councils as necessary.

ACL & AM Mechanisms—Flexibility in Application of NS1 Guidelines

Comment 49: Some commenters expressed support for the proposal to add additional examples of circumstances that might call for flexibility in the application of the NS1 guidelines. *See* § 600.310(h)(2) of proposed action. Others felt that the proposal could be improved. For instance, one commenter felt that the Pacific salmon example in the proposed action mischaracterizes the spawning potential of Pacific salmon. The commenter recommended keeping the original language or inserting the phrase ''of each run'' after ''potential.'' Another commenter suggested relocating the provision to make it clear that it applies to the complete set of NS1 guidelines and is not limited to only flexibility in establishing ACL mechanisms and AMs in FMPs.

Response: NMFS agrees with the commenter about the proposed language regarding Pacific salmon spawning potential, thus the sentence in this final action reverts back to as it was written in the 2009 NS1 guidelines: ''(*e.g.,* Pacific salmon, where the spawning potential for a stock is spread over a multi-year period).''

NMFS disagrees with the suggestion to relocate the flexibility provision in § 600.310(h)(2). NMFS believes the guidance in § 600.310(h)(2) is clear and that further revision is not necessary. Section § 600.310(h)(2) is meant to only provide flexibility in establishing ACLs and AMs. The revisions to § 600.310(h)(2) were not meant to expand what it applies to but rather to connect the proposed change in § 600.310(e)(2)(ii) to the requirement to specify ACLs and AMs because a Council specifying SDC in a manner that deviates from the standard NS1 guidelines approach will also likely need to deviate from the standard approach to setting ACLs and AMs.

Calculating T_{max}

Comment 50: NMFS received many comments supporting the inclusion of two additional methods to calculate T_{max} within the NS1 guidelines. Other commenters expressed concern that providing additional options for calculating T_{max} would incentivize Councils to merely pick the longest $T_{max,}$ which would result in a rebuilding plan that is ineffective and/or fails to meet the statutory requirement that rebuilding plans rebuild a stock in as short a time as possible. Similarly, many commenters sought additional guidance from NMFS as to how to pick between the three different T_{max} calculations. Several commenters also requested additional technical guidance on whether factors discussed in § 600.310(j)(3)(i) can be used to justify the method used for calculating T_{max}, and additional guidance on the preferred methodology to calculate mean generation time. Several commenters provided suggestions to either improve the proposed T_{max} calculation methods or include other alternate T_{max} calculation methods within the guidelines. Commenters also recommended that the guidelines encourage setting T_{target} as close to T_{min} as possible and encourage the use of management measures that adhere to T_{target} as opposed to T_{max}.

Response: As the preamble to the proposed rule discussed, while NMFS does not anticipate that the proposed alternative approaches to calculate T_{max} will produce drastically different values, NMFS has added these methods to give Councils the flexibility to calculate T_{max} in light of variable information and data availability. *See* 80 FR 2795–96, January 20, 2015. NMFS expects these additional methods will help Councils avoid using overly conservative or exaggerated T_{max} values in cases where there is a lack of available data to calculate mean generation time as required under the only available approach under the previous guidelines (*i.e.,* T_{min} plus one mean generation time). However, NMFS revised the final action to provide additional guidance on decisions regarding which T_{max} calculation method to use. NMFS emphasized that, in cases where T_{min} exceeds 10 years, T_{max} is a biological calculation. Because T_{max} is a biological calculation, the calculation methods provided in the

guidelines do not include other factors such as those outlined in § 600.310(j)(3)(i). NMFS also clarified in the final action that the determination of which T_{max} calculation method to use should be made by the Councils in consultation with their SSCs (or agency scientists or peer review processes in the case of Secretarial actions) and should be based on the best scientific information available. *See* § 600.310(j)(3)(i)(B)(*3*).To this end, NMFS has also added language to the final action emphasizing that a Council and its SSC should consider the relevant biological data and scientific uncertainty of that data when deciding which calculation method to use. Finally, NMFS also provided examples of cases where, given data availability and the life history characteristics of a stock, one of the alternative methods may be more appropriate than the status quo calculation method (T_{min} plus one mean generation time).

As noted in the 2009 final action, T_{max} is an upper bound on the duration of rebuilding time periods and is a limit that should be avoided. *See* 74 FR 3200, January 16, 2009. When developing and implementing an effective rebuilding plan, Councils must determine $T_{target,}$ which is the shortest rebuilding time period possible based on the factors in § 600.310(j)(3)(i). Thus, Councils must demonstrate that their adopted T_{target} is the shortest time possible for rebuilding and Council action addressing an overfished fishery should be based on T_{target} (16 U.S.C. 1854(e)(4)(A); *NRDC* v. *NMFS,* 421 F.3d 872, 882 (9th Cir. 2005)). NMFS believes the methods given for T_{max} calculations in the final guidelines are sufficient to produce appropriate T_{max} values and there is no need for additional guidance within the NS1 guidelines.

Finally, NMFS has already developed technical guidance on calculating mean generation time for use in rebuilding plans, which includes a definition for mean generation time (Restrepo et al., 1998). NMFS believes this technical guidance document is sufficient and does not believe an exact method should be specified in the NS1 guidance.

Comment 51: NMFS received several comments on the requirement within MSA section 304(e)(4)(A)(ii) to specify a time period for rebuilding overfished stocks that does not exceed 10 years (henceforth referred to as the ''10 year rebuilding requirement''). Comments reflected disappointment that the proposed changes to the guidelines do not address the issue of ''discontinuity'' among rebuilding plans: Where Councils with stocks that have a T_{min} greater than 10 years are able to adopt rebuilding plans significantly longer than 10 years while stocks with a T_{min} of 10 years or less are required to rebuild within 10 years. Comments included suggestions to remove the 10 year rebuilding requirement and replace it with alternative rebuilding requirements. Another commenter suggested that socio-economic considerations should be included when assessing a stock's ability to rebuild in 10 years. One commenter recommended revising the language in § 600.310(j)(3)(i)(B)(*1*) to clarify that, because fishing mortality cannot be guaranteed to equal zero, the 10 year rebuilding requirement should apply to stocks with a T_{min} of less than 10 years, rather than less than or equal to 10 years. Finally, other commenters suggested legislative action to modify the 10 year rebuilding requirement within the MSA.

Response: While NMFS acknowledges that the 10 year requirement under MSA section 304(e)(4)(A)(ii) can lead to disparate outcomes for different stocks, action by Congress would be required to change that statutory requirement. *See* 74 FR 3200–01, January 16, 2009. Under the 2009 NS1 Guidelines and this action, NMFS does not include socio-economic considerations with regard to the 10 year rebuilding requirement, because MSA section 304(e)(4)(A)(ii) does not provide for this. 16 U.S.C. 1854(e)(4)(A)(i) and (ii) (requiring under (ii) that rebuilding period not exceed 10 years, except under certain circumstances which do not include socio-economic considerations, but providing under (i) that ''needs of fishing communities'' may be considered when determining if period is as short as possible). NMFS reiterated in the 2009 final NS1 Guidelines that the needs of fishing communities are not part of the criteria for determining whether a rebuilding period can or cannot exceed 10 years, but are an important factor in establishing T_{target}. *See* 74 FR 3200, January 16, 2009.

Finally, NMFS acknowledges that hypothetically, there could be a situation where T_{min} for a stock is equal to 10 years and T_{max} is equal to 10 years, in which case a fishery may need to be closed in order to meet the 10 year rebuilding requirement. However, a Federally-managed stock has yet to be determined to be overfished and present the aforementioned situation, and NMFS believes such an extreme situation is unlikely.

Comment 52: Some commenters regarded the proposed language in § 600.310(j)(3)(i)(A), which clarifies that the starting year for the T_{min} calculation should be the first year the rebuilding plan is implemented, as a loophole that encourages Councils to delay the implementation of a rebuilding plan and set the starting date for T_{min} later than is appropriate. One commenter recommended re-instating ''whichever is sooner'' in subsection § 600.310(j)(3)(i)(B) of the existing guidelines in addition to retaining the proposed ''expected to be'' language.

Response: NMFS disagrees that guidance on the starting year for the calculation of T_{min} creates an incentive to delay implementation of rebuilding plans. MSA section 304(e)(3) requires that following notification that a fishery is overfished or approaching a condition of being overfished, a Council prepare and implement an FMP, FMP amendment, or proposed regulations within 2 years. This provision does not require that the starting year for a reference point for rebuilding plans (*i.e.,* T_{min}) be set prior to the first year the rebuilding plan is expected to be implemented. Because MSA section 304(e)(4) addresses reference points in the context of the rebuilding measures that the Council will be adopting, NMFS believes that the starting year reference point should be the same year as the implementation of those measures. Additionally, the MSA required that, by fishing year 2010/2011, FMPs establish mechanisms to specify ACLs to prevent overfishing, which means that during the period of rebuilding plan development, ACLs will be in place that end overfishing. Therefore, catch of stocks in poor shape (*i.e.,* overfished stocks undergoing overfishing) will be constrained immediately in order to end overfishing, regardless of when the rebuilding plan is implemented.

Adequate Progress & Extending Rebuilding Timelines

Comment 53: While NMFS received some comments in support of the proposed guidance on adequate progress determinations, some comments opposed the proposed changes and expressed that they are unnecessary, ineffective, and likely to decrease the odds of a stock being rebuilt. Many commenters expressed concern that the proposed criteria for adequate progress determinations in § 600.310(j)(3)(iv) of the proposed action were too vague, required additional guidance, and would allow stock biomass levels to be ignored. Many commenters emphasized that the criteria for adequate progress determinations should include some consideration of biomass trends to help identify when changing conditions render original $F_{rebuild}$ and/or biomass targets no longer appropriate. NMFS

also received many suggestions on how to significantly modify the guidance on adequate progress determinations.

Response: While NMFS agrees that a stock's biomass is a relevant factor when making adequate progress determinations, NMFS also emphasizes that there is a strong relationship between $F_{rebuild}$ and biomass trends. Stocks that consistently experience fishing mortality above $F_{rebuild}$ generally experience declining or little increases in biomass, while stocks that consistently experience fishing mortality equal to or below $F_{rebuild}$ generally experience increasing biomass. NMFS plans to work with Councils to actively review available biomass estimates for stocks in rebuilding plans and monitor whether rebuilding stocks are experiencing the expected relationship between $F_{rebuild}$ and biomass. Cases where a stock's biomass is not increasing, despite catch levels being maintained at or below $F_{rebuild}$ would be unexpected. Such cases would likely trigger the second criteria listed in § 600.310(j)(3)(iv) (*i.e.,* new and unexpected information has significantly changed the rebuilding expectations of the stock). *See* 80 FR 2796, January 20, 2015. Thus, NMFS is confident that the criteria for adequate progress determinations (see § 600.310(j)(3)(iv) of the final action) address and cover situations where a rebuilding plan fails to properly constrain fishing mortality rates as well as situations where a rebuilding stock's biomass is failing to increase. NMFS believes that further prescriptive guidance on adequate progress determinations is not needed in the NS1 guidelines.

Comment 54: Some commenters opposed § 600.310(j)(3)(v) of the proposed action. Commenters felt it would allow the same rebuilding parameters to be used for an indefinite period of time past the original rebuilding timeframes as long as adequate progress is not found. Commenters stated that the provision is a ''set it and forget it'' policy that gives no incentive to revisit a stock's $F_{rebuild}$ even if $F_{rebuild}$ was initially overestimated and/or the stock's biomass is not making progress toward reaching B_{msy} due to environmental stressors or other factors. Commenters recommended several revisions that encourage Councils to periodically assess whether their rebuilding plan parameters are adequate to rebuild the stock in the length of time mandated by Congress.

Response: As highlighted in the National Research Council report on rebuilding (NRC 2013), the primary objective of a rebuilding plan should be to maintain fishing mortality at or below $F_{rebuild.}$ By doing so, managers can avoid issues with updating timelines that are based on biomass milestones, which are subject to uncertainty and changing environmental conditions that are outside the control of fishery managers. Thus, the final action includes language to clarify that the NS1 guidelines recommend Councils maintain F rates at $F_{rebuild}$ when implementing a rebuilding plan, unless the Secretary finds that adequate progress is not being made. NMFS disagrees that § 600.310(j)(3)(v) allows original rebuilding timeframes to be used indefinitely. The final action gives the Secretary specific criteria to use when evaluating rebuilding plans for adequate progress every 2 years, which prevents rebuilding timeframes from continuing indefinitely without adequate progress towards rebuilding. Councils must develop and implement a new or revised rebuilding plan within two years of a determination that adequate progress is not being made. 16 U.S.C. 1854(e)(7).

Comment 55: Commenters requested more stringent guidance for Councils with stocks that have not been rebuilt by $T_{max.}$ Some commenters recommended NMFS replace ''T_{max}'' with ''T_{target}'' in § 600.310(j)(3)(vi) of the proposed action because T_{target} is the specified time period for rebuilding a stock that is considered to be in as short a time as possible and therefore is the reference point that is required to be met by the MSA. Commenters also recommended that the guidelines require F to be lowered in situations where a stock reaches T_{max} (or T_{target}) without having been rebuilt. Commenters suggested that the guidance contained in § 600.310(j)(3)(vi) should also apply to stocks where the Secretary finds that adequate progress is not being made. Two commenters recommended striking ''or the Secretary finds that adequate progress is not being made'' from the provision to avoid ''resetting the clock'' and potentially relaxing rebuilding parameters.

Response: NMFS believes that use of T_{max} in § 600.310(j)(3)(vi) gives Councils appropriate guidance in cases where a stock is not rebuilt by $T_{max.}$ As explained in response to comment 54, the primary objective of a rebuilding plan is to maintain $F_{rebuild}$. Thus, NMFS believes that requiring that F does not exceed $F_{rebuild}$ or 75 percent of the MFMT, whichever is lower, is an appropriate approach. *See e.g.,* response to comment 85, 74 FR 3200, January 16, 2009 (addressing similar comments). However, Councils should consider a lower mortality rate in light of the MSA's goal to rebuild stocks in as short a time as possible (*i.e.* T_{target}). Finally, MSA section 304(e)(7)(B) requires the Secretary, upon notifying a Council that adequate progress is not being made, ''to recommend further conservation and management measures which the Council should consider . . .'' Such recommendations may include, but are not limited to, rebuilding measures similar to those in § 600.310(j)(3)(vi) (*e.g.,* maintaining $F_{rebuild}$ or 75 percent of MFMT, whichever is lower). The phrase within § 600.310(j)(3)(vi)—''or the Secretary finds that adequate progress is not being made''—is appropriate because MSA section 304(e)(7) requires a Secretarial review of rebuilding plans at least every two years to determine adequate progress. Even if a stock or stock complex has not rebuilt by T_{max}, a rebuilding plan is still in place, and if the Secretary finds that adequate progress is not being made, further action may be required to revise the plan.

Emergency Actions and Interim Measures

Comment 56: Several commenters expressed concern with the proposed deletions and revisions in § 600.310(j)(4) addressing emergency rules and interim measures that are authorized under MSA sections 304(e)(6) and 305(c). Some interpreted the proposed deletions as limiting NMFS' authority under MSA section 305(c). Others were concerned that the limitations imposed on the use of the authority under MSA section 304(e)(6) to reduce, but not end, overfishing were overly restrictive. Finally, one commenter requested that NMFS' final guidance allow for interim measures or emergency rules that are 2, rather than 1 year in duration to better align with time lines under MSA section 304(e).

Response: For streamlining purposes, as discussed in the preamble to the proposed action, NMFS is deleting text under § 600.310(j)(4) that simply repeats language in MSA section 305(c). The deletions have no effect on authority set forth in MSA section 305(c). NMFS notes that it has a separate policy on emergency rules (*see* NMFS Policy Directive 01–101–07, Policy Guidelines on the Use of Emergency Rules, 62 FR 44421, August 21, 1997). Because the NS1 guidelines include extensive guidance on rebuilding plans and the implementation of MSA section 304(e), NMFS believes it is appropriate to provide guidance in the NS1 guidelines regarding MSA section 304(e)(6), which authorizes the Secretary to implement interim measures to reduce, but not necessarily end, overfishing.

The limitations imposed by this final action on the Secretary's use of MSA section 304(e)(6) were adopted as a means of reconciling the new mandate in the 2007 revisions to the MSA to ''end overfishing immediately,'' 16 U.S.C. 1854(e)(3)(A), and the provision in MSA section 304(e)(6) that allows for some reduced level of overfishing while a rebuilding plan is developed. Noting the tension between these two provisions, NMFS strove to find a way to give effect to 304(e)(6) without undermining Congress's explicit direction in 304(e)(3)(A). Because 304(e)(6) grants discretionary authority, NMFS is well within its authority to adopt limitations on its application in order to avoid undermining the agency's other competing obligations under the statute.

The final action requires three conditions before the Secretary uses section 304(e)(6) authority to allow overfishing to occur. First, interim measures taken under section 304(e)(6) must be necessary to address an unanticipated and significantly changed understanding of the status of the stock or stock complex. This ensures that action is taken to address either (1) a new overfished determination or (2) a failure of a rebuilding plan that has resulted, not from clear management failures (*i.e.,* overfishing), but from an unanticipated change in understanding of the stock that has rendered the existing management plan inadequate. Second, ending overfishing immediately must be expected to result in severe social and/or economic impacts to a fishery. This condition ensures that overfishing is only permitted in order to prevent serious negative consequences for the fishery. Third, interim measures must ensure that the stock or stock complex will increase its current biomass through the duration of those measures. In the context of the rebuilding provisions as a whole, MSA section 304(e)(6) suggests that the Secretary's obligation is to take action that would permit the Council time to develop measures that will rebuild the fishery. 16 U.S.C. 1854(e)(6) (allowing action ''[d]uring the development of a [rebuilding plan]''). Inherent in that provision is the assumption that the Secretary's actions will not worsen the current situation for the fishery, and will be a part of rebuilding the fishery. Thus, it was appropriate to require that any actions taken under this provision ensure that the fishery will increase its current biomass through the duration of the interim measures.

Finally, NMFS cannot extend the effective length of emergency rules and interim measures to 2 years. While MSA section 304(e)(3) provides 2 years to develop or revise a rebuilding plan, MSA section 305(c) specifies that an emergency rule or interim measure shall remain in effect for not more than 180 days after publication, and may be extended by publication in the **Federal Register** for one additional period of not more than 186 days. 16 U.S.C. 1855(c)(3)(B). Section 304(e)(6) does not change the duration of actions under section 305(c), and in fact, explicitly requires that action taken under 304(e)(6) be done ''under section 305(c).'' *Id.* 1854(e)(6).

Discontinuing Rebuilding Plans

Comment 57: Many commenters supported the additional provision in § 600.310(j)(5) that allows rebuilding plans to be discontinued for stocks that are later determined to have not been overfished in the year of the original overfished determination (but are not yet above B_{msy}). Commenters recommended that the discontinuation of rebuilding plans that meet the criteria within § 600.310(j)(5) should be mandatory and that Management Strategy Evaluations (MSEs) should be used to prevent establishment of unnecessary rebuilding plans.

In contrast, some commenters expressed concern that this provision would move away from a precautionary approach to rebuilding stocks and achieving OY. Specifically, commenters expressed concerns that this provision will encourage assumptions in a stock assessment model to be changed in order to achieve a desired outcome (*e.g.,* that the stock was never overfished and meets the criteria within § 600.310(j)(5)). Other commenters opposed the provision because the rebuilding plan might still be useful to achieving OY even if the stock is not technically overfished, ''especially if the stock is in limbo between 51 percent of B_{msy} and 100 percent of B_{msy}.''

Response: Discontinuing a rebuilding plan based on new information is an option a Council may choose to use in order to alleviate negative impacts on fishery participants due to reduced landings of a stock (or reduced landings of other stocks in mixed-stock fisheries) where new information has shown that the stock was not overfished in the year it was determined to be overfished, nor in subsequent years. NMFS highlights that the provision does not *require* discontinuing a rebuilding plan that meets the criteria within § 600.310(j)(5), and NMFS does not believe it is appropriate to mandate discontinuation. As discussed in the preamble to the proposed action, a Council may always opt to continue following the rebuilding plan to further the conservation and management needs of a stock or stock complex that remains below $B_{msy,}$ because such action is consistent with the MSA's objective that fisheries produce MSY on a continuing basis. *See* 80 FR 2796–98, January 20, 2015. Furthermore, NMFS agrees that additional decision-making tools that increase the accuracy of stock status determinations, such as MSEs, are beneficial. However, NMFS believes that, while the implementation of these tools is feasible within the current NS1 guidelines, the benefits of using such tools should be evaluated on a case-by-case basis and, therefore no further guidance on such decision-making tools is necessary.

Section 600.310(j)(5) allows Councils to be responsive to the best scientific information available while managing stocks to meet MSA mandates, including NS1's requirement to prevent overfishing while achieving OY on a continuing basis. The provision does not interfere or conflict with MSA conservation mandates because a Council may only discontinue a plan when new information shows the stock was not overfished in the year it was originally determined to be overfished, nor in subsequent years. NMFS disagrees that management action under this provision will encourage assumptions in stock assessment models to be changed, because assumptions within a stock assessment model are based on the best scientific information available. *See* § 600.315.

Comment 58: Commenters expressed concern that the proposed criteria in § 600.310(j)(5) only requires a stock to have not been overfished in the year the overfished determination was based on. If the stock was—in light of new information—overfished not in the year of the original overfished determination, but rather a year just prior to or just after that year, commenters argued that rebuilding plans would still be necessary and discontinuing the rebuilding plan would be inappropriate. Commenters suggested changes to the guidelines to prevent discontinuation of rebuilding plans for stocks that are shown not to have been overfished in the year of the original overfished determination, but are shown to have been overfished in subsequent years. One commenter also expanded this suggestion to include ''any of the five years prior to the original overfished determination.''

Response: NMFS agrees that new information in support of discontinuing a rebuilding plan must demonstrate that the stock is currently not below its MSST, was not overfished in the year of

the original determination, and was not overfished in subsequent years. NMFS has revised the guidelines accordingly. *See* § 600.310 (j)(5) of final action. The final action deletes proposed text that states that the ''biomass of the stock is not currently below the MSST,'' as this consideration is covered in the revised text. If new information demonstrates that a stock was not overfished in the year of the original overfished determination, but instead overfished in a subsequent year, a rebuilding plan is still necessary and the rebuilding timeframes should be adjusted accordingly.

NMFS disagrees with the suggestion that the provision should also include ''any of the five years prior to the original overfished determination.'' NMFS does not believe it has a scientific basis to specify a particular number of years prior to an original overfished determination where the discontinuation of a rebuilding plan would be inappropriate in all cases and for all Federally-managed stocks and stock complexes. Discontinuing a rebuilding plan based on new information for a stock that was not overfished in the original year of the overfished determination, but was overfished in a subsequent year would not have the same repercussions on a stock as stocks that have not been overfished in subsequent years. *See* 600.310(j)(5) of the final action. In the latter case, the stock is unlikely to be experiencing an overfished trend (*i.e.,* the stock was not overfished in the original determination year, nor in any of the subsequent years and is not currently overfished). Furthermore, as described in comment 57, the discontinuation of a rebuilding plan is an optional tool for managers. A Council may always opt to continue following rebuilding plans, in light of the conservation and management needs of the stock and FMP objectives.

Other Comments on Rebuilding

Comment 59: NMFS received several comments on rebuilding plans in general. One commenter requested that the guidelines explicitly encourage Councils to use rebuilding measures beyond catch limits if they are appropriate (*e.g.,* gear and effort limits). Other commenters expressed concern that the guidelines retain a minimum acceptable probability of 50 percent that management measures will rebuild the stock within the ''maximum allowable rebuilding time'' and recommended that the guidelines increase this threshold. NMFS also received requests for additional guidance on how to evaluate and incorporate consideration of environmental conditions within rebuilding timeframes.

Response: Councils must specify ACLs and AMs for all federally managed stocks, including stocks within rebuilding plans. 16 U.S.C. 1853(a)(15). As described in § 600.310(g), Councils may use accountability measures other than catch limits at their discretion (*e.g.,* gear restrictions, spatial and/or temporal restrictions, bag limits). As discussed in the preamble to the final 2009 NS1 Guidelines (*see* 74 FR 3196, January 16, 2009), NMFS stated at that time that the 50 percent probability is a lower bound and not a default value. Thus, if the management measures within a rebuilding plan have a 50 percent probability of achieving rebuilding by $T_{target,}$ the probability that the management measures will achieve rebuilding by T_{max} is greater than 50 percent. When selecting management measures within a rebuilding plan, Councils should analyze a range of alternatives and select from among the measures that have an appropriate probability of rebuilding by T_{target}. After considering public comment, NMFS does not believe that prescribing a specific probability greater than 50 percent is appropriate for several reasons. *See, e.g.,* response to comment 86, 74 FR 3200, January 16, 2009 (addressing similar comments). One reason is that fisheries are diverse and the ecological, social, and economic impacts of managing at a specific probability will differ depending on the characteristics of the fishery. Finally, when specifying a T_{target} that is as short as possible, the guidelines clearly state that Councils may take the ''interaction of the stock within the marine ecosystem'' into account, thus allowing Councils to account for environmental conditions within rebuilding timeframes. *See* § 600.310(j)(3)(i).

Recreational Fisheries

Comment 60: Commenters encouraged providing flexibility to consider the objectives of the recreational and commercial sectors differently. Additionally, some commenters requested that if NMFS emphasizes recreational objectives in FMPs, that formal, specific, and separate definitions are provided for the private angler and for hire sectors as those sectors have different objectives. Commenters also cautioned that NMFS must control the impacts of recreational fishing and stressed that the same scrutiny and accountability must be applied to both the commercial and recreational sectors.

Other commenters raised concerns about the impact of limited data availability on management of the recreational sector, noting a disconnect between the state of recreational fisheries data collection and management. One commenter suggested that NMFS develop a methodology for calculating the mortality on all forage fish attributable to the recreational sector and develop a better understanding of the role of forage fisheries that supply bait for the recreational fishing industry.

Response: NMFS agrees that flexibility should be afforded to Councils to take actions that reflect the differences between the commercial and recreational sectors and that all sectors should be adequately controlled to prevent overfishing. NMFS in § 600.305(b) directs Councils to reassess the objectives of the fishery on a regular basis so that all impacted sectors—recreational and commercial—can work with the Councils to ensure that their sector-specific objectives are adequately reflected in the FMPs.

NMFS does not believe that it is necessary to formally define the private angler and for hire sectors as the specific composition, needs, and objectives of recreational sectors will differ across regions. NMFS does not state in this final action what specific objectives of fishing sectors to consider; instead NMFS merely requires that Councils consider and incorporate the objectives of sectors that are impacted by their FMPs.

As discussed in the preamble to the proposed action, NMFS did not propose recreational-specific provisions in the guidelines. Instead, NMFS chose to highlight how various flexibility provisions that were proposed could be used to address needs raised by the recreational community. These flexibility provisions, such as conditional AMs, are universally applicable and not limited to the recreational sector. Also, in the 2009 revisions to the guidelines, the use of sector-ACLs and corresponding AMs and ACTs were discussed as an option for Councils should they decide that fishing sectors require different types of management strategies and measures.

NOAA's Marine Recreational Information Program is continuously working to improve how it collects, analyzes, and reports information. Recent improvements include the 2013 implementation of the Access Point Angler Intercept Survey that removes sources of potential bias from the sampling process. More information about data collection improvements is located at *http://www.st.nmfs.noaa.gov/recreational-fisheries/MRIP/making-improvement.* NMFS continues to

support research on the needs of the recreational fishery industry, including the need for enough forage fish to provide for healthy recreational fish species, and believes the NS1 guidelines provide adequate flexibility to reflect the results of such research as appropriate.

National Standard 3

Comment 61: One commenter suggested that NMFS require that the analysis discussed in § 600.320(e) be specified in the documents that support the FMP (Environmental Assessments, Regulatory Impact Reviews, etc.) rather than in the FMP itself to avoid excessively long FMPs. Another commenter felt that the proposal to delete language stating that the aforementioned analysis is required to document that an FMP ''is as comprehensive as practicable'' (*see* § 600.320(e) of proposed action) weakens the NS3 guidelines and contravenes the precautionary approach to management contained in the MSA. The commenter suggested keeping the language and replacing ''practicable'' with ''possible'' as a way to strengthen it.

The same commenter, while acknowledging that the purpose of NMFS' proposed deletion of the list of factors in § 600.320(d)(1) was for streamlining purposes, requested that the ecological factor be retained because it is important to manage species that are associated with the same ecosystem or dependent on similar habitat.

Another commenter opposed the proposed change to § 600.320(d) that used the phrase ''stocks in the fishery management unit'' because the issue of stocks in need of conservation and management is addressed with different language in § 600.305 of the proposed action.

Response: NMFS agrees that FMPs should not be excessively long but believes it is important that the analysis required in § 600.320(e) be contained in the FMP. This analysis enables both NMFS and the public to understand decisions made by a Council to implement NS3. The specific requirements of § 600.320(e) are all necessary steps in an analysis to determine how to manage an individual stock of fish as a unit (*e.g.,* range and distribution of stocks, management activities of adjacent states, etc.). Without providing this analysis, NMFS would be unable to determine under MSA 304(a) whether the FMP is consistent with NS3.

NMFS does not agree with the need to retain the ''as comprehensive as practicable'' language in § 600.320(e). The deletion of this language from the guidance does not change the requirements of the guidelines; Councils still ''should include'' the information contained in § 600.320(e)(1)–(4).

Although NMFS agrees that ecological similarity is an important factor in determining an appropriate management unit, retaining the specific language that slightly expands on the ecosystem factor is not necessary. The final action retains language that establishes that biological, geographic, economic, technical, social, and ecological perspectives are all valid considerations when organizing a management unit based on the FMP's objectives. *See* § 600.320(d)(1). NMFS does not believe that the deleted text (explaining that ecological perspectives could be based on species that are associated in the ecosystem or are dependent on a particular habitat) adds much value or guidance.

NMFS agrees that the issue of whether a stock requires conservation and management is adequately addressed in § 600.305 and thus, NMFS has deleted the last sentence of § 600.320(d) to avoid any potential confusion. *See* § 600.320(d) of final action. As NMFS explained in the proposed action, a Council, by determining that a stock should be included in a management unit, has determined that said stock is in need of conservation and management. *See* 80 FR 2789, January 20, 2015.

National Standard 7

Comment 62: Some commenters suggested retaining the text that NMFS proposed deleting at § 600.340(b). They argued that the text: Speaks to the need to weigh the benefits and costs of management; acknowledges the reality that management resources are limited and must be prioritized; and made it clear that management is not always necessary. One commenter felt the deletion of the language required all species to be under an FMP even if there is little benefit, high costs, and federal management would fail to serve a useful purpose. Other commenters felt that the deletion of the section was warranted because the relevant factors in the section have been incorporated into the new conservation and management framework in § 600.305(c) of the proposed action.

Another commenter recommended that § 600.340(c) of the proposed action be revised so that an evaluation of benefits and costs is limited to situations where alternative management measures are being considered, as opposed to FMPs justifying their own existence.

Other commenters requested that NMFS add language to the guidelines to note the value of engaging with enforcement agencies to solicit feedback when considering an action's costs, as directed under NS7.

Response: NMFS believes that § 600.305(c) of the final action (regarding stocks that require conservation and management) eliminates the need for the language that was deleted in § 600.340(b). Its deletion does not mean that all species, regardless of costs and benefits, must be included in an FMP—in fact § 600.305(c)(1) explicitly states that ''[n]ot every fishery requires federal management.'' MSA section 302(h)(1) only requires a Council to prepare an FMP for each fishery under its authority that requires (or in other words, is in need of) conservation and management.

National Standard 7 requires that for those stocks determined to be in need of conservation and management and therefore included in an FMP, Councils should develop conservation and management measures that, where practicable, minimize costs and avoid unnecessary duplication. 16 U.S.C. 1851(7). The language retained in the final NS7 guidelines, which was not changed by this action, explains how to implement this requirement through supporting analyses for FMPs. Such analyses should demonstrate ''real and substantial'' benefits of fishery regulation, taking into account the added research, administrative, and enforcement costs, as well as costs to the industry for compliance. *See* § 600.340(c). NS7 applies to all stocks determined to be in need of Federal management. Thus, the supporting analysis described in § 600.340(c) is needed for all stocks that require Federal management, not just for stocks that are managed using alternative measures.

NMFS agrees that enforcement costs are an important consideration, which is why they are noted for consideration several times in the NS7 guidelines. Certainly one way to acquire information about these costs would be to engage directly with enforcement agencies, but NMFS does not believe that the guidelines should mandate such engagement.

Forage Fish and Other Ecosystem Considerations

Comment 63: NMFS received many comments that the proposed action missed an opportunity to take a more transparent and comprehensive approach to incorporating EBFM into the NS1 guidelines, especially within the context of OY. One commenter

requested additional guidance on how to incorporate ecological factors into OY and ACL specifications.

Response: NMFS supports the implementation of EBFM. In that vein, NMFS proposed several revisions to the NS1 guidelines to facilitate the incorporation of EBFM into U.S. federal fisheries management, including the concept of using aggregate MSY estimates. EBFM is a developing scientific field, and NMFS believes that implementation of EBFM management strategies is feasible within the current NS1 guidelines framework, especially in light of the revisions NMFS has made. *See* 80 FR 2790, January 20, 2015.

Pursuant to MSA section (3)(33), OY is prescribed on the basis of MSY as reduced by ecological, economic, and social (''EES'') factors. The NS1 guidelines set forth examples of different considerations for each factor, and NMFS believes the examples provide sufficient guidance on how to apply these factors when setting OY. *See* § 600.310(e)(3)(iii)(B) of the final action. NMFS agrees with the commenter that clarification of the relationship between OY and ACL is necessary, and for that reason added a new section (§ 600.310(f)(4)(iv) of the final action) to the guidelines, which explains that ACLs (or ACTs) can be reduced from the ABC based on OY considerations. Section 600.310(f)(4)(iv) of the final action also clarifies that EES trade-offs may be evaluated when determining the risk policy for an ABC control rule. NMFS does not believe that further guidance on this issue is necessary.

Comment 64: One commenter requested more guidance on how ''prevailing'' is meant to be interpreted in the context of the environmental and ecological conditions that are taken into account when specifying a stock's MSY. *See* § 600.310(e)(1)(i)(A).

Response: The MSY definition is unchanged from the 2009 NS1 Guidelines. As explained in the preamble to the final 2009 guidelines, NMFS believes that ecological conditions and ecosystem factors should be taken into account when specifying MSY. *See e.g.,* response to comment 24, 74 FR 3187, January 16, 2009 (addressing similar comments). Accordingly, the definition of MSY refers to the ''prevailing ecological, environmental conditions,'' which requires Councils to consider what the existing ecological and environmental conditions of the fishery are at the time that MSY is specified, as those conditions may impact the level of catch or yield specified.

Comment 65: NMFS received many comments requesting additional guidance on the management of forage fish. One commenter opposed alternative management strategies for forage fish and instead called for more robust stock assessments for forage fish so that the existing framework for adaptive management can be used. Another commenter opposed the discussion of maintaining forage fish biomass higher than B_{msy} in the section of the guidelines that discuss considerations for specifying OY. *See* § 600.310 (e)(3)(iii)(B)(*3*) of proposed action.

Response: NMFS agrees that forage fish are important to both fisheries and the marine ecosystem. However, as stated in the proposed action, NMFS did not propose any new revisions to the NS1 guidelines related to forage fish, as the importance of forage fish to fisheries and the marine ecosystem was adequately highlighted in the 2009 revisions to the NS1 guidelines. *See* 80 FR 2798, January 20, 2015. For example, in § 600.310(e)(3)(iii)(A)(*3*), NMFS notes that maintaining adequate forage for all components of the ecosystem is one consideration that should be weighed and given serious attention when determining the greatest benefit to the Nation, and accordingly, determining the EES factors used to obtain OY. Additionally, the current guidelines state that, consideration should also be given to managing forage stocks for a higher biomass than B_{msy} to enhance and protect the marine ecosystem when specifying OY. NMFS did not change these concepts within the guidelines.

With regard to the comment requesting that ''alternative management strategies'' for forage stocks (*i.e.,* maintaining forage above B_{msy}) be removed, NMFS notes that the text is only a suggested consideration as part of the ecological factors a Council may consider when specifying OY. Councils are free to manage forage fish species under status quo management strategies, as long as those strategies are consistent with the National Standards and other applicable provisions of the MSA. Furthermore, NMFS disagrees that the discussion of forage fish biomass is misplaced in the discussion of OY specifications. Managing forage stocks for higher biomass than B_{msy} to enhance and protect the marine ecosystem is a valid ecological consideration for determining OY.

Comment 66: Several commenters requested that the guidelines give additional guidance on how Councils should use an ecosystem-based approach to manage stocks impacted by environmental stressors such as climate change, ocean acidification, pollution, etc. Some also provided suggestions to address these issues within the guidelines. One specific example was a request for more guidance on how Councils should manage a fish stock that moves from one Council's jurisdiction to another due to the impacts of climate change.

Response: NMFS believes that the existing NS1 guidelines support an adaptive, science-based approach to responding to changes in environmental conditions. Furthermore, as stated in § 600.305(b)(2) of the final action, NMFS has instructed Councils to manage their fish stocks according to the changing needs of the fishery, which would encompass necessary management adjustments in response to changing environmental conditions.

Finally, the National Standard 3 guidelines address the case where a stock moves between Council jurisdictions. The guidelines state that the entities involved should coordinate during the development of an FMP and, if a stock's range covers multiple Council areas, the preferred approach is to establish one FMP that covers the stock's entire range. *See* § 600.320(c) of the final action.

Other Comments

Comment 67: One commenter felt that the phrase ''including section 304(e) of the Magnuson-Stevens Act'' in § 600.310(k) should be deleted because it is directing Councils to consider a section of the MSA (*i.e.,* MSA section 304(e)—rebuilding overfished fisheries) that is expressly excluded from the MSA 304(i) process.

Response: NMFS did not propose changes to § 600.310(k), as adopted in the 2009 NS1 Guidelines, because NMFS believes that it is valid and valuable to consider MSA 304(e) when developing recommendations to the Secretary of State for international actions that will end overfishing. MSA section 304(i) was added in the 2007 reauthorization of the MSA as part of several significant new requirements regarding international fisheries. Consideration of the principles that guide domestic rebuilding does not mean that NMFS will seek to impose those requirements on fisheries that are not subject to MSA 304(e). NMFS believes that the experience gained domestically in applying MSA section 304(e) may be valuable when addressing rebuilding of stocks that experience international fishing pressure. Thus, the guidelines merely direct Councils to consider section 304(e) and other relevant MSA provisions. NMFS notes that, for highly migratory species, MSA

section 102(c) provides for promotion of MSA provisions in international or regional fisheries organizations, when such organizations do not have a process for developing rebuilding plans.

Comment 68: One commenter suggested that § 600.305 of the proposed action include language that identifies differences in application of the guidelines to internationally managed stocks and that identifies management entities under the umbrella of the term ''Secretary'' other than Regional Fishery Management Councils. This language would help clarify how the NS guidelines are applied. They felt that this would help clarify that the Highly Migratory Species Management Division does not establish SSCs and that Regional Fishery Management Councils must establish SSCs.

Response: The statute is clear as to what provisions apply to internationally- or Secretarially-managed stocks and what provisions pertain specifically to the Councils. For example, sections 302 and 304(a)–(b) address the Council process and Secretarial review of Council-adopted FMPs and proposed regulations. Section 304(g) sets forth the requirements for Secretarial development of an FMP for Atlantic highly migratory species, and section 304(c) provides for Secretarial development of FMPs under other circumstances. Section 304(i) details actions the Secretary is required to take when the Secretary determines a fishery is overfished or approaching a condition of being overfished due to excessive international fishing pressure. NS1 and other MSA requirements apply to all FMPs whether developed by the Council or Secretary. Moreover, this final action (which is unchanged from the 2009 NS1 Guidelines) explicitly states that the Secretary is included within the term ''Council'' when the term is used in the context of section 304(c) and (g) of the Magnuson-Stevens Act (where applicable). *See* § 600.305(d)(10).

Comment 69: Many commenters expressed concern regarding the deletion of what they considered ''plain-language guidance'' without adequate rationale. They believe the ''plain-language guidance'' provides useful guidance to managers and more certainty in the complicated area of fishery management with the result being greater compliance with the MSA. Several examples were cited. Some commenters felt that deletions of the phrase ''based on the best science available'' throughout the proposed action creates ambiguity and decreases the importance of sound science in decision-making. One commenter specifically pointed to the removal of the reference to the best scientific information available in § 600.310(e)(1)(v) of the proposed action, remarking that NMFS provided no explanation for deleting the reference to this statutory requirement when specifying MSY. Another commenter did not agree with the deletion in § 600.310(b)(3) of the proposed action of the phrase ''intended to avoid overfishing and achieve sustainable fisheries'' within the description of ACLs and AMs. The commenter felt that no reason was provided for deleting this language. One commenter said ''the most glaring example'' of deleting plain-language guidance is the removal of the last sentence of § 600.310(j)(2)(ii) regarding rebuilding plan requirements for stocks that are overfished and for which overfishing is occurring. The commenter felt this language was important because it ensures compliance with the Act and clearly states the mandate in 16 U.S.C. 1854(e)(3)(A) to end overfishing ''immediately.''

Response: NMFS agrees with the commenters that providing guidance in a clear fashion is important, and eliminating unnecessary repetition and streamlining the text of the guidelines facilitates that. NMFS proposed to delete the phrase ''based on the best scientific information available'' in § 600.310(e)(1)(v) to avoid unnecessary repetition, as this is a statutory requirement under NS2. Furthermore, the point is made in § 600.305(e)(1) of the final action, which establishes that NS2 applies directly to the management measures and reference points that are needed to implement NS1. However, this final action will retain the text in § 600.310(e)(1)(v) to emphasize the importance of using the best scientific information available in calculating MSY. Although several commenters noted that the phrase ''based on the best scientific information available'' was deleted ''throughout the proposed rule,'' the other deletions occurred in sections that were either replaced in new sections or were not substantive.

The deletion in § 600.310(b)(3) of the language ''intended to avoid overfishing and achieve sustainable fisheries'' was proposed to streamline the text. NS1 requires preventing overfishing and achieving OY, so the limits and accountability measures being discussed in § 600.310(b)(3) logically pertain to avoiding overfishing and achieving sustainable fisheries. NMFS does not believe that the deletion will lead to any confusion or change the intended meaning of this section.

The deletion of the last sentence from § 600.310(j)(2)(ii) was also proposed to avoid repetition and because it was not pertinent given the purpose of this subsection. As the commenter noted, this sentence is repeating what 16 U.S.C. 1854(e)(3)(A) already commands—to end overfishing immediately and rebuild affected stocks. Furthermore, § 600.310(j)(2) addresses the ''Timing of actions'' with regards to an overfished fishery. Thus, this subsection is mainly about when the Councils must take certain actions. The last sentence that was deleted from § 600.310(j)(2)(ii) was not pertinent to the purpose of this subsection because it prescribed the actions to take to address an overfished fishery. Due to the focus of this subsection on timing and because the language to be deleted is stated clearly in the statute, this final action deletes the text from the end of § 600.310(j)(2)(ii), as proposed.

Comment 70: One commenter expressed concern that the proposed change to § 600.310(b)(1)(ii) and the proposed addition of § 600.305(c)(1) result in a circular logic when the two are read together. The commenter asked, if a determination that a stock is overfished or undergoing overfishing is relevant to the determination that a stock requires conservation and management, how can the guidelines limit the application of SDCs to only stocks that have already been determined to require conservation and management?

Response: NMFS does not agree that there is a ''circular logic'' concern with the two provisions. First, a stock may be found to be overfished or subject to overfishing based on the best scientific information available, despite no prior specification of SDCs for the stock. *See* comment 16 (addressing similar comments). In such case, if the stock was predominantly caught in Federal waters, it must be included in an FMP. *See* § 600.305(c)(1). Second, as discussed in response to comment 5, stocks that require conservation and management are not limited under § 600.305(c)(1) to stocks that are overfished, subject to overfishing, or likely to become so. Thus, a Council may determine that a stock is in need of conservation and management, even if it is not overfished or subject to overfishing, based on consideration of one or more of the factors under § 600.305(c)(3). Furthermore, while SDCs are required to monitor the status of stocks or stock complexes in an FMP (*see* § 600.310(e)(2)(ii)), Councils may monitor other stocks (*e.g.,* EC species) for a variety of reasons. Through monitoring, a non-managed stock may

be found to be overfished or subject to overfishing based on the best scientific information available, despite no prior specification of SDCs for the stock. In such case, a Council would take appropriate action per § 600.305(c).

Comment 71: One commenter felt that the guidance on how to address short-term versus long-term environmental changes should be revised given the uncertainty surrounding the cause/effect relationship between environmental factors and fish stock abundance. This commenter said that § 600.310(e)(2)(iii)(B) is too rigid in requiring a re-specification of SDC, given that the magnitude and interconnectedness of the relationship between environmental factors and fish stock abundance is so uncertain. Also, the commenter states that the addition of ''ecosystem or habitat'' to § 600.310(e)(2)(iii)(B) increases the ways that a Council could misinterpret this subsection and justify not lowering fishing mortality as long as the effects are long-term, regardless of how uncertain the cause/effect relationship. The commenter also believes that the language in § 600.310(e)(2)(iii)(B) is redundant because existing MSY guidance already suggests re-estimating SDC when conditions change or there is new information.

Another commenter appreciated the attention given to environmental and ecological considerations but believed differentiating between short-term and long-term effects will take too long given the time sensitive economic realities of a fishery. The commenter suggested defining what are ''prevailing ecological, environmental conditions'' in the definition of MSY, and how and in what specific time frame those conditions are to be accounted.

Response: Section 600.310(e)(2)(iii) is a longstanding provision of the NS1 guidelines. *See* 74 FR 3178, January 16, 2009 (discussing provision in response to comment 30 in the final 2009 NS1 Guidelines). The requirements of NS2, that conservation and management measures be based on the best scientific information available, apply to the establishment of SDC. Therefore, in cases where changing environmental conditions alter the long-term reproductive potential of a stock, the SDC must be modified. As stocks and stock complexes are routinely assessed, long-term trends are updated with current environmental, ecological, and biological data to estimate SDCs. NMFS believes § 600.310(e)(2)(iii) continues to allow for accounting for variability in both environmental changes and variation in a stock's biological reaction to the environment.

The guidelines include language requiring a high standard for changing SDC that is consistent with NMFS technical guidance (Restrepo et al. 1998). NMFS outlines the relationship of SDC to environmental and habitat change in both the short and long-term in § 600.310(e)(2)(iii) of the final action. Total mortality of fish includes many factors other than fishing mortality. Short-term environmental changes may alter the size of a stock or complex, for instance, by episodic recruitment failures, but these events are not likely to change the reproductive biology or reproductive potential of the stock over the long-term. Thus, in such cases, a Council should not change the SDC. Other environmental, ecosystem, or habitat changes, such as some changes in ocean conditions, can alter both a stock's short-term size, and alter long-term reproductive biology. To respecify the SDC, Councils should indicate how such changes impact the stock's long-term reproductive potential and must provide an analysis, based on the best scientific information available, of how the SDC were chosen and how changes to the SDC impact the stock's long-term reproductive potential. *See* § 600.310(e)(2)(ii), (iii)(B), (iv). In all cases, fishing mortality must be controlled so that overfishing is prevented.

The language in § 600.310(e)(2)(iii)(B) is not redundant because it clarifies how to treat different kinds of environmental and habitat change when considering whether to respecify the SDC. Furthermore, NMFS believes distinguishing between short-term and long-term environmental changes is needed in order to determine whether respecifying the SDC is necessary. Finally, while ''prevailing'' in the context of § 600.310(e)(1)(i)(A) indicates the existing ecological and environmental conditions of the fishery at the time MSY is specified, the guidance also clarifies that MSY should be re-estimated as required by changes in long-term environmental or ecological conditions (§ 600.310(e)(1)(v)(A) of the final action). *See* response to comment 64 for further explanation of ''prevailing . . . conditions.''

Comment 72: One commenter asked if the guidelines could recommend a multi-year definition of overfished where, if stock biomass falls below MSST, a second stock assessment is required within a set number of years, and other risk-averse management measures are required in the interim. The commenter also stated that the commitment to rebuild overfished stocks to 100 percent of B_{msy} does not make biological sense.

Response: The NS1 guidelines currently define an overfished stock as a stock whose biomass has declined below MSST. *See* § 600.310(e)(2)(i)(E). If a stock is determined to be overfished, the MSA mandates that a Council prepare an FMP or amendment to end overfishing immediately and rebuild the overfished stock to a level consistent with producing MSY. 16 U.S.C. 304(e)(3). In light of this, NMFS does not believe that a second stock assessment to reaffirm a stock's overfished status, as recommended by the commenter, would be appropriate. However, NMFS acknowledges that, due to scientific uncertainty in biomass estimates of fish stocks, occasionally a stock that is identified as overfished is later determined to have never been overfished (NRC, 2013). NMFS addresses this issue by allowing a Council to discontinue a rebuilding plan that meets specific criteria. *See* § 600.310(j)(5). Finally, the long-standing requirement to rebuild overfished stocks to 100 percent of B_{msy} is consistent with the MSA. The MSA defines ''overfished'' with reference to ''the capacity of the fishery to produce the maximum sustainable yield on a continuing basis,'' 16 U.S.C. 1802(34), and the NS1 Guidelines have long clarified that ''overfished'' relates to the biomass of a stock or stock complex. *See* § 600.310(e)(2)(i). B_{msy} is defined in the guidelines as the long-term average size of a stock measured in terms of spawning biomass or other appropriate measure of the stock's reproductive potential that would be achieved by fishing at F_{msy}. *See* § 600.310(e)(1)(i)(C). Because ''overfished'' is defined in reference to MSY, rebuilding to 100 percent of B_{msy}—which is itself defined with reference to MSY—is appropriate and consistent with the MSA.

Comment 73: A number of commenters included discussions on the possible reauthorization of the MSA. Some commenters asked that NMFS delay final action on revisions to the NS1 guidelines until after any MSA reauthorization since NMFS will have to again revise and revisit the guidelines based on potential legislative changes. A number of commenters said generally that NMFS' proposed revisions do not preclude the need to reauthorize the MSA. Commenters also suggested what they would like to see included in the MSA reauthorization and their thoughts on current proposals.

Response: While NMFS appreciates the importance of MSA reauthorization and the many valid viewpoints on what should be included, this revision to the

NS1 guidelines is separate from MSA reauthorization. The NS1 guidelines do not change the law as these guidelines do not have the force and effect of law (16 U.S.C. 1851(b)).

NMFS does not intend to delay these revisions to the NS1 guidelines because it is unclear when any Congressional revisions to the MSA will be finalized. It is important that the clarity and adjustments that this final action provides is in place as soon as possible to improve fisheries management decisions. When MSA reauthorization is concluded and if it contains changes pertaining to the provisions in these guidelines, NMFS will make any necessary revisions. Comments related to what should be included in the MSA reauthorization and thoughts on current legislative proposals before Congress are outside the scope of these NS1 guidelines.

Comment 74: NMFS received a number of comments on § 600.310(m), a provision commonly known as the ''mixed stock exception.'' NMFS did not include any proposed changes to this provision in the notice of proposed rulemaking. Most of the comments were advocating for one of two positions: (1) Removal of the mixed stock exception because it is contrary to the MSA or (2) revision of the mixed stock exception to make it a more useful management tool. Several commenters said that this exception to overfishing is contrary to the MSA mandate to prevent overfishing. Further, since the MSA does not contain any exceptions to overfishing, NMFS cannot create one in its guidance. Other commenters stated that the exception should provide a similar level of flexibility as the proposed phase-in ABC control rules and multi-year overfishing determinations. Some commenters asked for an expansion of the exception to avoid the ''choke stock'' scenario, whereby a stock in a mixed fishery with low population levels leads to closure or a reduction in catch of another healthier stock to avoid overfishing of the weaker stock. One commenter also proposed returning to NMFS' earlier definition that merely required that permitted overfishing would not cause any species to require protection under the Endangered Species Act (ESA). *See* 63 FR 24231, May 1, 1998.

Response: While NMFS has chosen in the NS1 guidelines to emphasize the importance of stock-level analyses, NS1 and other MSA provisions refer to preventing overfishing in a ''fishery'' (16 U.S.C. 1851(a)(1)) and provide for flexibility in terms of the specific mechanisms and measures used to achieve this goal. Thus, the 2009 guidelines retained the mixed stock exception—with some revisions—to provide Councils with needed flexibility for managing fisheries, while ensuring that all stocks in the fishery continue to be subject to strong conservation and management. NMFS continues to believe that the exception should be applied with a great deal of caution, taking into consideration the 2007 revisions to the MSA and other provisions in the NS1 guidelines regarding stock complexes and indicator species. NMFS also believes that Councils should work to improve selectivity of fishing gear and practices in their mixed stock fisheries so that the need to apply the mixed stock exception is reduced in the future.

For the above reasons, NMFS does not believe the exception should be expanded. In addition, NMFS does not agree that flexibility similar to the approach taken for phase-in ABC control rules and multi-year overfishing determinations is appropriate. Those provisions address a different issue than the mixed stock exception, specifically, data limitation issues that make it difficult to set overfishing thresholds and determine with certainty if overfishing has occurred.

As discussed in the preamble to the final 2009 guidelines, NMFS believes that ESA listing is an inappropriate threshold for application of the mixed stock exception and that stocks should be managed so that they retain their potential to achieve MSY. *See* 80 FR 3201, January 16, 2009. Accordingly, the guidelines as refined in 2009 and retained in this final action include a higher threshold that limits F to a level that will not lead to the stock becoming overfished in the long term. In addition, if any stock, including those under the mixed stock exception, were to drop below its MSST, it would be subject to the rebuilding requirements of the MSA, which require that the Council take action to ''end overfishing immediately in the fishery'' and ''rebuild affected stocks of fish.'' 16 U.S.C. 1854(e)(3)(A).

Comment 75: One commenter suggested that EBFM be used to distinguish between ''low-value'' fish species and ''high-value'' fish species in order to avoid having to apply the same conservation and management standards to both types of species. The commenter stated that OY is more likely to be attained if the same conservation and management standards do not apply to both types of species.

Response: Once stocks are determined to require conservation and management, and thus preparation of an FMP, the measures developed for those stocks under the FMP must comply with applicable MSA requirements and standards. Neither the MSA nor the NS1 guidelines sets forth different conservation and management standards for low- or high-value fish. 16 U.S.C. 1802(5) (defining conservation and management broadly). It would be up to the appropriate Council to determine what the conservation and management needs and objectives are for the particular stocks and to develop measures accordingly, consistent with MSA requirements including NS1's mandate to prevent overfishing while achieving OY on a continuing basis. 16 U.S.C. 1851(a)(1). NMFS notes that § 600.305(c) of the final action does include consideration of a stock's economic and ecological value to the fishery (as discussed in comments 5 & 7).

Comment 76: Many commenters asked for clarity regarding the relationship of NS1 to the other national standards. The proposed changes to the NS1 guidelines remove the language from § 600.310(l) that the other national standards ''do not alter the requirement to prevent overfishing and rebuild overfished stocks.'' Commenters felt that this deletion creates ambiguity about the primacy of conservation and cited to *NRDC* v. *Daley,* 209 F.3d 747 (D.C. Cir. 2000) and *NRDC* v. *NMFS,* 421 F.3d 872 (9th Cir. 2005) as supporting the precedence of NS1. Several commenters included lengthy proposed language for this subsection that emphasizes that conservation supersedes all other requirements in the national standards. Some commenters also felt that the addition, in several sections, of a reference to ''trade-offs'' could undermine the primacy of conservation.

A number of commenters also suggested moving § 600.310(l) to § 600.305 (General section), as that would introduce the national standards at the outset rather than at the end of the NS1 section. Some commenters also suggested modifying subsection § 600.310(l) to state that SSCs ''shall'' rather than ''should'' advise their Councils regarding the best scientific information available for fishery management decisions. Finally, several commenters also recommended a change to § 600.305(b) to clarify that fishery management plans resolve conflicting objectives by giving NS1 priority.

Response: NMFS agrees with moving the text at § 600.310(l) to the General Section, and has added the text to the new § 600.305(e) in the final action. The ''but do not alter the requirement to prevent overfishing and rebuild overfished stocks.'' language was deleted because it is already clear from

the MSA, and case law interpreting its requirements, that the other national standards cannot be cited as a reason for failing to prevent overfishing or rebuild stocks. However, NMFS is re-inserting clarifying text to emphasize that National Standard 1 addresses preventing overfishing and achieving optimum yield.

NMFS disagrees with the need to eliminate references to ''trade-offs.'' The references to ''trade-offs'' properly reflects the delicate balance that Councils must perform in deciding what fishery management practices to implement so that there is compliance with all ten national standards and other MSA requirements. When considering the different means by which the conservation goals of the MSA can be achieved, Councils can consider the potential trade-offs between the national standards.

NMFS does not agree with the proposed change from ''should'' to ''shall'' with respect to SSC advice to Councils. The MSA specifies at 16 U.S.C. 1852(g)(1)(B) the scientific advice that the SSC ''shall'' provide to the Councils, and best scientific information available is not explicitly referenced there. *See* § 600.305(d)(2) (explaining that ''shall'' is used in the NS guidelines when quoting statutory language directly). There are diverse processes in place throughout the various regions, Councils, and SSCs for determining the best scientific information available, and the NS2 guidelines are the appropriate place to address specific roles of the SSC, as was noted in the response to comment 41 in the final 2009 guidelines. *See* 74 FR 3191, January 16, 2009. NMFS notes that the NS2 Guidelines provide that the SSC is required to base its scientific advice and recommendations on what the SSC determines, according to the guidelines in § 600.315(a), is the best scientific information available. *See* § 600.315(c)(1).

Comment 77: Several commenters asked the agency to revisit the guidelines' discussion of the MSA's ACL international exception. Some commented that the exception only pertains to the 2010/2011 timing requirement for establishing ACL/AM mechanisms. Several commenters recommended that the interpretation of what qualifies as an international agreement be broadened. One commenter suggested broadening the definition to include instances: (1) Where there is an informal agreement in a given fishery; and (2) where the fishing activities of another country(s) affect the ability of U.S. fishermen to achieve rebuilding and conservation, such as in the Atlantic mackerel fishery. One commenter asked for an express statement in § 600.310(h)(1)(ii) clarifying that § 600.310(f) and § 600.310(g) do not apply to stocks and stock complexes to which the international exception applies. Others said that internationally managed species are not excluded from the MSA's ACL requirement and thus the interpretation of the international exception at § 600.310(h)(2)(ii) is unreasonable and outside NMFS' authority.

Response: This final action does not change the international exception as adopted in the 2009 NS1 Guidelines. The response to comment 78 in the final 2009 guidelines (*see* 74 FR 3198–99, January 16, 2009) discussed the exception at length, and the reasoning behind the agency's response is still valid and reasonable. As explained in that response, the text of the exception is vague, thus NMFS considered and took public comment on different possible interpretations, including specifically looking at the interpretation advanced by some commenters that the exception only pertains to the 2010/2011 timing requirements. Having considered the text of the exception and other relevant MSA provisions, NMFS decided in 2009 not to interpret the exception as applying only to the timing of ACL/AM requirements. Based on public comments received here, NMFS has identified no new considerations or issues that warrant re-examination of the approach it adopted in 2009.

NMFS also addressed broadening the definition of ''international agreement'' in its response to comment 78 in the final 2009 guidelines. *See* 74 FR 3199, January 16, 2009. When considering what qualifies as an ''international agreement,'' for the purpose of Public Law 109–479 104(b), NMFS considers if the arrangement or understanding qualifies as an ''international agreement'' as understood under MSA section 3(24) (defining ''international fishery agreement'') and as generally understood in international negotiations. The Case-Zablocki Act, 1 U.S.C. 112b, and its implementing regulations also provide helpful guidance on interpreting the term ''international agreement.'' NMFS believes applying the exception to all fisheries where there is any kind of informal agreement and where the fishing activities of another country affect in any way the ability of U.S. fishermen to achieve rebuilding and conservation would be beyond what Congress prescribed.

NMFS believes there is no need to add language to § 600.310(h)(1)(ii) clarifying that § 600.310(f) and § 600.310(g) do not apply to stocks and stock complexes to which the international exception applies because § 600.310(h)(2)(ii) is clear that stocks or stock complexes subject to an international agreement are exempt from ACL and AM requirements. ACLs are detailed in § 600.310(f) and AMs are detailed in § 600.310(g). The title of § 600.310(h)(2) is ''Exceptions from ACL and AM requirements'' and includes ''International fishery agreements'' as one of the exceptions at § 600.310(h)(2)(ii).

Comment 78: A number of commenters noted the use of the word ''practicable'' in several parts of the proposed guidelines. Some simply wanted clarification on the word's intended definition. Others felt that the use of the word weakens statutory requirements. Another commenter felt that identifying the degree of uncertainty ''when practicable'' instead of ''when possible'' would reduce the importance of the requirement to account for uncertainty. Other commenters felt ''practicable'' was proper since it provides greater flexibility in dealing with the difficult weighing of options that is inherent in fisheries management decisions.

Response: NMFS believes that use of ''practicable'' in the NS1 guidelines is consistent with the MSA, and is intended to be understood based on the basic dictionary definition of that term. Black's Law Dictionary, for one, defines ''practicable'' as ''(of a thing) reasonably capable of being accomplished; feasible in a particular situation.'' *See* Black's Law Dictionary (10th ed. 2014). NMFS notes that ''practicable'' is used several times in the MSA, including in sections 302(b)(2)(B)–(C), 303(a)(7) & (11)–(13), and 304(g), and may have a different definition or interpretation specific to those provisions. NMFS does not believe that use of the term ''practicable'' in the NS1 guidelines weakens any statutory requirements. Of the six instances where NMFS uses ''practicable'' in the NS1 guidelines, none involve mandatory duties under the MSA.

Comment 79: One commenter felt that the requirement to describe data methods was an unnecessary burden. This requirement is in both § 600.310(c) and § 600.310(i) of the current regulations and remains basically unchanged in the proposed revisions. The commenter said that the data collection methods are under the control of NMFS rather than the Councils, some of this information is reported via the standardized bycatch reporting methodology, and the statute

does not list describing data collection methods as something that needs to be in the FMP.

Response: NMFS believes, as it also stated in the final 2009 NS1 Guidelines, that detailing the sources of data for the fishery and how they are used to account for all sources of fishing mortality in the annual catch limit system will be beneficial. *See* 74 FR 3199, January 16, 2009. These sections, which are essentially unchanged in this revision, only ask that the Councils provide documentation of the fisheries data and data collection methods they are already utilizing in either their FMPs or associated public documents such as Stock Assessment and Fishery Evaluation (SAFE) Reports.

Comment 80: One commenter suggested that in proposed § 600.310(f)(4)(ii), NMFS retain the language clarifying that sector-ACLs can be used for set-asides for research and bycatch. The commenter asserted that these set-asides are important management tools to account for all sources of mortality in the catch-setting process.

Response: NMFS believes the commenter is referring to the deletion of the language in § 600.310(h)(1)(ii) that refers to set-asides for research or bycatch as possible examples of sector-ACLs. The proposed § 600.310(f)(4)(ii) left unchanged § 600.310(f)(5)(ii) of the current regulations except for adding a sentence stating that if sector-ACLs are used, then sector-AMs should also be specified. NMFS does not believe that § 600.310(f)(4)(ii) limits the Council's ability to use a sector-ACL for set-asides for research and bycatch. While sector-ACLs can be used to account for set-asides for research and bycatch, NMFS does not believe that it is necessary to offer prescriptive guidance to Councils as to how best to account for that mortality.

Comment 81: One commenter requested that NMFS explore an alternative management strategy under which a ''sweet spot'' for catch is identified based on a long-term evaluation of stock biomass performance relative to catch, and annual catch limits could be exceeded if they fell below the ''sweet spot'' catch level.

Response: NMFS does not believe the proposed alternative management strategy would meet the requirements of the MSA, which requires the management of stocks based on annual catch reference points that are designed to prevent overfishing. The NS1 guidelines define overfishing in terms of fishing mortality and/or total catch, and Councils must specify catch limits that prevent overfishing on an annual basis. Thus, one ''sweet spot'' level of catch that is not specified on an annual basis, but is instead based on a historical relationship between the stock's biomass and total catch, would not be considered an appropriate reference point that can be used to determine whether overfishing is being prevented.

Comment 82: One commenter stated that the definition for target stocks given in § 600.305(d)(11) is not internally consistent within the guidelines because economic discards do not provide any sale or personal use benefits and thus, a fisherman would not target them. Therefore, the commenter suggested that the guidelines define target stocks as stocks or stock complexes that fisheries seek to catch for sale or personal use, or are 'economic discards' as defined under Magnuson-Stevens Act section 3(9).

Response: NMFS believes the definition of target stocks is consistent with both the MSA and within the NS1 guidelines. Economic discards are defined within the MSA as fish which are the target of a fishery, but which are not retained because they are of an undesirable size, sex, or quality, or for other economic reasons. 16 U.S.C. 3(9). Thus, economic discards are, by definition, fish stocks that are targeted by a fishery and are properly characterized within the current definition of target stocks in the NS1 guidelines.

Comment 83: One commenter requested additional clarification regarding the use of § 600.310(m) in cases where a stock is found to be overfished after overfishing is allowed under this provision.

Response: As explained in the final 2009 NS1 Guidelines, a rebuilding plan is required for any stock (including those under the mixed stock exception) that is determined to be overfished. The MSA requires that rebuilding plans end overfishing immediately and rebuild the affected stock to B_{msy}. *See* 74 FR 3201, January 16, 2009.

Comment 84: Several commenters expressed concern that the proposed changes to the NS guidelines would require, or at least strongly encourage, amendment to FMPs. One commenter requested that the agency revise the guidelines to explicitly state that modifications to FMPs based on the final action are not required.

Response: As emphasized in the preamble to the proposed rule, this action to revise the NS guidelines will not establish any new, specific requirements that would require Councils to revise their FMPs in order to comply with the MSA. The purpose of the final action remains the same as the proposed action—to facilitate compliance with the requirements of the MSA. *See* 80 FR 2786, January 20, 2015. The final action facilitates compliance with the MSA, but does not require modifications to FMPs. NMFS does not believe it is necessary to further emphasize this point within the NS guidelines themselves.

Comment 85: Two commenters requested that NMFS undergo an additional public engagement process prior to finalizing the proposed rule.

Response: NMFS does not believe that a further public comment or engagement process is needed to finalize this action. As detailed in Section I of the preamble of this final action, there was a robust opportunity for public engagement during the development of this rule, which included opportunities for public comment on an ANPR and proposed rule and opportunities for engagement at Council and other meetings. *See* also 80 FR 2786, January 15, 2015. NMFS has carefully considered the public comments received during the development of this final action, making changes as appropriate based on recommendations from commenters.

VI. Changes From Proposed Action (80 FR 2786, January 20, 2015)

In the revisions to § 600.305, paragraph (a)(3) was revised to clarify the approval process for FMP and FMP amendments. The last sentence of the paragraph was removed and replaced with a sentence clarifying that FMPs that are not formulated according to the guidelines may not be approved by the Secretary if the FMP or FMP amendment is inconsistent with the MSA or other applicable law (16 U.S.C. 1854(a)(3)).

Section 600.305(b)(2) was revised to clarify the discussion of fishery management objectives.

Section 600.305(c)(1) was revised to reference the MSA definition of ''conservation and management,'' and relevant cross-references. The sentence was also revised to clarify that based on this definition, and other relevant provisions of the Magnuson-Stevens Act, a Council should consider the non-exhaustive list of factors when deciding whether additional stocks require conservation and management.

Paragraph (c)(1)(iii) was revised for clarity by replacing ''stocks'' with ''stock.'' Paragraph (c)(1)(vi) was also revised for clarity by replacing ''and'' with ''or.'' Paragraph (c)(1)(x) was revised by removing the phrase ''could be or'' in order to clarify the conditions in which Councils should consider existing management regimes when

determining whether stocks require conservation and management. The phrase ''policies and standards'' was also removed from paragraph (c)(1)(x) and the paragraph was revised to clarify that factor (x) allows the following considerations to be considered when determining whether a stock requires conservation and management: The extent to which the fishery is already adequately managed by states, by state/Federal programs, or by Federal regulations pursuant to other FMPs or international commissions, or by industry-self regulation, consistent with the requirements of the Magnuson-Stevens Act and other applicable law.

Paragraph (c)(2) was reorganized into three paragraphs to break out and clarify considerations for adding a stock to an FMP versus removing a stock from an FMP. Paragraph (c)(2) retains the last sentence of proposed paragraph (c)(2) with the addition of a cross-reference and the text ''and should'' after the word ''can.''

Paragraph (c)(3) retains some text from the proposed paragraph (c)(2) and gives further explanation on what the proposed paragraph meant by no single factor being dispositive or required. New paragraph (c)(3) explains that, when considering adding a stock to an FMP, no single factor is dispositive or required. One or more of the above factors, and any additional considerations that may be relevant to the particular stock, may provide the basis for determining that a stock requires conservation and management. Based on the factor in paragraph (c)(1)(iii) of this section, if the amount and/or type of catch that occurs in Federal waters is a significant contributing factor to the stock's status, such information would weigh heavily in favor of adding a stock to an FMP. However, Councils should consider factor (c)(1)(x) before deciding to include a stock in an FMP. In many circumstances, adequate management of a fishery by states, state/Federal programs, or another Federal FMP would weigh heavily against a Federal FMP action.

Paragraph (c)(4) retains the bulk of the text from proposed paragraph (c)(2), except for sentences broken out into paragraphs (c)(2)–(3) as described above. For clarity, paragraph (c)(4) revises the phrase ''keeping an existing stock within an FMP'' to ''removing a stock from, or continuing to include a stock in, an FMP.'' The second sentence in paragraph (c)(4) was revised to provide further explanation on how to consider stocks whose status is impacted by catch in Federal waters. In addition, the first phrase in the 6th sentence of proposed paragraph (c)(2) was simplified to ''Finally,'' in the 6th sentence of paragraph (c)(4).

Paragraph (c)(5) retains the bulk of the text from proposed paragraph (c)(3). However, the 1st sentence was edited to clarify the circumstances under which a Council may designate stocks as EC species. The phrase ''or for other reasons'' at the end of the last sentence of the paragraph is also replaced with ''and/or to address other ecosystems'' to improve clarity of the paragraph. Other minor clarifying revisions were made to the citations within paragraph (c)(5).

Paragraph (c)(7) retains the text from proposed paragraph (c)(5), except for two instances where ''a FMP'' was corrected to ''an FMP.''

Paragraph (d)(3) was revised to clarify the definition of the term ''SOPP'' and correct ''a FMP'' to ''an FMP.'' Paragraph (d)(11) was revised to clarify that target stocks may include, but are not limited to, economic and regulatory discards. Furthermore, economic discards are, by definition, part of a target stock. On the other hand, regulatory discards may or may not be part of a target stock, depending on the stock in question. Paragraphs (d)(12–13) were added to § 600.305 to further clarify how a Council may refer to certain species. Paragraph (d)(12) explains that 'Non-target species' and 'non-target stocks' are fish caught incidentally during the pursuit of target stocks in a fishery. Non-target stocks may require conservation and management and, if so, must be included in a FMP and be identified at the stock level. If non-target species are not in need of conservation and management, they may be identified in an FMP as ecosystem component species. Paragraph (d)(13) explains that Ecosystem Component Species (*see* 50 CFR 600.305(c)(3) and 600.310(d)(1)) are stocks that a Council or the Secretary has determined do not require conservation and management, but desire to list in a FMP in order to achieve ecosystem management objectives.

Section 600.310(l) of the proposed rule was moved to the ''General'' section and designated as § 600.305(e) because the discussion of the relationship of the National Standards to each other is more appropriately discussed in the General section of the NS guidelines. The beginning of the paragraph further clarifies the relationship between NS1 and the other National Standards by reiterating that National Standard 1 addresses preventing overfishing and achieving optimum yield. Other minor clarifying revisions were made to the citations within paragraphs § 600.305(e)(1)-(2). New § 600.310(l)(4) was revised to add the phrase ''and other MSA provisions'' at the end of first sentence to clarify the scope of National Standard 8. Section 600.310(m) was re-designated as paragraph (1).

In the revisions to § 600.310, paragraph (b)(1)(ii) was revised to replace ''that require, or are in need of, conservation and management'' with ''in an FMP'' to simplify the text. To clarify the relationship between the SSC and the peer review process, the 3rd sentence of paragraph (b)(2)(v)(C) now explains that, for Regional Fishery Management Councils, the peer review process is not a substitute for the SSC and both the SSC and peer review process should work in conjunction with each other. Paragraph (b)(4) was also revised to remove ''or overfished'' to restore the original language used in this sentence, prior to the introduction of the proposed depleted definition.

Paragraph (d)(1) was revised to replace ''and'' with ''or'' after the term ''other reference points'' in the last sentence for clarification purposes. Other minor updates were made to the citations within paragraph (d)(1).

Paragraph (e)(1)(iv) was revised to remove the term ''common'' text from the description of aggregate MSY. This text is unnecessary and may cause confusion.

The following phrase was added after ''annually,'' in paragraph (e)(1)(v)(A): ''but it must be based on the best scientific information available (*see* § 600.315)'' for clarification.

To clarify that MFMT and all reference points that stem from it are required to be specified on an annual basis, the words ''on an annual basis,'' were restored to the first sentence of paragraph (e)(2)(i)(C).

Paragraph (e)(2)(ii)(A) was revised to clarify the relationship between paragraphs (e)(2)(ii)(A)*(1)-(3)* and (e)(2)(ii). For clarity and consistency, the terms ''describe'' and ''used'' in the first and second sentences were revised as ''specify'' and ''specified.'' Subparagraphs (e)(2)(ii)(A)(*1*) and (*2*) were revised to delete the phrase ''or exceeding a multi-year catch reference point'' to prevent any confusion between a multi-year catch reference point and the multi-year approach in subparagraph (e)(2)(ii)(A)(*3*).

Subparagraph (e)(2)(ii)(A)(*3*) was revised to address confusion reflected in public comments regarding when a multi-year approach to determine overfishing status can be used and whether the provision may impact reference points for future catch levels. Subparagraph (e)(2)(ii)(A)(*3*) clarifies that subparagraphs (e)(2)(ii)(A) *(1)* and

(2) establish methods to determine overfishing status based on a period of 1 year. As stated in paragraph (e)(2)(ii)(A), a Council should specify, within the FMP, which of these methods will be used to determine overfishing status. However, in certain circumstances, a Council may utilize a multi-year approach to determine overfishing status based on a period of no more than 3 years. The Council should identify in its FMP or FMP amendment, the circumstances when a multi-year approach is appropriate and will be used. Such circumstances may include situations where there is high uncertainty in the estimate of F in the most recent year, cases where stock abundance fluctuations are high and assessments are not timely enough to forecast such changes, or other circumstances where the most recent catch or F data does not reflect the overall status of the stock. The multi-year approach to determine overfishing status may not be used to specify future annual catch limits at levels that do not prevent overfishing. In addition, the subparagraph deletes text that refers to a comprehensive analysis based on the best scientific information available.

Paragraph (e)(2)(i)(F), which addressed ''depleted'' stocks, was deleted in response to public comment and given the need for further consideration of this issue. A minor grammatical edit was also made in the 6th sentence of paragraph (e)(2)(ii). Finally, the word ''may'' was added after ''Long-term environmental changes'' in paragraph (e)(2)(iii) to clarify the nature of the expected relationship between long-term environmental changes and a stock or stock complex.

Paragraph (e)(2)(ii)(B) was revised to remove the phrase ''social and/or economic impacts on the fishery,'' from the list of factors that could inform MSST to clarify that MSST is a biological reference point and is based on the level of biomass below which the capacity of the stock to produce MSY on a continuing basis is jeopardized.

Paragraph (e)(3)(ii) was revised by removing the last sentence and explaining that if conservation and management measures cannot meet the dual requirements of NS1 (preventing overfishing, while achieving, on a continuing basis, OY), Councils should either modify the measures or reexamine their OY specifications to ensure that the dual NS1 requirements can be met. To clarify how summaries of OY specifications should be included in FMPs, paragraph (e)(3)(iii) was revised by removing the words: ''which documents how the OY will produce the greatest benefits to the nation and prevent overfishing'' from the 1st sentence and combining the 2nd and 3rd sentences to explain that the OY assessment should include: a summary of information utilized in making such specification, an explanation of how the OY specification will produce the greatest benefits to the nation and prevent overfishing and rebuild overfished stocks; and a consideration of the economic, social, and ecological factors relevant to the management of a particular stock, stock complex, or fishery. Finally, paragraph (e)(3)(iv)(D) was revised to clarify the relationship between internationally-managed stocks and specifying OY.

Paragraph (f)(2)(i) was revised to clarify the level of analysis required when establishing ABC control rules by explaining that the Council must provide a comprehensive analysis and articulate within their FMP when the control rule can and cannot be used and how the control rule prevents overfishing.

Paragraph (f)(2)(i) was revised to further explain how to properly establish ABC control rules. The 1st sentence of paragraph (f)(2)(i) explains that Councils must establish an ABC control rule that accounts for scientific uncertainty in the OFL and for the Council's risk policy, and that is based on a comprehensive analysis that shows how the control rule prevents overfishing. Paragraph (f)(2)(ii) was revised by removing ''directed'' from the phrase: ''and may establish a stock abundance level below which directed fishing would not be allowed.'' Finally, the words ''in which case,'' ''provide a comprehensive analysis,'' and ''the control rule'' were removed from the last sentence of the paragraph so the last two sentences of the paragraph.

Paragraph (f)(2)(ii)(A) was revised to clarify that phase-in ABC control rules must be designed to prevent overfishing every year. In addition, the end of the paragraph explains that the Councils should evaluate the appropriateness of phase-in provisions for stocks that are overfished and/or rebuilding, as the overriding goal for such stocks is to rebuild them in as short a time as possible.

Paragraph (f)(2)(ii)(B) was revised to clarify the proper use of carry-over ABC control rules. To explain the meaning of the term ''ACL underage,'' the following words were added after ''unused portion of'' in the first sentence of paragraph (f)(2)(ii)(B): ''an ACL (*i.e.,* ACL underage) . . .'' The word ''must'' was also added before ''consider scientific uncertainty'' in the second sentence of the paragraph. To clarify that revising the ABC may not be necessary if the ACL was set below the ABC in the first place, the last sentence of the paragraph was removed and the third sentence of the paragraph now explains that carry-over provisions could also allow an ACL to be adjusted upwards as long as the revised ACL does not exceed the specified ABC. The end of the paragraph further clarifies the proper use of carry-over ABC control rules by explaining that, when considering whether to use a carry-over provision, Councils should consider the likely reason for the ACL underage. ACL underages that result from management uncertainty (*i.e.,* premature fishery closure) may be appropriate circumstances for considering a carry-over provision. ACL underages that occur as a result of poor or unknown stock status may not be appropriate to consider in a carry-over provision. In addition, the Councils should evaluate the appropriateness of carry-over provisions for stocks that are overfished and/or rebuilding, as the overriding goal for such stocks is to rebuild them in as short a time as possible.

Paragraph (f)(3) was revised to clarify the meaning of the term ''implementation of the ABC control rule.'' The second sentence of the paragraph explains that Councils and their SSCs should develop a process by which the SSC can access the best scientific information available when implementing the ABC control rule (*i.e.,* specifying the ABC). Paragraph (f)(3) was also revised to clarify that, in accordance with MSA section 302(g)(1)(B), specification of the ABC is the responsibility of the SSC.

To clarify that Councils may use varying terms to describe ACTs, the words ''or functional equivalent,'' were added to the third sentence of paragraph (f)(4)(i) that explains that, if an annual catch target (ACT), or functional equivalent, is not used, management uncertainty should be accounted for in the ACL. The words ''or the functional equivalent,'' were also added to paragraph (g)(4) so it reads: ''ACTs, or the functional equivalent, . . .'' for consistency.

Paragraph (f)(4)(iv) was revised to clarify how ABC is set in relation to OY. The words ''and is designed to prevent overfishing'' were removed from the 2nd sentence of paragraph (f)(4)(iv). Minor related revisions were also made to the 4th and 5th sentences of paragraph (f)(4(iv).

Minor revisions were made to the 5th sentence in paragraph (g)(3) to make the language consistent with the MSA.

A minor correction was made to paragraph (h)(1)(i) by replacing ''has''

with ''have'' after the phrase ''for species that.'' Minor updates were made to the citations within paragraphs (h)(1)(i)–(ii). In paragraph (h)(2), clarifications regarding the spawning potential of Pacific salmon were addressed by revising the example within the second sentence to ''*e.g.,* Pacific salmon, where the spawning potential for a stock is spread over a multi-year period.'' The word ''to'' was also added before the words ''manage to reference points based on MSY or MSY proxies.''

Paragraph (i)(2) was revised to replace ''*i.e.,''* with ''*e.g.,''* for clarification purposes.

Paragraph (j)(1) was revised to clarify that, consistent with MSA section 304(e), the Secretary will immediately notify in writing a Regional Fishery Management Council whenever the Secretary determines that one of the circumstances listed in subparagraphs (j)(1)(i)–(iv) is occurring.

Paragraph (j)(3)(i)(B)(*3*) was revised to provide additional guidance on how to determine which calculation method to use when calculating $T_{max.}$ The paragraph now explains that, in situations where T_{min} exceeds 10 years, T_{max} establishes a maximum time for rebuilding that is linked to the biology of the stock. When selecting a method for determining T_{max}, a Council, in consultation with its SSC, should consider the relevant biological data and scientific uncertainty of that data, and must provide a rationale for its decision based on the best scientific information available. One of the methods listed in subparagraphs (j)(3)(i)(B)(2)(*ii*) and (*iii*) may be appropriate, for example, if given data availability and the life history characteristics of the stock, there is high uncertainty in the estimate of generation time, or if generation time does not accurately reflect the productivity of the stock.

Minor edits were made to the 1st sentence of paragraph (j)(3)(i)(C) to align the paragraph more closely with the MSA.

Paragraph (j)(3)(iv) was revised so that the word ''are'' was replaced with ''is'' before ''exceeded'' and ''and'' was replaced with ''nor'' before ''caused the overage'' in the 3rd sentence of paragraph (j)(3)(iv). In addition, paragraph (j)(3)(iv) now explains that, for Secretarially-managed fisheries, the Secretary would take immediate action necessary to achieve adequate progress toward rebuilding and ending overfishing.

Paragraph (j)(3)(vi) was revised to explain that the one of the circumstances under which the fishing mortality rate for a stock or stock complex that has not rebuilt by T_{max} can change is when the fishing mortality rate is changed as a result of the Secretary finding that adequate progress is not being made.

Paragraphs (j)(5)(i)–(ii) were removed. Paragraph (j)(5) clarifies the criteria for discontinuing rebuilding plans by explaining that a Council may discontinue a rebuilding plan for a stock or stock complex before it reaches B_{msy} if the Secretary determines that the stock was not overfished in the year that the overfished determination (*see* MSA section 304(e)(3)) was based on and has never been overfished in any subsequent year, including the current year.

Paragraph (j)(6) was deleted because the definition for depleted stocks was removed from the final action.

Paragraph (l)(2) was revised to replace ''characteristic'' with ''characteristics'' for clarification purposes.

In the revisions to § 600.320, the last sentences of paragraphs (b)–(d) were removed to clarify, streamline, and reduce duplication between § 600.320 and § 600.305(c).

VII. References Cited

A complete list of all the references cited in this final action is available upon request from Stephanie Hunt (*see* **FOR FURTHER INFORMATION CONTACT**).

VIII. Classification

Pursuant to section 301(b) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the Magnuson-Stevens Act and other applicable law.

This rule has been determined to be significant for purposes of Executive Order 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

The provision of the Administration Procedure Act (5 U.S.C. 553) requiring a delay in effective date is inapplicable because this rule is a statement of policy. 5 U.S.C. 553(d)(2).

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration during the proposed rule stage that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed action . *See* 80 FR 2799, January 20, 2015). In summary, this action makes technical changes to the general section of the National Standard Guidelines and the guidelines for National Standards 1, 3, and 7 and does not require the Councils or the Secretary to make changes to their FMPs. Furthermore, because the guidelines do not directly regulate any entities, the proposed changes will not directly alter the behavior of any entities operating in federally managed fisheries, and thus no direct economic effects on small entities (as described within the proposed action) are expected to result from this action. Therefore, no small entities will be directly affected by this action and a reduction in profits for a substantial number of small entities is not expected. *See* 80 FR 2800, January 20, 2015. No public comments were received regarding this certification.

NMFS notes that on January 26, 2016, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries, effective February 26, 2016 (81 FR 4469). The rule increased the size standard for Seafood Product Preparation and Packaging (NAICS code 311710) from 500 to 750 employees. Furthermore, on December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only. *See* 80 FR 81194, December 29, 2015. The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *See* 80 FR 81194, December 29, 2015. Pursuant to the Regulatory Flexibility Act, and prior to July 1, 2016, a certification was developed for this regulatory action using SBA's size standards prior to February 26, 2016. NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standards discussed above and has determined that the new size standards do not affect analyses prepared for this regulatory action. Further, because the guidelines do not directly regulate any entities, any new size standard will not directly alter the behavior of any entities operating in federally managed fisheries, and thus no direct economic effects on commercial harvesting businesses, marinas, seafood dealers/wholesalers, or seafood processors are expected to result from this action. Thus, no small entities will be directly affected by this action and a

reduction in profits for a substantial number of small entities is not expected.

Therefore, the Chief Counsel for Regulation of the Department of Commerce hereby reaffirms that the rule will not have a significant economic impact on a substantial number of small entities. Thus, NMFS has determined that the certification established during the proposed rule stage is still appropriate for this final action and a final regulatory flexibility analysis has not been prepared for this final action.

List of Subjects in 50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

Dated: October 5, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 600 is amended as follows:

PART 600—MAGNUSON–STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and16 U.S.C. 1801 *et seq.*

■ 2. Section 600.305 is revised to read as follows:

§ 600.305 General.

(a) *Purpose.* (1) This subpart establishes guidelines, based on the national standards, to assist in the development and review of FMPs, amendments, and regulations prepared by the Councils and the Secretary.

(2) In developing FMPs, the Councils have the initial authority to ascertain factual circumstances, to establish management objectives, and to propose management measures that will achieve the objectives. The Secretary will determine whether the proposed management objectives and measures are consistent with the national standards, other provisions of the Magnuson-Stevens Act (MSA), and other applicable law. The Secretary has an obligation under section 301(b) of the MSA to inform the Councils of the Secretary's interpretation of the national standards so that they will have an understanding of the basis on which FMPs will be reviewed.

(3) The national standards are statutory principles that must be followed in any FMP. The guidelines summarize Secretarial interpretations that have been, and will be, applied under these principles. The guidelines are intended as aids to decision-making; FMPs formulated according to the guidelines will have a better chance for expeditious Secretarial review, approval, and implementation. FMPs that are not formulated according to the guidelines may not be approved by the Secretary if the FMP or FMP amendment is inconsistent with the MSA or other applicable law (16 U.S.C. 1854(a)(3)).

(b) *Fishery management objectives.* (1) Each FMP, whether prepared by a Council or by the Secretary, should identify what the FMP is designed to accomplish (*i.e.,* the management objectives to be attained in regulating the fishery under consideration). In establishing objectives, Councils balance biological constraints with human needs, reconcile present and future costs and benefits, and integrate the diversity of public and private interests. If objectives are in conflict, priorities should be established among them.

(2) To reflect the changing needs of the fishery over time, Councils should reassess the FMP's management objectives on a regular basis.

(3) How objectives are defined is important to the management process. Objectives should address the problems of a particular fishery. The objectives should be clearly stated, practicably attainable, framed in terms of definable events and measurable benefits, and based upon a comprehensive rather than a fragmentary approach to the problems addressed. An FMP should make a clear distinction between objectives and the management measures chosen to achieve them. The objectives of each FMP provide the context within which the Secretary will judge the consistency of an FMP's conservation and management measures with the national standards.

(c) *Stocks that require conservation and management.* (1) Magnuson-Stevens Act section 302(h)(1) requires a Council to prepare an FMP for each fishery under its authority that requires (or in other words, is in need of) conservation and management. 16 U.S.C. 1852(h)(1). Not every fishery requires Federal management. Any stocks that are predominately caught in Federal waters and are overfished or subject to overfishing, or likely to become overfished or subject to overfishing, are considered to require conservation and management. Beyond such stocks, Councils may determine that additional stocks require ''conservation and management.'' (See Magnuson-Stevens Act definition at 16 U.S.C. 1802(5)). Based on this definition of conservation and management, and other relevant provisions of the Magnuson-Stevens Act, a Council should consider the following non-exhaustive list of factors when deciding whether additional stocks require conservation and management:

(i) The stock is an important component of the marine environment.

(ii) The stock is caught by the fishery.

(iii) Whether an FMP can improve or maintain the condition of the stock.

(iv) The stock is a target of a fishery.

(v) The stock is important to commercial, recreational, or subsistence users.

(vi) The fishery is important to the Nation or to the regional economy.

(vii) The need to resolve competing interests and conflicts among user groups and whether an FMP can further that resolution.

(viii) The economic condition of a fishery and whether an FMP can produce more efficient utilization.

(ix) The needs of a developing fishery, and whether an FMP can foster orderly growth.

(x) The extent to which the fishery is already adequately managed by states, by state/Federal programs, or by Federal regulations pursuant to other FMPs or international commissions, or by industry self-regulation, consistent with the requirements of the Magnuson-Stevens Act and other applicable law.

(2) In evaluating factors in paragraphs (c)(1)(i) through (x) of this section, a Council should consider the specific circumstances of a fishery, based on the best scientific information available, to determine whether there are biological, economic, social and/or operational concerns that can and should be addressed by Federal management.

(3) When considering adding a stock to an FMP, no single factor is dispositive or required. One or more of the above factors, and any additional considerations that may be relevant to the particular stock, may provide the basis for determining that a stock requires conservation and management. Based on the factor in paragraph (c)(1)(iii) of this section, if the amount and/or type of catch that occurs in Federal waters is a significant contributing factor to the stock's status, such information would weigh heavily in favor of adding a stock to an FMP. However, Councils should consider the factor in paragraph (c)(1)(x) of this section before deciding to include a stock in an FMP. In many circumstances, adequate management of a fishery by states, state/Federal

programs, or another Federal FMP would weigh heavily against a Federal FMP action. *See, e.g.,* 16 U.S.C. 1851(a)(7) and 1856(a)(3).

(4) When considering removing a stock from, or continuing to include a stock in, an FMP, Councils should prepare a thorough analysis of factors in paragraphs (c)(1)(i) through (x) of this section, and any additional considerations that may be relevant to the particular stock. As mentioned in paragraph (c)(3) of this section, if the amount and/or type of catch that occurs in Federal waters is a significant contributing factor to the stock's status, such information would weigh heavily in favor of continuing to include a stock in an FMP. Councils should consider weighting the factors as follows. Factors in paragraphs (c)(1)(i) through (iii) of this section should be considered first, as they address maintaining a fishery resource and the marine environment. *See* 16 U.S.C. 1802(5)(A). These factors weigh in favor of continuing to include a stock in an FMP. Councils should next consider factors in paragraphs (c)(1)(iv) through (ix) of this section, which set forth key economic, social, and other reasons contained within the MSA for an FMP action. *See* 16 U.S.C. 1802(5)(B). Finally, a Council should consider the factor in paragraph (c)(1)(x) of this section before deciding to remove a stock from, or continue to include a stock in, an FMP. In many circumstances, adequate management of a fishery by states, state/Federal programs, or another Federal FMP would weigh in favor of removing a stock from an FMP. *See e.g.,* 16 U.S.C. 1851(a)(7) and 1856(a)(3).

(5) Councils may choose to identify stocks within their FMPs as ecosystem component (EC) species (*see* § § 600.305(d)(13) and 600.310(d)(1)) if a Council determines that the stocks do not require conservation and management based on the considerations and factors in paragraph (c)(1) of this section. EC species may be identified at the species or stock level, and may be grouped into complexes. Consistent with National Standard 9, MSA section 303(b)(12), and other applicable MSA sections, management measures can be adopted in order to, for example, collect data on the EC species, minimize bycatch or bycatch mortality of EC species, protect the associated role of EC species in the ecosystem, and/or to address other ecosystem issues.

(6) A stock or stock complex may be identified in more than one FMP. In this situation, the relevant Councils should choose which FMP will be the primary FMP in which reference points for the stock or stock complex will be established. In other FMPs, the stock or stock complex may be identified as ''other managed stocks'' and management measures that are consistent with the objectives of the primary FMP can be established.

(7) Councils should periodically review their FMPs and the best scientific information available and determine if the stocks are appropriately identified. As appropriate, stocks should be reclassified within an FMP, added to or removed from an existing FMP, or added to a new FMP, through an FMP amendment that documents the rationale for the decision.

(d) *Word usage within the National Standard Guidelines.* The word usage refers to all regulations in this subpart.

(1) *Must* is used, instead of ''shall'', to denote an obligation to act; it is used primarily when referring to requirements of the Magnuson-Stevens Act, the logical extension thereof, or of other applicable law.

(2) *Shall* is used only when quoting statutory language directly, to avoid confusion with the future tense.

(3) *Should* is used to indicate that an action or consideration is strongly recommended to fulfill the Secretary's interpretation of the Magnuson-Stevens Act, and is a factor reviewers will look for in evaluating a statement of organization, practices, and procedures (SOPP) or an FMP.

(4) *May* is used in a permissive sense.

(5) *Will* is used descriptively, as distinguished from denoting an obligation to act or the future tense.

(6) *Could* is used when giving examples, in a hypothetical, permissive sense.

(7) *Can* is used to mean ''is able to,'' as distinguished from ''may.''

(8) *Examples* are given by way of illustration and further explanation. They are not inclusive lists; they do not limit options.

(9) *Analysis,* as a paragraph heading, signals more detailed guidance as to the type of discussion and examination an FMP should contain to demonstrate compliance with the standard in question.

(10) *Council* includes the Secretary, as applicable, when preparing FMPs or amendments under section 304(c) and (g) of the Magnuson-Stevens Act.

(11) *Target stocks* are stocks or stock complexes that fishers seek to catch for sale or personal use, including such fish that are discarded for economic or regulatory reasons as defined under Magnuson-Stevens Act section 3(9) and 3(38).

(12) *Non-target species* and *non-target stocks* are fish caught incidentally during the pursuit of target stocks in a fishery. Non-target stocks may require conservation and management and, if so, must be included in a FMP and be identified at the stock or stock complex level. If non-target species are not in need of conservation and management, they may be identified in an FMP as ecosystem component species.

(13) *Ecosystem Component Species* (*see* §§ 600.305(c)(5) and 600.310(d)(1)) are stocks that a Council or the Secretary has determined do not require conservation and management, but desire to list in an FMP in order to achieve ecosystem management objectives.

(e) *Relationship of National Standard 1 to other national standards—General.* National Standard 1 addresses preventing overfishing and achieving optimum yield. *See* 16 U.S.C. 1851(a)(1) and 50 CFR 600.310. National Standards 2 through 10 provide further requirements for conservation and management measures in FMPs. *See* 16 U.S.C. 1851(a)(2) through (10) and 50 CFR 600.315 through 600.355. Below is a description of how some of the other National Standards intersect with National Standard 1.

(1) *National Standard 2* (*see* § 600.315). Management measures and reference points to implement NS1 must be based on the best scientific information available. When data are insufficient to estimate reference points directly, Councils should develop reasonable proxies to the extent possible (also *see* § 600.310(e)(1)(v)(B)). In cases where scientific data are severely limited, effort should also be directed to identifying and gathering the needed data. SSCs should advise their Councils regarding the best scientific information available for fishery management decisions.

(2) *National Standard 3* (*see* § 600.320). Reference points should generally be specified in terms of the level of stock aggregation for which the best scientific information is available (also *see* § 600.310(e)(1)(ii) and (iii)).

(3) *National Standard 6* (*see* § 600.335). Councils must build into the reference points and control rules appropriate consideration of risk, taking into account uncertainties in estimating harvest, stock conditions, life history parameters, or the effects of environmental factors.

(4) *National Standard 8* (*see* § 600.345). National Standard 8 addresses economic and social considerations and minimizing to the extent practicable adverse economic impacts on fishing communities within the context of preventing overfishing and rebuilding overfished stocks as required under National Standard 1 and

other MSA provisions. Calculation of OY as reduced from maximum sustainable yield (MSY) also includes consideration of economic and social factors, but the combination of management measures chosen to achieve the OY must principally be designed to prevent overfishing and rebuild overfished stocks.

(5) *National Standard 9* (*see* § 600.350). Evaluation of stock status with respect to reference points must take into account mortality caused by bycatch. In addition, the estimation of catch should include the mortality of fish that are discarded.

■ 3. Section 600.310 is revised to read as follows:

§ 600.310 National Standard 1—Optimum Yield.

(a) *Standard 1.* Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield (OY) from each fishery for the U.S. fishing industry.

(b) *General.* (1) The guidelines set forth in this section describe fishery management approaches to meet the objectives of National Standard 1 (NS1), and include guidance on:

(i) Specifying maximum sustainable yield (MSY) and OY;

(ii) Specifying status determination criteria (SDC) so that overfishing and overfished determinations can be made for stocks and stock complexes in an FMP;

(iii) Preventing overfishing and achieving OY, incorporation of scientific and management uncertainty in control rules, and adaptive management using annual catch limits (ACL) and measures to ensure accountability (*i.e.,* accountability measures (AMs)); and

(iv) Rebuilding stocks and stock complexes.

(2) *Overview of Magnuson-Stevens Act concepts and provisions related to NS1*—(i) *MSY.* The Magnuson-Stevens Act establishes MSY as the basis for fishery management and requires that: The fishing mortality rate must not jeopardize the capacity of a stock or stock complex to produce MSY; the abundance of an overfished stock or stock complex must be rebuilt to a level that is capable of producing MSY; and OY must not exceed MSY.

(ii) *OY.* The determination of OY is a decisional mechanism for resolving the Magnuson-Stevens Act's conservation and management objectives, achieving an FMP's objectives, and balancing the various interests that comprise the greatest overall benefits to the Nation. OY is based on MSY as reduced under paragraphs (e)(3)(iii)(A) and (B) of this section. The most important limitation on the specification of OY is that the choice of OY and the conservation and management measures proposed to achieve it must prevent overfishing.

(iii) *ACLs and AMs.* Any FMP shall establish a mechanism for specifying ACLs in the FMP (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 (Magnuson-Stevens Act section 303(a)(15)).

(iv) *Reference points.* SDC, MSY, OY, acceptable biological catch (ABC), and ACL, which are described further in paragraphs (e) and (f) of this section, are collectively referred to as ''reference points.''

(v) *Scientific advice.* The Magnuson-Stevens Act has requirements regarding scientific and statistical committees (SSC) of the Regional Fishery Management Councils, including but not limited to, the following provisions (paragraphs (b)(2)(v)(A) through (D) of this section). *See* the National Standard 2 guidelines for further guidance on SSCs and the peer review process (§ 600.315).

(A) Each Regional Fishery Management Council shall establish an SSC as described in section 302(g)(1)(A) of the Magnuson-Stevens Act.

(B) Each SSC shall provide its Regional Fishery Management Council recommendations for ABC as well as other scientific advice, as described in Magnuson-Stevens Act section 302(g)(1)(B).

(C) The Secretary and each Regional Fishery Management Council may establish a peer review process for that Council for scientific information used to advise the Council about the conservation and management of a fishery (*see* Magnuson-Stevens Act section 302(g)(1)(E)). If a peer review process is established, it should investigate the technical merits of stock assessments and other scientific information to be used by the SSC or agency or international scientists, as appropriate. For Regional Fishery Management Councils, the peer review process is not a substitute for the SSC and both the SSC and peer review process should work in conjunction with each other. For the Secretary, which does not have an SSC, the peer review process should provide the scientific information necessary.

(D) Each Council shall develop ACLs for each of its managed fisheries that may not exceed the ''fishing level recommendations'' of its SSC or peer review process (Magnuson-Stevens Act section 302(h)(6)). The SSC recommendation that is the most relevant to ACLs is ABC, as both ACL and ABC are levels of annual catch.

(3) *Approach for setting limits and accountability measures, including targets, for consistency with NS1.* When specifying limits and accountability measures, Councils must take an approach that considers uncertainty in scientific information and management control of the fishery. These guidelines describe how the Councils could address uncertainty such that there is a low risk that limits are exceeded as described in paragraphs (f)(2) and (g)(4) of this section.

(4) *Vulnerability.* A stock's vulnerability to fishing pressure is a combination of its productivity, which depends upon its life history characteristics, and its susceptibility to the fishery. Productivity refers to the capacity of the stock to produce MSY and to recover if the population is depleted, and susceptibility is the potential for the stock to be impacted by the fishery, which includes direct captures, as well as indirect impacts of the fishery (*e.g.,* loss of habitat quality).

(c) *Summary of items to include in FMPs related to NS1.* This section provides a summary of items that Councils must include in their FMPs and FMP amendments in order to address ACL, AM, and other aspects of the NS1 guidelines. Councils must describe fisheries data for the stocks and stock complexes in their FMPs, or associated public documents such as Stock Assessment and Fishery Evaluation (SAFE) Reports. For all stocks and stock complexes that require conservation and management (*see* § 600.305(c)), the Councils must evaluate and describe the following items in their FMPs and amend the FMPs, if necessary, to align their management objectives to end or prevent overfishing and to achieve OY:

(1) MSY and SDC (*see* paragraphs (e)(1) and (2) of this section).

(2) OY at the stock, stock complex, or fishery level and provide the OY specification analysis (*see* paragraph (e)(3) of this section).

(3) ABC control rule (*see* paragraph (f)(2) of this section).

(4) Mechanisms for specifying ACLs (*see* paragraph (f)(4) of this section).

(5) AMs (*see* paragraph (g) of this section).

(6) Stocks and stock complexes that have statutory exceptions from ACLs and AMs (*see* paragraph (h)(1) of this section) or which fall under limited circumstances which require different approaches to meet the Magnuson-

Stevens Act requirements (*see* paragraph (h)(2) of this section).

(d) *Stocks and stock complexes*—

(1) *Introduction.* As described in § 600.305(c), Councils should identify in their FMPs the stocks that require conservation and management. Such stocks must have ACLs, other reference points, and accountability measures. Other stocks that are identified in an FMP (*i.e.,* EC species or stocks that the fishery interacts with but are managed primarily under another FMP, *see* § 600.305(c)(5) through (6)) do not require ACLs, other reference points, or accountability measures.

(2) *Stock complex.* Stocks that require conservation and management can be grouped into stock complexes. A ''stock complex'' is a tool to manage a group of stocks within a FMP.

(i) At the time a stock complex is established, the FMP should provide, to the extent practicable, a full and explicit description of the proportional composition of each stock in the stock complex. Stocks may be grouped into complexes for various reasons, including where stocks in a multispecies fishery cannot be targeted independent of one another; where there is insufficient data to measure a stock's status relative to SDC; or when it is not feasible for fishermen to distinguish individual stocks among their catch. Where practicable, the group of stocks should have a similar geographic distribution, life history characteristics, and vulnerabilities to fishing pressure such that the impact of management actions on the stocks is similar. The vulnerability of individual stocks should be considered when determining if a particular stock complex should be established or reorganized, or if a particular stock should be included in a complex.

(ii) *Indicator stocks.* (A) An indicator stock is a stock with measurable and objective SDC that can be used to help manage and evaluate more poorly known stocks that are in a stock complex.

(B) Where practicable, stock complexes should include one or more indicator stocks (each of which has SDC and ACLs). Otherwise, stock complexes may be comprised of: Several stocks without an indicator stock (with SDC and an ACL for the complex as a whole), or one or more indicator stocks (each of which has SDC and management objectives) with an ACL for the complex as a whole (this situation might be applicable to some salmon species). Councils should review the available quantitative or qualitative information (*e.g.,* catch trends, changes in vulnerability, fish health indices, etc.) of stocks within a complex on a regular basis to determine if they are being sustainably managed.

(C) If an indicator stock is used to evaluate the status of a complex, it should be representative of the typical vulnerability of stocks within the complex. If the stocks within a stock complex have a wide range of vulnerability, they should be reorganized into different stock complexes that have similar vulnerabilities; otherwise the indicator stock should be chosen to represent the more vulnerable stocks within the complex. In instances where an indicator stock is less vulnerable than other members of the complex, management measures should be more conservative so that the more vulnerable members of the complex are not at risk from the fishery.

(D) More than one indicator stock can be selected to provide more information about the status of the complex.

(E) When indicator stocks are used, the stock complex's MSY could be listed as ''unknown,'' while noting that the complex is managed on the basis of one or more indicator stocks that do have known stock-specific MSYs, or suitable proxies, as described in paragraph (e)(1)(v) of this section.

(e) *Features of MSY, SDC, and OY*—

(1) *MSY.* Each FMP must include an estimate of MSY for the stocks and stock complexes that require conservation and management. MSY may also be specified for the fishery as a whole.

(i) *Definitions.* (A) *MSY* is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (*e.g.,* gear selectivity), and the distribution of catch among fleets.

(B) *MSY fishing mortality rate* (F_{msy}) is the fishing mortality rate that, if applied over the long term, would result in MSY.

(C) *MSY stock size* (B_{msy}) means the long-term average size of the stock or stock complex, measured in terms of spawning biomass or other appropriate measure of the stock's reproductive potential that would be achieved by fishing at $F_{msy.}$

(ii) *MSY for stocks.* MSY should be estimated for each stock based on the best scientific information available (*see* § 600.315).

(iii) *MSY for stock complexes.* When stock complexes are used, MSY should be estimated for one or more indicator stocks or for the complex as a whole (*see* paragraph (d)(2)(ii)).

(iv) *Methods of estimating MSY for an aggregate group of stocks.* Estimating MSY for an aggregate group of stocks (including stock complexes and the fishery as a whole) can be done using models that account for multi-species interactions, composite properties for a group of similar species, biomass (energy) flow and production patterns, or other relevant factors (*see* paragraph (e)(3)(iv)(C) of this section).

(v) *Specifying MSY.* (A) Because MSY is a long-term average, it need not be estimated annually, but it must be based on the best scientific information available (*see* § 600.315), and should be re-estimated as required by changes in long-term environmental or ecological conditions, fishery technological characteristics, or new scientific information.

(B) When data are insufficient to estimate MSY directly, Councils should adopt other measures of reproductive potential that can serve as reasonable proxies for MSY, F_{msy}, and B_{msy}.

(C) The MSY for a stock or stock complex is influenced by its interactions with other stocks in its ecosystem and these interactions may shift as multiple stocks in an ecosystem are fished. Ecological and environmental information should be taken into account, to the extent practicable, when assessing stocks and specifying MSY. Ecological and environmental information that is not directly accounted for in the specification of MSY can be among the ecological factors considered when setting OY below MSY.

(D) As MSY values are estimates or are based on proxies, they will have some level of uncertainty associated with them. The degree of uncertainty in the estimates should be identified, when practicable, through the stock assessment process and peer review (*see* § 600.335), and should be taken into account when specifying the ABC Control rule (*see* paragraph (f)(2) of this section).

(2) *Status determination criteria*—(i) *Definitions.* (A) *Status determination criteria* (*SDC*) mean the measurable and objective factors, MFMT, OFL, and MSST, or their proxies, that are used to determine if overfishing has occurred, or if the stock or stock complex is overfished. Magnuson-Stevens Act (section 3(34)) defines both ''overfishing'' and ''overfished'' to mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the MSY on a continuing basis. To avoid confusion, this section clarifies that ''overfished'' relates to biomass of a stock or stock complex, and ''overfishing'' pertains to a rate or level of removal of fish from a stock or stock complex.

(B) *Overfishing* occurs whenever a stock or stock complex is subjected to a level of fishing mortality or total catch that jeopardizes the capacity of a stock or stock complex to produce MSY on a continuing basis.

(C) *Maximum fishing mortality threshold (MFMT)* means the level of fishing mortalityi.e F), on an annual basis, above which overfishing is occurring. The MFMT or reasonable proxy may be expressed either as a single number (a fishing mortality rate or F value), or as a function of spawning biomass or other measure of reproductive potential.

(D) *Overfishing limit (OFL)* means the annual amount of catch that corresponds to the estimate of MFMT applied to a stock or stock complex's abundance and is expressed in terms of numbers or weight of fish.

(E) *Overfished.* A stock or stock complex is considered ''overfished'' when its biomass has declined below MSST.

(F) *Minimum stock size threshold (MSST)* means the level of biomass below which the capacity of the stock or stock complex to produce MSY on a continuing basis has been jeopardized.

(G) *Approaching an overfished condition.* A stock or stock complex is approaching an overfished condition when it is projected that there is more than a 50 percent chance that the biomass of the stock or stock complex will decline below the MSST within two years.

(ii) *Specification of SDC and overfishing and overfished determinations.* Each FMP must describe how objective and measurable SDCs will be specified, as described in paragraphs (e)(2)(ii)(A) and (B) of this section. To be measurable and objective, SDC must be expressed in a way that enables the Council to monitor the status of each stock or stock complex in the FMP. Applying the SDC set forth in the FMP, the Secretary determines if overfishing is occurring and whether the stock or stock complex is overfished (Magnuson-Stevens Act section 304(e)). SDCs are often based on fishing rates or biomass levels associated with MSY or MSY based proxies. When data are not available to specify SDCs based on MSY or MSY proxies, alternative types of SDCs that promote sustainability of the stock or stock complex can be used. For example, SDC could be based on recent average catch, fish densities derived from visual census surveys, length/weight frequencies, or other methods. In specifying SDC, a Council must provide an analysis of how the SDC were chosen and how they relate to reproductive potential of stocks of fish within the fishery. If alternative types of SDCs are used, the Council should explain how the approach will promote sustainability of the stock or stock complex on a long term basis. A Council should consider a process that allows SDCs to be quickly updated to reflect the best scientific information available. In the case of internationally-managed stocks, the Council may decide to use the SDCs defined by the relevant international body. In this instance, the SDCs should allow the Council to monitor the status of a stock or stock complex, recognizing that the SDCs may not be defined in such a way that a Council could monitor the MFMT, OFL, or MSST as would be done with a domestically managed stock or stock complex.

(A) *SDC to Determine Overfishing Status.* Each FMP must specify a method used to determine the overfishing status for each stock or stock complex. For domestically-managed stocks or stock complexes, one of the following methods (described in (e)(2)(ii)(A)(*1*) and (*2*) of this section) should be specified. If the necessary data to use one of the methods described in either subparagraph (e)(2)(ii)(A)(*1*) or (*2*) is not available, a Council may use an alternate type of overfishing SDC as described in paragraph (e)(2)(ii).

(1) Fishing Mortality Rate Exceeds MFMT. Exceeding the MFMT for a period of 1 year constitutes overfishing.

(2) Catch Exceeds the OFL. Exceeding the annual OFL for 1 year constitutes overfishing.

(*3*) *Multi-Year Approach to Determine Overfishing Status.* Subparagraphs (e)(2)(ii)(A) (1) and (2) establish methods to determine overfishing status based on a period of 1 year. As stated in paragraph (e)(2)(ii)(A), a Council should specify, within the FMP, which of these methods will be used to determine overfishing status. However, in certain circumstances, a Council may utilize a multi-year approach to determine overfishing status based on a period of no more than 3 years. The Council should identify in its FMP or FMP amendment, circumstances when the multi-year approach is appropriate and will be used. Such circumstances may include situations where there is high uncertainty in the estimate of F in the most recent year, cases where stock abundance fluctuations are high and assessments are not timely enough to forecast such changes, or other circumstances where the most recent catch or F data does not reflect the overall status of the stock. The multi-year approach to determine overfishing status may not be used to specify future annual catch limits at levels that do not prevent overfishing.

(B) *SDC to determine overfished status.* The MSST or reasonable proxy must be expressed in terms of spawning biomass or other measure of reproductive potential. MSST should be between ½ B_{msy} and B_{msy}, and could be informed by the life history of the stock, the natural fluctuations in biomass associated with fishing at MFMT over the long-term, the requirements of internationally-managed stocks, or other considerations.

(C) Where practicable, all sources of mortality including that resulting from bycatch, scientific research catch, and all fishing activities should be accounted for in the evaluation of stock status with respect to reference points.

(iii) *Relationship of SDC to environmental and habitat change.* Some short-term environmental changes can alter the size of a stock or stock complex without affecting its long-term reproductive potential. Long-term environmental changes may affect both the short-term size of the stock or stock complex and the long-term reproductive potential of the stock or stock complex.

(A) If environmental changes cause a stock or stock complex to fall below its MSST without affecting its long-term reproductive potential, fishing mortality must be constrained sufficiently to allow rebuilding within an acceptable time frame (*see* also paragraph (j)(3)(i) of this section). SDC should not be respecified.

(B) If environmental, ecosystem, or habitat changes affect the long-term reproductive potential of the stock or stock complex, one or more components of the SDC must be respecified. Once SDC have been respecified, fishing mortality may or may not have to be reduced, depending on the status of the stock or stock complex with respect to the new criteria.

(C) If manmade environmental changes are partially responsible for a stock or stock complex's biomass being below MSST, in addition to controlling fishing mortality, Councils should recommend restoration of habitat and other ameliorative programs, to the extent possible (*see* also the guidelines issued pursuant to section 305(b) of the Magnuson-Stevens Act for Council actions concerning essential fish habitat).

(iv) *Secretarial approval of SDC.* Secretarial approval or disapproval of proposed SDC will be based on consideration of whether the proposal:

(A) Is based on the best scientific information available;

(B) Contains the elements described in paragraph (e)(2)(ii) of this section;

(C) Provides a basis for objective measurement of the status of the stock or stock complex against the criteria; and

(D) Is operationally feasible.

(3) *Optimum yield.* For stocks that require conservation and management, OY may be established at the stock, stock complex, or fishery level.

(i) *Definitions*— (A) *Optimum yield (OY).* Magnuson-Stevens Act section (3)(33) defines ''optimum,'' with respect to the yield from a fishery, as the amount of fish that will provide 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; that is prescribed on the basis of the MSY from the fishery, as reduced by any relevant economic, social, or ecological factor; and, in the case of an overfished fishery, that provides for rebuilding to a level consistent with producing the MSY in such fishery.

(B) In NS1, use of the phrase ''achieving, on a continuing basis, the OY from each fishery'' means: producing, from each stock, stock complex, or fishery, an amount of catch that is, on average, equal to the Council's specified OY; prevents overfishing; maintains the long term average biomass near or above B_{msy}; and rebuilds overfished stocks and stock complexes consistent with timing and other requirements of section 304(e)(4) of the Magnuson-Stevens Act and paragraph (j) of this section.

(ii) *General.* OY is a long-term average amount of desired yield from a stock, stock complex, or fishery. An FMP must contain conservation and management measures, including ACLs and AMs, to achieve OY on a continuing basis, and provisions for information collection that are designed to determine the degree to which OY is achieved. These measures should allow for practical and effective implementation and enforcement of the management regime. If these measures cannot meet the dual requirements of NS1 (preventing overfishing while achieving, on a continuing basis, OY), Councils should either modify the measures or reexamine their OY specifications to ensure that the dual NS1 requirements can be met.

(iii) *Assessing OY.* An FMP must contain an assessment and specification of OY (MSA section 303(a)(3)). The assessment should include: a summary of information utilized in making such specification; an explanation of how the OY specification will produce the greatest benefits to the nation and prevent overfishing and rebuild overfished stocks; and a consideration of the economic, social, and ecological factors relevant to the management of a particular stock, stock complex, or fishery. Consistent with Magnuson-Stevens Act section 302(h)(5), the assessment and specification of OY should be reviewed on a continuing basis, so that it is responsive to changing circumstances in the fishery.

(A) *Determining the greatest benefit to the Nation.* In determining the greatest benefit to the Nation, the values that should be weighed and receive serious attention when considering the economic, social, or ecological factors used in reducing MSY, or its proxy, to obtain OY are:

(*1*) The benefits of food production derived from providing seafood to consumers; maintaining an economically viable fishery together with its attendant contributions to the national, regional, and local economies; and utilizing the capacity of the Nation's fishery resources to meet nutritional needs.

(*2*) The benefits of recreational opportunities reflect the quality of both the recreational fishing experience and non-consumptive fishery uses such as ecotourism, fish watching, and recreational diving. Benefits also include the contribution of recreational fishing to the national, regional, and local economies and food supplies.

(*3*) The benefits of protection afforded to marine ecosystems are those resulting from maintaining viable populations (including those of unexploited species), maintaining adequate forage for all components of the ecosystem, maintaining evolutionary and ecological processes (*e.g.,* disturbance regimes, hydrological processes, nutrient cycles), maintaining productive habitat, maintaining the evolutionary potential of species and ecosystems, and accommodating human use.

(B) *Economic, Ecological, and Social Factors.* Councils should consider the management objectives of their FMPs and their management framework to determine the relevant social, economic, and ecological factors used to determine OY. There will be inherent trade-offs when determining the objectives of the fishery. The following is a non-exhaustive list of potential considerations for social, economic, and ecological factors.

(*1*) *Social factors.* Examples are enjoyment gained from recreational fishing, avoidance of gear conflicts and resulting disputes, preservation of a way of life for fishermen and their families, and dependence of local communities on a fishery (*e.g.,* involvement in fisheries and ability to adapt to change). Consideration may be given to fishery-related indicators (*e.g.,* number of fishery permits, number of commercial fishing vessels, number of party and charter trips, landings, ex-vessel revenues etc.) and non-fishery related indicators (*e.g.,* unemployment rates, percent of population below the poverty level, population density, etc.), and preference for a particular type of fishery (*e.g.,* size of the fishing fleet, type of vessels in the fleet, permissible gear types). Other factors that may be considered include the effects that past harvest levels have had on fishing communities, the cultural place of subsistence fishing, obligations under tribal treaties, proportions of affected minority and low-income groups, and worldwide nutritional needs.

(*2*) *Economic factors.* Examples are prudent consideration of the risk of overharvesting when a stock's size or reproductive potential is uncertain (*see* § 600.335(c)(2)(i)), satisfaction of consumer and recreational needs, and encouragement of domestic and export markets for U.S. harvested fish. Other factors that may be considered include: The value of fisheries, the level of capitalization, the decrease in cost per unit of catch afforded by an increase in stock size, the attendant increase in catch per unit of effort, alternate employment opportunities, and economic contribution to fishing communities, coastal areas, affected states, and the nation.

(*3*) *Ecological factors.* Examples include impacts on EC species, forage fish stocks, other fisheries, predator-prey or competitive interactions, marine mammals, threatened or endangered species, and birds. Species interactions that have not been explicitly taken into account when calculating MSY should be considered as relevant factors for setting OY below MSY. In addition, consideration should be given to managing forage stocks for higher biomass than B_{msy} to enhance and protect the marine ecosystem. Also important are ecological or environmental conditions that stress marine organisms or their habitat, such as natural and manmade changes in wetlands or nursery grounds, and effects of pollutants on habitat and stocks.

(iv) *Specifying OY.* If the estimates of MFMT and current biomass are known with a high level of certainty and management controls can accurately limit catch, then OY could be set very close to MSY, assuming no other reductions are necessary for social, economic, or ecological factors. To the degree that such MSY estimates and management controls are lacking or

unavailable, OY should be set farther from MSY.

(A) The OY can be expressed in terms of numbers or weight of fish, and either as a single value or a range. When it is not possible to specify OY quantitatively, OY may be described qualitatively.

(B) The determination of OY is based on MSY, directly or through proxy. However, even where sufficient scientific data as to the biological characteristics of the stock do not exist, or where the period of exploitation or investigation has not been long enough for adequate understanding of stock dynamics, or where frequent large-scale fluctuations in stock size diminish the meaningfulness of the MSY concept, OY must still be established based on the best scientific information available.

(C) An OY established at a fishery level may not exceed the sum of the MSY values for each of the stocks or stocks complexes within the fishery. Aggregate level MSY estimates could be used as a basis for specifying OY for the fishery (*see* paragraph (e)(1)(iv) of this section). When aggregate level MSY is estimated, single stock MSY estimates can also be used to inform single stock management. For example, OY could be specified for a fishery, while other reference points are specified for individual stocks in order to prevent overfishing on each stock within the fishery.

(D) For internationally-managed stocks, fishing levels that are agreed upon by the U.S. at the international level are considered to be consistent with OY requirements under the MSA and these guidelines.

(v) *OY and foreign fishing.* Section 201(d) of the Magnuson-Stevens Act provides that fishing by foreign nations is limited to that portion of the OY that will not be harvested by vessels of the United States. The FMP must include an assessment to address the following, as required by section 303(a)(4) of the Magnuson-Stevens Act:

(A) The OY specification is the basis for establishing any total allowable level of foreign fishing (TALFF).

(B) Part of the OY may be held as a reserve to allow for domestic annual harvest (DAH). If an OY reserve is established, an adequate mechanism should be included in the FMP to permit timely release of the reserve to domestic or foreign fishermen, if necessary.

(C) *DAH.* Councils and/or the Secretary must consider the capacity of, and the extent to which, U.S. vessels will harvest the OY on an annual basis. Estimating the amount that U.S. fishing vessels will actually harvest is required to determine the surplus.

(D) *Domestic annual processing (DAP).* Each FMP must assess the capacity of U.S. processors. It must also assess the amount of DAP, which is the sum of two estimates: The estimated amount of U.S. harvest that domestic processors will process, which may be based on historical performance or on surveys of the expressed intention of manufacturers to process, supported by evidence of contracts, plant expansion, or other relevant information; and the estimated amount of fish that will be harvested by domestic vessels, but not processed (*e.g.,* marketed as fresh whole fish, used for private consumption, or used for bait).

(E) *Joint venture processing (JVP).* When DAH exceeds DAP, the surplus is available for JVP.

(f) *Acceptable biological catch and annual catch limits.* (1) *Definitions.*— (i) *Catch* is the total quantity of fish, measured in weight or numbers of fish, taken in commercial, recreational, subsistence, tribal, and other fisheries. Catch includes fish that are retained for any purpose, as well as mortality of fish that are discarded.

(ii) *Acceptable biological catch (ABC)* is a level of a stock or stock complex's annual catch, which is based on an ABC control rule that accounts for the scientific uncertainty in the estimate of OFL, any other scientific uncertainty, and the Council's risk policy.

(iii) *Annual catch limit (ACL)* is a limit on the total annual catch of a stock or stock complex, which cannot exceed the ABC, that serves as the basis for invoking AMs. An ACL may be divided into sector-ACLs (*see* paragraph (f)(4) of this section).

(iv) *Control rule* is a policy for establishing a limit or target catch level that is based on the best scientific information available and is established by the Council in consultation with its SSC.

(v) *Management uncertainty* refers to uncertainty in the ability of managers to constrain catch so that the ACL is not exceeded, and the uncertainty in quantifying the true catch amounts (*i.e.,* estimation errors). The sources of management uncertainty could include: Late catch reporting; misreporting; underreporting of catches; lack of sufficient inseason management, including inseason closure authority; or other factors.

(vi) *Scientific uncertainty* refers to uncertainty in the information about a stock and its reference points. Sources of scientific uncertainty could include: Uncertainty in stock assessment results; uncertainty in the estimates of MFMT, MSST, the biomass of the stock, and OFL; time lags in updating assessments; the degree of retrospective revision of assessment results; uncertainty in projections; uncertainties due to the choice of assessment model; longer-term uncertainties due to potential ecosystem and environmental effects; or other factors.

(2) *ABC control rule.*— (i) For stocks and stock complexes required to have an ABC, each Council must establish an ABC control rule that accounts for scientific uncertainty in the OFL and for the Council's risk policy, and that is based on a comprehensive analysis that shows how the control rule prevents overfishing. The Council's risk policy could be based on an acceptable probability (at least 50 percent) that catch equal to the stock's ABC will not result in overfishing, but other appropriate methods can be used. When determining the risk policy, Councils could consider the economic, social, and ecological trade-offs between being more or less risk averse. The Council's choice of a risk policy cannot result in an ABC that exceeds the OFL. The process of establishing an ABC control rule may involve science advisors or the peer review process established under Magnuson-Stevens Act section 302(g)(1)(E).

(ii) The ABC control rule must articulate how ABC will be set compared to the OFL based on the scientific knowledge about the stock or stock complex and taking into account scientific uncertainty (*see* paragraph (f)(1)(vi) of this section). The ABC control rule should consider reducing fishing mortality as stock size declines below B_{msy} and as scientific uncertainty increases, and may establish a stock abundance level below which fishing would not be allowed. When scientific uncertainty cannot be directly calculated, such as when proxies are used, then a proxy for the uncertainty should be established based on the best scientific information, including comparison to other stocks. The control rule may be used in a tiered approach to address different levels of scientific uncertainty. Councils can develop ABC control rules that allow for changes in catch limits to be phased-in over time or to account for the carry-over of some of the unused portion of the ACL from one year to the next. The Council must articulate within its FMP when the phase-in and/or carry-over provisions of the control rule can and cannot be used and how each provision prevents overfishing, based on a comprehensive analysis.

(A) *Phase-in ABC control rules.* Large changes in catch limits due to new

scientific information about the status of the stock can have negative short-term effects on a fishing industry. To help stabilize catch levels as stock assessments are updated, a Council may choose to develop a control rule that phases in changes to ABC over a period of time, not to exceed 3 years, as long as overfishing is prevented each year (*i.e.,* the phased-in catch level cannot exceed the OFL in any year). In addition, the Councils should evaluate the appropriateness of phase-in provisions for stocks that are overfished and/or rebuilding, as the overriding goal for such stocks is to rebuild them in as short a time as possible.

(B) *Carry-over ABC control rules.* An ABC control rule may include provisions for the carry-over of some of the unused portion of an ACL (*i.e.,* an ACL underage) from one year to increase the ABC for the next year, based on the increased stock abundance resulting from the fishery harvesting less than the full ACL. The resulting ABC recommended by the SSC must prevent overfishing and must consider scientific uncertainty consistent with the Council's risk policy. Carry-over provisions could also allow an ACL to be adjusted upwards as long as the revised ACL does not exceed the specified ABC. When considering whether to use a carry-over provision, Councils should consider the likely reason for the ACL underage. ACL underages that result from management uncertainty (*e.g.,* premature fishery closure) may be appropriate circumstances for considering a carry-over provision. ACL underages that occur as a result of poor or unknown stock status may not be appropriate to consider in a carry-over provision. In addition, the Councils should evaluate the appropriateness of carry-over provisions for stocks that are overfished and/or rebuilding, as the overriding goal for such stocks is to rebuild them in as short a time as possible.

(3) *Specification of ABC.* ABC may not exceed OFL (*see* paragraph (e)(2)(i)(D) of this section). Councils and their SSC should develop a process by which the SSC can access the best scientific information available when implementing the ABC control rule (*i.e.,* specifying the ABC). The SSC must recommend the ABC to the Council. An SSC may recommend an ABC that differs from the result of the ABC control rule calculation, based on factors such as data uncertainty, recruitment variability, declining trends in population variables, and other factors, but must provide an explanation for the deviation. For Secretarial FMPs or amendments, agency scientists or a peer review process would provide the scientific advice to establish ABC. For internationally-assessed stocks, an ABC as defined in these guidelines is not required if stocks fall under the international exception (*see* paragraph (h)(1)(ii) of this section). While the ABC is allowed to equal OFL, NMFS expects that in most cases ABC will be reduced from OFL to reduce the probability that overfishing might occur.

(i) *Expression of ABC.* ABC should be expressed in terms of catch, but may be expressed in terms of landings as long as estimates of bycatch and any other fishing mortality not accounted for in the landings are incorporated into the determination of ABC.

(ii) *ABC for overfished stocks.* For overfished stocks and stock complexes, a rebuilding ABC must be set to reflect the annual catch that is consistent with the schedule of fishing mortality rates (*i.e.,* $F_{rebuild}$) in the rebuilding plan.

(4) *Setting the annual catch limit*— (i) *General.* ACL cannot exceed the ABC and may be set annually or on a multiyear plan basis. ACLs in coordination with AMs must prevent overfishing (*see* MSA section 303(a)(15)). If an Annual Catch Target (ACT), or functional equivalent, is not used, management uncertainty should be accounted for in the ACL. If a Council recommends an ACL which equals ABC, and the ABC is equal to OFL, the Secretary may presume that the proposal would not prevent overfishing, in the absence of sufficient analysis and justification for the approach. A ''multiyear plan'' as referenced in section 303(a)(15) of the Magnuson-Stevens Act is a plan that establishes harvest specifications or harvest guidelines for each year of a time period greater than 1 year. A multiyear plan must include a mechanism for specifying ACLs for each year with appropriate AMs to prevent overfishing and maintain an appropriate rate of rebuilding if the stock or stock complex is in a rebuilding plan. A multiyear plan must provide that, if an ACL is exceeded for a year, then AMs are implemented for the next year consistent with paragraph (g)(3) of this section.

(ii) *Sector-ACLs.* A Council may, but is not required to, divide an ACL into sector-ACLs. If sector-ACLs are used, sector-AMs should also be specified. ''Sector,'' for purposes of this section, means a distinct user group to which separate management strategies and separate catch quotas apply. Examples of sectors include the commercial sector, recreational sector, or various gear groups within a fishery. If the management measures for different sectors differ in the degree of management uncertainty, then sector-ACLs may be necessary so that appropriate AMs can be developed for each sector. If a Council chooses to use sector-ACLs, the sum of sector-ACLs must not exceed the stock or stock complex level ACL. The system of ACLs and AMs designed must be effective in protecting the stock or stock complex as a whole. Even if sector-ACLs and sector-AMs are established, additional AMs at the stock or stock complex level may be necessary.

(iii) *ACLs for State-Federal Fisheries.* For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments should include an ACL for the overall stock that may be further divided. For example, the overall ACL could be divided into a Federal-ACL and state-ACL. However, NMFS recognizes that Federal management is limited to the portion of the fishery under Federal authority. *See* 16 U.S.C. 1856. When stocks are co-managed by Federal, state, tribal, and/or territorial fishery managers, the goal should be to develop collaborative conservation and management strategies, and scientific capacity to support such strategies (including AMs for state or territorial and Federal waters), to prevent overfishing of shared stocks and ensure their sustainability.

(iv) *Relationship between OY and the ACL framework.* The dual goals of NS1 are to prevent overfishing and achieve OY on a continuing basis. The ABC is an upper limit on catch that prevents overfishing within an established framework of risk and other considerations. As described in paragraph (e)(3) of this section, ecological, economic, and social factors, as well as values associated with determining the greatest benefit to the Nation, are important considerations in specifying OY. These types of considerations can also be considered in the ACL framework. For example, an ACL (or ACT) could be set lower than the ABC to account for ecological, economic, and social factors (*e.g.,* needs of forage fish, promoting stability, addressing market conditions, etc.). Additionally, economic, social, or ecological trade-offs could be evaluated when determining the risk policy for an ABC control rule (*see* paragraph (f)(2) of this section). While OY is a long-term average amount of desired yield, there is, for each year, an amount of fish that is consistent with achieving the long-term OY. A Council can choose to express OY on an annual basis, in which case the FMP or FMP amendment should indicate that the OY is an

''annual OY.'' An annual OY cannot exceed the ACL.

(g) *Accountability measures (AMs).* (1) *Introduction.* AMs are management controls to prevent ACLs, including sector-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur. AMs should address and minimize both the frequency and magnitude of overages and correct the problems that caused the overage in as short a time as possible. NMFS identifies two categories of AMs, inseason AMs and AMs for when the ACL is exceeded. The FMP should identify what sources of data will be used to implement AMs (*e.g.,* inseason data, annual catch compared to the ACL, or multi-year averaging approach).

(2) *Inseason AMs.* Whenever possible, FMPs should include inseason monitoring and management measures to prevent catch from exceeding ACLs. Inseason AMs could include, but are not limited to: An annual catch target (*see* paragraph (g)(4) of this section); closure of a fishery; closure of specific areas; changes in gear; changes in trip size or bag limits; reductions in effort; or other appropriate management controls for the fishery. If final data or data components of catch are delayed, Councils should make appropriate use of preliminary data, such as landed catch, in implementing inseason AMs. FMPs should contain inseason closure authority giving NMFS the ability to close fisheries if it determines, based on data that it deems sufficiently reliable, that an ACL has been exceeded or is projected to be reached, and that closure of the fishery is necessary to prevent overfishing. For fisheries without inseason management control to prevent the ACL from being exceeded, AMs should utilize ACTs that are set below ACLs so that catches do not exceed the ACL.

(3) *AMs for when the ACL is exceeded.* On an annual basis, the Council must determine as soon as possible after the fishing year if an ACL was exceeded. If an ACL was exceeded, AMs must be implemented as soon as possible to correct the operational issue that caused the ACL overage, as well as any biological consequences to the stock or stock complex resulting from the overage when it is known. These AMs could include, among other things, modifications of inseason AMs, the use or modification of ACTs, or overage adjustments. The type of AM chosen by a Council will likely vary depending on the sector of the fishery, status of the stock, the degree of the overage, recruitment patterns of the stock, or other pertinent information. If an ACL is set equal to zero and the AM for the fishery is a closure that prohibits fishing for a stock, additional AMs are not required if only small amounts of catch (including bycatch) occur, and the catch is unlikely to result in overfishing. For stocks and stock complexes in rebuilding plans, the AMs should include overage adjustments that reduce the ACLs in the next fishing year by the full amount of the overage, unless the best scientific information available shows that a reduced overage adjustment, or no adjustment, is needed to mitigate the effects of the overage.

(4) *Annual Catch Target (ACT) and ACT control rule.* ACTs, or the functional equivalent, are recommended in the system of AMs so that ACL is not exceeded. An ACT is an amount of annual catch of a stock or stock complex that is the management target of the fishery, and accounts for management uncertainty in controlling the catch at or below the ACL. ACT control rules can be used to articulate how management uncertainty is accounted for in setting the ACT. ACT control rules can be developed by the Council, in coordination with the SSC, to help the Council account for management uncertainty.

(5) *AMs based on multi-year average data.* Some fisheries have highly variable annual catches and lack reliable inseason or annual data on which to base AMs. If there are insufficient data upon which to compare catch to ACL, AMs could be based on comparisons of average catch to average ACL over a three-year moving average period or, if supported by analysis, some other appropriate multi-year period. Councils should explain why basing AMs on a multi-year period is appropriate. Evaluation of the moving average catch to the average ACL must be conducted annually, and if the average catch exceeds the average ACL, appropriate AMs should be implemented consistent with paragraph (g)(3) of this section.

(6) *AMs for State-Federal Fisheries.* For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments must, at a minimum, have AMs for the portion of the fishery under Federal authority. Such AMs could include closing the EEZ when the Federal portion of the ACL is reached, or the overall stock's ACL is reached, or other measures.

(7) *Performance Standard.* If catch exceeds the ACL for a given stock or stock complex more than once in the last four years, the system of ACLs and AMs should be reevaluated, and modified if necessary, to improve its performance and effectiveness. If AMs are based on multi-year average data, the performance standard is based on a comparison of the average catch to the average ACL. 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, if the vulnerability of the stock has not already been accounted for in the ABC control rule.

(h) *Establishing ACL mechanisms and AMs in FMPs.* FMPs or FMP amendments must establish ACL mechanisms and AMs for all stocks and stock complexes that require conservation and management (*see* § 600.305(c)), unless paragraph (h)(1) of this section is applicable. These mechanisms should describe the annual or multiyear process by which ACLs, AMs, and other reference points such as OFL and ABC will be established.

(1) *Exceptions from ACL and AM requirements*—(i) *Life cycle.* Section 303(a)(15) of the Magnuson-Stevens Act ''shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species'' (Pub. L. 109–479 104(b)(2)). This exception applies to a stock for which the average age of spawners in the population is approximately 1 year or less. While exempt from the ACL and AM requirements, FMPs or FMP amendments for these stocks must have SDC, MSY, OY, ABC, and an ABC control rule.

(ii) *International fishery agreements.* Section 303(a)(15) of the Magnuson-Stevens Act applies ''unless otherwise provided for under an international agreement in which the United States participates'' (Pub. L. 109–479 104(b)(1)). This exception applies to stocks or stock complexes subject to management under an international agreement, which is defined as ''any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party'' (*see* Magnuson-Stevens Act section 3(24)). These stocks would still need to have SDC, MSY, and OY.

(2) *Flexibility in application of NS1 guidelines.* There are limited circumstances that may not fit the standard approaches to specification of reference points and management measures set forth in these guidelines. These include, among other things, conservation and management of Endangered Species Act listed species, harvests from aquaculture operations, stocks with unusual life history characteristics (*e.g.,* Pacific salmon, where the spawning potential for a stock

is spread over a multi-year period), and stocks for which data are not available either to set reference points based on MSY or MSY proxies, or to manage to reference points based on MSY or MSY proxies. In these circumstances, Councils may propose alternative approaches for satisfying requirements of the Magnuson-Stevens Act other than those set forth in these guidelines. Councils must document their rationale for any alternative approaches in an FMP or FMP amendment, which will be reviewed for consistency with the Magnuson-Stevens Act.

(i) *Fisheries data.* In their FMPs, or associated public documents such as SAFE reports as appropriate, Councils must describe general data collection methods, as well as any specific data collection methods used for all stocks and stock complexes in their FMPs, including:

(1) Sources of fishing mortality (both landed and discarded), including commercial and recreational catch and bycatch in other fisheries;

(2) Description of the data collection and estimation methods used to quantify total catch mortality in each fishery, including information on the management tools used (*e.g.,* logbooks, vessel monitoring systems, observer programs, landings reports, fish tickets, processor reports, dealer reports, recreational angler surveys, or other methods); the frequency with which data are collected and updated; and the scope of sampling coverage for each fishery; and

(3) Description of the methods used to compile catch data from various catch data collection methods and how those data are used to determine the relationship between total catch at a given point in time and the ACL for stocks and stock complexes that require conservation and management.

(j) *Council actions to address overfishing and rebuilding for stocks and stock complexes*—

(1) *Notification.* The Secretary will immediately notify in writing a Regional Fishery Management Council whenever the Secretary determines that:

(i) Overfishing is occurring;

(ii) A stock or stock complex is overfished;

(iii) A stock or stock complex is approaching an overfished condition; or

(iv) Existing remedial action taken for the purpose of ending previously identified overfishing or rebuilding a previously identified overfished stock or stock complex has not resulted in adequate progress (*see* MSA section 304(e)).

(2) *Timing of actions*—(i) *If a stock or stock complex is undergoing overfishing.* Upon notification that a stock or stock complex is undergoing overfishing, a Council should immediately begin working with its SSC (or agency scientists or peer review processes in the case of Secretarially-managed fisheries) to ensure that the ABC is set appropriately to end overfishing. Councils should evaluate the cause of overfishing, address the issue that caused overfishing, and reevaluate their ACLs and AMs to make sure they are adequate.

(ii) *If a stock or stock complex is overfished or approaching an overfished condition.* Upon notification that a stock or stock complex is overfished or approaching an overfished condition, a Council must prepare and implement an FMP, FMP amendment, or proposed regulations within two years of notification, consistent with the requirements of section 304(e)(3) of the Magnuson-Stevens Act. Council actions should be submitted to NMFS within 15 months of notification to ensure sufficient time for the Secretary to implement the measures, if approved.

(3) *Overfished fishery.*—(i) Where a stock or stock complex is overfished, a Council must specify a time period for rebuilding the stock or stock complex based on factors specified in Magnuson-Stevens Act section 304(e)(4). This target time for rebuilding (T_{target}) shall be as short as possible, taking into account: The status and biology of any overfished stock, the needs of fishing communities, recommendations by international organizations in which the U.S. participates, and interaction of the stock within the marine ecosystem. In addition, the time period shall not exceed 10 years, except where biology of the stock, other environmental conditions, or management measures under an international agreement to which the U.S. participates, dictate otherwise. SSCs (or agency scientists or peer review processes in the case of Secretarial actions) shall provide recommendations for achieving rebuilding targets (*see* Magnuson-Stevens Act section 302(g)(1)(B)). The above factors enter into the specification of T_{target} as follows:

(A) *The minimum time for rebuilding a stock (T_{min}).* T_{min} means the amount of time the stock or stock complex is expected to take to rebuild to its MSY biomass level in the absence of any fishing mortality. In this context, the term ''expected'' means to have at least a 50 percent probability of attaining the B_{msy}, where such probabilities can be calculated. The starting year for the T_{min} calculation should be the first year that the rebuilding plan is expected to be implemented.

(B) *The maximum time for rebuilding a stock or stock complex to its B_{msy} (T_{max}).*

(*1*) If T_{min} for the stock or stock complex is 10 years or less, then T_{max} is 10 years.

(*2*) If T_{min} for the stock or stock complex exceeds 10 years, then one of the following methods can be used to determine T_{max}:

(*i*) T_{min} plus the length of time associated with one generation time for that stock or stock complex. ''Generation time'' is the average length of time between when an individual is born and the birth of its offspring,

(*ii*) The amount of time the stock or stock complex is expected to take to rebuild to B_{msy} if fished at 75 percent of MFMT, or

(*iii*) T_{min} multiplied by two.

(*3*) In situations where T_{min} exceeds 10 years, T_{max} establishes a maximum time for rebuilding that is linked to the biology of the stock. When selecting a method for determining $T_{max,}$ a Council, in consultation with its SSC, should consider the relevant biological data and scientific uncertainty of that data, and must provide a rationale for its decision based on the best scientific information available. One of the methods listed in subparagraphs (j)(3)(i)(B)(*2*)(*ii*) and (*iii*) may be appropriate, for example, if given data availability and the life history characteristics of the stock, there is high uncertainty in the estimate of generation time, or if generation time does not accurately reflect the productivity of the stock.

(C) *Target time to rebuilding a stock or stock complex (T_{target}).* T_{target} is the specified time period for rebuilding a stock that is considered to be as short a time as possible, taking into account the factors described in paragraph (j)(3)(i) of this section. T_{target} shall not exceed T_{max}, and the fishing mortality associated with achieving T_{target} is referred to as $F_{rebuild}$.

(ii) Council action addressing an overfished fishery must allocate both overfishing restrictions and recovery benefits fairly and equitably among sectors of the fishery.

(iii) For fisheries managed under an international agreement, Council action addressing an overfished fishery must reflect traditional participation in the fishery, relative to other nations, by fishermen of the United States.

(iv) *Adequate Progress.* The Secretary shall review rebuilding plans at routine intervals that may not exceed two years to determine whether the plans have resulted in adequate progress toward ending overfishing and rebuilding affected fish stocks (MSA section 304(e)(7)). Such reviews could include

the review of recent stock assessments, comparisons of catches to the ACL, or other appropriate performance measures. The Secretary may find that adequate progress is not being made if $F_{rebuild}$ or the ACL associated with $F_{rebuild}$ is exceeded, and AMs are not correcting the operational issue that caused the overage, nor addressing any biological consequences to the stock or stock complex resulting from the overage when it is known (*see* paragraph (g)(3) of this section). A lack of adequate progress may also be found when the rebuilding expectations of a stock or stock complex are significantly changed due to new and unexpected information about the status of the stock. If a determination is made under this provision, the Secretary will notify the appropriate Council and recommend further conservation and management measures, and the Council must develop and implement a new or revised rebuilding plan within two years (*see* MSA sections 304(e)(3) and (e)(7)(B)). For Secretarially-managed fisheries, the Secretary would take immediate action necessary to achieve adequate progress toward rebuilding and ending overfishing.

(v) While a stock or stock complex is rebuilding, revising rebuilding timeframes (*i.e.,* T_{target} and T_{max}) or $F_{rebuild}$ is not necessary, unless the Secretary finds that adequate progress is not being made.

(vi) If a stock or stock complex has not rebuilt by T_{max}, then the fishing mortality rate should be maintained at its current $F_{rebuild}$ or 75 percent of the MFMT, whichever is less, until the stock or stock complex is rebuilt or the fishing mortality rate is changed as a result of the Secretary finding that adequate progress is not being made.

(4) *Emergency actions and interim measures.* If a Council is developing a rebuilding plan or revising an existing rebuilding plan due to a lack of adequate progress (*see* MSA section 304(e)(7)), the Secretary may, in response to a Council request, implement interim measures that reduce, but do not necessarily end, overfishing (*see* MSA section 304(e)(6)) if all of the following criteria are met:

(i) The interim measures are needed to address an unanticipated and significantly changed understanding of the status of the stock or stock complex;

(ii) Ending overfishing immediately is expected to result in severe social and/or economic impacts to a fishery; and

(iii) The interim measures will ensure that the stock or stock complex will increase its current biomass through the duration of the interim measures.

(5) *Discontinuing a rebuilding plan based on new scientific information.* A Council may discontinue a rebuilding plan for a stock or stock complex before it reaches B_{msy} if the Secretary determines that the stock was not overfished in the year that the overfished determination (*see* MSA section 304(e)(3)) was based on and has never been overfished in any subsequent year including the current year.

(k) *International overfishing.* If the Secretary determines that a fishery is overfished or approaching a condition of being overfished due to excessive international fishing pressure, and for which there are no management measures (or no effective measures) to end overfishing under an international agreement to which the United States is a party, then the Secretary and/or the appropriate Council shall take certain actions as provided under Magnuson-Stevens Act section 304(i). The Secretary, in cooperation with the Secretary of State, must immediately take appropriate action at the international level to end the overfishing. In addition, within one year after the determination, the Secretary and/or appropriate Council shall:

(1) Develop recommendations for domestic regulations to address the relative impact of the U.S. fishing vessels on the stock. Council recommendations should be submitted to the Secretary.

(2) Develop and submit recommendations to the Secretary of State, and to the Congress, for international actions that will end overfishing in the fishery and rebuild the affected stocks, taking into account the relative impact of vessels of other nations and vessels of the United States on the relevant stock. Councils should, in consultation with the Secretary, develop recommendations that take into consideration relevant provisions of the Magnuson-Stevens Act and NS1 guidelines, including section 304(e) of the Magnuson-Stevens Act and paragraph (j)(3)(iii) of this section, and other applicable laws. For highly migratory species in the Pacific, recommendations from the Western Pacific, North Pacific, or Pacific Councils must be developed and submitted consistent with Magnuson-Stevens Reauthorization Act section 503(f), as appropriate.

(3) *Considerations for assessing ''relative impact.''* ''Relative impact'' under paragraphs (k)(1) and (2) of this section may include consideration of factors that include, but are not limited to: Domestic and international management measures already in place, management history of a given nation, estimates of a nation's landings or catch (including bycatch) in a given fishery, and estimates of a nation's mortality contributions in a given fishery. Information used to determine relative impact must be based upon the best available scientific information.

(l) *Exceptions to requirements to prevent overfishing.* Exceptions to the requirement to prevent overfishing could apply under certain limited circumstances. Harvesting one stock at its optimum level may result in overfishing of another stock when the two stocks tend to be caught together (This can occur when the two stocks are part of the same fishery or if one is bycatch in the other's fishery). Before a Council may decide to allow this type of overfishing, an analysis must be performed and the analysis must contain a justification in terms of overall benefits, including a comparison of benefits under alternative management measures, and an analysis of the risk of any stock or stock complex falling below its MSST. The Council may decide to allow this type of overfishing if the fishery is not overfished and the analysis demonstrates that all of the following conditions are satisfied:

(1) Such action will result in long-term net benefits to the Nation;

(2) Mitigating measures have been considered and it has been demonstrated that a similar level of long-term net benefits cannot be achieved by modifying fleet behavior, gear selection/configuration, or other technical characteristics in a manner such that no overfishing would occur; and

(3) The resulting rate of fishing mortality will not cause any stock or stock complex to fall below its MSST more than 50 percent of the time in the long term, although it is recognized that persistent overfishing is expected to cause the affected stock to fall below its B_{msy} more than 50 percent of the time in the long term.

■ 4. Section 600.320 is revised to read as follows:

§ 600.320 National Standard 3—Management Units.

(a) *Standard 3.* To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(b) *General.* The purpose of this standard is to induce a comprehensive approach to fishery management. The geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and

not be overly constrained by political boundaries.

(c) *Unity of management.* Cooperation and understanding among entities concerned with the fishery (*e.g.,* Councils, states, Federal Government, international commissions, foreign nations) are vital to effective management. Where management of a fishery involves multiple jurisdictions, coordination among the several entities should be sought in the development of an FMP. Where a range overlaps Council areas, one FMP to cover the entire range is preferred.

(d) *Management unit.* The term ''management unit'' means a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives.

(1) *Basis.* The choice of a management unit depends on the focus of the FMP's objectives, and may be organized around biological, geographic, economic, technical, social, or ecological perspectives.

(2) *Conservation and management measures.* FMPs should include conservation and management measures for that part of the management unit within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ. The measures need not be identical for each geographic area within the management unit, if the FMP justifies the differences. A management unit may contain stocks of fish for which there is not enough information available to specify MSY and OY or their proxies.

(e) *Analysis.* An FMP should include discussion of the following:

(1) The range and distribution of the stocks, as well as the patterns of fishing effort and harvest.

(2) Alternative management units and reasons for selecting a particular one. A less-than-comprehensive management unit may be justified if, for example, complementary management exists or is planned for a separate geographic area or for a distinct use of the stocks, or if the unmanaged portion of the resource is immaterial to proper management.

(3) Management activities and habitat programs of adjacent states and their effects on the FMP's objectives and management measures. Where state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations. The FMP should also discuss the impact that Federal regulations will have on state management activities.

(4) Management activities of other countries having an impact on the fishery, and how the FMP's management measures are designed to take into account these impacts. International boundaries may be dealt with in several ways. For example:

(i) By limiting the management unit's scope to that portion of the stock found in U.S. waters;

(ii) By estimating MSY for the entire stock and then basing the determination of OY for the U.S. fishery on the portion of the stock within U.S. waters; or

(iii) By referring to treaties or cooperative agreements.

■ 5. Section 600.340 is revised to read as follows:

§ 600.340 National Standard 7—Costs and Benefits.

(a) *Standard 7.* Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) *Alternative management measures.* Management measures should not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments. Factors such as fuel costs, enforcement costs, or the burdens of collecting data may well suggest a preferred alternative.

(c) *Analysis.* The supporting analyses for FMPs should demonstrate that the benefits of fishery regulation are real and substantial relative to the added research, administrative, and enforcement costs, as well as costs to the industry of compliance. In determining the benefits and costs of management measures, each management strategy considered and its impacts on different user groups in the fishery should be evaluated. This requirement need not produce an elaborate, formalistic cost/benefit analysis. Rather, an evaluation of effects and costs, especially of differences among workable alternatives, including the status quo, is adequate. If quantitative estimates are not possible, qualitative estimates will suffice.

(1) *Burdens.* Management measures should be designed to give fishermen the greatest possible freedom of action in conducting business and pursuing recreational opportunities that are consistent with ensuring wise use of the resources and reducing conflict in the fishery. The type and level of burden placed on user groups by the regulations need to be identified. Such an examination should include, for example: Capital outlays; operating and maintenance costs; reporting costs; administrative, enforcement, and information costs; and prices to consumers. Management measures may shift costs from one level of government to another, from one part of the private sector to another, or from the government to the private sector. Redistribution of costs through regulations is likely to generate controversy. A discussion of these and any other burdens placed on the public through FMP regulations should be a part of the FMP's supporting analyses.

(2) *Gains.* The relative distribution of gains may change as a result of instituting different sets of alternatives, as may the specific type of gain. The analysis of benefits should focus on the specific gains produced by each alternative set of management measures, including the status quo. The benefits to society that result from the alternative management measures should be identified, and the level of gain assessed.

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