



## Pacific Fishery Management Council

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 Dorothy M. Lowman, Chair | Donald O. McIsaac, Executive Director

January 12, 2016

Mr. Alan Risenhoover  
 Director  
 Office of Sustainable Fisheries  
 National Oceanic and Atmospheric Administration  
 National Marine Fisheries Service  
 NOAA/NMFS  
 1315 East-West Highway, Room 14743  
 Silver Spring, MD 20910

Re: Comments on “Draft Guidance for Conducting Reviews of Catch Share Programs” and request for an extension of comment deadline through March 21, 2016

Dear Mr. <sup>Alan</sup> Risenhoover:

We appreciate the extension of the comment period from the originally announced November 20, 2015 deadline to January 29, 2016 and offer the following as staff comments on the “Draft Guidance for Conducting Reviews of Catch Share Programs.” The solicitation for comments from Regional Fishery Management Councils came too late for it to be included on our November Council meeting agenda, and the extension to January 29 fails to capture our next Council meeting in mid-March 2016. Thus, these comments reflect the Council staff perception of the will of the Pacific Council given past Council actions and limited tangential discussions during the November 2015 Council meeting. Because formal public process has yet to be conducted on this important matter, we request the extension deadline be modified to March 21, 2016.

The perennial challenge in drafting guidelines is doing so outside the context of a specific situation. With respect to a program review, those specifics include the policies to be analyzed, the areas of concern which have developed in the context of their application, and the governmental resource constraints and important competing demands for those resources that will occur at the time of the review. When drafting guidelines outside of the constraining context, care must be taken not to set up expectations which cannot be practically met in the ultimate context in which they are applied, thereby generating the impression of failure—in this case, the impression that a review was inadequately conducted. A way forward is needed that takes into account the pragmatics of limited resources while at the same time providing useful guidance—a bridging between the ideal and the real world of limited capacities. To that end, we offer some general comments and have attached a list of more specific comments.

First, the guidelines should remain general, and adopted regional operating agreements should be relied on to specify the process by which National Marine Fisheries Service (NMFS) and the Council will work together to conduct a review. For the Pacific Council, given sufficient resources, we would expect that as with other Magnuson-Stevens Act (MSA) actions the review would be coordinated in the Council forum where: NMFS participates cooperatively side-by-side with state, tribal, and Council staff; appropriate review team composition is determined; scientific information is reviewed by the Scientific and Statistical Committee; and NMFS is represented in decision authority by a single voice. Once the Council review process is completed, then the Secretary would make a determination as to whether or not the review meets the requirements of the MSA. In contrast, the guidelines specify that a lead should be designated without identifying who will be responsible for designating the lead, do not mention state and tribal partners, specify that the plan review team should be the original plan development team, specify that the science centers should review the scientific information, and specify that the Council and four separate divisions of NMFS/National Oceanic and Atmospheric Administration (NOAA) would each sign off on the review. In addition to these differences between the typical Pacific Council process and these guidelines, we note that the guidelines do not take into account that in situations of high controversy it might be most appropriate that the original plan development team *not* be the team that reviews the plan. Further, requiring four independent NMFS sign-offs as part of a Council process could lead to confusion regarding NMFS positions, and create an inefficient, lengthy loop as to when version adjustments are reviewed by the Council or any of the four NMFS/NOAA divisions. The regional processes and project managers should be trusted to most efficiently organize and allocate the project resources within the contexts present at the time of the review and as guided by regional operating agreements. A Secretarial review process on an end-document coming from the Council forum can be used to provide the opportunities for any and all internal NMFS sign-offs.

Second, the guidelines include new annual or biannual interim reporting requirements not required by the MSA. Further, it is anticipated that such interim reports go through a draft and finalization process with opportunity for public comment. While it is suggested that the feedback process “can be handled informally,” it is not clear what such informality means in the Council process and how such informality would be provided while maintaining an open, transparent public process. Such new requirements should not be taken lightly in that they inevitably displace or degrade the quality of work in an overburdened process. Such displacements and degradations then compound inefficiencies when the consequences of such inadequacies are encountered and must be dealt with in the future. Overall performance of the fishery will be monitored in the Stock Assessment and Fisheries Evaluation document, and critical failures will become apparent as part of the ongoing management activities. Most likely, new catch share programs will result in the generation of some new tables and data summaries for annual and biannual management processes, but the local managers should be trusted rather than indiscriminately prioritizing the generation of interim processes and reports over other regional management needs.

Third, the draft guidelines statement that “if a particular component of a program is the subject of a current management action, that component does not need to be addressed in a detailed manner within the review” is somewhat confusing. Generally, catch share programs function as an integrated whole, and it is sometimes difficult to draw lines between particular components or the effects of those components. The guidelines recommend that the review follow a National

Environmental Policy Act-type structure. In such a structure, cumulative effects sections address past, present, and reasonably foreseeable future actions. We suggest that any program component under revision at the time of the review be handled in a comparable section rather than not addressing the component “in a detailed manner.”

Fourth, the recommendation that the source of all recommendations should be tracked and summarized, cross-referencing to note commonalities and differences, is unnecessarily burdensome and fails to recognize the nature of a collaborative process. Public comment will certainly be kept for the administrative record, but if the collaborative process results in a set of recommendations that are collectively endorsed, the origin of the recommendation is not relevant to the result. Further, in such a dialogical process it is often not possible to identify the source of an idea for a recommendation. Finally, where a particular partner entity strongly disagrees with a recommendation, an opportunity is often provided for a minority report, so all voices have the opportunity to be represented.

Fifth, the guidelines cite several studies as those which should be used or referenced during the review (e.g. Section V.C, page 7-8). In order to maintain the relevance of the guidelines across time it might be more efficient to list such documents in a separate technical resources document which could be updated as new information and studies become available. Additionally, the language recommending these studies should be modified to acknowledge that, depending on the particular circumstances and concerns being addressed, there may be better alternative sources.

Sixth, there are some areas where the guidelines get into unnecessary detail and seem to be making unstated and inapplicable assumptions about the particular configuration of the catch share program being reviewed. For example, with respect to the reconsideration of intersector allocations, this statement is made:

...any recommendations to change those allocations should consider the potential for entities to exceed the existing caps/limits on QS and QP under an alternative allocation and, in turn, the possibility they would be forced to divest under a different allocation or the existing caps/limits need to be reconsidered. (p. 11)

This statement is inapplicable to programs in which limits are expressed as a percent. At the same time, there are comparable considerations that would have to be taken into account (e.g., effect on total quota pounds (QP) available to an individual). This guidance on the effects of reallocation on caps is one among many details that will have to be considered, only a few of which are called out in the guidelines. This leads to unevenness in the level at which the guidelines address the program review. These details of analysis should be left for regional efforts to develop. Additionally, we recommend that, except where there is a clear legal mandate, NMFS consider replacing the word *should include* (or words with that sense) with *should consider including* (or words with that sense). This will make the advisory nature of the guidelines clearer for those following them and members of the public who might compare a particular review to the NMFS review guidance.

As a final note, we would like to emphasize the tremendous workload that is potentially embodied in the guidelines as currently specified. In addition to the catch share program review, not only is a detailed review of the underlying allocations indicated, but also a review and cost

assessment of the data system with respect to the potential for substitution of electronic technologies. Such assessments are no small matter and in aggregate might equate to a workload associated with more than two major environmental impact statements. Programs with as broad of a sweep as many catch share systems touch in important ways on many different subsystems, including stock assessment methodologies, which, like intersector allocations, also impact the total amount of fish available for the catch share program. However, as a practical matter, not every system can be included in a review of the catch share program. Further, the guidelines suggest that where adjacent catch share programs have interactions that they be reviewed together. For the Pacific Council, this might require expanding the trawl catch share program review to include the recently reviewed sablefish tier limit program. We would encourage resistance to the temptation to take the opportunity of the catch share program review to accomplish reviews of related subsystems.

Thank you for the opportunity to comment, and we hope you will have a favorable response to our request to be provided more time so that the Pacific Council can fully engage in this review.

Sincerely,



D. O. McIsaac, Ph.D.  
Executive Director

JLS:kma

Cc: Council Members  
Regional Fishery Management Council Executive Directors  
Ms. Kelly Denit  
Dr. Mike Travis

## Attachment: Other Detailed Comment

### Page 1

**Sablefish permit stacking program.** The guidelines list the Pacific sablefish permit stacking program as a review that is underway. That review was completed in June 2014, the date cited in footnote 11.

### Page 2

**January 12, 2007.** Paragraph II.A states that the MSA requires “‘formal detailed’ review of all LAPPs established after January 12, 2007.” The January 12, 2007 date is cited numerous times in the document. As we understand it, on the one hand, the MSA provides a general exemption from the requirements of 303A “Limited Access Privilege Programs” for any program in place within 6 months after the date of enactment of the MSA reauthorization of 2006 (this would be six months after January 12, 2007). On the other hand, there is an exception to this exemption (303A(i) TRANSITION RULES) for the section of the MSA which requires periodic reviews (303A(C)(1)(g)). Section 303A(i) of the MSA states that programs implemented prior to six months after MSA reauthorization “shall be subject to review under subsection (c)(1)(G) of this section not later than 5 years after the program implementation.” However, the draft policy goes on to state

For CSPs established prior to January 12, 2007, the requirement to initiate the first review within 5 years after establishment does not apply. As such the first review of these CSPs should be initiated no later than 7 years after the CS Policy went into effect (i.e. no later than the end of calendar year 2017)...

To provide clarity, additional explanation should be provided on the relationship between the dates in the guidelines and those in the MSA.

**Review within 5 years.** Paragraph II.A states “For CSPs established after January 12, 2007, the initial review must commence no later than 5 years after the program was established...” Later in the paragraph the deadline is restated as “the requirement to initiate the first review within 5 years after...” The draft guidelines appear to contradict the MSA requirement to conduct an initial “formal and detailed review 5 years *after* the implementation of the program” (303A(c)(1)(G)) (emphasis added). Five years *after* is not the same as “*within* 5 years after.”

### Page 3

**Limit on the frequency of reviews.** The last sentence of Section II states that: “The Councils and NMFS ... should not conduct reviews more frequently than every 3 years for the purpose of complying with the MSA requirement or CS Policy.” The basis for this restriction is not apparent. While the Pacific Council does not anticipate doing reviews more frequently than once every 3 years, if the Council and NMFS determine that such a review is the best use of regional resources, it is not clear why the guidelines would preclude the occurrence of a more frequent

review. If such a review were conducted, it should reset the clock on the next 7-year review period.

**Presumption of NMFS lead in developing the general plan for review.** In the second paragraph of IV.A, the statement that “For CSPs established by the Councils, it is recommended the appropriate Council(s) review a draft of the plan [general plan for the review] before it is finalized and significant work begins,” implies a presumed NMFS lead in the development of a plan rather than NMFS as a partner participating in a collective forum. This runs counter to the Pacific Council model.

**Planning for needed resources.** The last two sentences of the second paragraph of IV.A should be modified to account for Council/agency resource limitations (insertions indicated): “Whenever possible, a final plan should be completed no later than one year prior to initiating the review, as this will ensure adequate time is available to conduct any necessary supplementary/specialized data collections and acquire the resources needed to conduct the review. The timeline for conducting analyses associated with the review should take into account the availability of data, available resources, and the length of time necessary to complete those analyses.

#### Page 5-6

**List of contents for the review.** The third paragraph of Section V.A provides a list of contents for the review. That list should be augmented to include “a summary of any unexpected effects (positive or negative) which do not fall under the program’s goals or objectives.”

#### Page 7

**Use of “possible.”** In Section V.C (and perhaps elsewhere) the word “possible” (a word which does not take into account limited agency and Council resources) sets too high a bar for the recommended actions. Occurrences of possible should be replaced with more precise language. For example:

- “...make use of standardized performance indicators or metrics developed at the national level, to the extent ~~possible~~ that those indicators adequately describe the effects to be analyzed.”
- “To the extent ~~possible~~ that it is efficient and useful, reviews should...”
- “...make use of the NMFS Office of Science and Technology’s (S/T) economic and social performance indicators to the extent ~~possible~~ that it is efficient and useful.”

#### Page 9

**“measurable (at least qualitatively).”** The meaning of qualitative measurement is not clear.

**Reference to “maximize net benefits.”** To be clear that non-pecuniary benefits are included in the assessment of net benefits, add a parenthetical identical to that in EO 12866: “(including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).” That “net benefits are not exclusively economic in nature” is identified in Section V “General Approach, Scope of Review, and Use of Standardized Approaches,” however, it would be good to repeat this caveat in Section VI “Describing and Analyzing Program Performance.”