

FMP {approvability} = National Standards + FMP Components + OALs + Secretarial Review

FISHERY MANAGEMENT PROCESS

National Standards

The MSA contains 10 national standards that establish competing policy objectives that must be balanced and addressed in fishery management actions. These standards are at the core of the MSA and must be carefully considered and documented on the record. Some national standards restrict discretion more than others. NMFS has provided guidance on what each of the National Standards means in the National Standard Guidelines published in the Code of Federal Regulations. In addition, case law has developed around some of the National Standards and provides additional interpretations of their meanings. This section will provide that additional information where available. If you need additional guidance ask an attorney.

The National Standards require that FMPs:

1. Achieve optimum yield while preventing overfishing;
2. Be based on the best available scientific information;
3. Manage stocks as a unit *to the extent practicable*;
4. Ensure any needed allocations are fair and equitable, reasonably calculated to promote conservation, and carried out so that no individual acquires excessive shares;
5. Consider efficiency in the utilization of the resource *where practicable*, except that no measure may have economic allocation as its sole purpose;
6. Consider and allow for variations and contingencies;
7. *Where practicable*, minimize costs and avoid unnecessary duplication;
8. Consistent with the conservation requirements of the act, consider the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of [National Standard] 2 in order to provide for their sustained participation, and *to the extent practicable* minimize adverse economic impacts on such communities;
9. *To the extent practicable*, minimize bycatch and the mortality of unavoidable bycatch;

10. *To the extent practicable, promote the safety of human life at sea.*

National Standards 1, 2, 4, part of 5, and 6 are phrased as absolute requirements, whereas the remaining National Standards indicate they must be addressed to the extent “practicable.” The key requirement for these standards that must be addressed to the extent “practicable” is that they are discussed on the record and the Council’s rationale for its treatment of them is explained.

National Standard 1 2 3 4 5 6 7 8 9 10

Achieve optimum yield/prevent overfishing

Reflecting a central driving policy of the MSA which is that FMPs achieve optimum yield (OY) while preventing overfishing, it reads: “Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery...”

National Standard Guideline - [Sec.600.310](#)



[Visit website](#)

Sustainability – It’s in our hands. The Nation Marine Fisheries Services (NOAA Fisheries) commissioned well known artist and fish enthusiast, Ray Troll, to design original artwork that would both visually communicate and inspire interest in the mission of NOAA Fisheries – to sustain the nation’s living oceans.

Tasked with this challenge, Ray and co-creator Terry Pyles, who provided the computer-based coloration, have depicted the inter-relationships comprising our marine ecosystems.

Terms

OY: The MSA defines OY to mean: “the amount of fish which – 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. It is prescribed on the basis of the “maximum sustainable yield” (MSY) from the fishery, as reduced by any relevant social, economic, or ecological factor; and in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery. In the SFA amendments, Congress change the definition to MSY as “reduced.” Thus OY can no longer be set at a level that exceeds MSY.

MSY: is not defined in the Statute, but the National Standard Guidelines say that MSY means “the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions.” The National Standard Guidelines also provide additional information about how Councils should go about specifying MSY.

NMFS published new guidelines for National Standard 1 on January 16, 2009. The new guidelines address new requirements contained in the MSRA. Because National Standard 1 is such an important, core component of fishery management under the MSA, the new National Standard 1 guidelines have implications for other parts of the MSA as well. For example, guidance on defining stocks (see 600.310(d)) could have implications for management units under National Standard 3. Guidance on assessing and specifying OY pertains to the Mandatory FMP Component of specifying OY at MSA 303(a)(1). Guidance on preventing overfishing and rebuilding relates to the Mandatory FMP component at 303(a)(1) as well as to the MSAs special provisions on overfishing at 304(e). Details regarding these pieces of guidance will be discussed in greater detail in the appropriate sections of the MSA chapter. As an overview, highlights of the approach contained in the new guidelines are that they provide:

- Provide a Comprehensive Approach with implications for other parts of the MSA
- Rely on Control Rules, Targets, and limits
- Respond to Uncertainty conservatively
- Provide Guidance on Use of ACLs and AMs
- Provide Guidance and Interpretations on Ending Overfishing

They also define specialized terms and introduce new Terminology:

- Target and Non-target Stocks: 600.310(d)(3) defines "Target stocks" as Astocks that fishers seek to catch for sale or personal use, including "economic discards" as defined under Magnuson-Stevens Act section 3(9).@ 600.310(d)(4) defines "Non-target species" and "non-target stocks" as A fish caught incidentally during the pursuit of target stocks in a fishery, including regulatory discards' as defined under Magnuson-Stevens Act section 3(38). They may or may not be retained for sale or personal use. Non-target species may be included in a fishery and, if so, they should be identified at the stock level. Some non-target species may be identified in an FMP as ecosystem component (EC) species or stocks.
- Ecosystem Components (EC): 600.310(d)(5) allows, but does not require the identification of Ecosystem Components in a fishery which are: non-target species or stocks; that are not subject to overfishing, approaching overfished, or overfished; not be likely to become subject to overfishing or overfished; and not generally be retained for sale or personal use. Reasons for including Aecosystem components in and FMP could include data collection purposes; ecosystem considerations related to specification of OY for the associated fishery; considerations in the development of conservation and management measures for the associated fishery; and/or to address other ecosystem issues.

Bycatch implications: While EC species are not considered to be "in the fishery," a Council should consider measures for the fishery to minimize bycatch and bycatch mortality of EC species consistent with National Standard 9, and to protect their associated role in the ecosystem.

Need for Reference Points: EC species do not require specification of reference points but should be monitored to the extent that any new pertinent scientific information becomes available (e.g., catch trends, vulnerability, etc.) to determine changes in their status or their vulnerability to the fishery. If necessary, they should be reclassified as "in the fishery."

- Status Determination Criteria (SDC): 600.310(e)(2)(i)(A) defines Status determination criteria (SDC) as Athe quantifiable 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..
- Overfishing/Overfished: 600.310(e)(2)(i)(E) states that Aa 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.
- Maximum Fishing Mortality Threshold (MFMT): 600.310(e)(2)(i)8) states

that MFMT means the level of fishing mortality (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.

- Minimum Stock Size Threshold (MSST). 600.310(e)(2)(i)(F) states that MSST is “the level of biomass below which the stock or stock complex is considered to be overfished.”
- ABC/ABC Control Rule: Section 600.310(f) states that a control rule is a “policy for establishing a limit or target fishing level that is based on the best available scientific information and is established by fishery managers in consultation with fisheries scientists.” The guidelines state that control rules should be designed so that management actions become more conservative as biomass estimates, or other proxies, for a stock or stock complex decline and as science and management uncertainty increases. The “ABC control rule” means a specified approach to setting the ABC for a stock or stock complex as a function of the scientific uncertainty in the estimate of OFL and any other scientific uncertainty (see paragraph (f)(4) of this section). Acceptable biological catch (ABC) is a level of a stock or stock complex's annual catch that accounts for the scientific uncertainty.
- Annual Catch Limit (ACL). The MSRA added a mandatory FMP component at 303(a)(15) requiring that FMPs establish a mechanism for specifying ACLs and including measures to assure accountability (Accountability Measures/AMs). The N.S. 1 Guidelines state that the ACL is the level of annual catch of a stock or stock complex that serves as the basis for invoking AMs. ACL cannot exceed the ABC, but may be divided into sector-ACLs (660.310(f)(2)(iv)).
- Annual Catch Target (ACT)/ACT Control Rule: 600.310(f)(2)(v) and (vi) state that the ACT control rule means a specified approach to setting the ACT for a stock or stock complex such that the risk of exceeding the ACL due to management uncertainty is at an acceptably low level
- Accountability Measures (AMs): The MSRA added a mandatory FMP component at 303(a)(15) requiring that FMPs establish a mechanism for specifying ACLs and including measures to assure accountability (Accountability Measures/AMs). The N.S. 1 Guidelines state that the 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. 600.310(g).

Key aspects of the Rebuilding and Ending Overfishing provisions relate to:

- Minimum and Maximum Time Periods

- **T_{min}:** 600.310(j)(3)(i)(A) defines the minimum time for rebuilding a stock as 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}.
- **T_{max}:** 600.310(j)(3)(i)(8) and (D) provide that If T_{min} for the stock or stock complex is 10 years or less, then the maximum time allowable for rebuilding (T_{max}) that stock to its B_{msy} is 10 years. If T_{min} for the stock or stock complex exceeds 10 years, then the maximum time allowable for rebuilding a stock or stock complex to its B_{msy} is 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.
- **International Overfishing:** 600.310(k) provides guidance on how to handle situations in which excessive international fishing pressure is the cause of overfishing or overfished status.
- **Can overfishing ever be allowed?** 600.310(m) provides limited exceptions to the requirement to prevent overfishing: in a mixed stock fishery, a Council may allow some degree of overfishing on one stock in order to harvest another at its optimum level if an analysis shows that the stock that would be subject to overfishing is not overfished; the result would be long-term net benefits to the nation; mitigating measures have been considered and no other approach can achieve similar long-term benefits; and the resulting rate of F will not cause any stock to fall below MSST more than 50% of the time over the long-term (recognizing that persistent overfishing is likely to cause a stock to drop below B_{msy} more than 50% of the time).

National Standard 1 2 3 4 5 6 7 8 9 10

Based on best available science

The standard requires that FMPs be based on the “best available scientific information.”

National Standard Guideline - [Sec.600.315](#)



Researchers with herring caught during an acoustic trawl survey. Photo by David Csepp, NOAA Fisheries.

Terms

Incomplete Information. The fact that scientific information concerning a fishery is incomplete does not prevent the preparation and implementation of an FMP.

Conflicting Opinions. If there are conflicting facts or opinions relevant to a particular point, the Council and Secretary may choose among them, but should justify the choice

New Information. FMPs must take into account the best scientific information available at the time of preparation. Between the initial drafting of the FMP and its submission for final review, new information often becomes available. This new information should be incorporated into the final FMP where practicable. It is not necessary to start the FMP process over again, unless the information indicates that drastic changes have occurred in the fishery that might require revision of the management objectives or measures, or unless it changes the factual basis for making necessary determinations under the MSA or other applicable law.

SAFE Report. The SAFE Report (Stock Assessment/Fishery Evaluation) is a regularly updated product that summarizes the most current scientific information on the fishery.

Case Law Examples

National Marine Fisheries Service has generally won litigation where incomplete or conflicting data were at issue as long as there has been a sound explanation for why the data was used. The administrative record is of prime importance in such cases.

- In *Blue Water Fisherman’s Ass’n v. Mineta*, the court held that lack of complete scientific information on stock status (sharks) does not prevent the Secretary from conserving a species based on limited available data, especially when the very nature of the species prevents the collection of more complete scientific information.
- In *A.M.L. Intern., Inc. v. Daley*, the court held that a decision by the Secretary based on conflicting or incomplete scientific evidence is not thereby rendered arbitrary and capricious in relation to National Standard 2.
- In *Southern Offshore Fishing Association v. Daley*, the court stated that “Inconclusiveness alone... does not preclude the Secretary from acting based on a thorough consideration of available and relevant data... Difficulties with the data and the nature of the scientific method are expected in managing a resource as elusive as a fishery.”

- Also, “The Magnuson Act does not force the Secretary and Councils to sit idly by, powerless to conserve and manage a fishery resource simply because they are somewhat uncertain about the accuracy of relevant information.”
- And, “The Administrative record before the court evinces a healthy debate (both within NMFS and between NMFS and participating constituencies) which featured noticeably vocal expert opinions both supporting and opposing the means employed by the Secretary... It is the prerogative of [the Secretary] to weigh those opinions and make a policy judgment based on the scientific data.(lost on other grounds).”
- In *North Carolina Fisheries Assoc., Inc., and Georges Seafood, Inc., v. Evans*, the court upheld NMFS’s use of a biomass proxy that showed overfishing was occurring even though plaintiffs had offered a new, but not yet vetted, theory showing other results.
- In *Recreational Fishing Alliance v. Evans*, the court held that NMFS is required only to base its determination on information available at the time of preparing an FMP or regulations, and that incomplete information does not prevent the preparation and implementation of a FMP.
- In *Ace Lobster Co., Inc. v. Evans*, the court held that despite new reports submitted by plaintiffs showing results other than those relied on by the agency, the new reports did not necessarily apply to the current action, and there was evidence that NMFS did rely on relevant information.
- In *North Carolina Fisheries Association v. Gutierrez*, the Court held, “...even assuming the data was weak..., and the collection methodology was flawed, the Secretary’s decision to press forward...was rational. It is well settled...the Secretary can act when the available science is incomplete or imperfect, even where concerns have been raised about the accuracy of the methods or models employed.”
- Finally, in *Ocean Conservancy and Oceana v. Gutierrez*, court held that National Standard 2 does not require NMFS to rely exclusively on one study or to implement the most protective strategy. Despite NMFS’ decision not to implement an 18/0 circle hook requirement to protect sea turtles after considering the results of an experiment indicating these hooks were the most effective means of reducing turtle takes, the court stated, “The comprehensive approach adopted by the NMFS...was entirely reasonable because it considered not only its own data, but also other studies, expert opinions, and considerations raised by the public at large.”

Notable losses on National Standard 2 grounds involved judicial scrutiny of the reasonableness of the agency’s handling of facts in the record, and NMFS’s making a decision based on issues other than the science.

In one case, *Natural Resources Defense Council, Inc. v. Evans*, NMFS argued that in calculating bycatch mortality rates for the 2001 Pacific groundfish specifications, it was reasonable to extrapolate from a 1987 study, since that was the best available information. The court found that NMFS had not explained why it was reasonable to use estimates of 16-20% bycatch mortality when the study NMFS was using also cited a possible rate of 52%. In addition, the court held that it was not reasonable for NMFS to continue to rely on estimates of 16-20% bycatch mortality rates when it was a “virtual certainty” that bycatch mortality had increased over the years. The court criticized NMFS for failing to account for new evidence and instead relying on “static estimates that are 15 years old.”

The other notable loss on National Standard 2 grounds occurred in *Midwater Trawlers Coop. et al v. Commerce*, an unusual and fact-specific case involving tribal treaty rights. NMFS was under court-order to set aside an amount of quota for Indian tribes in order to comply with treaty rights. The court struck down the agency’s attempt to strike

a “compromise,” stating “In sum, the best available politics does not equate to the best available science as required by the Act.” After a court ordered review, NMFS subsequently relied on the same approach. Upon review the court then accepted the same methodology, concluding, “...although the Fisheries Service's initial adoption of the sliding scale method may have been the result of a compromise, the Fisheries Service has amply demonstrated that it is the method supported by the best available scientific information.” Again, the strength of the rationale in the record was key.

A notable instance of a district judge ruling against the agency on science in NMFS's older cases occurred in *Fishermen's Dock Cooperative v. Brown*, which was overruled on appeal. The case related to NMFS's implementation of the 1994 summer flounder commercial quota, which had been developed based on a conservative estimate of the stock's recruitment rate (based on one standard deviation below the geometric mean). The district court concluded that the geometric mean constituted the best available scientific information and that to the extent the basis for the quota deviated from the mean, it was invalid. On appeal the Fourth Circuit reversed.

In *North Carolina Fisheries Association v. Gutierrez*, the Court held that the approval of a Council's Scientific and Statistical Committee was not a prerequisite for National Standard 2 compliance, stating, “...That the Secretary acted rationally is especially clear in this case, since he sought and received confirmation from the Southeast Regional Science Center that the amendment as modified was still based upon the best scientific information available...Agency officials, and ultimately the Secretary, are the actors charged with deciding whether an amendment...is based upon the best scientific information available at the time of its adoption. This Court's responsibility is only to ensure the decision reached was a rational one. The record in this case reveals extensive scientific study, intense debate among the interested parties and the regulators, and a reasonable effort by the Secretary to produce an amendment both grounded in and responsive to the information at his disposal.”

National Standard 1 2 3 4 5 6 7 8 9 10

Manage stocks as a unit

The standard requires that: “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.”

Thus, it encourages integrated management of stocks of fish, but allows for discretion. 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.

National Standard Guidelines - [Sec.600.320](#) & [Sec.600.310 \(d\)](#)

Figure 1. Western and eastern Georges Bank haddock management units.



*Western and eastern
Georges Banks haddock
management units*

FMP

To document that an FMP is as comprehensive as practicable, the record should address:

- The range and distribution of stocks, and the patterns of fishing effort and harvest.
- 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.
- Management activities and habitat programs of adjacent states and their effects on the FMP's objectives and management measures.
- Management activities of other countries having an impact on the fishery, and how the FMP's management measures are designed to take into account those impacts.

The MSA does not preclude separation of naturally spawning and hatchery spawned fish into separate stocks.

It is important to note that new provisions in the NS1 Guidelines regarding classification of stocks as target, non-target, or ecosystem component may be relevant for NS 3 purposes as well.

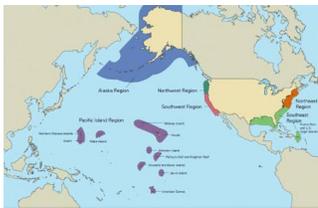
National Standard 1 2 3 4 5 6 7 8 9 10

Restrictions on Allocations

The standard provides that: “Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be:

- A. Fair and equitable to all such fishermen;
- B. Reasonably calculated to promote conservation; and
- C. Carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.”

National Standard Guidelines - [Sec.600.325](#) & [Sec.600.310 \(j\) \(3\) \(iii\)](#)



U.S. Exclusive Economic Zone

Terms

An “allocation” or “assignment” of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of National Standard 4.

FMP

An FMP may not differentiate among U.S. citizens, nationals, resident aliens, or corporations on the basis of their state of residence. However, conservation and management measures that have different effects on persons in various geographic locations are permissible if they satisfy the other guidelines under National Standard 4.

An FMP may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the OY, and if the measures are fair and equitable, are reasonably calculated to promote conservation, and avoid excessive shares.

Case Law Examples

- *National Coalition for Marine Conservation v. Evans*, Key features of the FMP included 4 closed areas to pelagic longlining to prevent overfishing and a ban on live bait to reduce marlin bycatch. Plaintiffs argued that the locations of the closures discriminated against Florida residents; alleged that NMFS had “rescinded” a closure in the Gulf in order to protect Louisiana residents; and alleged that NMFS had failed to consider alternative locations for the permanent closures. The court found that although the Florida closure may have “incidental allocative effects,” it is not an allocation for the purposes of NS 4. Even if the Florida Closure were an allocation, it was justified by the record. The record showed that the closure furthered a legitimate FMP goal, and would achieve conservation benefits. Plaintiffs failed to show that the

closure was unfair, inequitable, or failed to promote conservation under NS 4.

- In *North Carolina Fisheries Association v. Gutierrez*, the Court noted the Secretary acknowledged that certain sectors would be disproportionately affected by new restrictions, but determined it was justified. The Court upheld, "...the Secretary here explicitly acknowledged that certain sectors and even certain vessels would bear the brunt of the plan amendment. He nevertheless determined that the burden borne was justified by the overall benefit of ending overfishing of the four species at issue. Plaintiffs have not identified anything "intentionally invidious or inherently unfair in the plan adopted by the Council and the Secretary," *Sea Watch Int'l*, and their challenge under National Standard 4 therefore fails.
- In *Yakutat, Inc. V. Gutierrez*, the Court concluded there was no evidence that NMFS's decision to not include 1999 as a qualifying year for the Alaska p. cod LLP violated National Standard 4. Plaintiffs argued that the FMP qualified two boats that had clearly abandoned the fishing industry, while it excluded their boat, thereby demonstrating the unfairness of the qualifying criteria. The court found that NMFS and the Council had directly addressed this issue and provided a rationale for the dates they selected. The court wrote, "The record demonstrates the Secretary's concern "to conserve and manage the Pacific cod resources" and "stabilize fully utilized Pacific cod resources" being harvested in the BSAI...Controlling precedent requires that a plan not be deemed arbitrary and capricious, 'even though there may be some discriminatory impact,' if the regulations 'are tailored to solve a gear conflict problem and to promote the conservation of'" the fish in question."

National Standard 1 2 3 4 5 6 7 8 9 10

Efficiency in Utilization

This national standard provides that: “Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.”

This national standard requires consideration of economic factors and distributions, but also requires that such factors be considered in the context of other relevant social, biological, and ecological objectives. Originally, this National Standard required “promotion” of efficiency in utilization, but as priorities have changed towards sustainability, this requirement has been modified to require only its “consideration.”

National Standard Guidelines - [Sec.600.330](#)



Modern North Pacific crab fishery reflects substantial changes in management regimes to sustain economic benefits to the region.

Terms

Economic Allocation. This standard prohibits only those measures that distribute fishery resources among fishermen on the basis of economic factors alone, and that have economic allocation as their only purpose. Where conservation and management measures are recommended that would change the economic structure of the industry or the economic conditions under which the industry operates, the need for such measures must be justified in light of the biological, ecological, and social objectives of the FMP, as well as the economic objectives.

FMP

An FMP should contain management measures that result in an efficient fishery as is practicable or desirable, efficiency in utilization. In theory, an efficient fishery would harvest the OY with the minimum use of economic inputs such as labor, capital, interest, and fuel.

National Standard 1 2 3 4 5 6 7 8 9 10

FMPs shall take into account variations in fisheries and allow for contingencies

This national standard provides that: “Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.”

National Standard Guidelines - [Sec.600.335](#) & [Sec. 600.310 \(e\) \(iii\) \(v\)](#)



Katrina also had a profound impact on the environment.

Terms

Variations. In fishery management terms, variations arise from biological, social, and economic occurrences, as well as from fishing practices. Biological uncertainties and lack of knowledge can hamper attempts to estimate stock size and strength, stock location in time and space, environmental/habitat changes, and ecological interactions. Economic uncertainty may involve changes in foreign or domestic market conditions, changes in operating costs, drifts toward overcapitalization, and economic perturbations caused by changed fishing patterns. Changes in fishing practices, such as the introduction of new gear, rapid increases or decreases in harvest effort, new fishing strategies, and the effects of new management techniques, may also create uncertainties. Social changes could involve increases or decreases in recreational fishing, or the movement of people into or out of fishing activities due to such factors as age or educational opportunities.

Contingencies. Unpredictable events, such as unexpected resource surges or failures, fishing effort greater than anticipated, disruptive gear conflicts, climatic conditions, or environmental catastrophes, are best handled by establishing a flexible management plan that contains a range of management options through which it is possible to act quickly without amending the FMP or even its regulations.

FMP

Every effort should be made to develop FMPs that discuss and take variations into account. To the extent practicable, FMPs should provide a suitable buffer in favor of conservation.

It is important to note that NS1 provisions regarding potential establishment of an OY reserve compliment NS6.

National Standard 1 2 3 4 5 6 7 8 9 10

Minimize costs and avoid unnecessary duplication *where practicable

This national standard provides that: “Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.”

The National Standard Guidelines note that “Not every fishery needs a FMP.”

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.

National Standard Guidelines - [Sec.600.340](#)



FMP

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. Additional criteria for determining whether regulation is appropriate are set forth in the National Standard Guidelines.

A recreational angler cuts up his catch of yellowfin tuna.

National Standard 1 2 3 4 5 6 7 8 9 10

Fishing Communities

The standard provides that: “Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of National Standard 2 in order to:

- A. Provide for the sustained participation of such communities, and
- B. To the extent practicable, minimize adverse economic impacts on such communities.”

National Standard 8 does not constitute a basis for allocating resources to a specific fishing community or for providing preferential treatment based on residence in a fishing community.

National Standard Guidelines - [Sec.600.345](#) & [600.310 \(l\)](#)



The Fishermen's memorial in Gloucester, Mass.

Terms

The term “**fishing community**” means a community that is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew, and fish processors that are based in such communities. A fishing community is a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing, or on directly related fisheries-dependent services and industries (for example, boatyards, ice suppliers, tackle shops). Thus a “fishing community” must be geographically based. “Virtual communities” of parties with similar interests are not protected by National Standard 8.

The term “**sustained participation**” means continued access to the fishery within the constraints of the condition of the resource.

FMP

The importance of fishery resources to fishing communities must be considered within the context of the conservation requirements of the MSA. Deliberations regarding the importance of fishery resources to affected fishing communities must not compromise the achievement of conservation requirements and goals of the FMP.

All other things being equal, where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative. Where the preferred alternative negatively affects the sustained participation of fishing communities, the FMP should discuss the rationale for selecting this alternative over another with a lesser impact on fishing communities.

Case Law Examples

As mentioned above, the National Standards embody a series of competing policy goals that must be considered, some of which constrain discretion more than others. The amount of discretion and the required balancing of competing priorities makes the administrative record of primary importance in defending against litigation. The following cases demonstrate the weight accorded to National Standard 1 vis-à-vis National Standard 8:

- In *NRDC v. Daley*, a summer flounder case which contained a challenge to NMFS's balancing of National Standards 1 and 8, the district court upheld NMFS's argument that the MSA required a balancing of the competing goals of National Standards 1 and 8 as equal priorities: achieving conservation requirements and minimizing economic impacts. The appellate court reversed, ruling that National Standard 1 (conservation) supersedes National Standard 8 (mitigation of economic impact). Subsequently, NMFS has applied the appellate court's decision and has been upheld in several other jurisdictions.
- In *Recreational Fishing Alliance v. Evans*, the Court held, "while economic effects must be taken into account, such effects were not meant to trump the real purpose of the MSA, which is to preserve and protect US fisheries."
- In *Ace Lobster Co., Inc. v. Evans*, the Court held that "Deliberations regarding the importance of fishery resources to affected fishing communities, therefore, must not compromise the achievement of conservation requirements and goals of the FMP."
- In *A.M.L. Intern., Inc. v. Daley*, the Court stated that "A collapsed fishery will not be economically viable for decades, and is a worse economic consequence than the temporary measures (several years of industry shut-down) contained in the FMP... The fact that the implementation of the SDFMP [Spiny Dogfish FMP] will result in a closure of the spiny dogfish directed fishery is, in itself, not a violation of NS-8."
- More recently, in *North Carolina Fisheries Association v. Gutierrez*, the Court held, "Explicit in both the statutory text and implementing regulations is Congress's intent that conservation efforts remain the Secretary's priority, and that a focus on the economic consequences of regulations not subordinate this principal goal of the MSA...the Secretary was aware of potentially devastating economic consequences, considered significant alternatives, and ultimately concluded that the benefits of the challenged regulation outweighed the identified harms. Acknowledging as much does not, as plaintiffs protested at the motions hearing, render National Standard 8 "a useless appendage" or deprive that provision of its "action forcing" quality. Prelim. Tr. at 13. National Standard 8 has retained its utility, undoubtedly "forcing" the Secretary to undertake the kind of analysis he reasonably did in this case."

National Standard 1 2 3 4 5 6 7 8 9 10

Bycatch

The standard provides that: “Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.”

National Standard Guidelines - [Sec.600.350](#)



Shrimp by catch

Terms

The MSA defines “**bycatch**” as “fish” that are harvested in a fishery, but that are not sold or kept for personal use. The MSA defines “fish” as “finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds.” Thus marine mammals and seabirds are not included in the MSA definition of bycatch.

Bycatch includes the discard of whole fish at sea or elsewhere, including economic discards and regulatory discards, and fishing mortality due to an encounter with fishing gear that does not result in capture of fish (i.e., unobserved fishing mortality). Bycatch does not include retained incidental catch (i.e., any fish that legally are retained in a fishery and kept for personal, tribal, or cultural use, or that enter commerce through sale, barter, or trade).

FMP

The priority under this standard is first to avoid catching bycatch species where practicable. Fish that are bycatch and cannot be avoided must, to the extent practicable, be returned to the sea alive. Any proposed conservation and management measure that does not give priority to avoiding the capture of bycatch species must be supported by appropriate analyses.

Case Law Examples

Case law has provided some guidance on practicability:

- In *Legacy Fishing Co. v. Gutierrez* plaintiffs argued that the severity of the economic impacts of the Alaska Groundfish Retention Standards rendered the provisions impracticable. The court found that National Standard 9 cannot be viewed in a vacuum, but is a component of a larger balancing scheme that NMFS must consider. Finding for NMFS, the court wrote, “...the agency carefully analyzed the impact of these regulations on the important factors recognized in National Standard 7 and 8, including all the potential hardships highlighted in plaintiffs' complaint. After the benefits were weighed against the costs, as required by statute, the agency determined that the "costs of the GRS program are justified by the groundfish discard and compliance history of the non AFA trawl C/P sector." The economic impacts on the plaintiffs' vessels are potentially grave, and the court does not diminish the difficulties that will be faced by the individuals forced to comply with the GRS program. But the record reflects that these difficulties were recognized, analyzed, and considered by the NMFS in striking the statutorily mandated balance. (This case

was reversed on other grounds by Fishing Company of Alaska, D.C. Cir. 12/2007).

- In *Ocean Conservancy and Oceana v. Gutierrez* court held that National Standard 9 does not require NMFS to implement the most protective bycatch avoidance measure available. The court wrote, "...plaintiffs assert that National Standard 9 requires the NMFS to adopt the most protective measure available with regards to minimizing bycatch. *Id.* I disagree....Simply stated, National Standard 9 is not entitled to greater weight than any of these other standards. See *Nat'l Coalition for Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 137 (D.D.C. 2002). In this Court's judgment, NMFS's 2004 Final Rule balanced competing interests by reconciling the economic needs of fishermen with the conservation goal of reducing bycatch to the lowest level possible. In doing so, it thoroughly reviewed the relevant scientific data on bycatch and consulted with participants in the fishery to determine whether the proposed regulations would be effective and practical."

National Standard 1 2 3 4 5 6 7 8 9 10

Safety of Life at sea

“Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”

This standard acknowledges that fishing is an inherently dangerous occupation characterized by unforeseeable and unavoidable hazards. The standard recognizes that regulations may pressure fishermen to fish under conditions they would otherwise avoid. The standard is not meant to give preference to one method of managing a fishery over another, but rather directs the Councils and the Secretary to identify and avoid regulations that pressure fishermen to take risks, as long as they can meet the other national standards and the legal and practical requirements of conservation and management. The National Standard Guidelines set forth additional criteria that should be considered in evaluating a measure’s compliance with National Standard 10.

National Standard Guidelines - [Sec.600.355](#)



Fishing vessel in heavy seas

Case Law Examples

In *Legacy Fishing Co. v. Gutierrez* the court upheld agency action when NMFS responded to Coast Guard concerns about safety by creating mitigation measures. The Coast Guard stated during notice and comment that the ban on haul mixing may create safety problems by forcing fishermen to stack full nets on vessel decks, which could "adversely affect a vessel's stability." A.R. 152 (letter from Coast Guard to NMFS, noting that "sudden load shifts and unnecessarily high deck loads [are] significant contributors to vessel capsizings and sinkings"). The NMFS analyzed this concern and ultimately concluded this safety risk could be avoided by refraining from stacking nets on vessel decks, and suggested several alternatives such as adjusting the timing of haul back activities, short wiring a haul to the vessel, and modifying vessel layout to expand fish bin capacity. The Coast Guard ultimately agreed with the NMFS that the haul mixing ban will not decrease vessel safety, since regulated vessels may choose between a number of safe ways to respond to the ban. The agency thoroughly considered the ban's impact on vessel safety, and determined the regulation would "not decrease vessel safety compared to the status quo," and was necessary to enforce the GRS program. (This case was reversed on other grounds by *Fishing Company of Alaska*, D.C. Cir. 12/2007).