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Re: Scientific and Statistical Committee Review under the Magnuson-Stevens Act (NSGLC-12-04-04)

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Dear Doug:

Below is the summary of research of the National Sea Grant Law Center regarding the question you posed to us on May 31, 2012 about whether the Gulf of Mexico Fishery Management

Council's failure to consult with the Scientific and Statistical Committee on fishery management plan amendments violates the Magnuson-Stevens Act. The following information is intended as informational research only and does not constitute legal representation of Florida Sea Grant or its constituents by the National Sea Grant Law Center. It represents our interpretation of the relevant laws and cases.

As I understand it, you are concerned that the Gulf of Mexico Fishery Management Council did not consult with the SSC on recent FMP amendments. To date, in addition to contacting the Council via letter to clarify a request to review the science and data, you made statements during public comment periods for two proposed plan amendments. In response to your advisory request, this memo first examines the role of the SSCs in general, including an overview of the pertinent provisions of the Magnuson-Stevens Act (MSA). Next, it discusses the practice of other Councils with respect to their inclusion of SSCs in the review process for amendments or other decisions. Finally, it explores how an amendment that may not meet conservation goals established by the MSA might be treated by a court.

Role of the SSC under the Magnuson Stevens Act

The MSA states that

“Each Council shall establish, maintain, and appoint the members of a scientific and statistical committee to assist it in the development, collection, evaluation, and peer review of such statistical, biological, economic, social, and other scientific information as is relevant to such Council’s development and amendment of any fishery management plan.”¹

This provision of the MSA authorizes the SSC to assist with information gathering and evaluation necessary for the development of a management plan. The Act further states,

“[e]ach scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices.”²

Decisions and recommendation made by SSCs, however, are “considered to be advisory in nature.”³

¹ 16 USCS § 1852(g)(1)(a).

² 16 USCS § 1852 (g)(1)(b).

³ 16 USCS § 1852 (g)(5).

In response to your comment on Amendment 11 to the Fishery Management Plan for Spiny Lobster, NMFS noted that “the Magnuson-Stevens Act does not require that an SSC review every fishery management plan amendment developed by its Council.”⁴ Rather, the SSC provides information upon the Council’s request.⁵ The response did note that SSC participation is required in certain instances. For example, the Councils must:

- “develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process established under subsection (g)”;⁶ and
- “develop, in conjunction with the scientific and statistical committee, multi-year research priorities for fisheries, fisheries interactions, habitats, and other areas of research that are necessary for management purposes ...” that must meet certain requirements.⁷

As we interpret these provisions, when a Council is developing annual catch limits and setting certain research priorities, it must consult with the SSC. When developing FMPs and making other fisheries management decisions, Councils may seek the advice of an SSC. However, Councils are not required to seek such advice, and any recommendations provided by the SSC are in an advisory capacity (i.e., non-binding).

Other FMCs

The practice of SSCs reviewing plan amendments varies among Councils. Some SSCs do not provide review of plan amendments. Others review certain aspects of plan amendments. For example:

- No review. SSC members from the Mid-Atlantic Fisheries Management Council and the New England Fisheries Management Council do not typically review plan amendments.⁸
- Review of scientific information. The Pacific Fisheries Management Council responded that “when there is a substantial scientific component to a plan amendment, they are generally asked to review that portion of a plan amendment.”⁹
- Review of social and economic information by SSCs. Some SSCs may review plan amendments and provide guidance on social and economic information. For example, in the South Atlantic Council SSC members in the Social Sciences subcommittee receive plan amendments for review and are welcome to review them but are not required to do so.¹⁰ In the North Pacific Council, the SSC reviews “the adequacy of all social and economic analyses prior to the Council’s final decision. The [NPFMC’s] SSC utilizes its scientific expertise to provide technical advice to analysts concerning all FMP and

⁴ Response on file with the NSGLC.

⁵ Response on file with the NSGLC.

⁶ 16 USCS § 1852 (h)(6)

⁷ 16 USCS § 1852 (h)(7).

⁸ Email from Chris Legault, Ph.D, Chair of NEFMC SSC to Terra Bowling (June 20, 2012) (on file with NSGLC).

⁹ Email from Owen Hamel, Ph.D, Chair of PFMC SSC to Terra Bowling (June 20, 2012) (on file with NSGLC).

¹⁰ Phone interview with John Boreman, Ph.D, chair of MAFMC and SAFMC member (June 21, 2012).

regulatory amendment analyses prior to public review.”¹¹ The Western Pacific Council reviews plan amendments when they are “put forth to the SSC in National Environmental Policy Act (NEPA)-like format with a range of alternatives, the SSC may choose to recommend one or more alternatives, modify the alternatives, or propose other alternatives. The social science members do not usually see these items prior to the circulation of meeting documents, and rely heavily on staff for development of potential costs, benefits, and the impacts of proposed alternatives.”¹²

There seems to be a greater opportunity for SSCs to provide guidance on social and economic information. At the National SSC Workshop on “Ecosystem and Social Science considerations in U.S. Federal Fishery Management” in the Fall of 2011, one of the conclusions of the breakout groups was that “[t]here is a wide range of engagement of social scientists in SSC deliberations across the country ranging from full engagement in some regions to little or no engagement in some regions. Social scientists should be more fully engaged in the SSC process through review of Council analyses included in annual specifications, Fishery Management Plans (FMPs), Amendments, and Framework actions.”¹³

Court Decision

What happens when a rule is established that may be contrary to scientific recommendations? In *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747 (D.C. Cir. 2000), the U.S. Court of Appeals for the District of Columbia found that NMFS’ quota for the 1999 harvest of summer flounder was unreasonable. In this case, NMFS set the 1999 summer flounder quota at 18.52 million pounds, which had an 18% chance of achieving the target fishing mortality rate (F) for the 1999 summer flounder fishery. Under the MSA, the quota must not exceed the “F” set in its FMP, which was 0.24 in 1999. Scientists (the Summer Flounder Monitoring Committee) had suggested that the quota be set at 14.645 million pounds and the Mid-Atlantic Fishery Management Council had recommended the total allowable catch be set at 20.20 million pounds. While the lower court rejected a challenge to NMFS’ quota by finding that NMFS was entitled to deference, the appeals court disagreed. The D.C. Circuit ruled that the quota was unreasonable, because the agency must have a “fairly high level of confidence that the quota it recommends will not result in a F greater than the target F.” The court found that the agency’s decision was not entitled to deference, because it was not consistent with the Act’s statutory purpose, which, according to the court, is conservation. In that same vein, a court looking to see whether an amendment was in line with the Act’s purpose would likely look to see whether a Council considered or followed scientific recommendations.

Conclusion

In conclusion, it appears as though the Magnuson-Stevens Act does not require review of plan amendments by SSCs. Despite this, some SSCs do review the amendments. It is important to

¹¹ Report of a National Scientific and Statistical Committee Workshop on Ecosystem and Social Science Considerations in U.S. Federal Fishery Management at 13 (Oct. 4-6, 2011) (on file with NSGLC).

¹² *Id.* at 19.

¹³ *Id.* at 1.

note that plan amendments are open for public comment and even if SSCs do not review and comment on amendments as a group, individual SSC members may comment on any amendments during the public comment period.

I hope you find this information helpful. Please let me know if you have follow-up questions or would like additional information.

Sincerely,

Terra Bowling
National Sea Grant Law Center