

Mr. Chris Oliver
Assistant Administrator for NOAA Fisheries
1315 East-West Highway
Silver Springs MD 20910

October 30, 2020

Dear Mr. Oliver,

For the second year in a row, the Bering Sea trawl fisheries are well over their sablefish allocation. As shown in Appendix A, Table 1, in 2019 and 2020, the Bering Sea trawl fleet exceeded its sablefish TAC by 2,453 metric tons (356%) and 3,310 metric tons (484%) respectively (with two months left in the 2020 season). These exceedances amounted to over 11 million pounds in the last two years alone.¹ In fact, the Bering Sea sablefish (trawl) sector has exceeded its quota for four years in a row. There are also consistent TAC overages in the Central Gulf of Alaska trawl fisheries as shown in Appendix A, Table 2. Also, for the second year in a row, sablefish quota share holders and fixed gear organizations asked the Council to take action to hold the trawl sector accountable for the overages. North Pacific Fishery Management Council members raised the issue and indicated they might make a motion to address trawl overages at the December 2020 meeting, but no action has been taken to date. Meanwhile, the waste of this valuable resource continues.

Section 303(a)(15) of the Magnuson-Stevens Act requires that fishery management plans (FMPs) include a “mechanism for specifying annual catch limits ... including measures to ensure accountability.”² This mandate reflected a primary purpose of the 2006 Magnuson-Stevens Fishery Conservation and Reauthorization Act which responded to a need to require adherence to scientifically established annual catch limits (ACLs).³ The National Standard 1 Guidelines explain that accountability measures (AMs) should prevent exceedances of ACLs, and “correct or mitigate overages of the ACL if they occur.”⁴ Councils should identify and correct overages “as soon as possible” each year, and address “any biological consequences to the stock or stock complex resulting from the overage”⁵ The implementation of AMs in response to an overage is mandatory, and should address and minimize both the frequency and magnitude of overages and correct the problems in as “short a time as possible.”⁶

The Bering Sea-Aleutian Islands and Gulf of Alaska groundfish FMPs share four AMs - §3.2.4.1 (the Observer Program), §3.2.4.2 (the Catch Accounting System), §3.2.4.3 (Inseason Management), and §3.2.4.4 (Harvest Specifications and TAC Overage).⁷ §3.2.4.3 relies primarily on prohibiting sablefish retention to encourage avoidance once the trawl fisheries harvest their total TAC.⁸ The FMP provisions

¹ 5,074 x 2204.62 = 11,186,241.88

² 16 U.S.C. § 1853(a)(15).

³ *Conservation Law Foundation v. Pritzker*, 37 F.Supp.3d 254, 266-276 (D.D.C. 2014).

⁴ 50 C.F.R. § 600.310(g)(1)

⁵ *Id.* § 600.310(g)(3)

⁶ *Id.* § 600.310(g)(1), (3); *see also Oceana v. Locke*, 831 F.Supp.2d 95, 119-120 (D.D.C. 2011).

⁷ North Pacific Fishery Management Council. 2019. Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP). Anchorage, AK: August 2019. *See* pp. 24-26; North Pacific Fishery Management Council. 2019. Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI FMP). Anchorage, AK: October 2018. *See* pp. 24-26.

⁸ GOA FMP at 25; BSAI FMP at 25. *See also* ES-4 (stating that “[g]roundfish species and species under this FMP for which TAC has been achieved shall be treated in the same manner as prohibited species” meaning that sablefish species “must be avoided while fishing for groundfish”). Retention prohibitions and voluntary avoidance measures can be ineffective, and consequently, inadequate AMs. *See Oceana v. Locke*, 831 F.Supp.2d 95, 120 (D.D.C. 2011). (finding that non-retention limits applied once the fleet exceeded their TAC failed to decrease the likely bycatch of five specific stocks as bycatch during efforts to catch other species); *see also Guindon v. Pritzker*, 31 F.Supp.3d 169, 199-200 (D.D.C. 2014).

also state that “[i]n the rare occurrence of a TAC being exceeded,” NMFS would evaluate the causes of the overage and develop actions that would prevent the overage from happening again such as further restricting the directed fishery or adjusting the stock assessment.⁹ These two AMs neither provided for any management actions that control excess incidental take of sablefish by sector, nor prevented the Bering Sea trawl sector from exceeding its ACL again in 2020.¹⁰

Excess take in the trawl fisheries caused ABC/ACL overages in two areas last year.¹¹ At the January/February 2020 Council Meeting, NPFMC senior scientist Dr. Diana Stram explained that the Council’s “extensive discussion” about the overage did not formally identify any AMs but resulted in actions she believes functioned as AMs: (1) the Council set an Alaska-wide Overfishing Limit (OFL); (2) selected a TAC that was below the ABC and (3) cautioned trawl industry representatives to guard against overages in 2020.¹² NMFS assumed these measures would reduce incidental sablefish take in the trawl fisheries in 2020.¹³

With the exception of the Council “cautioning” the trawl sector, last year’s actions and the FMPs both rely on AMs that apply to the entire groundfish fishery instead of addressing overages caused by incidental catch in the trawl sector. It makes no sense to rely on fishery-wide measures when one sector consistently adheres to its catch limit, while another sector demonstrates considerable uncertainty and variability in its catch limit overages which recur year after year.¹⁴ When a sector repeatedly and substantially exceeds its quota, such as the Gulf of Mexico recreational red snapper fishery from 2008-2013, it “defies logic” to assume that existing AMs and/or voluntary measures will prevent a recurrence.¹⁵

The trawl sector exceeded the 2020 sablefish ABC/ACL for all Bering Sea sectors by nearly fifty percent.¹⁶ This overage raises a clear need to specify sector-specific AMs, particularly in light of the differences in management uncertainties for the different sectors and the proportion of sablefish take by the trawl sector.¹⁷ Further, the National Standard Guidelines specify that if catch exceeds ACL more than once every four years, the agency must re-evaluate and, if needed, modify “the system of ACLs and AMs ... to improve its performance and effectiveness.”¹⁸ The type of AM may vary by fishery sector, stock status, recruitment patterns, other information, and *the degree of the overage*.¹⁹ A key factor is that an AM must actually correct overages.²⁰ AMs that respond to overages could include modifications for 2021 such as an inseason closure authority, area closures, or overage payback adjustments that meaningfully incentivize avoidance behaviors.²¹

⁹ GOA FMP at 25; BSAI FMP at 25.

¹⁰ See GOA FMP at 25; BSAI FMP at 25-26.

¹¹ NPFMC Meeting Audio 2020_2_1.MP3 at 7:56:52. Available at: <https://app.box.com/s/01yly8h8036dt6rqbilmb0hq798p4h2/file/610385628212>

¹² *Id.* at 7:57:21-7:58:15.

¹³ Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands; Final 2020 and 2021 Harvest Specifications for Groundfish. 85 Fed. Reg. 13,555. (March 9, 2020).

¹⁴ See *Guindon v. Pritzker* at 199-200.

¹⁵ *Id.*, 31 F.Supp.3d at 180.

¹⁶ Cf. Appx. A, Table 1; Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands; Final 2020 and 2021 Harvest Specifications for Groundfish. 85 Fed. Reg. at 13,556, Table 1, 13,564 Table 10. (March 9, 2020).

¹⁷ See 50 C.F.R. § 600.310 (f)(4)(ii); *Guindon v. Pritzker*, 31 F.Supp.3d at 198; *Oceana v. Locke*, 831 F.Supp.2d at 116, 120-121 (finding that “an overall suite of accountability measures” across a large, multi-species fishery was an ineffective strategy for adhering to catch limits for five specific stocks or obviate the need for sector-specific AMs).

¹⁸ 50 C.F.R. § 600.310(g)(7).

¹⁹ *Id.*, 600.310(g)(3).

²⁰ *Id.*

²¹ Both NMFS and Congress consider overage payback adjustments to be an appropriate AM. See Magnuson-Stevens Act Provisions; National Standard Guidelines. 81 Fed. Reg. 71,858, 71,876 (October 18, 2016); S. Rep. No. 109-229 (2006) (“the (indicating that any catch in excess of that limit (overages) should be deducted from the following year’s catch limit).

Effective AMs are critical because, as explained in Appendix B, sablefish stocks are close to historic low levels with rebuilding dependent on the recent strong year classes that are currently schooled in the Bering Sea. Commercial catch rates remain low and high uncertainty remains around the survival and eventual recruitment of these strong year classes into the spawning population. The high mortality imposed on these juvenile fish compromises the rebuilding potential of the stock. Members of the fixed gear sector are extremely concerned that the Council's failure to act could be a long-term disaster for this valuable resource and the directed fishery. 5 million pounds of immature sablefish can mature into 20-25 million pounds of marketable sablefish making the failure to act a startling and unnecessary sacrifice.

As you may be aware, the apportionment of sablefish between management areas has been frozen for four years while the sablefish stock assessment team evaluated various apportionment strategies. Because juvenile sablefish are currently abundant in the Bering Sea, the trawl industry has advocated for reapportioning sablefish quota from the Gulf to the Bering Sea as a solution to their allocation overages. Reapportioning sablefish quota to the Bering Sea might decrease the waste, since trawlers have to discard sablefish once their allocation is reached, but it will only increase mortality on these juvenile fish. Apportionment should be based on mature fish, not juveniles that have not yet contributed to the spawning biomass. Likewise, last year's creation of a fishery wide OFL to prevent the trawl sector from exceeding the Bering Sea OFL, simply served to disguise the ACL overage rather than address it.

Given the Council's inaction, the undersigned organizations request that NOAA identify accountability measures to control trawl sablefish catch to the assigned TACs. **We believe NOAA should act immediately to stop trawl sablefish bycatch and to identify appropriate accountability measures for 2021 and beyond.** Both NMFS and the Council are responsible for meeting Magnuson-Stevens Act goals to conserve and manage U.S. fishery resources in accordance with the Act's conservation and management principles.²² The Act delegates NMFS "ultimate authority" over federal fishing policy and oversight.²³ This "ultimate authority" means that that agency has the responsibility to ensure that Councils develop needed AM to adapt to changing conditions or correct past errors in judgment.²⁴

Chosen AMs must ensure "accountability," meaning "the quality or state of being accountable, liable, or responsible."²⁵ An existing scheme that allows for "persistent overages" does not ensure accountability.²⁶ The Alaska groundfish fishery ACLs include both retained and incidental catch, and there is no accountability for the amount of incidental catch that alone exceeds the ACL. The GOA and BSAI FMPs thus lack established measures to ensure accountability, causing the FMPs to be out of compliance with the Magnuson-Stevens Act.²⁷ NMFS and the Council need to consider area closures, payback provisions, and even hard cap inseason closure authority as needed to ensure accountability.²⁸

Thank you for your time and attention,

Sincerely,

²² 16 U.S.C. § 1801(b).

²³ 16 U.S.C. § 1802(39); 1854.

²⁴ See *Guindon v. Pritzker*, at 197-98 (explaining that "NMFS is not left helpless, with hands tied, hoping that the Council will eventually correct the omission [of an AM]" because the Magnuson-Stevens Act and the agency's own guidelines make abundantly clear that AMs are necessary. NMFS must disapprove any Council proposal, such as 2021 harvest specifications, that do not adequately address excess trawl take of sablefish); see also *Flaherty v. Bryson*, 850 F.Supp.2d 38, 54 (D.D.C. 2012) ("it is NMFS's role ... to ensure the Council has done its job properly under the MSA").

²⁵ *Flaherty v. Bryson*, 850 F.Supp.2d at 67 (D.D.C. 2012) see also <https://www.dictionary.com/browse/accountability>

²⁶ *Guindon v. Pritzker*, 31 F.Supp.3d at 200 (D.D.C. 2014).

²⁷ *Oceana v. Locke*, 831 F.Supp.2d at 115-116.

²⁸ *Id.* at 119-120.

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Senator Murkowski
Senator Sullivan
Representative Young
Commissioner Doug Vincent-Lang
Deputy Commissioner Rachel Baker

APPENDIX A

Table 1. Bering Sea Trawl Fishery Sablefish TAC Overages (in mt) as of 10/29/2020²⁹

Year	Quota	Catch	Overage	Percent Over
2020 to date	861	4,287	3,426	498
2019	689	2,453	1,764	356
2018	677	985	308	145
2017	589	649	60	110
Total	2,816	8,258	5,442	293

Table 2. Central Gulf of Alaska Trawl Fishery Sablefish TAC Overages (in mt)³⁰

Year	Quota	Catch	Overage	Percent Over
2020 to date	1,289	1,880	591	146
2019	1,036	1,960	924	189
2018	1,032	2,124	1,092	206
2017	903	1,192	289	132
Total	4,260	7,162	2,902	168

APPENDIX B

I. Twelve concerns from the sablefish stock assessment scientists (excerpted from the Science and Statistical Committee's December 2019 Report on C1 BSAI Specifications).³¹

1. The estimate of the 2014 year class strength declined 56% from 2017 to 2019. A decline of this magnitude illustrates the uncertainty in these early recruitment estimates.
2. Fits to abundance indices are poor for recent years, particularly fishery CPUE and the GOA trawl survey.
3. The AFSC longline survey Relative Population Weight index, though no longer used in the model is still only just above average.
4. The retrospective bias is positive (i.e., historical estimates of spawning biomass increase as data is removed).
5. Mean age of spawners has decreased dramatically since 2017 and continues a downward trend, suggesting higher importance of the contribution of the 2014 year class to adult spawning biomass; however, age-4 body condition of this year class was poor, and much lower than during the last period of strong recruitments
6. The very large estimated year classes for 2014 and 2016 are expected to comprise about 33% and 14% of the 2020 spawning biomass, respectively. The 2014 year class is about 50% mature while the 2016 year class should be less than 15% mature in 2020.

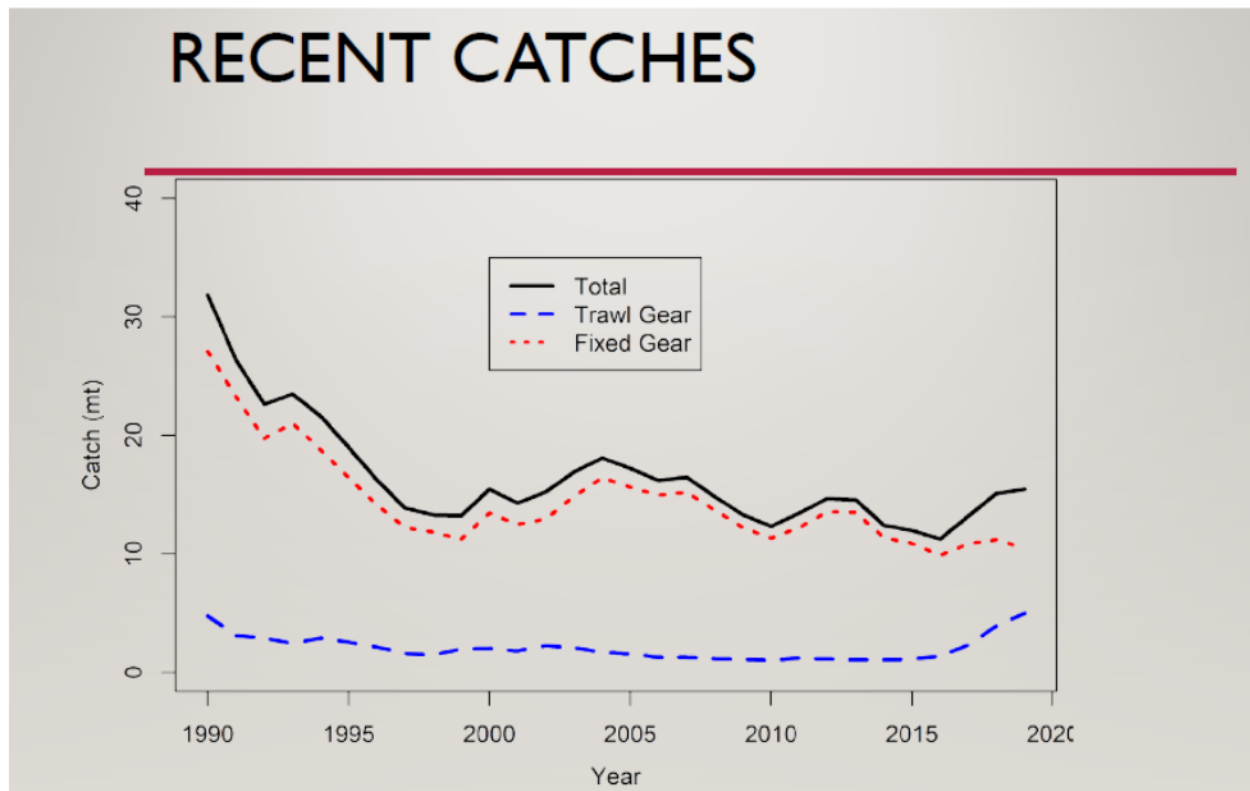
²⁹ See https://www.fisheries.noaa.gov/sites/default/files/akro/car110_bsai_with_cdq2020.html;
https://www.fisheries.noaa.gov/sites/default/files/akro/car110_bsai_with_cdq2019.html;
https://www.fisheries.noaa.gov/sites/default/files/akro/car110_bsai_with_cdq2018.html;
https://www.fisheries.noaa.gov/sites/default/files/akro/car110_bsai_with_cdq2017.html

³⁰ See https://www.fisheries.noaa.gov/sites/default/files/akro/car110_goa2020.html;
https://www.fisheries.noaa.gov/sites/default/files/akro/car110_goa2019.html;
https://www.fisheries.noaa.gov/sites/default/files/akro/car110_goa2018.html;
https://www.fisheries.noaa.gov/sites/default/files/akro/car110_goa2017.html.

³¹ NPFMC Science and Statistical Committee. 2019. SSC Report on C1 BSAI Specifications, December 2019.

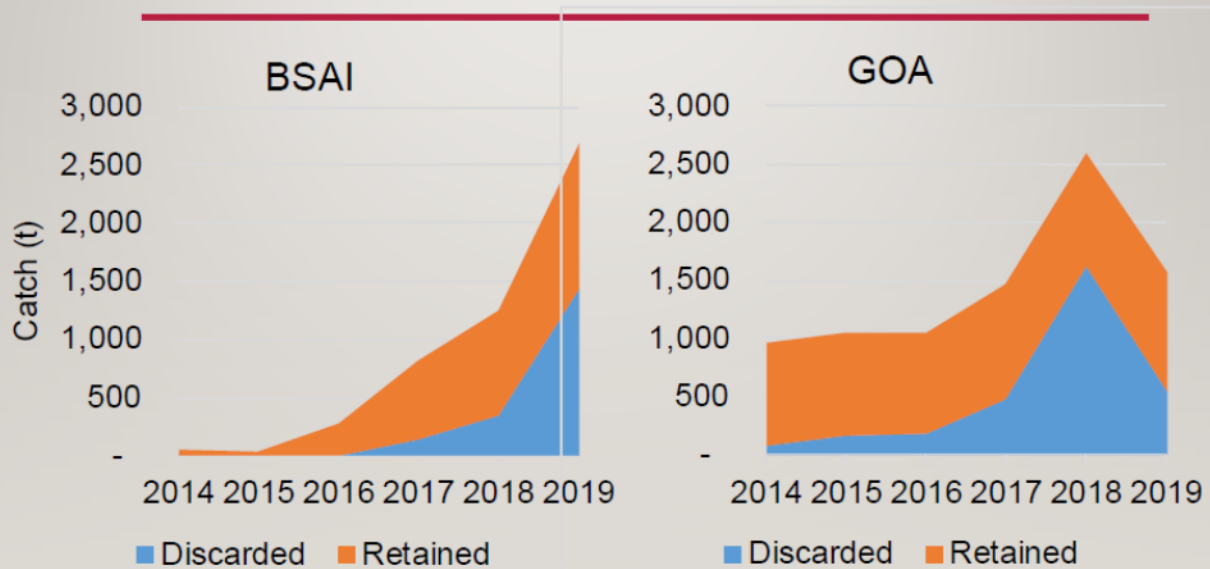
7. The projected increase in future spawning biomass is highly dependent on young fish maturing in the next few years; results are very sensitive to the assumed maturity rates.
8. Evenness in the age composition has dramatically declined, which means future recruitment and fishing success will be highly dependent on only a few cohorts of fish.
9. Spatial overlap between sablefish returning to adult slope habitat and the arrowtooth flounder population may have increased resulting in potentially higher competition and predation
10. Another marine heat wave formed in 2018, which may have been beneficial for sablefish recruitment in 2014 - 2016, but it is unknown how it will affect fish in the population or future recruitments.
11. Fishery performance has been very weak in the directed fishery with CPUE at time-series lows in 2018.
12. Small sablefish are being caught incidentally at unusually high levels shifting fishing mortality spatially and demographically, which requires more analysis to fully understand these effects.

II. SELECTED SABLEFISH GRAPHS³²



³² Hanselman, D. et al. 2019. Powerpoint, Alaska Sablefish. Alaska Fisheries Science Center. Juneau, AK: December 2019.

TRAWL CATCH AND DISCARDS



RISK-MATRIX FRAMEWORK: 3

- Assessment model: 2 (increased concern)
- Population dynamics: 3 (major concern)
- Ecosystem: 2 (increased concern)
- Fishery performance: 3 (major concern)

