

protections under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act; and

(e) Other natural or manmade factors affecting its continued existence, including but not limited to information on: Productivity, survival, and mortality rates of this population; the occurrence and effect of inbreeding; effects to Sonoran Desert area bald eagles while outside the Sonoran Desert area; effects to Sonoran Desert area bald eagles' prey base and productivity, including effects of nonnative predatory fish and native fish restoration; effects of low-flying aircraft; the presence and abundance of pesticides and contaminants such as lead, mercury, or dichlorodiphenyldichloroethylene (DDE); the effects of climate change; and the effects from eggshell thinning.

(6) Information supporting the existing boundary developed in our May 1, 2008, final listing rule (73 FR 23966) for Sonoran Desert area bald eagles under consideration in this status review, or information indicating that the boundary should be modified.

If you submitted information in response to our notice of initiation of a status review, which was published in the **Federal Register** on May 20, 2008 (73 FR 29096), you do not need to resend it. We will include the submission in the public record, and we will consider the information in the preparation of our status review.

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If you submit personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

Section 4(b)(3)(B) of the Act requires that, for any petition to revise the Lists of Threatened and Endangered Wildlife and Plants that contains substantial scientific or commercial information that the action may be warranted, we make a finding within 12 months of the date of the receipt of the petition on whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted but precluded by other pending proposals. Such 12-month findings are to be published promptly in the **Federal Register**.

Federal actions taken prior to May 2008 are described in a notice of initiation of a status review of the Sonoran Desert area bald eagle, which was published in the **Federal Register** on May 20, 2008 (73 FR 29096). On August 27, 2008, the U.S. District Court for the District of Arizona granted the Center for Biological Diversity and Maricopa Audubon Society's unopposed motion to amend the previous court order (*Center for Biological Diversity v. Kempthorne*, CV 07-0038-PHX-MHM (D. Ariz.)) to extend the completion date of the bald eagle status review to October 12, 2009. Included in the motion submitted to the court were declarations discussing the need for additional time for Native American Tribes to compile and submit information.

At this time, we are soliciting new information on the status of and potential threats to the Sonoran Desert population of bald eagles. We will base our new determination as to whether listing is warranted on a review of the best scientific and commercial information available, including all such information received as a result of this notice. For more information on the biology, habitat, and range of the Sonoran Desert population of bald eagles, please refer to our previous 90-day finding published in the **Federal Register** on August 30, 2006 (71 FR 51549), and our final delisting rule for the bald eagle published in the **Federal Register** on July 9, 2007 (72 FR 37346).

## Author

The primary authors of this notice are the staff members of the Arizona Ecological Services Office.

## Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: January 7, 2009.

**Kenneth Stansell**,

*Acting Director, U.S. Fish and Wildlife Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 253 and 600

[Docket No. 080228332-81199-01]

RIN 0648-AW38

#### Magnuson-Stevens Act Provisions; Interjurisdictional Fisheries Act; Disaster Assistance Programs; Fisheries Assistance Programs

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** In accordance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended, and the Interjurisdictional Fisheries Act (IFA), NMFS (on behalf of the Secretary of Commerce) proposes regulations to govern the requests for determinations of fishery resource disasters as a basis for acquiring potential disaster assistance. The regulations would establish definitions, and characteristics of commercial fishery failures, fishery resource disasters, serious disruptions affecting future production, and harm incurred by fishermen, as well as requirements for initiating a review by NMFS, and the administrative process it will follow in processing such applications. The intended result of these procedures and requirements is to clarify and interpret the fishery disaster assistance provisions of the MSA and the IFA through rulemaking and thereby ensure consistency and facilitate the processing of requests.

**DATES:** Comments must be submitted in writing on or before February 17, 2009.

**ADDRESSES:** You may submit comments, identified by 0648-AW38, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>;
- **Fax:** 301-713-1193, Attn: Robert Gorrell;
- **Mail:** Alan Risenhoover, Director, NMFS Office of Sustainable Fisheries,

Attn: Disaster Assistance Program Guidance and Procedures, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Alan Risenhoover at the above address and by e-mail to [David-Rostker@omb.eop.gov](mailto:David-Rostker@omb.eop.gov), or by fax to (202) 395-7285.

**Instructions:** All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Robert Gorrell, at 301-713-2341 or via e-mail at [robert.gorrell@noaa.gov](mailto:robert.gorrell@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The Secretary of Commerce or his/her designee (Secretary) can provide disaster assistance under sections 312(a) or 315 of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1861, 1864), as amended, and under sections 308(b) or 308(d) of the Interjurisdictional Fisheries Act (IFA) (16 U.S.C. 4107), after Congress appropriates funds for such purpose. This proposed rule would provide guidance and procedures for either initiating or evaluating requests for fisheries disaster assistance under these two statutes, but does not include provisions for grants or other types of financial assistance and disaster aid. This proposed rule would apply to both Federal and state coastal commercial fisheries and does not apply to recreational fisheries. Recreational fisheries determined to be part of a fishing community may participate in assistance depending on the individual disaster assistance plans. The proposed rule also supplements and modifies existing regulations at subpart C of 50 CFR 253 governing disaster assistance under the IFA. Until this rule, NMFS has not published regulations to govern disaster assistance under the MSA.

**Magnuson-Stevens Fishery Conservation and Management Act (MSA)**

Section 312(a) states that the Secretary, at his discretion or upon

request of a governor of an affected state or a fishing community, "shall determine whether there is a commercial fishery failure due to a fishery resource disaster." Upon making such a determination, the Secretary is authorized to make funds available "for assessing the economic and social effects of the commercial fishery failure, or any activity that the Secretary determines is appropriate to restore the fishery or prevent a similar failure in the future and to assist a fishing community affected by such failure." For assistance to be provided under section 312(a), a commercial fishery failure must be shown to have occurred due to a fishery resource disaster of natural or undetermined causes or man-made causes beyond the control of fishery managers to mitigate through conservation and management measures, including regulatory restrictions (including those imposed as a result of judicial action) imposed to protect human health or the marine environment.

Although this rule does not contain provisions for awarding grants or other types of financial assistance and disaster aid, the reader may be interested that under section 312(a), the Federal share of the cost of any activity cannot exceed 75 percent. The Secretary is authorized to make sums available to be used by the affected State, by the fishing community, or by the Secretary in cooperation with the affected State or fishing community for assessing the economic and social effects of the commercial fishery failure, or any activity that the Secretary determines is appropriate to restore the fishery or prevent a similar failure in the future and to assist a fishing community affected by such failure. Before making funds available for an activity authorized under this section, the Secretary must make a determination that such activity will not expand the size or scope of the commercial fishery failure in that fishery or into other fisheries or other geographic regions.

Effective January 12, 2007, the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA)(PL 109-479) amended section 312(a) of the MSA and added a new section 315. At the request of the Governors of affected states, section 315 authorized the Secretary to establish a regional economic transition program to provide disaster relief assistance to fishermen, charter fishing operations, United States processors, and owners of related fishery infrastructure affected by a "catastrophic regional fishery disaster." Subject to the availability of

appropriations, the regional economic transition program must provide funds or other economic assistance for disbursement to affected entities in meeting immediate regional shoreside infrastructure needs, financial assistance and job training, fishing capacity reduction, and other activities authorized under MSA 312(a) or IFA 308(d). The amendment also allows for waiver of non-Federal matching requirements in catastrophic regional fishery disasters if the Secretary determines no reasonable means are available for applicants to meet the matching requirement and that the probable benefit of 100 percent Federal financing outweighs the public interest of imposing a matching requirement.

**Interjurisdictional Fisheries Act (IFA)**

IFA section 308(b) authorizes the Secretary to provide grants or cooperative agreements to states determined to have been affected by a commercial fishery failure or serious disruption affecting future production due to a fishery resource disaster arising from natural or undetermined causes. Although this rule does not contain provisions for awarding grants or other types of financial assistance and disaster aid, the reader may be interested that IFA section 308(b) and 50 CFR section 253.23(a)(1) contain provisions for section 308(b) assistance and state that the Federal share of the cost of any activity cannot exceed 75 percent. The Secretary may distribute these funds after making a thorough evaluation of the scientific information submitted and determining that a commercial fishery failure due to a fishery resource disaster arising from natural or undetermined causes has occurred. Funds may only be used to restore the resource affected by the disaster, and only by existing methods and technology.

IFA section 308(d) enables the Secretary to help persons engaged in commercial fisheries by initiating projects or other measures to alleviate harm determined by the Secretary to have been incurred as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster. Eligibility for direct assistance under this subsection is limited to any person having less than \$2,000,000 in net revenues annually from commercial fishing, as determined by the Secretary. IFA section 308(d) and subpart C of 50 CFR part 253.23(2) contain provisions for section 308(d) assistance and states that funds provided under section 308(d) must undergo formal notice and opportunity for public comment on the appropriate limitations, terms, and conditions for awarding assistance.

There is no matching requirement for recipients under section 308(d).

### Intent of This Action

The Sustainable Fisheries Act of 1996 amended the MSA by adding section 312(a). Since then, NMFS has processed requests for section 312(a) determinations of a “commercial fishery failure due to a fishery resource disaster” on a case-by-case basis. NMFS recently developed policy and administrative procedures which are found in the NMFS Policy Directives System (PDS) at <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/index.cfm> to provide internal guidance when undergoing an MSA section 312(a) review. The procedures also addressed review of requests made under the IFA. This proposed rule largely incorporates this policy and accompanying procedures and addresses new requirements under the reauthorized MSA. The intent of this proposed rule is to provide more certainty as to how to qualify for a positive determination under either the MSA or the IFA.

This rule proposes procedures and requirements for initiating, evaluating, and deciding requests for determinations of fishery resource disasters. The proposed rule would establish definitions, characteristics of commercial fishery failures and fishery resource disasters, requirements for initiating a review by NMFS, and the criteria NMFS will use in evaluating such requests.

These proposed procedures and requirements also would guide any fisheries disaster determinations considered at the discretion of the Secretary under the authority of sections 312(a) and 315 of the MSA and sections 308(b) and 308(d) of the IFA.

### Definitions

In section 600.1502, the proposed rule sets forth definitions of terms used in implementing sections 312(a) and 315 of the MSA and sections 308(b) and 308(d) of the IFA. Some definitions are repeated from the MSA and the IFA. Others define terms used in the MSA but not defined in the IFA. The term “commercial fishery failure” for purposes of implementing the IFA under this subpart is defined differently from under the current section 253.20. This rule also replaces the definition of “commercial fishery failure” in 50 CFR 253.20 to ensure that the Secretary is uniformly applying the term when evaluating requests for disaster assistance under either the MSA or the IFA. Other terms are newly established. Five particularly important terms—

“commercial fishery failure”, “fishery resource disaster”, “man-made causes”, “natural causes”, and “undetermined causes”—are defined in section 600.1502 but are also discussed elsewhere in this preamble.

### Determining a Commercial Fishery Failure or Determining a Serious Disruption Affecting Future Production of a Fishery or Determining Harm Due to a Fishery Resource Disaster Three-Pronged Test

Section 600.1503 of the proposed rule contains key requirements for the Secretary to make a positive determination of a commercial fishery failure, serious disruption affecting future production of a fishery, or harm due to a fishery resource disaster under MSA section 312(a) and IFA sections 308(b) and (d). In making this determination, every request for fisheries disaster assistance must meet the appropriate three-pronged test: (1) There must have been a fishery resource disaster within the meaning of the MSA or IFA and these regulations; (2) the cause for the fishery resource disaster resulting in a commercial fishery failure or serious disruption affecting future production of a fishery must have been one of the allowable causes identified in either the MSA or IFA and these regulations; and (3) there must be economic impact stemming from the fishery resource disaster which supports a determination of a commercial fishery failure under MSA section 312(a) and IFA section 308(b) and these regulations; or, in the case of IFA section 308(b), a determination of a serious disruption affecting future production of a fishery.

Under section 308(d) of the IFA, it is not necessary for the Secretary to determine a commercial fishery failure or a serious disruption affecting future production but only a determination of harm to persons engaged in commercial fisheries incurred as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster. Section 600.1503(f) of the proposed rule contains requirements for the Secretary to make a positive determination of harm incurred as a result of a fishery resource disaster under section 308(d) of the IFA.

### Establishing the Existence of a Fishery Resource Disaster

Section 600.1503(b) of the proposed rule contains requirements for meeting the first test, identifying a fishery resource disaster. While a substantial decrease in the number of available fish (i.e., a stock crash) would clearly appear to fall within the definition of a fishery

resource disaster, NMFS interprets the term more broadly. The term “fishery resource” is defined in the MSA to include both the fish themselves and fishing. Therefore, NMFS is defining the term “fishery resource disaster” to include impediments to fishing not just stock collapses. The proposed rule would define a “fishery resource disaster” to mean a sudden and unexpected large decrease in fish stock biomass or other event that results in the loss of essentially all access to the fishery resource, such as loss of fishing vessels and gear, for a substantial period of time in a specific area.

NMFS believes that a reasonably predictable, foreseeable, and recurrent fishery resource cycle of variations in species distribution or stock abundance does not constitute a fishery resource disaster, since normal fluctuations are an expected component of participating in a commercial fishery. Loss of access to a specific fishery resource is the key factor and it must be for a substantial period of time or for the foreseeable future, except for negligible fishing.

In concluding whether a fishery resource disaster has occurred, the Secretary will consider, among other things, whether the fishery resource biomass has precipitously declined or “crashed”. Landings, stock status, and other data supporting such a decline or crash will need to be evaluated. The Secretary will also consider other biological and environmental information regarding access to the fishery. For instance, in a public health emergency, such as a red tide event, fishermen may be precluded from catching an otherwise healthy stock of fish because that fish has a bacteria harmful to humans. In other cases, a hurricane may destroy the majority of boats and gear of a fishing fleet. In both cases, there could be a fishery resource disaster without a stock collapse because the fishermen could not access the population either due to an unanticipated human health issue or due to the unexpected destruction of fishing equipment. Accordingly, the loss of access to a fish population is a broader and better test for a fishery resource disaster than a test that focuses solely on the biological population levels of the subject stock.

Damage or loss of spawning habitat or refugia may also result in a fishery resource disaster, but again the key factor will be whether that damage or loss prevents access to harvest fishery resources for a substantial period of time or for the foreseeable future.

NMFS considered whether to include an economic test as part of the criteria for concluding whether there was a

fishery resource disaster, given that the definition of “fishery resource” includes fishing and therefore implies consideration of the fishing industry. However, doing so would co-mingle the concept of fishery resource disaster in the first prong of the three-prong test with the concept of a commercial fishery failure in the third prong. Because the economic effects of the disaster are taken into account as part of the commercial fishery failure, NMFS chose to focus on loss of access as the appropriate test under the first prong. As such, an event precluding all access to a fishery could be a fishery resource disaster but not necessarily a commercial fishery failure unless the fishery suffers sufficient economic loss to meet the test in the third prong as described below.

For the Secretary to conclude that a fishery resource disaster has occurred, the Secretary’s analysis may include, among other things, information provided by fishery stock assessments, landings data, assessments of storm damage to habitat, and documents evidencing lost vessels and gear.

#### **Causes—Natural, Man-Made, or Undetermined**

In order for the Secretary to make a positive determination, the cause of the fishery resource disaster must meet one of the requirements mentioned in the statutes. Section 600.1503(c) of the proposed rule contains standards for meeting this second-prong test. Natural causes are defined in the proposed rule to mean a weather-, climate-, or biology-related event (e.g., hurricane, flood, drought, El Niño effects on water temperature, or disease). This definition is intended to cover all known events that can occur in nature, but do not include interference by human beings. “Natural causes”, as defined by these regulations, is a basis for fishery resource disaster determinations under MSA section 312(a) and IFA sections 308(b) and 308(d).

Prior to the amendments in the reauthorized MSA in January 2007, section 312(a) discussed man-made causes by stating the Secretary must determine whether there is a commercial fishery failure due to a fishery resource disaster as a result of “man-made causes beyond the control of fishery managers to mitigate through conservation and management measures.”

In the reauthorized MSA, however, Congress added a phrase stating that regulatory restrictions imposed to protect human health and the marine environment could provide the basis for a fishery resource disaster. The new

language is preceded by the phrase “including,” which indicates that the new language describes a subset of the types of man-made causes that could support a positive determination. Moreover, the new language identifies two distinct categories of regulatory restrictions: (1) those imposed to protect human health; and (2) those imposed to protect the marine environment.

Regulations precluding access to fisheries due to public health concerns are a legitimate basis for a fishery resource disaster. For instance, at the request of the Food and Drug Administration, the Secretary closed a large area in Maine to shellfish fishing because of a massive red tide in 2005. In that situation, the stock was biologically robust but harvest was precluded because consuming the shellfish posed a human health risk. The underlying cause of the access preclusion (the red tide) was outside the ability of the fishery managers to control and it may not have been possible to mitigate for the closure by allowing greater fishing effort in other areas.

There are instances where NOAA and other agencies sometimes implement regulations precluding access to fisheries in order to protect the marine environment. For example, closures designed to protect marine mammals or associated with National Marine Sanctuaries or presidentially declared national monuments could potentially be considered an appropriate basis for a fisheries resource disaster.

Unfortunately, the statutory language is ambiguous in that it is not obvious on the face of the statute what types of regulatory restrictions are “imposed to protect the marine environment.” The statute does not define what it means to implement regulations to protect the marine environment or even provide a definition of the marine environment and there is little guidance in the legislative history. Although in common usage, it might seem appropriate to include stocks of fish in the definition of marine environment, this interpretation is problematic in the broader context of the MSA.

The MSA defines the term “conservation and management” to refer to “all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any *fishery resource and the marine environment*” (emphasis added). NMFS concludes, by using the distinct terms “fishery resource” and “marine environment,” that Congress intended “marine environment” to have a different meaning from “fishery

resource.” Therefore, “fishery resource” is not part of the “marine environment” as the term is used in the MSA. Since the “marine environment” is distinct from “fisheries resource”, a regulation implemented to protect a fishery resource is not a regulatory restriction imposed to protect the “marine environment” under Section 312(a). Therefore, fishery rebuilding regulations could not constitute the basis for finding a “fishery resource disaster” under Section 312(a) of the MSA. In this context, and for purposes of determining the causes of a fishery resource disaster, “marine environment” is defined to consist of: “(a) Ocean or coastal waters (note: coastal waters may include intertidal areas, bays, or estuaries); (b) an area of lands under ocean or coastal waters; or (c) a combination of the above.”

NMFS’s interpretation is also consistent with the statute’s specification that man-made causes, including regulatory restrictions, may be the basis for a fishery resource disaster only if they are “beyond the control of fisheries managers to mitigate through conservation and management measures.” Clearly, regulatory restrictions implemented for conservation and management of a fishery such as area closures or direct effort controls, including those designed to prevent overfishing and rebuild the fishery, can preclude access to the fishery. However, it is difficult to characterize regulatory restrictions imposed by fishery managers as being “beyond the control of fishery managers to mitigate through conservation and management measures.”

When fishery managers implement regulatory restrictions to prevent overfishing, the managers are mitigating the harm that will inevitably occur if the fishery continues unconstrained overfishing. Any regulation designed to end overfishing will result in loss of access to the resource. By restricting fishing levels such that overfishing does not occur, fishery managers are creating short-term access loss in order to avoid the much more substantial long-term access losses that would result from a stock collapse. Therefore, fishery management regulations are the tool used by fishery managers to control and mitigate the fishery resource disaster that will be caused by continued overfishing.

NMFS’s interpretation is also consistent with the overall structure, context, and purposes of the MSA. Interpreting section 312 to permit a fishery resource disaster finding for regulations imposed to meet the statutory mandate to end overfishing

and rebuild overfished stocks would also create perverse disincentives to follow the law and end overfishing. When Congress passed the Sustainable Fisheries Act in 1996, it included extensive provisions related to overfishing and rebuilding. And when it reauthorized the MSA in 2007, a principal purpose was to end overfishing. That simply cannot be accomplished without decreasing fish harvests in some manner. However, providing disaster assistance because a fishery has continued overfishing would discourage responsible fishing practices. NMFS does not believe as a matter of policy that the statute should be interpreted in a manner that would undermine the fundamental purpose of the MSA to ensure sustainable fishing into the future. Without a fishery resource disaster and causes consistent with the MSA or IFA requirements, regulatory restrictions to protect the sustainability of fishing are not a basis for compensation under MSA section 312(a).

Man-made causes are defined in the proposed rule to mean events or activities caused by humans that could not have been prevented or addressed by fishery management measures and that are otherwise beyond the control of fishery managers to mitigate through conservation and management measures (e.g., oil spill), except for regulatory restrictions or judicial actions imposed to protect human health or the marine environment. "Man-made causes" applies only to determinations under MSA section 312(a), and not to IFA section 308(b) and IFA section 308(d). "Undetermined causes" are defined in the proposed rule to mean "causes in which the current state of knowledge does not allow the identification of the exact cause or causes; however, fishing restrictions to end overfishing, overfishing, or inadequate harvest controls cannot be the basis for making a fishery disaster determination." If overfishing has occurred in the 5-year period immediately preceding a disaster claimed to be caused by "undetermined causes", the Secretary will presume that overfishing or inadequate harvest controls was the cause of the claimed disaster, unless the requester demonstrates otherwise. As noted above, NMFS interprets the statute to provide that regulatory restrictions designed to prevent overfishing and rebuild the fishery may not serve as a basis for finding a fishery resource disaster resulting from "man-made causes." Nearly all commercial fisheries in the 200-mile Exclusive Economic Zone are subject to Federal (principally

NMFS) management designed to conserve and manage the fishery resources and prevent overfishing. In other fisheries, such as State fisheries, NMFS neither regulates nor collects data to determine whether overfishing is occurring, and hence, the requester must demonstrate that the loss of access was not caused by overfishing, fishing restrictions to end overfishing, or inadequate harvest controls. In this context, it is vital that NMFS establish safeguards to ensure that the "undetermined causes" criterion is not used as a back-door to obtain fishery resource disaster determinations that otherwise would be precluded. At the same time, NMFS wants to ensure that appropriate relief is available where a fishery resource disaster results from undetermined causes unrelated to harvest restrictions designed to conserve and manage the fishery resource. Therefore, any requester claiming undetermined causes must demonstrate why a fishery resource disaster (i.e., the loss of essentially all access to the fishery resource for a substantial period of time) was not caused by overfishing, fishing restrictions to end overfishing, or inadequate harvest controls.

"Undetermined causes" applies to determinations made under both MSA section 312(a) and IFA section 308(b), but not to IFA section 308(d).

#### **Determination of a Commercial Fishery Failure or a Serious Disruption Affecting Future Production of a Fishery**

Section 600.1503(d) of the proposed rule contains requirements for meeting the test in the third prong.

A. *Commercial Fishery Failure under MSA Section 312(a) and IFA Section 308(b)*. The proposed rule would define a "commercial fishery failure" to mean: (1) When the 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by 80 percent or more compared to the average for the immediately preceding 5-year period; or (2) when the 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by at least 35 percent compared to the average for the immediately preceding 5-year period, and the economic impacts are severe and are beyond the normal range of annual revenue fluctuations in the fishery compared with the immediately preceding 5-year period. Increased costs, e.g., increased fuel and other energy costs, cannot be the basis for a positive determination of a commercial

fishery failure. In determining whether economic impacts are severe, the Secretary will consider, among other things, the degree of economic hardship suffered by those directly engaged in the commercial fishery, but not the community at large. The Secretary will also consider the degree to which those impacts are offset by mitigating circumstances, including other commercial fishing opportunities for the affected fishermen. A decrease in 12-month revenues of less than 35 percent compared to the average of the 5-year period immediately preceding the disaster will not support a positive determination.

It is NMFS's best judgment that the 5 most recent years is the appropriate comparison period, and that the 35 percent and 80 percent decrease in revenues are the appropriate levels in making determinations. Given the wide variance in life cycles of the many fish species, changes in harvestable biomass, price fluctuations with changes in supply, and other variables impacting fishery revenues, a 5-year average is believed to be a reasonable comparison. It is a long enough time period to allow the Secretary to gauge a reduction in annual fishing revenues and to determine whether the decline in revenues is sudden. Less than 5 years does not allow the Secretary to account for normal short-term variations. If it is longer than 5 years, the relevance to conditions existing at the time of the disaster becomes more tenuous. NMFS would be particularly interested in receiving comments on this. If you do not believe using the immediately preceding 5-year period is appropriate for comparison, tell us why.

While a reduction in revenue of less than 35 percent could be significant, under the proposed rule it would not result in a commercial fishery failure. A reduction in revenues of less than 35 percent may be absorbed over a few years whereas a reduction in revenues of 35 percent or greater could take a substantially longer period of time to offset.

On the other hand, a reduction in revenues of 80 percent or more likely will result in an economic failure for fishery participants and could take several years to absorb. At this level, all economic activity is likely ultimately to diminish. NMFS would also be particularly interested in receiving comments on using 35 percent and 80 percent thresholds. If you do not think these are the appropriate thresholds, tell us why.

In all instances, in order for NMFS to be able to complete its analysis under the statutes, it must have a clear

understanding of which stock or stocks of fish constitute the fishery in which a commercial fishery failure determination is sought. The requester will be responsible for identifying the commercial fishery as well as the geographical boundaries of the fishery.

In cases of revenue decreases between 35 and 80 percent, the extent to which revenues must decrease for a commercial fishery failure to be found will vary among fisheries. Within this range, a commercial fishery failure must be determined on a case-by-case basis because each fishery is different and revenues fluctuate widely, and cannot be defined universally. The Secretary will consider, among other things, information provided on revenues, landings data, prices, actual losses, and market conditions. The Secretary will consider the average revenue information for the 5-year period immediately preceding the fishery resource disaster. Other factors to consider are the magnitude of the fishery (e.g., the timing and scope of a small, localized fishery may present a very different situation from coastwide fisheries) and other opportunities for the affected fishermen. For example, fishermen may be able to offset revenue declines in one fishery by increasing revenues from another fishery.

**B. Serious Disruption under IFA Section 308(b).** The proposed rule would define "serious disruption affecting future production" to mean "a non-cyclical sudden and precipitous decrease in harvestable biomass or spawning stock size of a fish stock that limits access to the fishery for a substantial period of time in a specific area." In making a determination of a serious disruption affecting future production of a fishery, the proposed rule would require the Secretary to consider the estimated decrease in harvestable biomass or spawning stock size of the fish targeted by the fishery affected by the disaster arising from natural or undetermined causes. The Secretary will issue a determination of a serious disruption affecting future production if he/she finds that the harvestable biomass or spawning stock size of the fish targeted by the fishery (which is dependent on the fishery resource subject to a fishery disaster) has decreased by 80 percent or more compared to the average for the 5-year period immediately preceding the disaster. If the harvestable biomass or spawning stock size of the fish targeted by the fishery has decreased at least 35 percent compared to the average for the immediately preceding 5-year period, the Secretary will review the circumstances. The Secretary will make

his/her decision based on the severity of the serious disruption affecting future production of the fishery. In reaching a determination, the Secretary will consider, among other things, most recent trawl surveys and other fishery resource surveys conducted by NMFS and/or state officials, as well as most recent stock assessments and other indicators of future production from the fishery. The Secretary believes these are the appropriate parameters, based on the reasoning in the prior section.

**Repetitive Requests Not Allowed: One Positive Commercial Fishery Failure or Serious Disruption Determination per Fishery Resource Disaster**

Section 600.1503(e) of the proposed rule would prevent repetitive requests for commercial fishery failure determinations or serious disruption affecting future production determinations due to the same fishery resource disaster, once a positive determination has been made. There are several reasons to propose this. Repetitive requests based on the same fishery resource disaster do not provide additional benefits for the fishermen because Congress can respond to the determination by appropriating money, or subsequently appropriating additional money if the disaster relief was insufficient. It is also a waste of resources to entertain repetitive requests. In many instances the fishery resource will take years to recover and reviewing repetitive requests only to come to the same conclusion is a waste of government resources.

In the past, the Secretary has received multiple requests over several years to determine a commercial fishery failure based on the original fishery resource disaster that occurred years earlier. For example, the St. Paul snow crab fishery in the Eastern Bering Sea, has depended on the snow crab resource, which failed several years ago and has not rebuilt. The Secretary twice made a commercial fishery failure determination (in different years) due to a fishery resource disaster in that fishery. The proposed rule would prevent repeated determinations.

Under the proposed rule, once the Secretary has made a positive commercial fishery failure determination based on a fishery resource disaster under either MSA section 312(a) or IFA section 308(b), he/she may not make a commercial fishery failure determination in any subsequent year based on the same fishery resource disaster. The proposed rule would also disallow repetitive requests for determinations of a serious disruption affecting future production under

section 308(b) of the IFA based on the same fishery resource disaster on which a positive determination has already been made.

For the Secretary to make a new commercial fishery failure or serious disruption determination in a fishery for which an earlier positive determination was made, or in substantially the same fishery, there must be a new triggering event based on new data that evidences an appreciable change in the fishery resource and the economic conditions of the commercial fishery. The change must show that there has been a new cause of the restriction on access to the fishery resource, different from the earlier determination. Additionally, the commercial fishery failure must be measured from the circumstances occurring after the last determination.

**Determination of Harm Incurred Under IFA Section 308(d)**

Section 308(d) of the IFA authorizes the Secretary to help persons engaged in commercial fisheries, either by providing assistance directly to those persons or by providing assistance indirectly through states and local government agencies and nonprofit organizations, for projects or other measures to alleviate harm determined by the Secretary to have been incurred as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster. Section 600.1503(d) of the proposed rule would define "harm" to mean "uninsured physical damage or economic loss to fishing vessels, fishing gear, processing facilities, habitat, marketability or infrastructure (i.e. port facilities for landing or unloading catch) suffered as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster and measured in economic terms." This is defined in Subpart C of 50 CFR 253.23(a)(2) and in our experience, has been an appropriate measure of harm.

**One Harm Incurred Determination per Fishery Resource Disaster**

Section 600.15403(g) of the proposed rule would prevent repetitive requests for determinations of harm incurred under IFA section 308(d) based on the same fishery resource disaster on which a positive determination has already been made. The reasons for NMFS to propose this are the same as those reasons for disallowing repetitive requests for determinations of a commercial fishery failure or serious disruption based on the same fishery resource disaster. Repetitive requests based on the same disaster do not provide additional benefits for the

fishermen because Congress can respond to the determination by appropriating additional money if the disaster relief was insufficient. It is also a waste of resources to entertain repetitive requests. In many instances the fishery resource will take years to recover and reviewing repetitive requests only to come to the same conclusion is a waste of government resources.

For the Secretary to make a new determination of harm incurred in a fishery for which an earlier positive determination was made, there must be a new triggering event based on new data that evidences an appreciable change in the fishery resource and there must be a showing of new harm incurred based on the average revenues during the most recent 5-year period. NMFS believes this is an appropriate time period based on the reasoning in the previous section.

#### **Regional Catastrophic Fishery Failure Under MSA Section 315**

Section 600.1503(h) sets forth requirements for a positive determination of a regional catastrophic fishery failure. Under section 315 of the Magnuson-Stevens Act, a catastrophic regional fishery disaster affects more than one state or a major fishery managed by a Regional Fishery Management Council or interstate fishery commission.

A major fishery is defined as a fishery in Federal waters affecting fishermen in more than 1 state or territory. In order to ensure that the request actually covers a major fishery, requests for a determination of a Regional Catastrophic Fishery Failure must be submitted in writing by two or more Governors in a joint letter to the Secretary.

Further, requests for a determination of a regional catastrophic fishery failure under section 315 of the Magnuson-Stevens Act must meet all of the requirements for a determination under section 312(a) of the Magnuson-Stevens Act or section 308(d) of the Interjurisdictional Fisheries Act and comply with all requirements of § 600.1504.

In determining whether there has been a catastrophic regional fishery disaster, the Secretary must conclude that the severity of the economic impacts on the coastal or fishing communities are beyond the normal range of average revenues during the most recent 5-year period.

#### **Initiating an Evaluation Request**

Where a Governor or an elected or politically-appointed representative of

the affected fishing community (i.e., mayor, city manager, or county executive) wishes to submit under MSA section 312(a), or at least two Governors under MSA section 315, a written request to the Secretary for fisheries disaster assistance, section 600.1504 of the proposed rule requires a letter containing key information in order for NMFS to initiate an evaluation of the request. Similarly, a request for disaster assistance under sections 308(b) or 308(d) of the IFA would require the same information.

The person(s) requesting disaster assistance is most likely to have the relevant information and, therefore, is responsible for explaining why a commercial fishery failure should be determined and providing documentation supporting the request with the initial letter requesting fisheries disaster assistance from the Secretary under either the MSA or the IFA. The requester must submit 5-year average cost and revenue information and NMFS, in its sole discretion, may request non-government expert review of the economic data. Requesters should also supply the necessary information on the fishery to assist the Secretary in making a determination, including data on actual losses, the number of participants, the number of vessels, and how long they participated in the fishery. The requester also should provide information on the amount of effort in the fishery before the fishery resource disaster occurred. NMFS may request additional information it believes is necessary to determine whether the economic impacts are severe enough to constitute a commercial fishery failure.

The person(s) requesting disaster assistance is most likely to know the rationale for his/her request and is therefore responsible for supplying supporting documentation. This documentation must accompany the initial letter requesting a determination of a fishery resource disaster from the Secretary under either the MSA or the IFA. Requests submitted under either the MSA or the IFA without a rationale and supporting documentation for reaching a conclusion on whether or not there is a fishery resource disaster will be denied. NMFS may require the applicant to submit any additional information it believes is necessary to conclude whether a fishery resource disaster has occurred. This information is needed in order for the Secretary to effectively evaluate the circumstances and impacts to determine if the requirements proposed under section 600.1503 are met.

The initiation letter must include a clear definition of the fishery, including identification of all fish stocks and whether it includes non-Federal fisheries as well as Federal fisheries, and the geographical boundaries of the fishery for which the request is being made. The initiation letter must also include the rationale and supporting documentation as outlined in this preamble and regulatory text, including the eight items found at section 600.1504(a)(2). Any initiation letter submitted must also include the amount of financial assistance needed to alleviate the alleged commercial fishery failure (MSA 312(a) or 315 and IFA 308(b)), the serious disruption affecting future production (IFA 308(b)), or harm incurred (IFA 308(d)), including which groups of fishery participants would be eligible to receive assistance. The applicant should submit any additional information he or she believes relevant to an evaluation of the request. Before submitting the initiation letter, applicants are encouraged to contact the appropriate NMFS regional office informally for help in identifying materials to assist in the evaluation. NMFS will send the requester a letter if additional information is needed to make the determination.

If the request fails to meet any one of the appropriate three prongs outlined above or is otherwise disapproved, NMFS will send the applicant a letter explaining the reasons for disapproving the request. Any new request from the applicant for disaster assistance in the same fishery for which a positive determination has been made must include an explanation of a new fishery resource disaster or a significant change in circumstances including a new 5-year average for impacts in order to warrant a review by NMFS.

Any vessel-specific fishery information submitted to NMFS with a request for a MSA 312(a) or 315 determination would be subject to the confidentiality provisions and limitations of section 402(b) of the MSA and regulations in 50 CFR 600 subpart E. Information submitted with a request for an IFA 308(b) or 308(d) determination will be protected to the extent permitted by statute.

The Secretary or his/her designee may initiate his/her own evaluation and, based on consideration of relevant facts or data, the Secretary's designee may make an internal recommendation to the Secretary for fisheries disaster assistance.

#### **Evaluation Process**

Section 600.1505 of the proposed rule provides that the Secretary will conduct

his/her evaluation in accordance with section 600.1503 of this proposed rule. The Secretary will inform the requester of the outcome of his/her evaluation, including reasons for the decision.

In the instance of a "fast track" determination where an 80 percent decline in revenues is substantiated, the Secretary will send the requester a positive determination within 30 days of receiving evidence substantiating a decrease of 80 percent if the other two prongs of the test are met. In the instance of a "standard track" determination, the Secretary will send the requester a letter of positive or negative determination as soon as practicable.

The Secretary will strive to make a decision on all fisheries disaster assistance requests within 120 days from receipt of a complete application.

#### Classification

This proposed rule is published under the authority of, and consistent with, the MSA and the IFA.

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

This proposed rule has no impacts on small business entities because of the nature of the rule until a fishery-specific disaster assistance is proposed at some future time.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

The proposed rule would establish guidance and administrative procedures for processing requests for all fisheries disaster assistance requests under the Magnuson-Stevens Act and the Interjurisdictional Fisheries Act. It is not fishery specific. Therefore, the proposed rule has no direct impacts on small business entities. The benefits of this rule in clarifying the fishery disaster assistance provisions of the MSA and the IFA through rulemaking, thereby facilitating the processing of requests, are believed considerable; however, these are not quantifiable without application to specific fisheries. Because the proposed rule conveys broad guidance and is not fishery-specific, this rulemaking does not lend itself to quantitative or even qualitative analysis. Analysis of data and impacts on vessels, vessel revenues, port revenues, fish stock impacts, etc. is not possible in the absence of identifying specific fisheries and disaster assistance fishery components.

As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule would require the submission of information from members of the public who decide to submit fisheries disaster assistance requests to the Secretary. These collection-of-information requirements are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). These requirements have been submitted to OMB for approval. The public's reporting burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information requirements. While preparation time for the NOAA/NMFS requirements will vary with each disaster assistance request, the average preparation time for the requester is estimated to be 40 hours for each disaster assistance request. NMFS expects to receive 4 disaster assistance requests per year. Thus, the total annual burden is estimated to be 160 hours per year. Public comment is sought regarding: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS at the above address, and by e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov) or by fax to 202-395-7285.

Notwithstanding any other provision of law, no person is required to respond to nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection-of-information displays a currently valid OMB control number.

Persons affected by these regulations should be aware that other Federal and state statutes and regulations may provide additional or alternative sources of fisheries disaster assistance.

#### List of Subjects

##### 50 CFR Part 253

Disaster assistance, Fisheries, Grant programs—business, Reporting and recordkeeping requirements.

##### 50 CFR Part 600

Fisheries, Fisheries disaster assistance, Fishing, Reporting and recordkeeping requirements.

Dated: January 12, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries.*

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR parts 253 and 600 as follows:

#### PART 253—FISHERIES ASSISTANCE PROGRAMS

1. The authority citation for 50 CFR part 253 continues to read as follows:

**Authority:** 46 U.S.C. 1271–1279 and 16 U.S.C. 4101 *et seq.*

2. In § 253.20, revise the definition for "Commercial fishery failure" to read as follows:

##### § 253.20 Definitions.

\* \* \* \* \*

*Commercial fishery failure* means either one of the following:

(1) The 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by 80 percent or more compared to the average for the immediately preceding 5-year period; or

(2) The 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by at least 35 percent compared to the average for the immediately preceding 5-year period, and severe economic impacts have occurred due to such decreased annual revenues and the decline in revenues is beyond the normal range of fluctuation of average annual revenues of the fishery compared with the immediately preceding 5-year period. Decreased revenues not equal to at least a 35 percent decline of revenues over the immediately preceding 5-year period is by definition not a commercial fishery failure.

\* \* \* \* \*

#### PART 600—MAGNUSON-STEVENS ACT PROVISIONS

3. The authority citation for 50 CFR part 600 continues to read as follows:

**Authority:** 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

4. Under part 600, add subpart Q to read as follows:

##### Subpart Q—Fisheries Disaster Assistance Sec.

600.1500 Purpose and scope.

600.1501 Relation to other laws.

- 600.1502 Definitions.  
 600.1503 Determining a commercial fishery failure or determining a serious disruption affecting future production of a fishery or determining harm due to a fishery resource disaster.  
 600.1504 Initiating an evaluation request.  
 600.1505 Evaluation process.  
 600.1506 [Reserved]  
 600.1507 [Reserved]  
 600.1508 [Reserved]  
 600.1509 [Reserved]  
 600.1510 [Reserved]

**Authority:** 16 U.S.C. 1861a, 16 U.S.C. 1864, and 16 U.S.C. 4107.

### Subpart Q—Fisheries Disaster Assistance

#### § 600.1500 Purpose and scope.

The regulations in this subpart apply to fishery disasters under the authority of sections 312(a) and 315 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and under the authority of section 308(b) and 308(d) of the Interjurisdictional Fisheries Act of 1986 (Interjurisdictional Fisheries Act). This subpart provides guidance and implements administrative procedures for disaster assistance under both of these laws, and applies to Federal fisheries and State coastal fisheries.

#### § 600.1501 Relation to other laws.

(a) Regulations pertaining to fisheries disaster assistance under the Interjurisdictional Fisheries Act are also set forth in subparts A and C of part 253—Fisheries Assistance Programs of Title 50 of the Code of Federal Regulations.

(b) Persons affected by these regulations should be aware that other Federal and state statutes and regulations may provide additional or alternative sources of fisheries disaster assistance.

#### § 600.1502 Definitions.

(a) In addition to the definitions in the Magnuson-Stevens Act and the Interjurisdictional Fisheries Act and in § 253.20 of this title, the terms used in this subpart have the following meanings:

*Catastrophic regional fishery disaster* means a natural disaster, including a hurricane or tsunami, or a regulatory closure (including regulatory closures resulting from judicial action) to protect human health or the marine environment (but not including regulations and closures to address overfishing), that:

- (1) Results in economic losses to coastal or fishing communities;
- (2) Affects more than one state or a major fishery managed by a Council or interstate fishery commission; and

(3) Is determined by the Secretary to be a commercial fishery failure under section 312(a) of the Magnuson-Stevens Act or a fishery resource disaster under section 308(d) of the Interjurisdictional Fisheries Act.

*Coastal community* means a group of people living in a particular area located on the coast of any of the several states of the United States.

*Commercial fishery* means the same as “commercial fishing” in the Magnuson-Stevens Act, which is “fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter, or trade.”

*Commercial fishery failure* means either one of the following:

(1) The 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by 80 percent or more compared to the average for the immediately preceding 5-year period; or

(2) The 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by at least 35 percent compared to the average for the immediately preceding 5-year period, and severe economic impacts have occurred due to such decreased annual revenues and the decline in revenues is beyond the normal range of fluctuation of average annual revenues of the fishery compared with the immediately preceding 5-year period. Decreased revenues not equal to at least a 35 percent decline of revenues over the immediately preceding 5-year period is by definition not a commercial fishery failure.

*Conservation and management* means all of the rules, regulations, conditions, methods, and other measures which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment.

*Council* means one of the eight Regional Fishery Management Councils established by Section 302 of the Magnuson-Stevens Act.

*Economic losses* means a revenue decline in a fishery to a degree consistent with a commercial fishery failure for the fishery.

*Fishery* means one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographic, scientific, technical, recreational, and economic characteristics; and any fishing for such stocks.

*Fishery resource* means any fishery, any stock of fish, any species of fish, and any habitat of fish when used in connection with requests for disaster assistance under the Magnuson-Stevens Act; and means finfish, mollusks, crustaceans, and any other form of marine animal or plant life, other than marine mammals and birds when used in connection with requests for disaster assistance under the Interjurisdictional Fisheries Act. A fishery resource is not a part of the marine environment.

*Fishery resource disaster* means a sudden, unexpected, large decrease in fish stock biomass or other change that results in loss of essentially all access to the fishery resource, such as loss of fishing vessels and gear, for a substantial period of time. Under the Magnuson-Stevens Act, executive or judicial actions implemented to protect human health or the marine environment may cause a fishery resource disaster if the result is loss of essentially all access to the fishery resource for a substantial period of time or for the foreseeable future.

*Fishing community* means a coastal community which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs.

*Harm* means uninsured physical damage or economic loss to fishing vessels, fishing gear, processing facilities, habitat, marketability or infrastructure (*i.e.*, port facilities for landing or unloading catch) suffered as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster and measured in economic terms, consistent with the requirements to determine a commercial fishery failure.

*Major fishery managed by a Council* means any fishery for which a Regional Fishery Management Council has prepared and the Secretary has approved and implemented a Federal fishery management plan under section 304 of the Magnuson-Stevens Act.

*Man-made causes* means causes due to some human event or activity that could not have been prevented or addressed by fishery management measures and that are otherwise beyond the control of fishery managers to mitigate through conservation and management measures, including regulatory restrictions (including those imposed as a result of judicial action) imposed to protect human health or the marine environment.

*Marine environment* consists of:

- (1) Ocean or coastal waters (note: Coastal waters may include intertidal areas, bays, or estuaries);

(2) An area of lands under ocean or coastal waters; or

(3) A combination of the above.

*Natural causes* means a weather-, climate-, or biology-related event (e.g., hurricane, flood, drought, El Niño effects on water temperature, disease), but does not include normal or cyclical variations in species distribution or stock abundance, etc.

*Secretary* means the Secretary of Commerce, or his/her designee.

*Serious disruption affecting future production* means an unexpected sudden and precipitous decrease in the harvestable biomass or spawning stock size of a fish stock that causes a limitation to access to the fishery for a substantial period of time in a specific area. The anticipated economic impact on production is consistent with a commercial fishery failure.

*Undetermined causes* means causes in which the current state of knowledge does not allow the identification of the exact cause or causes; however, fishing restrictions to end overfishing, overfishing, or inadequate harvest controls cannot be the basis for making a fishery disaster determination.

(b) If any of the terms in paragraph (a) of this section are defined differently in § 253.20 of this title, for purposes of this subpart the definitions in this section apply.

**§ 600.1503 Determining a commercial fishery failure or determining a serious disruption affecting future production of a fishery or determining harm due to a fishery resource disaster.**

(a) *Three-pronged test.* Every request for fisheries disaster assistance under section 312(a) of the Magnuson-Stevens Act or under sections 308(b) or 308(d) of the Interjurisdictional Fisheries Act must meet the appropriate three-pronged test:

(1) There must have been a fishery resource disaster within the meaning of the Magnuson-Stevens Act or the Interjurisdictional Fisheries Act and these regulations;

(2) The cause for the fishery resource disaster must be one of the causes defined in paragraph (c) of this section; and

(3)(i) Under the Magnuson-Stevens Act section 312(a) and Interjurisdictional Fisheries Act section 308(b) and these regulations, there must be economic impact stemming from the fishery resource disaster which supports a determination of a commercial fishery failure;

(ii) Under Interjurisdictional Fisheries Act section 308(b), in lieu of a commercial fishery failure there must be a determination of a serious disruption

affecting future production of a fishery; or

(iii) Under Interjurisdictional Fisheries Act section 308(d), there must be a determination of harm to persons engaged in commercial fisheries incurred as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster.

(b) *Establishing the existence of a fishery resource disaster.* (1) Where there is convincing evidence that there has been a sudden, unexpected large decrease in fish stock biomass or other event that results in the loss of essentially all access to the fishery resource, for a substantial period of time in a specific area, the Secretary will conclude that there has been a fishery resource disaster.

(2) Analysis by the Secretary may include, among other things, information provided by fishery stock assessments, landings data, storm damage assessments to habitat, and documents evidencing lost vessels and gear. The Secretary may require the applicant to submit whatever additional information it believes is necessary to reach a conclusion on whether a fishery resource disaster has occurred.

(c) *Causes—natural, man-made, or undetermined.* (1) Under Magnuson-Stevens Act section 312(a) and these regulations, the Secretary shall determine whether there has been a commercial fishery failure due to a fishery resource disaster as a result of:

(i) Natural causes;

(ii) Undetermined causes; or

(iii) Man-made causes beyond the control of fishery managers to mitigate through conservation and management measures, including regulatory restrictions (including those imposed as a result of judicial action) imposed to protect human health or the marine environment.

(iv) Executive or judicial actions that provide for fishery resource conservation do not constitute “man-made” causes and are not a basis for commercial fishery failure

determination, unless they are imposed to protect human health or the marine environment. A regulatory closure of a fishery to protect public health or the marine environment could cause a fishery resource disaster resulting in a commercial fishery failure. However, fishery regulations (including fishery rebuilding regulations, closure of a fishery or other direct or indirect effort controls) for conservation and management of a fishery resource, including measures to address overfishing, cannot constitute the basis for a determination that a commercial fishery failure due to a fishery resource

disaster exists under section 312(a) of the Magnuson-Stevens Act.

(2) Under Interjurisdictional Fisheries Act section 308(b) and these regulations, the Secretary shall determine whether there has been a commercial fishery failure or a serious disruption affecting future production due to a fishery resource disaster as a result of:

(i) Natural causes; or

(ii) Undetermined causes.

(3) Under Interjurisdictional Fisheries Act section 308(d) and these regulations, the Secretary shall determine whether harm has been incurred as a result of natural causes.

(d) *Determination of a commercial fishery failure or a serious disruption affecting future production of a fishery.*

(1) *Elements considered in making the determination.* In making a determination of a commercial fishery failure, the Secretary shall consider the stock or stocks of fish that constitute the fishery in which a commercial fishery failure determination is sought, whether the request includes non-Federal as well as Federal fisheries, and the geographical boundaries of the fishery. The analysis by the Secretary may include information on revenues, landings data, prices, actual losses, and market conditions. The magnitude of the fishery is important as are other opportunities for the affected fishermen. The Secretary will consider the immediately preceding 5-year average revenue information. Exogenous market factors (e.g., reduced demand for product, increased fuel and other energy costs) cannot be the basis for a positive determination of a commercial fishery failure. The Secretary, in his/her sole discretion, may request non-government review of the economic data. The Secretary may require the applicant to submit whatever additional information he/she believes is necessary to determine whether the economic impacts are severe enough to constitute a commercial fishery failure.

(i) In making a determination of a serious disruption affecting future production of a fishery, the Secretary shall consider the estimated decrease in harvestable biomass or spawning stock size of the fishery affected by the disaster arising from natural or undetermined causes.

(ii) [Reserved]

(2) *Fast Track Determination.* Pursuant to Magnuson-Stevens Act section 312(a) and Interjurisdictional Fisheries Act section 308(b), if the Secretary finds that the 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by 80 percent

or more compared to the average for the immediately preceding 5-year period, then the Secretary shall determine there has been a commercial fishery failure. In addition, in the case of Interjurisdictional Fisheries Act section 308(b), the Secretary shall issue a determination of a serious disruption affecting future production if he/she finds that the harvestable biomass or spawning stock size of the fish targeted by the fishery (which is dependent on the fishery resource subject to a fishery disaster) has decreased by 80 percent or more compared to the immediately preceding 5-year period. In both of these instances, the Secretary will send the applicant a letter of positive determination no later than 30 days after receiving evidence substantiating a decrease in revenues of 80 percent or more and that the elements of the three prong test relating to causation and fishery resource disaster are met.

(3) *Standard Track Determination.* Pursuant to Magnuson-Stevens Act section 312(a) and Interjurisdictional Fisheries Act section 308(b), if the Secretary finds that the 12-month revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) have decreased by less than 80 percent but at least 35 percent compared to the average annual revenues during the immediately preceding 5-year period, then the Secretary may issue a determination of a commercial fishery failure. The Secretary shall make his/her decision based on the severity of the economic impacts with consideration of mitigating circumstances. In determining the severity of the economic impacts, the Secretary shall consider, among other things, the degree of economic hardship suffered by those engaged in the fishery. Because the impact of revenue decline will vary among fisheries, a commercial fishery failure determination in a fishery where 12-month revenues have declined less than 80 percent but at least 35 percent compared to the average annual revenues during the immediately preceding 5-year period, must be made on a case-by-case basis. For a positive determination, the Secretary would need to conclude that severe economic impacts due to significantly decreased revenues from commerce in the fishery (which is dependent on the fishery resource subject to a fishery resource disaster) of between 30 and 80 percent over 12 months are beyond the normal range of revenue fluctuations during the immediately preceding 5-year period. The Secretary shall consider the degree to which those impacts are offset by

mitigating circumstances, including other commercial fishing opportunities for the affected fishermen.

(4) In the case of Interjurisdictional Fisheries Act section 308(b), the Secretary may issue a determination of a serious disruption affecting future production if he/she finds that the harvestable biomass or spawning stock size of the fish targeted by the fishery (which is dependent on the fishery resource subject to a fishery disaster) has decreased by less than 80 percent but at least 35 percent compared to the average for the immediately preceding 5-year period. The Secretary shall make his/her decision based on the severity of the disruption affecting future production of the fishery. In reaching a determination, the Secretary shall consider, among other things, most recent trawl surveys and other fishery resource surveys conducted by NMFS and/or state officials, as well as most recent stock assessments and other indicators of future production from the fishery.

(5) A decrease in 12-month revenues of less than 35 percent compared to the average of the immediately preceding 5-year period will not support a positive determination under Magnuson-Stevens Act 312(a). A decrease in harvestable biomass or spawning stock size of less than 35 percent compared to the average for the immediately preceding 5-year period will not support a positive determination under the Interjurisdictional Fisheries Act 308(b).

(e) *Repetitive requests not allowed:* *One positive commercial fishery failure or serious disruption determination per fishery resource disaster.* Once the Secretary has made a positive commercial fishery failure determination, or under Interjurisdictional Fisheries Act section 308(b) found a serious disruption affecting future production of a fishery due to a fishery resource disaster, he/she may not make a commercial fishery failure or serious disruption determination in any subsequent year based on the same fishery resource disaster. In order for the Secretary to make a new commercial fishery failure or serious disruption determination in a fishery for which an earlier positive determination was made, or in substantially the same fishery, there must be a new triggering event based on new data that evidences an appreciable change in the fishery resource and the economic conditions of the commercial fishery failure.

(f) *Determination of harm incurred under Interjurisdictional Fisheries Act section 308(d).* The Secretary may provide assistance directly to persons

engaged in commercial fishing or indirectly to those persons through states and local government agencies and nonprofit organizations, for projects or other measures to alleviate harm determined by the Secretary to have been incurred as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster. In making a determination as to whether harm to persons engaged in commercial fisheries incurred as a direct result of a fishery resource disaster arising from a hurricane or other natural disaster, the Secretary must determine that:

(1) There was a fishery resource disaster within the meaning of section 308(d) of the Interjurisdictional Fisheries Act and these regulations;

(2) The cause for the disaster must have been a hurricane or other natural disaster; and

(3) The harm incurred was a direct result of a fishery resource disaster arising from a hurricane or other natural disaster.

(g) *One harm incurred determination per fishery resource disaster.* Once the Secretary has made a positive determination of harm incurred under § 600.1503(f), he/she may not make a harm incurred determination in any subsequent year based on the same fishery resource disaster. In order for the Secretary to make a new determination of harm incurred in a fishery for which an earlier positive determination was made, there must be a new triggering event based on a fishery resource disaster arising from new data that evidences an appreciable change in the fishery resource. Additionally, there must be a showing of new harm incurred based on the average revenues during the immediately preceding 5-year period.

(h) *Regional catastrophic fishery failure.* Under section 315 of the Magnuson-Stevens Act, a catastrophic regional fishery disaster affects more than one state or a major fishery managed by a Regional Fishery Management Council or interstate fishery commission.

(1) A major fishery is defined as a fishery in Federal waters affecting fishermen in more than 1 state or territory. Requests for a determination of a Regional Catastrophic Fishery Failure must be submitted in writing by two or more Governors in a joint letter to the Secretary.

(2) A determination of a regional catastrophic fishery failure under section 315 of the Magnuson-Stevens Act must meet all of the requirements for a determination under section 312(a) of the Magnuson-Stevens Act or section 308(d) of the Interjurisdictional

Fisheries Act and comply with all requirements of § 600.1504.

(3) In determining whether there has been a catastrophic regional fishery disaster, the Secretary must conclude that the severity of the economic impacts on the coastal or fishing communities are beyond the normal range of revenue fluctuations during the 5-year period immediately preceding the claimed disaster.

**§ 600.1504 Initiating an evaluation request.**

(a) The Secretary may accept requests for fisheries disaster assistance under section 312(a) or section 315 of the Magnuson-Stevens Act from the Governor of an affected state, or two or more Governors if under section 315, or an elected or politically appointed representative of the affected fishing community (i.e., mayor, city manager, or county executive). The Secretary may accept requests for fisheries disaster assistance under section 308(b) or section 308(d) of the Interjurisdictional Fisheries Act from an elected or politically appointed representative of the affected fishing community (i.e., mayor, city manager, or county executive). All such requests should be submitted to the Secretary by letter and must include:

(1) A clear definition of the fishery, including identification of all fish stocks and whether it includes non-Federal fisheries as well as Federal fisheries, and the geographical boundaries of the fishery for which the request is being made;

(2) The rationale and supporting documentation as required by this subpart, including:

(i) Characteristics of the fishery which is the subject of the request and other related fisheries that participants also fish in (size and value; number of participants; seasonal and other environmental limitations; socio-economic data; landings data; and market conditions);

(ii) Decline in landings, economic impact, revenues, or net revenues by vessel category, port, etc. (this should represent the proportion of the affected fishery resource compared to the commercial fishery as a whole, not just for the affected fishery resource);

(iii) Number of participants involved by vessel category, port, etc.;

(iv) Length of time the resource (or access to it) has been or will be restricted;

(v) Documented decline in the stock(s);

(vi) In the case of a fishery disaster request for a fishery that has been subject to overfishing during the 5-year period immediately preceding the

claimed disaster, the Secretary will presume that overfishing or inadequate harvest controls was the cause of the claimed disaster unless the requester provides:

(A) Information that demonstrates that overfishing did not cause the disaster if the stock(s) was subject to overfishing during the 5-year period immediately preceding the claimed disaster; and

(B) Information that demonstrates that adequate harvest controls were in place during the 5-year period immediately preceding the claimed disaster if the disaster was claimed to be caused by undetermined causes.

(vii) Documented spending plan which describes the activities that could be used to mitigate adverse impacts if a commercial fishery failure due to a fishery resource disaster were determined; and

(viii) A comprehensive economic and socio-economic evaluation of the affected region's fisheries, including economic losses to coastal and fishing communities, if the request is for a catastrophic regional fishery disaster.

(3) The amount of financial assistance needed to alleviate the claimed commercial fishery failure (under Magnuson-Stevens Act section 312(a) or 315 and under the Interjurisdictional Fisheries Act section 308(b)), the serious disruption affecting future production (under Interjurisdictional Fisheries Act section 308(b)), or harm incurred (under Interjurisdictional Fisheries Act section 308(d)), including which groups of fishery participants would be eligible to receive assistance.

(b) The Secretary will presume that overfishing or inadequate harvest controls was the cause of the claimed disaster unless the requester demonstrates otherwise.

(c) The requester may submit any additional information he or she believes relevant to an evaluation of the request. The requester is encouraged to contact the appropriate NMFS regional office informally for assistance in identifying materials that would assist in the evaluation before submitting the initiation letter.

(d) After receiving the initial request, the Secretary may request any additional information that it deems necessary to complete his/her evaluation and reach a decision.

(e) Requests without a rationale and supporting documentation for determining a commercial fishery failure will be denied. If the request fails to meet any one of the appropriate three prongs required to make a determination, the Secretary shall send the applicant a letter explaining his/her reasons for disapproving the request.

(f) Any new request from the applicant for disaster assistance in the same fishery for which a positive determination has previously been made must include an explanation of a new triggering event based on new data that evidences an appreciable change in the fishery resource, and the economic conditions of the commercial fishery showing new harm.

(g) Any vessel-specific fishery information submitted to the Secretary with a request for a Magnuson-Stevens section 312(a) or 315 determination would be subject to the confidentiality provisions and limitations of section 402(b) of the Magnuson-Stevens Act and regulations in 50 CFR 600 subpart E. Information submitted with a request for an Interjurisdictional Fisheries Act section 308(b) or 308(d) determination will be protected to the extent permitted by statute.

(h) The Secretary may also initiate his/her own evaluation and make a determination for fisheries disaster assistance based on relevant facts or data.

**§ 600.1505 Evaluation process.**

The Secretary shall initiate an evaluation of the letter requesting a determination as soon as practicable after receiving it. The Secretary shall conduct his/her evaluation in accordance with § 600.1503. The Secretary shall inform the requester of the outcome of the evaluation, including reasons for the decision.

**§ 600.1506 [Reserved]**

**§ 600.1507 [Reserved]**

**§ 600.1508 [Reserved]**

**§ 600.1509 [Reserved]**

**§ 600.1510 [Reserved]**

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**Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and