



June 2, 2022

Chris Moore, Executive Director, MAFMC
Mike Luisi, Chair, MAFMC
Peter Hughes, Chair, MSB Committee
Sara Winslow, Chair, RH/S Committee
Mid-Atlantic Fishery Management Council
800 N. State St, Suite 201
Dover, DE 19901

Re: Atlantic Mackerel Rebuilding Alternatives and Associated Science and Statistical Committee (SSC) Acceptable Biological Catch (ABC) Recommendations

Dear Dr. Moore, Mr. Luisi, Mr. Hughes, and Ms. Winslow:

We are writing to express our concern regarding the Mackerel, Squid, Butterfish (MSB) Committee recommendation to rebuild Atlantic mackerel under Alternative 4. This approach generates ABC recommendations that exceed the SSC's recommendations and is thus inconsistent with requirements of the Magnuson Stevens Fishery Conservation and Management Act (MSA). We urge the Mid-Atlantic Fisheries Management Council (Council) to select an alternative that rebuilds Atlantic mackerel consistent with the law when taking final action.

Under relevant law, the MSA states that “[e]ach Council shall, in accordance with the provisions of this Act –“ ... “develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee...”¹ The National Standard 1 guidelines support this mandate stating, “[e]ach Council shall develop ACLs for each of its managed fisheries that may not exceed the “fishing level recommendations” of its SSC.... The SSC recommendation that is the most relevant to ACLs is ABC, as both ACL and ABC are levels of annual catch.”²

The SSC convened on March 15, 2022, to review the condition of the Atlantic mackerel stock and discuss the proposed alternatives in Atlantic Mackerel Rebuilding Version 2. Each alternative laid out a rebuilding trajectory and a level of risk of overfishing with ABCs generated for all ten years of the rebuilding plan. The SSC reviewed and considered the ABCs for all 10 years for each alternative,³ but the SSC Report expressly provides ABCs for FY 2023 and FY 2024.⁴

¹ Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1852 (h)(6).

² National Standard 1 Guidelines. 50 C.F.R. § 600.310 (b)(2)(v)(D).

³ MAFMC, [March 15-16, 2022 SSC Meeting Briefing Materials. NEFSC rebuilding projection tables](#): Mackerel 10 Year Rebuilding Projections (Excel), and Mackerel P* Projections (Excel).

⁴ March 28, 2022 Memorandum from SSC Chair Paul J. Rago PhD to MAFMC Chairman Michael P. Luisi, [Report of the March 2022 SSC Meeting](#). P. 10-11.



For several reasons provided in the SSC summary of that meeting, the SSC recommended Alternative 2 split standard P* (Alternative 3 in the Public Hearing Document (PHD)).⁵ The SSC justified this recommendation and the resulting ABCs as follows: Alternative 2 “(1) fulfills rebuilding plan requirements; (2) is the most responsive to new information on changes in stock status; (3) produces the highest rebuilding plan 10-year catch yield); (4) is fully consistent with the Council’s P* risk policy; and (5) would avoid “break points” in catch limit advice, which would reduce year-to-year changes in the ABC.”⁶ Alternative 2 (Alternative 3 of the PHD) generates an ABC of 4,539mt in FY 2023 and 6,207mt in FY 2024.

At the May 16, 2022 MSB Committee meeting, the Committee deliberated over several alternatives and even a hybrid option before ultimately voting to recommend Alternative 4 from the Public Hearing Document. Alternative 4 has an ABC of 8,094mt in FY 2023 and 9,274mt in FY 2024. The selection of Alternative 4 would allow catch to exceed the SSC’s ABC recommendations for those two years by almost double those found in the Alternative 2 (Alternative 3 in the PHD) rebuilding trajectory for FY 2023.⁷

The legal requirement to select catch limits that do not exceed the SSC’s ABC recommendation was brought to the attention of the MSB Committee at the May 16, 2022 meeting. In response, NOAA General Counsel stated that the SSC considered all alternatives to “viable for a rebuilding plan” and that “without explicitly saying it ... the SSC was giving its blessing for any of the ABCs for 2023 as they appear in each of these alternatives.”⁸ That interpretation, however, is not apparent from the SSC’s Report and in fact is contradicted by their clear recommendation for Alternative 2 (Alternative 3 in the Public Hearing Document).

To reiterate, the summary of the SSC meeting states:

This table summarizes the alternatives specified by the Council and gives the calculated 2023, 2024, and total rebuilding plan (2023-2032) ABC estimates. Note that an OFL CV probability of 150% applies to alternatives 2 and 5. The SSC recommends Alternative is 2: Split standard P* (see ToR 1).

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⁵ 2022 [Mackerel Rebuilding Plan Version 2](#). P. 26.

⁶ Report of the March 2022 SSC Meeting. P. 11.

⁷ 2022 [Mackerel Rebuilding Plan Version 2](#). P. 26-28

⁸ MAFMC May 16, 2022 MSB Committee Meeting Recording, at 1:16:25.

Table 1. Atlantic Mackerel Rebuilding Options Summary

Rebuilding Alternative Name	Rebuilding Risk Policy	Recruitment	Probability Rebuild by 2032	F (2023/2024 if multiple)	Rebuilt by (median)	2023 median Catch/ABC (mt)	2024 median Catch/ABC (mt)	Rebuild Plan median catch/ABC 2023-2032 (mt)
1. 2009+ Rebuild	50% chance of rebuilding by 2032	2009+	56.6%	0.01	June 2031	703	865	12,866
2. Split standard P*	Use basic P* as rebuilding plan.	Split at 1/2 Bmsy	51.5%	0.07/0.08	June 2031	4,539	6,207	171,291
3. Split 60% rebuild	60% chance of rebuilding by 2032	Split at 1/2 Bmsy	60.5%	0.12	June 2031	8,094	9,274	144,147
4. Split 50% rebuild	50% chance of rebuilding by 2032	Split at 1/2 Bmsy	53.4%	0.14	June 2032	9,371	10,591	157,821
5. Split 50% rebuild with P* deduction	Use rebuild F from split 50% chance of rebuild and then deduct per P* as if rebuild F was overfishing F	Split at 1/2 Bmsy	62.3%	0.04/0.05	June 2029	2,976	4,168	134,022

The SSC reviewed all alternatives and recommends the P* approach with the maximum fishing mortality threshold (MFMT) equal to the Fmsy proxy (Alternative 2).⁹

⁹ March 28, 2022 Memorandum from SSC Chair Paul J. Rago PhD to MAFMC Chairman Michael P. Luisi, [Report of the March 2022 SSC Meeting](#). P. 10-11.



While the announcement for the upcoming MAFMC Council meeting states that all five rebuilding alternatives are “endorsed by the SSC as being consistent with the best available science,”¹⁰ the relevant part of the SSC Report states: “The SSC believes these recommendations [for Alternative 2 (Alternative 3 in the PHD)] meet National Standard guidelines for best available scientific information available.” The SSC provided insight on all the alternatives certainly based on the best available science, but their *only* “recommendation” was for Alternative 2.¹¹

The MSA, NS1 guidelines, and caselaw¹² are clear that NMFS cannot approve an action with catch limits that exceed the SSC ABC recommendations. Without remanding the SSC’s advice for further guidance, the Council is limited to selecting Public Hearing Document Alternatives 1, 2 or 3 which do not contain catch limits that exceed the SSC ABC recommendations for FY 2023 and 2024.¹³ If the Council adopts Alternative 4 and its associated ABCs as the Atlantic Mackerel Rebuilding Plan Version 2, NOAA Fisheries should not approve this recommendation.

Thank you for considering these comments and concerns during final action on the rebuilding plan for Atlantic mackerel.

Sincerely,

K. Purcie Bennett-Nickerson
Executive Director and Staff Attorney
Bennett Nickerson Environmental Consulting

Erica Fuller
Senior Attorney
Conservation Law Foundation

Molly Masterton
Director, U.S. Fisheries
Natural Resources Defense Council

Pam Lyons Gromen
Executive Director
Wild Oceans

CC:

Mike Pentony: Regional Administrator, NOAA Fisheries

Emily Gilbert: Scallop, Herring, Mackerel, Squid, and Butterfish Branch Chief, NOAA Fisheries

¹⁰ [June 2022 MAFMC Hybrid Council Meeting notification and agenda.](#)

¹¹ h 28, 2022 Memorandum from SSC Chair Paul J. Rago PhD to MAFMC Chairman Michael P. Luisi, [Report of the March 2022 SSC Meeting](#). P. 10-11.

¹² See *Conservation L. Found. v. Pritzker*, 37 F. Supp. 3d 254, 267 (D.D.C. 2014).

¹³ 2022 [Mackerel Rebuilding Plan Version 2](#). P. 24-28.