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January 17, 2012

**VIA ELECTRONIC MAIL**

Mary Beth Nickell-Tooley, Chair  
Scallop Oversight Committee  
New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950

**Re: Issues for January 19, 2012 Scallop Oversight Committee Meeting**

Dear Chair Tooley:

As you know, we represent the Fisheries Survival Fund, and submit this letter in connection with the Scallop Oversight Committee's deliberations on Scallop Framework Adjustment 24 ("Framework 24"), when it meets on January 19, 2012, in Providence. This letter also addresses certain emerging issues for the next, 2012-13 fishing year. These issues include the lack of viability of the DelMarVa Access Area for the upcoming fishing year, a seemingly impending closure of what has become a major mid-Atlantic scallop abundance area as an accountability measure relating to the scallop fleet's SNE YTF sub-ACL, the disproportionate bycatch impacts of scallop vessels fishing with trawls, mandatory provision of observer information upon conclusion of an observed scallop trip, and the timing of Georges Bank Access Area openings.

**DelMarVa Access Area.** First, FSF and its participants have a major concern regarding the suitability of the DelMarVa access area ("DMVAA") for rotational fishing in the next fishing year, where half the fleet is scheduled to have an 18,000 pound trip.

According to the information presented to the Scallop Plan Development Team on January 5, 2012, the SMAST video survey estimated that, in the summer of 2011, the DMVAA contained 10.2 million pounds of exploitable scallop biomass. However, later in the year, after the area access program for 2011 was well underway, VIMS estimated between 3.7 and 4.8

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million pounds, depending on the dredge (commercial or survey) and shell height-meat weight conversion factor used. The lower estimate is consistent with the limited access fleet's recent experience of very low catch rates of scallops in that access area. Finally, NMFS' 2011 dredge survey shows a steep decline in biomass, almost to the levels found in the Elephant Trunk Access Area, which has not begun to recover from the rotational fishing program that ended in fishing year 2010-11.

The DMVAA does not appear able to support 2012's prescribed level of fishing. An access area trip accounts for approximately 6 million pounds of scallops, meaning a trip by half the fleet would account for approximately 3 million pounds, representing most of the scallops estimated from the VIMS survey. We recognize that, by the end of an access area's rotational period, catches will drop dramatically; however, it is not realistic to expect the fleet to harvest nearly all of the available biomass in an access area.

On occasion, as was the case with the Hudson Canyon Area before it recovered, the biomass estimated when developing the rotational plan is over-estimated to the point the rotational plan ceases to be viable. The Council ultimately took action to address the biomass over-estimates in the Hudson Canyon area.

Notably, the reasons for the Council to act regarding the DMVAA are even more compelling than those involved for Hudson Canyon. Specifically, only half the fleet will be assigned a DMVAA trip, creating a significant inequity between them and the other half of the fleet that will be assigned a trip in a viable access area. (So-called "half trips" area also occurring in Closed Area I, the Nantucket Lightship Area, and the new Hudson Canyon Area.) The half-trip approach allows an increase in the number of 18,000 pound area access area trips the fleet can take, a step designed to optimize yields. The approach requires some level of parity, however, in fishing opportunity among scallop fleet participants to comply with Magnuson-Stevens Act National Standard Four's requirement that allocations of fishing privileges be fair and equitable and designed to promote conservation. 16 U.S.C. § 1851(a)(4).

The following options are available to the Committee and Council:

- (1) Re-assign the DMVAA access area trips to another access area; or
- (2) Convert the 18,000 pound DMVAA access area trip allocations to open area days at sea, using an open area DAS conversion factor.

FSF participants would very much prefer that any such step be taken in the 2012-13 fishing year, if at all possible. Such a step would ensure the most equitable outcome (allowing all fleet participants relatively equivalent 2012-13 fishing opportunities) and best promote conservation. FSF participants have no interest in fishing down the DMVAA to the

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point it will take a long time to recover. A delayed recovery can thwart longer term rotational management efforts.

If such an adjustment is not possible in the upcoming fishing year, FSF participants would prefer allowing vessels with DMVAA trips the option to carry-over their DMVAA trips in return for extra open area DAS in the following (2013-14) fishing year as part of Framework 24. (Catch limits for the 2013-14 fishing year would also need to be modified to accommodate this additional carryover.) We recognize the fleet would have to take it somewhat “on faith” that Framework 24 would actually provide for such a carry-over and re-allocation to the following year, but the prospects for that step should have become clear by November 2012, when the Council is expected to take final action on the framework. If the re-allocation does not seem very probable to occur in Framework 24, the vessels allocated the trip to the DMVAA would have time to try to make the trip before the fishing year ends.

**SNE YT Sub-Annual Catch Limit (“ACL”).** NMFS is currently projecting a 28% overage of the SNE YTF sub-ACL for the scallop fleet. As a result, under the scallop regulations as they stand now, an area from the shoreline south to a line generally from 40°N-73°W to 40°N-70°W (that is, from mid-Long Island east to the eastern tip of Nantucket) is scheduled to close for the entire upcoming fishing year as an accountability measure (“AM”). This area has not traditionally included a large component of the scallop resource; however, according to the latest survey information, the area includes a full 39% of the mid-Atlantic open area scallop biomass. Amendment 15 established the closure area using data from 2006-2008.

At this point, FSF must reiterate its opposition to enacting AM’s in the second year (the year immediately following the year when the projected overage occurred). In this SNE YTF AM instance, the overage is projected based on data from only March 1 through September 30, 2011. Apparently, it takes 90 days for NMFS to process the observer data and make it available. The Council had included a provision in Scallop Amendment 15 that would have applied a “year 3” AM to the YTF sub-ACL provisions—meaning that there would be time for NMFS to estimate bycatch based on the entire fishing year’s worth of observer data. However, the Regional Administrator unexpectedly informed the Council she would not approve a year 3 AM, even though Amendment 15 explains in describing the year 3 option that the “stock area would close to the scallop fishing fishery at the beginning of year 3, not the subsequent fishing year because data will not be available in time to have measures in place by the start of the scallop fishing year.” Amendment 15 Final Environmental Impact Statement (Dec. 6, 2010), at 113 (emphasis added). Amendment 15 now employs a “year 2” AM with YTF catch estimates calculated “on or about January 15.”

The extent of data available can and does cause significant changes in estimated YTF catch by scallop vessels. NMFS explains in its website description of its YTF catch estimation procedures that “the YTF discard rate will be calculated as the ratio of observed YTF

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discards (lb) to the observed catch of all species (lb) on observed scallop trips.” The incidence of yellowtail catch in the scallop fishery declines in the fall and winter months, meaning the information would change for the better were this information included in the estimate. The decline in YTF catch can be seen from Figure 9 in the Amendment 15 at FEIS, which shows that more than 75% of SNE YTF “savings” from the AM are projected to occur during the March through September period. Further, and perhaps equally important, the weight of any early season “outlier” trip or trips is mitigated as more trips are observed and added in. As a result, NMFS has forced itself to make estimates using an incomplete and most likely misleading data set. This failure has real-world conservation repercussions, forcing the fleet onto areas with lower yields and increased bottom time.

The current approach is, in fact, leading to incredible variability in the SNE YTF catch estimates for the scallop fishery. For example, the 2011 SNE YTF catch by the scallop fishery has been declining steadily as more information becomes available. The scallop fishery’s SNE YTF catch was first estimated at 165% of the sub-ACL, then 145%, and most recently at 128% of the sub-ACL. The amount of YTF catch in the LAGC trawl fishery has gone from an estimate of 41,000 lbs to 11,000 lbs. (There are still questions of whether the trawl vessels were on scallop, groundfish, or fluke trips, especially as fluke and SNE YTF may be readily confused by an observer.) This lack of precision is especially important as the length of the AM closure is based on the percentage overage that occurs. For instance, a 1-2% overage only requires a March closure, and a sliding scale proceeds to a 20% overage, at which point the closure is a full year in duration.

Significantly, a NMFS about-face subsequently occurred, and the Council was allowed to apply year 3 AMs to the groundfish fishery. Accordingly and especially given the extreme volatility of the estimates, and the significant ramifications that stem from them, FSF requests a delay in the implementation of this SNE YTF closure AM for the upcoming fishing year. The delay would not cause a threat of overfishing, as we understand that the total ACL for SNE YTF was not exceeded according to any estimate. (In fact, when Groundfish Framework 47 is implemented later in 2012, the regulations will no longer require implementation of the AM at all because the overall ACL for SNE YTF was not exceeded and the scallop catch was less than 150% of its sub-ACL. The Council added this measure to Framework 47 by unanimous vote at the November 2011 Council meeting.)

**Scallop Trawl Vessels:** The Committee should strongly consider proposing to eliminate a vessel’s ability to target scallops with trawl gear in Framework 24. The net boats have by far the highest YTF bycatch rate. In the YTF sub-ACL regime in which the scallop fishery now operates, the Council should not continue to allow the use of such inefficient gear on trips where the YTF bycatch is counted against the scallop fleet.



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**Observer Data:** FSF requests that Framework 24 contain a provision that requires the observer to provide the observer's data from a trip to the owner of the vessel that carried the observer. Given the importance of observer data to the calculation of bycatch rates, observer data should be made immediately available to fleet participants. The reports can be checked for errors as soon as the trip is completed. The Committee may recall an observer miscoding "sand dollars" as "sand dabs," thereby causing a significant erroneous estimate of scallopers' windowpane flounder bycatch—and the potential for a hastily-conceived management over-reaction. This step would also better enable the scallop industry to implement an organized program to track YTF catches as well as the bycatch of other species.

**Seasonal Closures of Georges Bank Access Areas:** FSF requests that the Committee include in Framework 24 measures to adjust the current March 1<sup>st</sup> to June 15<sup>th</sup> closure of the Georges Bank access areas. The current closure is based upon outdated science and is hindering the fleet's ability to achieve the goals of the scallop FMP. More specifically, the access area trips may actually, currently be timed to coincide with relatively higher, rather than lower, YTF catch rates. New data provided by this past year's RSA projects and several years of observer data represent the best scientific information available and should be the basis for a new analysis on when the access areas should be available to the fleet.

\* \* \*

FSF representatives will be available at the January 19 Scallop Committee meeting to discuss these issues in more detail. In the meantime, please do not hesitate to contact us if you have any questions or require additional information.

Sincerely,



David E. Frulla  
Andrew E. Minkiewicz  
Shaun M. Gehan

*Counsel for the Fisheries Survival Fund*

cc: NEFMC Scallop Oversight Committee members  
Deirdre Boelke, Scallop Plan Coordinator  
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