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October 30, 2008

VIA ELECTRONIC MAIL

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Ms. Deirdre Boelke, Chair
Scallop Plan Development Team
New England Fishery Management Council
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Re: Recent Suggestions Regarding Sea Turtles and the Interplay Between the Magnuson-Stevens Act and the Endangered Species Act

Dear Ms. McGee and Ms. Boelke:

As you know, we represent the Fisheries Survival Fund (“FSF”). FSF appreciates the progress the Council’s Scallop Plan Development Team (“PDT”) and Scallop Oversight Committee have made to respond to the National Marine Fisheries Service’s (“NMFS”) request for evaluation of the first “term and condition” and related “reasonable and prudent measure” in the March 2008 Biological Opinion for the scallop fishery. However, in recent meetings, it appears that certain misapprehensions exist with respect to the relationship between the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) and the Endangered Species Act (“ESA”) with respect to “management” of sea turtles. FSF would like to take this opportunity to address this relationship with a concrete legal analysis.

In particular, at least one group is demanding that the Council bring sea turtles under the full scope of MSA-type management. Specifically, the allegation has been made that the Council should set annual catch limits (“ACL”) and accountability measures (“AM”) for threatened and endangered sea turtles which interact with the scallop fishery. Second, and separately, the PDT appears to have conflated MSA mandates under National Standard 9 with respect to bycatch with the species protection requirements afforded by the ESA. In both the

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instances, the actual interplay between the two laws should, we believe, be articulated more precisely. Our letter briefly reviews the legal standards relating to the sea turtle issues before the Committee and addresses these suggestions.

Starting with former proposition, the notion of setting ACLs and AMs for sea turtles is a legal *non sequitur*. Not only is there no fishery for sea turtles, but the management objective is to avoid them and minimize the impact of any unavoidable interactions that occur. By contrast, annual catch limits are to be a component of a fishery management plan (“FMP”) for a managed stock. As such, ACL’s presuppose and are predicated upon the establishment of management reference points based on the overarching responsibility under the MSA to achieve optimum yield from a stock of fish. *See* 16 U.S.C. § 1851(a)(1). For its part, the new ACL/AM provision added by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 102 Stat. 3575, 3579 (Jan. 12, 2007), states:

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall – establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

16 U.S.C. § 1853(a)(15). This section not only focuses on “fisheries,”¹ but on setting ACLs for the purpose of preventing “overfishing.” As defined in the MSA, overfishing is a rate of harvest that jeopardizes the ability of “a fishery to produce maximum sustainable yield [“MSY”] on a continuing basis.” *Id.* § 1802(34). It is hard to fathom the setting of MSY for loggerhead sea turtles. Instead, the reference to “yield” in both MSY and National Standard 1 relates to the overarching purpose of the MSA, which is directed towards achieving sustainable harvests and maximizing returns from managed species in terms of economic, nutritional, and recreational benefits. *See id.* § 1802(33) (defining optimum yield). None of these concepts apply to protected species, nor to sea turtles specifically.

Rather, the conservation objective for sea turtles is not to achieve any “yield” from sea turtle populations, but rather to avoid jeopardizing the continued existence of the species and to rebuild populations to levels such that there is little likelihood that these species will become extinct. For those purposes, the ESA provides a much more direct and workable legal

¹ Which are defined as “one or more stocks of fish which can be treated as a unit for the *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.*” *Id.* § 1802(13) (emphasis added). A “stock of fish,” for its part, is defined as “a species, subspecies, geographical grouping, or other category of fish *capable of management* as a unit.” *Id.* § 1802(42).

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framework from which to respond to sea turtle issues. Indeed, NMFS itself recognized that the ESA was the principal instrument for addressing protected species issues when it denied FSF's and Garden State Seafood Association's petition for a rulemaking to require the use of turtle chains on all scallop dredges. *See* 69 Fed. Reg. 63498, 63498 (Nov. 2, 2004) (“[T]he Magnuson-Stevens Act is not the appropriate legal authority for adequately addressing incidental takes of sea turtles in the sea scallop fishery.”). Accordingly, no legal requirement—or even a tenable policy argument—exists to establish a fishery management plan or any of the required elements of such a plan, including ACLs and AMs, for sea turtles.

The proposed National Standard 1 guidelines do not change this result. Aside from the fact that all that currently exists is a proposal, which itself imposes no legal requirements on the Council, the proposed guidelines do not require the setting of ACLs and AMs for the new, extra-statutory category of “ecosystem component species” identified by the organization advocating for MSA management of sea turtles. In fact, these proposed guidelines do just the opposite. They state: “*Because [ecosystem component] species are not considered to be ‘in the fishery,’ specification of reference points, ACLs, and AMs are not required.*” *See* 73 Fed. Reg. 32526, 32529 (June 9, 2008) (emphasis added). The Council would be well advised to avoid an invitation to attempt to set management reference points for protected species, and continue to work on alternatives to NMFS's wrong-headed, Biological Opinion-based limit on the Mid-Atlantic scallop fishery. As the PDT has recognized, the term and condition at issue could have significantly negative conservation and safety consequences for the scallop fishery.

The latter issue involves the scope of NMFS's “bycatch” minimization obligations under the MSA. A statement in the draft PDT guidance regarding the Biological Opinion may suggest some equivalency between these bycatch minimization requirements of the MSA and NMFS's duties under the ESA. Specifically, the document suggests that “a change to the fishery that is deemed to be minor would also clearly be practicable, so that these same changes would be required under the MSA in order to reduce bycatch to the extent practicable.” Both regimes apply a practicability standard in this instance, but the underlying legal regimes differ.

More specifically, the scope of what constitutes a “take” under the ESA is broader than the definition of “bycatch” under the MSA. The MSA's definition of bycatch is “fish which are *harvested* in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards.” 16 U.S.C. § 1802(2) (emphasis added). By contrast, “take,” as used in the ESA, “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

Regarding bycatch, National Standard 9 requires that “[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” 16 U.S.C. § 1851(a)(9). For its part, the ESA requires NMFS to minimize the *impact* of takes. *Id.* § 1536(b)(4)(C). In the

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current context of no-jeopardy, as the PDT correctly notes, a practicability standard, expressed in terms of major *versus* minor impacts on the fishery, applies.

Much has already been done to minimize "bycatch" of turtles. For instance, the turtle chain rule has been implemented, which almost completely eliminates "bycatch," in terms of turtles being caught in a dredge. Under the ESA, these chains would minimize the impact (in terms of injury) of takes, but the chains have not been viewed to reduce the number of takes. However, management measures, specifically rotational fishing, have worked to reduce total takes in absolute terms in the Mid-Atlantic through reduction in bottom time. Further, as FSF outlined in its October 21, 2008, letter to the Scallop Committee, research is underway into additional gear modifications that may further reduce the potential for bycatch, and the impact of takes, of turtles in scallop dredges. FSF and its partners have also undertaken other research and educational efforts to reduce the potential for harm to sea turtles in the scallop fishery.

The FSF looks forward to continuing to work proactively with the Council and NMFS to address these important issues. As the Plan Development Team's recent analysis shows, the Council has done a commendable job in helping to improve scallop management and to achieve the objectives of both the MSA and ESA by implementing and refining a management system that focuses on increasing scallop catch per unit of effort.

Thank you for taking the time to consider these comments. Please do not hesitate to contact us if you have any questions or require additional information.

Sincerely,



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

Counsel for the Fisheries Survival Fund