

November 12, 2008

John Pappalardo
Chairman
New England Fishery Management Council
50 Water Street Mill 2
Newburyport, MA 01950

Patricia Kurkul
Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive, Gloucester, MA 01930

**Re: New England Fishery Management Council consideration of Sea Turtle
Conservation Measures to meet the requirements of the March 14, 2008 Biological
Opinion for the Atlantic Sea Scallop Fishery**

Dear Mr. Pappalardo and Ms. Kurkul:

When the New England Fishery Management Council meets on November 20, 2008, to consider action related to reduction of takes on loggerhead turtles in the sea scallop fishery, Oceana urges the Council to reject any alteration of the current Biological Opinion.

**Reasonable and Prudent Measure and Terms and Condition 1 represent ‘minor changes’
to the fishery:**

The Plan Development Team’s analysis of measures to mitigate the impacts of scallop fishing set forth in the Biological Opinion shows that the measures are reasonable and prudent. The PDT analysis indicates that, regardless of the metric by which these changes are measured, changes in landings, fishing mortality, and fishing effort will be less than 10% compared with the expected performance of the fishery in 2010. In contrast, the PDT’s analysis establishes that there are historic fluctuations resulting in ‘highly variable’ performance of the scallop fishery over the past 5 - 10 years.¹ The scallop fishery has experienced changes of up to 30% year to year changes as judged by landings and mortality (see figure 1 and 2) and revenue in the past five years (figure 3). Therefore, the changes that would result from the reasonable and prudent measures are small in comparison to the normal fluctuation experienced by this fishery.

¹ “Although it is not repeated in each alternative, the general assumption is made that turtles interactions occur when and where scallop fishing effort overlaps with the presence of sea turtles. Risks may be greater during turtle high use periods, but interactions could still occur in the margins of that period given that both turtle distribution and fishing activities are *highly variable*.” Framework 19 Final Document, p. 198, December 19, 2007.

Even if recent management under the access area program is considered, the Mid-Atlantic fishing mortality for this fishery has varied by significantly more than the magnitude of the changes expected under the Terms and Conditions of the Biological Opinion. Using this approach, the changes to the fishery under the Biological Opinion may be an *expected variation* in the normal management of the fishery rather than a 'more than minor change' to the fishery.

Combined U.S. Georges Bank and Mid-Atlantic Sea Scallops Trends in Landings and Fishing Mortality

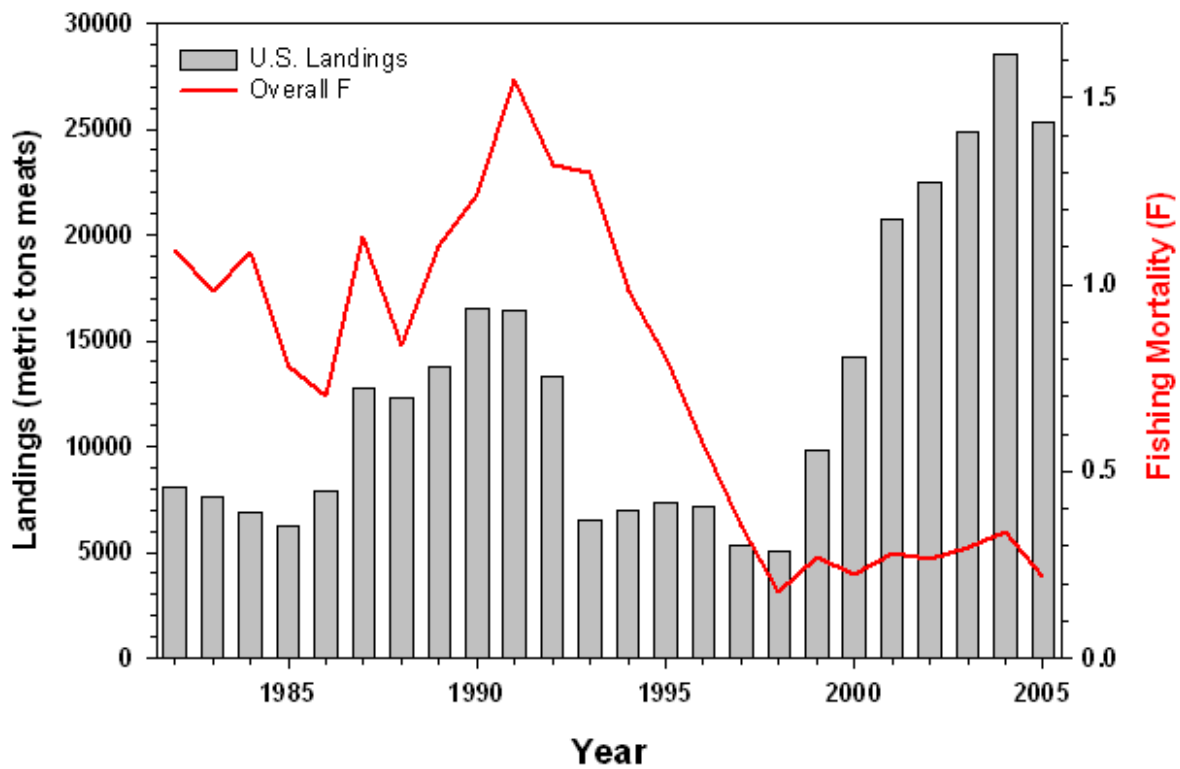


Figure 36.12. Trends in catch and fishing mortality for combined U.S. Georges Bank and Mid-Atlantic sea scallop resources.

(Source: **Status of Fishery Resources off the Northeastern US**, NEFSC website)

Mid-Atlantic Sea Scallops Trends in Landings and Fishing Mortality

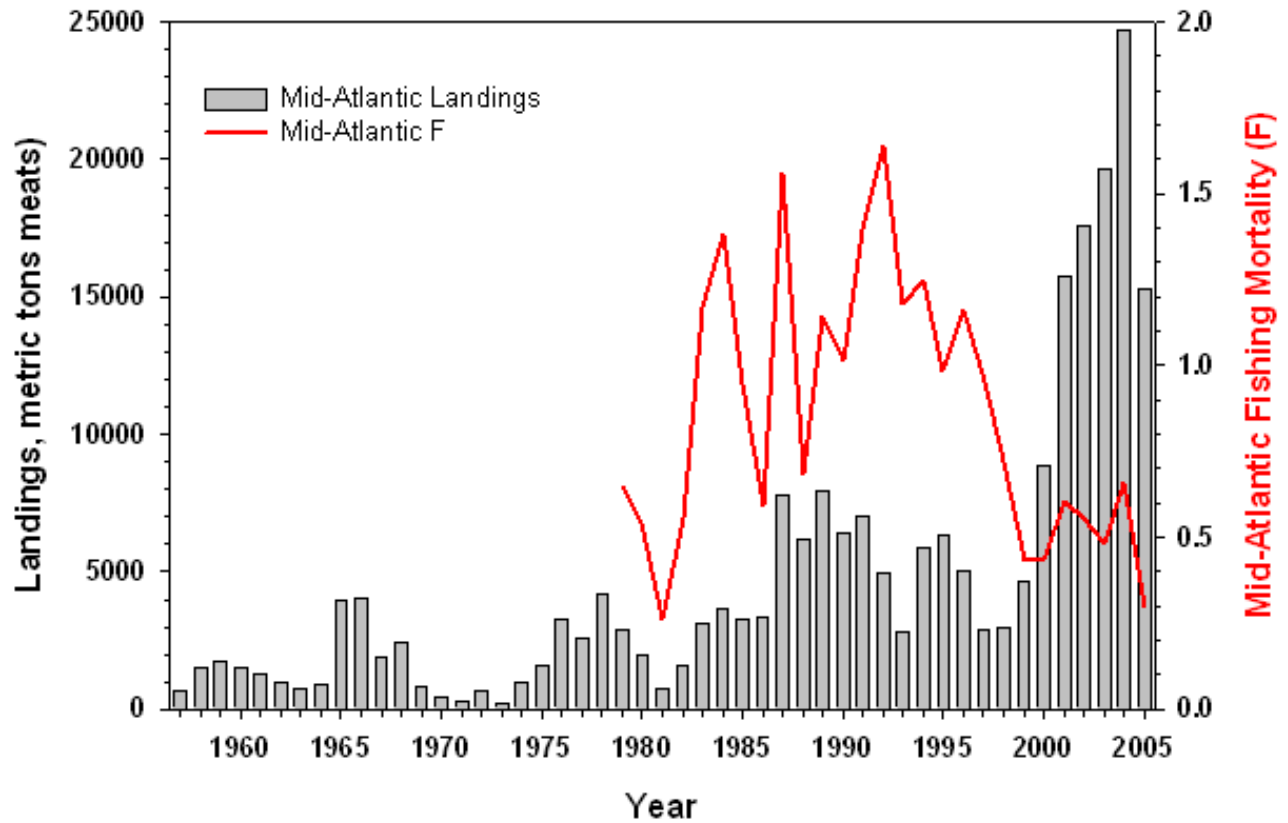
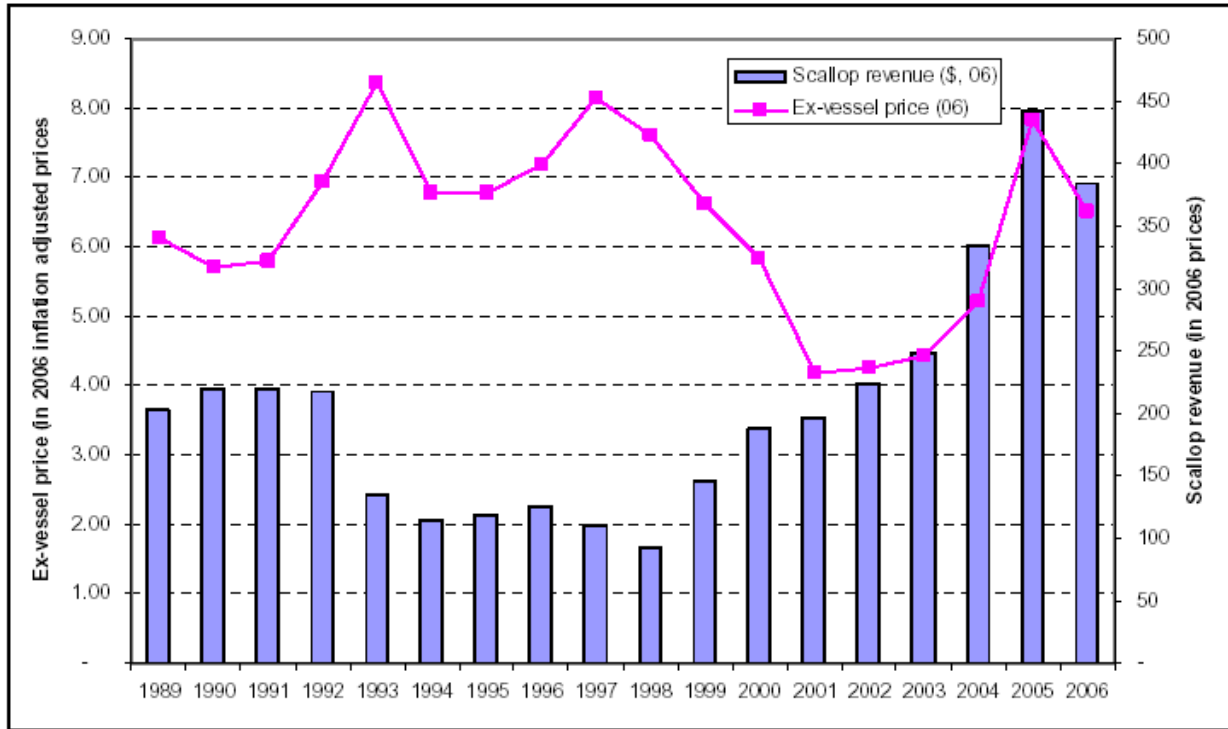


Figure 36.9. Trends in landings and fishing mortality for Mid-Atlantic sea scallops.

(Source: **Status of Fishery Resources off the Northeastern US, NEFSC website**)

Figure 21. Scallop prices and revenue



(Source: FW19, page 111)

The New England Fishery Management Council should proceed very cautiously in recommending any changes to the Existing Biological Opinion:

The current Biological Opinion was prepared and approved by the National Marine Fisheries Service. Under the Endangered Species Act, it is only by operating in compliance with the Terms and Conditions of the Biological Opinion that individual scallop fishing enterprises, and the agency as a whole, are shielded from liability under the blanket prohibition on takes established by the Act. If the Council and the agency elect not to implement Term and Condition 1, the Fisheries Service will be liable for breaking the law for each turtle take that occurs, as will the scallop vessel that actually takes the sea turtle. *See, e.g., American Hawaii Longline Ass'n v. NMFS*, 288 F. Supp. 2d 7 (D.D.C. 2003) (without biological opinion, longline fishing could not continue). Furthermore, by taking such a rash action when it is well-documented that takes will occur, the Council and the Fisheries Service will open the fishery to uncertainty and unanticipated disruption as a result of litigation aimed at barring reasonably anticipated and unlawful turtle takes.

Accordingly, any modification of the Reasonable and Prudent Measures and Terms and Conditions of the Biological Opinion is unlawful unless accomplished through a reinitiation of formal consultation under section 7 of the Endangered Species Act. If the Council elects to adopt the motions approved by the scallop committee at the committee's November 3, 2008, meeting, the Council is in effect requesting the agency to reinitiate consultation. When and if the agency elects to reinitiate, the responsibility for complying with the Endangered Species Act will rest with the agency, not the Council. The agency will not, and legally cannot, defer to the Council's advice, but must evaluate the issue without prejudice.

Guidance for any Changes to the Existing Biological Opinion:

If the Council decides to recommend to the agency reinitiation of formal consultation, the Council should build a solid case for why a new consultation is needed and what modifications would be proposed to meet the requirement that the take, not just bycatch, of sea turtles be adequately mitigated. The best way for the Council to do this would appear to be for the Council to use its existing framework authority to make changes equivalent to the measures developed in the existing BiOp. If the Council can then establish that its regulations have similar or greater benefits for threatened loggerhead sea turtles, it will have a solid case that the Biological Opinion should be modified to reflect the new situation.

To date, the Scallop Plan Development Team and Committee have focused on the effects of management measures on the scallop fishery without an appropriate level of consideration of the effects of the measures on takes of turtles. If the Council elects to suggest changes to the Biological Opinion and develop measures in FW 21 to meet these altered requirements, such changes must be accompanied by a full evaluation of the effects of the current Biological Opinion Measures as well as the anticipated effect of any proposed measures on the takes of loggerhead turtles. The latter effect is the most important metric by which management measures must be measured in an ESA action.

It is incumbent upon the fisheries service to evaluate and analyze the likely effects with a high degree of certainty before any changes to the Biological Opinion are approved. The Council should give this issue careful consideration and understand that failing to clearly and effectively demonstrate the benefits of an altered BiOp will jeopardize the vital Incidental Take Statement and Terms and Conditions that allow the scallop fishery to operate. Any failure to comply with the Terms and Conditions would subject the agency and individual scallop fishing enterprises to the liabilities associated with unlawful takes as well as the risk of fishery disruption through litigation.



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Oceana remains committed to its work to reduce takes of turtles in the scallop fishery and hopes that the Council will give it full attention to this issue in the coming months to ensure that effective on-the-water action is taken in this fishery.

Thank you,

David Allison
Senior Campaign Director
Oceana

Cc: James Balsiger, NOAA Acting Assistant Administrator for Fisheries
Paul Howard, New England Fishery Management Council Executive Director