



#56

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John Pappalardo
Chairman
New England Fishery Management Council
50 Water Street Mill #2
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Re: Accounting for Scallop Catch of Yellowtail Flounder in 2010

Dear Ms. Kurkul and Mr. Pappalardo,

Oceana wishes to convey its concern about a serious regulatory gap in the simultaneous development of Amendment 16 to the Groundfish Fishery Management Plan (FMP), Amendment 15 to the Scallop FMP, and the respective framework actions (FW44 and FW15) which will establish specifications for these fisheries for the 2010 fishing season. In the development of the management actions, the Council and agency have recognized a significant interaction between the Georges Bank and Southern New England stocks of yellowtail flounder and the Atlantic scallop fishery, yet failed to take action to establish meaningful annual catch limits, enforced with accountability measures, for yellowtail flounder in the scallop fishery in 2010, as well as to limit such bycatch consistent with National Standard 9.

The regulatory requirements discussed in this letter were adopted by Congress to prevent the kind of depletion of fish populations that has plagued New England fisheries. Failing to address the interaction between the groundfish and the scallop fishery risks further damage to the environment as well as to commercial fishing enterprises.

The Council and the agency must take immediate action to ensure that these FMPs comply with the law and ensure that the groundfish Fishery Management Plan meets its goals and objectives for management of this fishery in 2010 and beyond.

Yellowtail Flounder: Overfished and Experiencing Overfishing

As you know, both Georges Bank and Southern New England/Mid-Atlantic yellowtail flounder are seriously depleted with biomasses reported to the Council at 22% and 13%

of SSBmsy respectively and F levels of 114% and 160% of Fmsy¹. As a key stock that is caught throughout the Northeast multispecies fishery, yellowtail is at the center of the management of this fishery in all but the Gulf of Maine and will likely be a limiting factor in the management and operation of the new catch share management program that will come on line in the region on May 1, 2010. Under this program, all of the allowable catch for these two stock of yellowtail will be allocated to sectors with very real consequences for the directed groundfish fishery if and when an allocated quota is caught.

Compounding this situation is the long history of yellowtail catch and discards in the scallop fishery which has used a hard bycatch cap to control yellowtail bycatch in groundfish closed areas since 1999 (FW11/29). Through 2009 yellowtail catch in the scallop fishery has been limited to 10% of the quota for each stock. Notwithstanding this cap, recent analysis indicates that if *all* catches of yellowtail in the scallop fishery are considered, the stock specific catches in the scallop fishery could be as high as 11-41% of a stock's ABC².

Even when faced with ten years worth of data and new projections that the scallop fishery will cause significant problems for the management of the groundfish fishery, the only management measures scheduled to control bycatch of yellowtail in the scallop fishery in 2010 are status quo management measures in the scallop access areas. The Council does not propose to set a limit on overall yellowtail catch in the scallop fishery for 2010 as part of an overall Annual Catch Limit (ACL) for these stocks. Instead the Council chose to simply reclassify the yellowtail catch of the scallop fishery as an 'other subcomponent' of the overall groundfish catch until the scallop FMP can develop Accountability Measures (AMs) to control this portion of the yellowtail catch. This is an illegal approach which weakens the ACL/AM management program for the groundfish FMP significantly as scallop catch was recently shown to consume nearly half of the ABC for a given stock.

Without meaningful ACLs and corresponding AMs on all known sources of mortality of a stock, Annual Catch Limits will not have been implemented in the groundfish Fishery Management Plan.

2010- A transition to Annual Catch Limits and Accountability Measures-

2010 and 2011 are the mandated implementation dates for ACLs and AMs in America's fisheries as an effective approach to ending overfishing. Oceana has advocated since

¹ Assessment of 19 Northeast Groundfish Stocks through 2007 *Report of the 3rd Groundfish Assessment Review Meeting (GARM III)*, Northeast Fisheries Science Center, Woods Hole, Massachusetts, August 4-8, 2008

² Presentation by Tom Nies to New England Fishery Management Council, September 23, 2009: http://www.nefmc.org/nemulti/council_mtg_docs/Sept%202009/Northeast%20Multispecies%20Annual%20Catch%20Limits.pdf. Downloaded September 28, 2009.

the scoping phase of the ACL/AM groundfish amendment 16 and scallop amendment 15 that bycatch of non-target groundfish caught in the scallop fishery must be limited in the groundfish FMP to comply with the requirements of the Magnuson-Stevens Act.

Despite our ongoing support for effective management of this issue in 2010 (as required by the FMP which manages yellowtail flounder) the Council has continued to develop separate actions which create a clear regulatory loophole in the interim between the scheduled implementation dates for Amendment 16 to the groundfish Fishery Management Plan (May 1, 2010) and Amendment 16 to the scallop FMP (March 1, 2011)

This situation will allow the scallop fishery to operate without any measures to ensure accountability for the majority of its catches of yellowtail despite being clearly identified as a source of mortality.

Failing to address this significant issue is poor management of the region's fisheries and would appear in either case to be illegal under a number of mandates under the MSA and NEPA. This issue must be remedied before the implementation of A16 and FW44 in the spring of 2010.

Specifically, the proposed management measures for 2010 fail to satisfy:

I. National Standard 1: End Overfishing and Develop Annual Catch Limits

A. Yellowtail Accountability Measures are required in the scallop fishery for 2010-

Failing to control known mortality of yellowtail flounder in the scallop fishery with effective AMs jeopardizes the rebuilding plan for Georges Bank and SNE/MA yellowtail flounder and violates National Standard 1 to end overfishing.

The Magnuson-Stevens Reauthorization Act and the NS1 Final Rule are quite clear in their requirement that fisheries have ACLs, 'the level of annual *catch of a stock or stock complex* that serves as the basis for invoking AMs³', and 'measures to ensure accountability⁴' in place by either 2010 (for overfished groundfish) or 2011 (for scallops which are not currently subject to overfishing)⁵. This definition requires that ACLs

³ National Standard One Final Rule. Definitions. (74 Federal Register, Friday, January 16, 2009)

⁴ (15) establish a mechanism for specifying annual catch limits in the plan (including 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 sec.303 (a)(15))

⁵ (1) shall, unless otherwise provided for under an international agreement in which the United States participates, take effect—

(A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and
(B) in fishing year 2011 for all other fisheries; (16 U.S.C. 1853 note.)

must be established at the *stock or stock complex level* (e.g. Georges Bank Yellowtail Flounder) and that the agency must require AMs on all portions of the catch to ensure that the entire catch of yellowtail flounder, including the catch incurred in the scallop fishery, is kept under the overall ACL.

The Council has proposed evading its obligation to limit catch of yellowtail flounder and ensure accountability by creating a new term that is not supported by the mandates of the MSA: Other Subcomponent. To evade accountability in 2010 based on the rationale that AMs will not be in place in the scallop *fishery* until 2011 and inventing a new term for a stock that is 'in the fishery' under the NS1 guidance is not supported by the law or the NS1 rulemaking.

If ACLs are not accompanied by AMs for all fisheries with significant catches of yellowtail flounder those ACLs are marginalized, ineffective and arguably non-existent.

B. In-Season Management Authority-

The NS1 Final Rule gave firm guidance to the Councils that FMPs must provide explicit authority for the agency to close the scallop fishery or portions of the fishery if, based on the best information available, the agency determines that the scallop fishery will exceed its allocation of any stock of yellowtail flounder:

'FMPs should contain inseason closure authority giving NMFS the ability to close fisheries if it determines, based on data that it deems sufficiently reliable, that an ACL has been exceeded or is projected to be reached, and that closure of the fishery is necessary to prevent overfishing.'

§ 600.310 (g) (2) National Standard 1—Optimum Yield.

At a minimum, the scallop and groundfish FMPs must include this authority and the Council should take action to include this important oversight role in addition to any other AMs to control scallop catch of yellowtail flounder.

C. Management of the scallop Fisheries Catch of Yellowtail Flounder must be consistent with the Goals and Objectives for the Multispecies Fishery Management Plan-

The NS1 Final Rule acknowledged the reality of modern fisheries and anticipated the need to manage the catch of one stock of fish in another FMP and how Councils should proceed in managing these interactions (emphasis added):

(7) Stocks or species identified in more than one FMP. If a stock is identified in more than one fishery, Councils should choose which FMP will be the primary FMP in which management objectives, SDC, the stock's overall ACL and other reference points for the stock are established. *Conservation and management measures in other FMPs in which the stock is identified as part of a fishery should be consistent with the primary FMP's management objectives for the stock.*

§ 600.310 (c) (7) National Standard 1—Optimum Yield.

A review of the goals and objectives for the groundfish Fishery Management Plan as adopted in Amendment 13 and continued in Amendment 16 (attached) reveals that providing for yellowtail flounder catch in the scallop fishery is not within the scope of the multispecies FMP. Therefore any allocation to the scallop fishery without ACLs and AMs for the affected stocks is inconsistent with the goals and objectives of the fishery and may be illegal.

If the Council intends to allocate yellowtail to the scallop fishery this allocation must come with firm conditions on the catch of yellowtail flounder in the scallop fishery which will ensure that the scallop fishery catch of yellowtail flounder supports the goals and objectives of the groundfish FMP, does not jeopardize the groundfish fishery, its new sectors or its future allocation schedule.

Adding a firm backstop on scallop catches of yellowtail flounder will effectively control this catch and bring it in line with the groundfish FMP.

II. National Standard 4: Fair and Equitable Allocation-

National Standard 4 requires allocation decisions to be fair and equitable among users (emphasis added):

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) *fair and equitable to all such fishermen*; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

-16 USC 1851. Section 301 (a) (4)

As proposed in A16 and FW44, there will be well-defined AMs for both the sector and common pool portions of the groundfish fishery. These AMs will result in meaningful

consequences for these portions of the directed fishery through either an outright closure of a sector if its allocation is exceeded or a Days-at-Sea (DAS) adjustment in the common pool fishery in the sector.

In sharp contrast to these meaningful measures, the scallop fishery will have *no accountability* for its catch of yellowtail flounder in 2010 through either in-season or as after the fact overage adjustments. In fact, Council staff has informed the Council that any overages will be deducted from the directed groundfish fishery rather than any future allocation to the scallop fishery. This plan of action, which provides a 'free year' for the scallop fishery in the words of the Council's scallop plan coordinator is neither fair nor equitable.

It has been argued that the scallop fishery 'needs' a significant allocation of yellowtail flounder to fully prosecute its fishery. However, despite a similar 'need' for yellowtail allocation to ensure their sectors full catch of other stocks, none of the *directed* groundfish vessels or sectors received a full allocation of yellowtail flounder and will likely be limited by this allocation. Why should the scallop fishery be given preferential treatment in its allocation?

This allocation scheme creates unfair and inequitable accountability and places the groundfish fishery and its fledgling sector operations at a considerable disadvantage in both 2010 and beyond.

The Council must take action in FW44 to ensure accountability in *all fisheries* that catch yellowtail flounder in 2010.

III. National Standard 9: Reduce Bycatch-

The catch of yellowtail flounder in the scallop fishery has been a longstanding issue which has resulted in a consistent trend of widespread discards of this overfished stock throughout the scallop fishery. Recent estimates show that despite a range of permits held by scallop vessels, 95-98 percent of the yellowtail flounder that is caught in the scallop fishery is discarded, often in spite of possession limits for scallop vessels that allow retention and sale of yellowtail flounder⁶. It is likely that the high rate of discarding is driven by the very low relative value of yellowtail flounder compared to sea scallops.

Regardless of the reasoning behind this behavior, it is incumbent on the Council and the agency under NS9 to reduce bycatch to the extent practicable. Furthermore the Council is required by the National Standard 9 guidelines to make a determination of

⁶ Comments of Tom Nies, Groundfish plan coordinator, New England Fishery Management Council to multispecies oversight committee meeting, November 5, 2009.

whether a conservation and management measure minimizes bycatch or bycatch mortality to the extent practicable, consistent with other national standards and maximization of net benefits to the Nation, should consider the following factors:

- (A) Population effects for the bycatch species.
- (B) Ecological effects due to changes in the bycatch of that species (effects on other species in the ecosystem).
- (C) Changes in the bycatch of other species of fish and the resulting population and ecosystem effects.
- (D) Effects on marine mammals and birds.
- (E) Changes in fishing, processing, disposal, and marketing costs.
- (F) Changes in fishing practices and behavior of fishermen.
- (G) Changes in research, administration, and enforcement costs and management effectiveness.
- (H) Changes in the economic, social, or cultural value of fishing activities and nonconsumptive uses of fishery resources.
- (I) Changes in the distribution of benefits and costs.
- (J) Social effects.

§ 600.350 National Standard 9—Bycatch.

The actions proposed in Amendment 16, FW21 and FW44 fail to consider any of these factors in the management of the scallop fishery and the Georges Bank and SNE/MA stocks of yellowtail flounder in 2010.

In reaction to a series of cursory analyses that showed a 'need' for up to 41% of the ABC for some stocks of yellowtail flounder to allow for full prosecution of the scallop fishery the groundfish committee suggested two actions: 1) provide 90% of 'needed' allocation of yellowtail flounder to the scallop fishery for 2010 and 2) require retention of all legal-sized yellowtail flounder caught in the scallop fishery.

Neither of these options is consistent with the requirements of NS9 to reduce bycatch nor were they analyzed to the extent specified by the NS9 guidance. These options must be amended to bring these fisheries into compliance with the MSA by providing real incentives for the scallop fishery to improve its bycatch rates.

Increased Allocation to meet Scallop 'Need' fails to Improve Bycatch-

The option to provide the scallop fishery with nearly the entire amount of yellowtail flounder that is necessary to prosecute its fishery in 2010 and beyond provides no meaningful reduction in catch of yellowtail flounder and simply endorses the current behavior of the fishery as a major component of the overall catch of yellowtail flounder.

This option will not reduce bycatch over time and little if any incentive to improve the practices of the fishery.

Reclassifying yellowtail bycatch as landings fails to satisfy NS9-

The proposed requirement to land all yellowtail caught in the scallop fishery is a weak measure to use Improved Retention/Improved Utilization (IR/IU), an ineffective method to nominally reduce bycatch, in New England's fisheries without any real conservation benefits for the stock. Furthermore, without a requirement that yellowtail flounder be landed in a salable condition, it is likely that scallop vessels will simply move from discarding yellowtail flounder to retaining it for the bait market instead of taking the time and energy to adequately process and care for their flounder catch in a crew-limited fishery.

Using overfished yellowtail flounder as lobster bait because of weak regulation is poor management and does not achieve Optimum Yield for this valued stock. The Council must amend this action to clarify its intent in requiring retention to encourage use in the food sector rather than bait to capture the true maximum benefit of the catch of these overfished fish.

IV. National Environmental Policy Act (NEPA)-

The interaction of the groundfish and scallop fisheries through yellowtail catch will likely have significant impacts on each of these important fisheries. The current description and discussion of the effects of this interaction on the groundfish and scallop fisheries the environment and the affected yellowtail stocks in amendment 16 is woefully inadequate and must be improved to bring the amendment 16 Environmental Impact Statement into compliance with NEPA.

This improved analysis must include a rigorous consideration of alternatives to manage this interaction and an analysis of the effects, including cumulative effects, of this action. Failing to fully explore the effects of this action is illegal and will lead to decisions and management action based on scant analysis and a misinformed public that does not understand the impacts of these actions on themselves, their fisheries or their fisheries sector.

V. Suggested Remedial Action-

The rulemaking for Amendment 16 to the groundfish FMP is ongoing with an effective date for this action expected on May 1, 2010. At this point although significant changes to Amendment 16 are unlikely the agency wields significant power to correct this illegal treatment of yellowtail flounder catch in the scallop fishery through its possible

disapproval of Amendment 16. It is incumbent on the agency to ensure that the groundfish FMP is in compliance with the mandates of the Magnuson-Stevens Reauthorization Act, the clear direction of the 2009 National Standard 1 guidelines and the requirements of NEPA to fully explore and analyze a range of management alternatives. Oceana encourages the agency to disapprove amendment 16 until meaningful AMs to control yellowtail catch in the scallop fishery are included in the amendment with a full discussion of the impacts of this action on both the scallop and groundfish fisheries as well as the marine environment.

Action for 2010-

At this time there is a range of options available to the Council and the agency to address this inequity between fisheries that catch overfished groundfish to be effective in 2010. Oceana suggests that the Council and agency explore these options at its earliest convenience to have management measures in place for the beginning of the groundfish fishing year, May 1, 2010.

Oceana supports the use of in-season measures to stop scallop fishing in discrete portions of yellowtail stock areas when the portion of the ACLs allocated to the scallop fishery have been caught through landings or discards.

These measures can be implemented through either the current Framework 21/41 process or through Interim Action by the agency:

A. Framework 21/44 Rulemaking and NEPA Development-

In 2010 the scallop fishery will be managed under regulations developed in Framework 21 to the scallop Fishery Management Plan while the groundfish fishery will be managed under regulations developed in FW 44 to the multispecies FMP. Both FW21 and FW44 will be debated at the upcoming November, 2009 New England Fishery Management Council meeting in Newport, RI. These two suites of regulations will control effort, catch, and area access for the scallop fishery and groundfish fishery for 2010 as well as regulations on the status quo yellowtail flounder bycatch program for access areas. It is entirely within the scope of a framework action for the Council, under the lists if items that can be addressed in a FW adjustment to the scallop⁷ and groundfish⁸ FMPs, to

⁷In addition to the measures already included in the FMP, this final rule specifies that changes in the following measures can be enacted through framework action: Size and configuration of rotational management areas; controlled access seasons to minimize bycatch and maximize yield; area-specific DAS or trip allocations; amount and duration of TAC specifications following re-opening; limits on number of closures; TAC or DAS set-asides for funding research; priorities for scallop-related research that is funded by a set-aside from scallop management allocations; finfish TACs for controlled access areas; finfish possession limits; sea sampling frequency; and *area-specific gear limits and specifications*. (Amendment 10 Final Rule. 69 Fed. Reg., No. 120, June 23, 2004

include an area-specific specification on yellowtail catch managed under hard TAC and attach a management measure to ensure accountability in the scallop fishery catch of Yellowtail Flounder in 2010.

These measures will control yellowtail bycatch in the open area component of the scallop fishery in the suite of measures adopted in FW21 until amendment 15 formally introduces ACLs and AMs to the scallop fishery. Although these will not be formal ACLs or AMs as developed in Amendment 15 to the scallop FMP, they will serve as *de facto* limits that will control mortality in the scallop fishery (satisfying National Standard 1), bring fairness to the management of the two fisheries' catch of Yellowtail Flounder (to be consistent with NS4) and minimize bycatch (satisfying National standard 9).

B. Secretarial Interim Action-

Amendment 16 fails to put a meaningful and appropriate ACL on yellowtail catch. The risk of scallop bycatch of yellowtail flounder stocks resulting in overfishing of yellowtail flounder is clearly demonstrated by recent stock assessment and the bycatch analysis presented to the Council at its September, 2009 meeting and the estimated bycatch of yellowtail flounder that will take place under the range of scallop catch strategies under consideration in FW21.

For this reason the Council should strongly request the secretary implement an interim measure to prevent overfishing of the yellowtail stocks by establishing a hard limit on yellowtail catch in the scallop fishery until ACLs and AMs for the scallop Fishery Management Plan can be implemented in 2011⁹.

⁸ The following management measures may be adjusted through a framework action, in addition to those measures previously identified as framework measures in the FMP: Revisions to status determination criteria, including, but not limited to, changes in the target fishing mortality rates, minimum biomass thresholds, numerical estimates of parameter values, and the use of a proxy for biomass; DAS allocations (such as the category of DAS under the DAS reserve program), DAS baselines, etc.; Modifications to capacity measures, such as changes to the DAS transfer or DAS leasing measures; **Calculation of area-specific TACs, area management boundaries, and adoption of area-specific management measures**; Sector allocation requirements and specifications, including establishment of a new sector; Measures to implement the U.S./ Canada Resource Sharing Understanding, including any specified TACs (hard or target); Changes to administrative measures; Additional uses for regular B DAS; Future uses for C DAS; Reporting requirements; The GOM Inshore Conservation and Management Stewardship Plan; GB cod gillnet sector allocation; Allowable percent of TAC available to a sector through a sector allocation; Categorization of DAS; DAS leasing provisions; Adjustments for steaming time; Adjustments to the Handgear Only permits; Gear requirements to improve selectivity, reduce bycatch, and/or reduce impacts of the fishery on EFH; SAP modifications; and Anything else analyzed with respect to Amendment 13. (Amendment 13 Final Rule. 69 Fed. Reg., No. 81. April 27, 2004)

⁹ During the development of a fishery management plan, a plan amendment, or proposed regulations required by this subsection, the Council may request the Secretary to implement interim measures to reduce overfishing under section 305(c) until such measures can be replaced by such plan, amendment, or regulations. Such measures, if otherwise in compliance with the provisions of this Act, may be implemented even though they are not sufficient by themselves to stop overfishing of a fishery. (16 U.S.C. 1853 Magnuson-Stevens Reauthorization Act, Section 304 (e)(6))

The Magnuson-Stevens Reauthorization Act is very clear that overfishing will end in 2010 and the Council and agency should consider this avenue for regulating this significant bycatch problem and avoiding overfishing.

Conclusion-

The catch of yellowtail flounder in the scallop fishery will likely cause serious harm to the effort to recover yellowtail stocks which are among the most depleted in the region. Additionally, the fledgling sector management program in the groundfish fishery is likely to be significantly disrupted when the sectors are both constrained by low ACLs on yellowtail stocks and then held accountable for the scallop fishery's overages as well.

The agency is mandated to rebuild overfished stocks, provide fair and equitable management between overlapping fisheries and reduce bycatch. To fulfill these mandates the agency must work at the Council level, using the agency's oversight capacity, to address this situation through all of the regulatory pathways at its disposal; create a fair and equitable fishery management program for the northeast region which accounts for all yellowtail catch and hold those responsible for overages accountable.

Oceana remains committed to ensuring that meaningful limits on all sources of fisheries mortality are identified and managed through effective catch limits. We call on the Council and the agency to take this issue seriously in the coming months by crafting a solution that aids in the recovery of yellowtail and that balances the interaction between these important fisheries.

Thank you,



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Goals and Objectives of the Multispecies Fishery Management Plan:

2.3 Goals and Objectives

The goals and objectives of this amendment are:

Goal 1: Consistent with the National Standards and other required provisions of the Magnuson- Stevens Fishery Conservation and Management Act and other applicable law, manage the northeast multispecies complex at sustainable levels.

Goal 2: Create a management system so that fleet capacity will be commensurate with resource status so as to achieve goals of economic efficiency and biological conservation and that encourages diversity within the fishery.

Goal 3: Maintain a directed commercial and recreational fishery for northeast multispecies.

Goal 4: Minimize, to the extent practicable, adverse impacts on fishing communities and shoreside infrastructure.

Goal 5: Provide reasonable and regulated access to the groundfish species covered in this plan to all members of the public of the United States for seafood consumption and recreational purposes during the stock rebuilding period without compromising the Amendment 13 objectives or timetable. If necessary, management measures could be modified in the future to insure that the overall plan objectives are met.

Goal 6: To promote stewardship within the fishery.

Objective 1: Achieve, on a continuing basis, optimum yield (OY) for the U.S. fishing industry.

Objective 2: Clarify the status determination criteria (biological reference points and control rules) for groundfish stocks so they are consistent with the National Standard guidelines and applicable law.

Objective 3: Adopt fishery management measures that constrain fishing mortality to levels that are compliant with the Sustainable Fisheries Act.

Objective 4: Implement rebuilding schedules for overfished stocks, and prevent overfishing.

Objective 5: Adopt measures as appropriate to support international transboundary management of resources.

Objective 6: Promote research and improve the collection of information to better understand groundfish population dynamics, biology and ecology, and to improve assessment procedures in cooperation with the industry.

Objective 7: To the extent possible, maintain a diverse groundfish fishery, including different gear types, vessel sizes, geographic locations, and levels of participation.

Objective 8: Develop biological, economic and social measures of success for the groundfish fishery and resource that insure accountability in achieving fishery management objectives.

Objective 9: Adopt measures consistent with the habitat provisions of the M-S Act, including identification of EFH and minimizing impacts on habitat to the extent practicable.

Objective 10: Identify and minimize bycatch, which include regulatory discards, to the extent practicable, and to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.