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November 5, 2012

VIA ELECTRONIC MAILMr. C.M. "Rip" Cunningham, Jr., Chair
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950**Re: Georges Bank Yellowtail Flounder**

Dear Mr. Cunningham:

We submit this letter on behalf of the Fisheries Survival Fund ("FSF") regarding the options in Multispecies Framework 48 for allocating Georges Bank yellowtail flounder ("GBYT") to the scallop fishery. This letter also addresses the new scallop annual catch limits ("ACL") option in Scallop Framework 24. FSF is well aware of the multiple constraints facing the groundfish fishery next year. We are also mindful that ACLs for the scallop fishery are likewise projected to decline by at least 30 percent from the current fishing year. The combination of these reductions is going to result in a severe economic blow to the fishing communities that rely on each of these fisheries, particularly in New Bedford.

With that in mind, FSF respectfully makes the following two requests: (1) that the Council make GBYT a non-allocated species until ACLs for this stock can return to levels that can support a directed fishery; and if option (1) is not chosen then, (2) that the scallop fishery continue to receive an allocation of 90 percent of its projected GBYT "need" to ensure that the full measure of optimum yield can be achieved from the scallop resource. The former proposal will ensure that GBYT does not become a choke species, either for scallops or relatively more abundant groundfish species, such as haddock, which have been perennially under-harvested. As we explain, failure to adopt either option essentially eliminates the scallop access area program.

FSF realizes that not allocating GBYT will entail hardship for vessel owners with a substantial portion of GBYT allocations. At the same time, the revised Transboundary Resource Advisory Committee ("TRAC") recommendation of 218 metric tons ("mt") is so low, that this stock is likely to be taken exclusively as incidental catch in various fisheries. Indeed, having any directed fishery on such a low allocation is not practicable. For comparison, Southern New England/Mid-Atlantic ("SNE/MA") winter flounder and southern windowpane flounder are each non-allocated species, and yet the ACLs for these stocks were higher this year than GBYT will

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be in the 2013 fishing year. The 2012 ACL for SNE/MA winter flounder was 606 mt and southern windowpane was 381 mt. FSF also notes that since the Council has not allocated SNE/MA winter flounder, that stock has been caught at levels below F_{MSY} for the first time since it was placed under a rebuilding program. The same considerations that led the Council to determine that winter and windowpane flounder stocks should not be subject to a target fishery should likewise lead to a determination that GBYT should not be a target fishery next year.

Turning to our second point, limiting the scallop fishery's allocation to some fixed percentage, as is being considered in Framework 48, will multiply the adverse economic impacts on fishing communities from the latest impending round of multispecies and scallop harvest reductions. Whether overall allowable scallop harvests in the 2013/14 fishing year are reduced to a level projected to be somewhat more consistent with a fixed GBYT allocation, as new Alternative 4 in Scallop Framework 24 proposes (an issue discussed below), or a low allocation leads to overages that trigger accountability measures ("AM") in the subsequent fishing year, thousands of tons of sustainable scallop yield will be foregone. This represents tens of millions of dollars in lost revenues to communities such as New Bedford that additional yellowtail flounder landings will not come close to replacing. This will make an already challenging year for our fishing communities even more dire and erode the scallop industry's ability to maintain shore-side infrastructure in New Bedford, along the recently devastated Jersey shore, and in Tidewater Virginia.

In this regard, it is important to note that Magnuson-Stevens Act National Standard 8 applies to fishing communities as a whole, not to individual fisheries. The relative allocation of this particular stock between the groundfish and scallop fisheries is conservation neutral, as the overall ACL is the governing limit. Thus, the Council is required to choose the option which "minimize[s] adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8). In this case, fishing communities such as New Bedford will benefit more from options that maximize scallop landings, which provide much greater economic benefits than does allowing directed landings of about 70 mt of GBYT. The same is true for the additional landings of other groundfish species that likely will be foregone if the GBYT ACL becomes constraining and limits groundfish Sectors' harvest of these stocks.

We also note that no other fishery is being asked to constrain its catch in response to the decrease in GBYT allowable harvest. No recommendation has been made to reduce any other groundfish ACL to account for the reduced GBYT ACL. In fact, the Council is considering increasing the "other sub-components" sub-ACL next year due to higher than anticipated catches in the small-mesh whiting fishery. Moreover, at the same time the Council is considering fixed allocations of GBYT to the scallop fishery that would essentially preclude a viable access area program in 2013, it is developing a program to allow groundfishermen access to these very same areas. It is simply not credible to believe, or contend, that scallop dredges may incidentally catch some GBYT in these areas, but that otter trawls designed to catch fish will not.

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FSF takes its responsibility to minimize incidental catch very seriously and has made enormous strides in achieving this goal. These efforts include funding and conducting gear research, establishing a bycatch hotspot reporting system with SMAST, and funding an investigation into the best times and areas to avoid incidental access area catch. It is our hope that next year, new seasonal closures designed to avoid high bycatch times, based on research funded by scallop research set-aside funds, will be operative and continue the industry's march towards reduced incidental flatfish catch. In addition, the SMAST program is set to be expanded to the Georges Bank open areas, after considerable new development and investment.

This allocation situation is incredibly significant—a viable access area fishery in 2013 (if not beyond) is at stake. Given existing resource constraints while the mid-Atlantic access areas are allowed to grow out, scallop access area landings will be reduced in 2013 by nearly two-thirds (from 72,000 lb./vessel in 2012 to 26,000 lb./vessel) in the Framework 24 alternatives the Scallop Committee has approved for Council consideration in November. (The unapproved option the Scallop PDT created, discussed below, reduces access area landings by a full 75 percent.) Any access at all to Closed Area II would be difficult to square with the Framework 48 fixed percentage GB YT options proposed. In essence, the scallop fishery could end up with less than a single access area trip, including essentially none on Georges Bank. The net result would be a return to the mid-1990's when the Council kicked scallopers out of many of their historic fishing grounds in its as-yet incomplete effort to rebuild groundfish stocks.

The Council should, moreover, recognize that the scallop industry has created a high-end specialty market for large, access area scallops that have opened foreign markets and sustained scallop prices and the fishing communities in which scallop vessels are home-ported. The absence of these scallops will lead to product substitution and ultimately a decline in scallop prices. As explained above, we recognize that not allocating GBYT will result in losses to certain groundfish interests (though the tiny overall 217 mt U.S. GBYT ACL itself limits the downside); however, sector holders are not, as scallopers are, exclusively dependent on one species.

With respect to Scallop Framework 24, FSF takes particular exception to the Plan Development Team ("PDT")-crafted "Alternative 4," which, contrary to law, reduces scallop harvests below optimum yield ("OY") simply to reduce the scallop fishery's incidental take of yellowtail. We note that while the Council may take "protection of the marine ecosystem" into account when determining the level of fishing to equate to OY,¹ that is not the calculation being made in this instance. The overall GBYT ACL is fixed, and thus is a neutral factor with respect to ecosystem considerations. The only question is to whom the right of harvest will be allocated, an issue of economics. As shown above, the "greatest overall benefit to the Nation" will be achieved by maintaining a viable scallop access area program. For this reason, we believe that Alternative 4 is inconsistent with the law and the regulations, which set forth the considerations and procedure by which the scallop ACL is to be determined.

¹ 16 U.S.C. § 1802(33).

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Moreover, Alternative 4 is not a lawful option. It was not developed by recommendation of the Scallop Oversight Committee, nor of the Council as a whole. It was purely the result of freelancing by the PDT, and first made public during a staff presentation at the October 11, 2012, Groundfish Committee meeting. The Scallop Oversight Committee has not even reviewed the option, to date. As such, it is not an alternative which the Council may adopt at its November meeting. The scallop regulations are clear: "After considering the PDT's findings and recommendations, or at any other time, if the Council determines that adjustments to, or additional management measures are necessary, it shall develop and analyze appropriate management actions over the span of at least two Council meetings." 50 C.F.R. § 648.55(f) (emphasis added). Alternative 4 has not been "develop[ed]" or "analyze[d]" over the course of two Council meetings, and therefore is not a lawful option.

* * *

In conclusion, FSF recognizes the groundfish sector program is struggling—struggling financially, requiring millions in federal assistance; struggling as a conservation matter to rebuild the multispecies fishery; struggling as a community matter to maintain more than a select few viable groundfish operations; struggling to gain industry acceptance; and struggling as a public policy matter to overcome vehement political opposition extending well beyond New England. For its part, the scallop fishery has worked both directly and indirectly to support the groundfish rebuilding program as it has progressed from multispecies DAS, through the A-/B-day program, and now into the sector system. Directly, the scallop industry has worked diligently and invested millions in research to reduce flatfish interactions. Indirectly, the scallop industry has developed a stable, sustainable, efficient fishery that harvests better scallops with orders of magnitude less bycatch and opportunity for bycatch. These changes have not come without sacrifice. Scallop fishing has been reduced from a year-round activity in the Amendment 4 period, to 120 DAS at the turn of the Millennium in Amendment 7, to about one-third of that level in 2013 under the best of Framework 24's options. The Council should not jeopardize the scallop fishery's continued success in pursuit of its groundfish sector experiment.

Thank you very much for your time and attention to these concerns.

Sincerely,



David E. Frulla

Andrew E. Minkiewicz

Shaun M. Gehan

Counsel to the Fisheries Survival Fund

cc: NMFS Regional Administrator John Bullard