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January 27, 2012

**VIA ELECTRONIC MAIL**

Rip Cunningham, Chair  
New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950

**Re: Issues for Scallop Committee Report at the January Council Meeting**

Dear Chairman Cunningham:

As you know, we represent the Fisheries Survival Fund, and submit this letter in connection with the Scallop Committee's report on Scallop Framework Adjustment 24 ("Framework 24") and related matters. This letter supplements our January 17, 2012, letter to the Scallop Committee. In general, FSF supports all the motions and recommendations of the Scallop Committee regarding the scope of Framework Adjustment 24. Our January 17 letter sets forth FSF's position in this regard. We write regarding developments that have occurred since the Scallop Committee meeting. In particular, two important issues arose at the January 19 Scallop Committee: (i) the lack of viability of the DelMarVa Access Area for the upcoming fishing year, and (ii) an 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.

**DelMarVa Access Area.** First, FSF in its January 17 letter expressed 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. The Scallop Committee shared FSF's concerns and voted to recommend the Council request an emergency action to address the DMVAA situation. The Scallop Committee asked the Scallop PDT to consider potential options. FSF supports the Committee's motion and offers the following recommendations on how to best address the concern.

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 (approximately 75%) of the exploitable scallop biomass estimated in the VIMS survey from late last summer.

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An emergency situation exists because the projection for the DMVAA made in 2010 in connection with Framework 22's establishment of specifications for the 2012 fishing year was overly optimistic for an unknown reason.<sup>1</sup> The VIMS survey detected some recruitment in the DMVAA, but that recruitment should not be counted on to help sustain the allocated trips. A parallel can be drawn to Hudson Canyon in the mid-2000's, when the Council did take steps to remove or delay effort toward the end of the first access area opening there. The scallop biomass in the Hudson Canyon area recovered, and a second rotational program is now underway. Likewise, the DMVAA should not be fished to the point that its recovery over the mid-term is jeopardized. The recruitment detected there—of which there was little in the Mid-Atlantic as a whole—should be protected for future fishing, potentially via a subsequent access area program.

Further, assigning scallop fishing effort to the DMVAA in 2012-13, past the point the area remains viable, will increase bottom time, and the potential for bycatch and protected species interactions. Finally, failure to take emergency action will visit an unexpected and disproportionate economic impact on half of the fleet which has the bad luck to draw a DMVAA trip in a lottery. When the "half trip" system was devised, the idea was to increase the number of available access trips for the fleet, while ensuring equivalent opportunities.

The Scallop Committee sought the Scallop PDT's advice on a recommendation for the Council to make as a request to NMFS for emergency action. FSF respectfully submits the following three points to guide the Council's decision on what recommendation to make:

- 1) Any emergency measure should ensure the entire scallop fleet is treated equally, and provided generally equivalent fishing opportunities. Thus, FSF would strongly oppose an emergency closure of the DMVAA that was not accompanied by a re-allocation of scallops that treats the entire fleet equally.
- 2) Any emergency action should not reduce the overall allocation to the scallop fishery. While there are fewer scallops in DMVAA than projected, there are more scallops in other areas of the mid-Atlantic and Georges Bank than previously projected. The action should simply move the fleet to where the scallops are relatively greater in abundance.
- 3) A shift of the 3 million pounds currently allocated to the DMVAA into another access area is FSF's preferred remedy, as that step would ensure equivalence

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<sup>1</sup> There has been a pattern where projections of the amount of scallops that can be taken from a Mid-Atlantic access area have been overly optimistic, and the Council has had to recommend emergency action before. This is not a flaw of the rotational management system itself, but it does call for the development of some adaptive measure to address unanticipated changes in biomass in an access area through a process, potentially a notice action process, that does not require emergency action. The Scallop Committee has appropriately recommended the Council vote to include consideration of this topic in Framework 24.

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across the fleet. Moving the trips into the Hudson Canyon Access Area would not increase yellowtail flounder bycatch. If the compensation is more appropriately made in open area DAS, then FSF generally supports an allocation of five additional DAS to the DMVAA trip holders. However, that step alone would unbalance fishing opportunities; half the fleet would then have an additional access area trip, while the other half would have extra DAS. To best ensure equality, the entire fleet should lose an access area trip (not just the half with the DMVAA trip) and the entire fleet should be allocated five open area DAS.

**SNE YT Sub-Annual Catch Limit (“ACL”).** NMFS has not yet released its final projection of the scallop fleet’s SNE YTF sub-ACL usage, but previous projections were of a 28% overage. Amendment 15 now employs a “year 2” AM with YTF catch estimates calculated “on or about January 15.” FSF has not seen the final estimate, but we expect there will be an overage. 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. FSF has explained its concerns regarding this AM in detail in its January 17 letter.

For reasons that are not fully understood by FSF, NMFS has now decided to handicap itself even further in calculating the scallop fleet’s 2011 SNE YTF bycatch by using a less rigorous estimation method. Despite the Scallop PDT recommending that NMFS use a stratified approach, to account for whether the scallop catch occurred in a high YTF bycatch area or a low one, NMFS’ projection will apparently not be using a stratified basis and is likely biased high in its results. 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. A SNE closure may also push the fleet onto Georges Bank, where access area programs are expected to result in more GB YTF bycatch than occurred in 2011. NMFS and the Council are ill-advised to create an issue on Georges Bank in 2012 as a poorly calibrated reaction to SNE YTF caches in 2011.

Finally and more generally, FSF opposes enacting AM’s in the second year (the year immediately following the year when the projected overage occurred), based on less than a full year’s data. As our January 17 letter explained, the extent of data available can and does cause significant changes in estimated YTF catch by scallop vessels. 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 the shortcomings of “year 2” AMs in this context.

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The current partial year estimation 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 YT catch in the LAGC trawl fishery has gone from an estimate of 41,00 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.

Accordingly, the Council should recommend deferring any SNE closure. Indeed, 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 will not be exceeded and the scallop catch is most likely less than 150% of its sub-ACL. The Council added this measure to Framework 47 by unanimous vote at the November 2011 Council meeting.

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FSF representatives will be available at the January Council 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  
Emily Gilbert, NMFS Northeast Regional Office