

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, D.C. 20007-5108

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

NEW YORK, NY

LOS ANGELES, CA

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICE

MUMBAI, INDIA

DIRECT LINE: (202) 342-8474

EMAIL: aminkiewicz@kelleydrye.com

August 20, 2013

**VIA ELECTRONIC MAIL &  
ORIGINAL BY U.S. MAIL**

William A. Karp, Ph.D.  
Director  
Northeast Fisheries Science Center  
166 Water Street  
Woods Hole, MA 02543-1026

**Re: GB YTF Assessment**

Dear Dr. Karp:

We write on behalf of the Fisheries Survival Fund (FSF) regarding our serious concerns with the Georges Bank yellowtail flounder (GB YTF) assessment. Over a year ago, on July 13, 2012, we wrote to express similar concerns with the 2012 assessment. The outcome of the 2013 assessment shows very clearly that our earlier concerns were essentially unaddressed, despite a series of reassurances. We do acknowledge the work that National Marine Fisheries Service (NMFS) scientists put into stock assessments. Nonetheless, the GB yellowtail flounder stock assessment team has once again produced a deeply flawed assessment. In short, the assessment has increased in uncertainty, the assessment process did not meet NMFS' own guidance for best available scientific information, and accepting the assessment contradicts NMFS' own guidance regarding retrospective patterns.

We write to implore NMFS to work with the New England Fishery Management Council (NEFMC) Scientific and Statistical Committee (SSC) to improve the assessment before it is used. In summary, and based on NMFS' own standards, the assessment is not viable for use as a basis for catch advice. Accordingly, NMFS and the NEFMC should use alternative catch strategies to set the allocation for GB YTF. FSF also, yet again, requests that NMFS embark upon an expanded biological research program for GB YTF. FSF is advocating for an open and objective process in setting catch, and we are convinced that the process before us now is arbitrary and capricious, just as it was last year.

William A. Karp, Ph.D.

August 20, 2013

Page Two

We are severely disappointed that NMFS has made no discernible progress in assessing this critical species. It is abundantly evident that, with no clear set of guidelines to judge the assessment and no clear alternative path for giving catch advice, members of the Transboundary Resource Assessment Committee (“TRAC”), convened pursuant to the U.S.-Canada Resource Sharing Understanding (Understanding), are still reluctant to reject the assessment, despite overwhelming evidence of its unsuitability. Unfortunately, it appears that the TRAC is approving the assessment, largely because it does not know what to do in the absence of this assessment. This does not have to be the case. FSF and others have asked for, and NMFS has promised, on several occasions, to provide objective criteria to review stock assessments, as well as a road map for scientists in the event an assessment has been rejected, as the GB YTF assessment should be. To date, no such criteria or road map has surfaced. The result is catch advice for GB YTF that lacks a rational basis.

### **Increasing Uncertainty in the Assessment**

As you are aware, the GB YTF assessment has been problematic for some time. The last benchmark assessment for GB YTF occurred in 2005. The base case model, or single series virtual population analysis (VPA) model, was showing a retrospective pattern in 2003, even before the 2005 benchmark assessment. The 2005 benchmark assessment could not recommend a single model to resolve the problem, so they recommended that results from three approaches be used: (1) the “major change” (now called the “split-series”) VPA, described below in more detail; (2) the “base case” (now called the “single series”) VPA; and (3) survey trends and relative exploitation rates (catch/survey biomass).

In 2005, the assessment team used the split-series model to attempt to account for the retrospective pattern, where the trawl series is given a different catchability rate starting in 1995. By splitting the time series, the assessment team was able to artificially mask the retrospective pattern, as the change in catchability successfully accounted for the unknown aliases that were causing the retrospective pattern. This split series model fix proved to be ineffective, as a strong retrospective pattern quickly emerged again, to the point that the split series was not used to provide catch advice in 2011. In 2012, the retrospective patterns in both the single series and split series model increased significantly, and the TRAC agreed that neither model is useful for catch advice. (Single series mean rho values were .72 for F and 2.48 for SSB and split series mean rho values were .5 for F and 1.62 for SSB).<sup>1</sup> The TRAC assessment team explored ways to correct the model. The exploration led to the team conducting three separate model runs that mechanistically changed the catch rate, the natural mortality rate and both the catch rate and the natural mortality rate, to ascertain if they could eliminate the retrospective pattern. What they

---

<sup>1</sup> The rho statistic of Mohn (1999) has been commonly used to measure the retrospective pattern. The rho is the average distance between the initial estimate of abundance and the new estimate of abundance when more years of data are used. More technically, it is defined as the sum of relative difference between an estimated quantity from an assessment with a reduced time series and the same quantity estimated from the full time series.

William A. Karp, Ph.D.  
August 20, 2013  
Page Three

found is that the catch rate had to be increased by a factor of five times and the natural mortality rate had to be increased by a factor of four times, to remove the retrospective pattern.

In 2013, the TRAC once again used the same set of models, the single series virtual population analysis (VPA) model and the split series VPA model. To no one's surprise, the results were just as unsatisfactory. What was surprising was the TRAC's conclusion. Despite the retrospective pattern increasing in both models (single series mean rho values were .80 for F and 3.7 for spawning stock biomass (SSB) and split series mean rho values were .6 for F and 1.99 for SSB), the TRAC recommended the split series VPA as a basis for estimating current stock size and fishing mortality rate, albeit with a retrospective adjustment.

The retrospective pattern has continued to increase, despite the TRAC modifying the base case model to mask the original retrospective pattern. At this point in the model's life, the uncertainty is so high as to make any results it produces an arbitrary product. The TRAC did recognize that the model's "precise" output of 122 metric tons as the preferred catch target should be taken with a grain of salt; however, it is amazing that it would then provide catch advice based upon a model that has experienced such increasing retrospective patterns over such an extended period of time.

### **The Assessment Does not meet National Standard 2 Guidelines for Best Available Science**

While the TRAC is an international collaboration between the United States and Canada, the TRAC's results are applied in the United States through Magnuson-Stevens Act-compliant processes. Therefore, these results must comply with applicable U.S. law. Just as special legislation was required to exempt the fisheries covered by the Transboundary Management Guidance Committee (TMGC),<sup>2</sup> it would require special legislation to exempt the TRAC assessment from the requirements of National Standard 2 and its implementing guidelines. 16 U.S.C. § 1851(a)(2); 50 C.F.R. § 600.315. The current GB YTF assessment is not consistent with NMFS' newly-revised National Standard Two guidelines in a series of important respects:

1. 50 CFR § 600.315(a)(6)(ii)(B) requires: "Alternative scientific points of view should be acknowledged and addressed openly when there is a diversity of scientific thought." The TRAC received two separate papers that showed two separate means of estimating the GB YTF population (a Peterson tagging study, and a scallop dredge survey). While both studies did not include the entire stock area for GB YTF, they both had a higher estimation for the stock size for a sub-set of the GB YTF stock area than split series VPA estimated for the entire stock

---

<sup>2</sup> More specifically, the Magnuson-Stevens Act's statutory deadlines for rebuilding a fish stock do not apply to a fish stock managed jointly with other countries via an international organization or pursuant to an international agreement. However, the Understanding was never ratified by Congress as a formal international agreement, and so NMFS considered it bound to follow the Magnuson-Stevens Act's rebuilding timelines for the fish stocks managed pursuant to the Understanding, including GB YTF, until the International Fisheries Clarification Act was enacted.

William A. Karp, Ph.D.  
August 20, 2013  
Page Four

area. Neither of these studies was acknowledged in the TRAC report. While we have no basis to judge the relative precision of one approach versus another, the TRAC report must address the divergence in results and acknowledge that this is another sign of increased uncertainty with the model.

2. 50 CFR § 600.315(b)(2)(iii) requires: “Peer reviewers must not have contributed or participated in the work product or scientific information under review.” It is our understanding that the TRAC is considered an integrated peer review process, meaning that most of the scientists conducting peer reviews of annual updates are members of the TRAC itself. Significantly, the scientists on the TRAC are comprised almost solely of scientists who contributed extensively to the GB YTF assessment. Accordingly, very few external reviewers are involved in the TRAC peer review process. This fact is even more problematic because the guidance also states; “[f]or peer review of products of higher novelty or controversy, a greater degree of independence is necessary to ensure the credibility of the peer review process.” There is no question that the GB YTF assessment is the source of great controversy, yet the peer review does not meet even a minimal standard of independence. This casts serious doubt upon the entire proceedings and raises the specter of personal attachment to the work product, biasing the final recommendation.
3. 50 CFR § 600.315(a)(4) requires: “Emergent science should be considered more thoroughly....” Using a Mohns rho adjustment to mask a retrospective pattern as a means to provide catch advice is an emergent and controversial method. NMFS has recently stated that the validity of using a correction for a persistent retrospective pattern to provide catch advice is still an active area of research.<sup>3</sup> There was no extra review or extra processes that led to the TRAC’s recommendation to use the assessment with a Mohns rho correction for catch advice. While other assessments have used a Mohns rho adjustment, it is still an emergent technique that is not widely accepted.

### **The GB YTF Assessment Does not Follow NMFS Workshop Recommendations**

A fundamental principle in reviewing an agency’s action is answering the question: Did the agency follow its own guidance? If the agency did not follow its own guidance, absent a clearly articulated and rational explanation for why it did not, the underlying action is presumptively arbitrary and capricious within the meaning of the Administrative Procedure Act.

---

<sup>3</sup> *Report of the Retrospective Working Group, January, 2009, page 11.*

William A. Karp, Ph.D.  
August 20, 2013  
Page Five

The plague of retrospective patterns is not unique to the GB YTF assessment and, as a result, NMFS convened a workshop in January of 2009 to examine the issue. The workshop produced a number of suggestions for addressing a retrospective pattern. The TRAC ignored almost all of these recommendations:

1. If a model shows a retrospective pattern, then consider alternative models or model assumptions. This was not done during the 2013 TRAC process. In fact, as noted above, when alternative models were presented to the TRAC they were not addressed in the TRAC report.
2. Develop objective and consistent criteria for the acceptance of assessments with retrospective patterns. The TRAC and NMFS have completely ignored this recommendation. For over a year, we have called for, and the NEFMC has passed a motion, directing the agency to provide objective criteria for approval of an assessment. Despite numerous promises and assurances that criteria were on the way, none have surfaced. The lack of objective criteria leaves the TRAC with no template for how to address this onerous situation. The result is the TRAC's and NMFS' predictable reliance on the status quo that assaults the regulated community's belief in the justness and impartiality of the process.
3. A strong retrospective pattern is grounds to reject the assessment model as an indication of stock status or the basis for management advice. Indeed it is! The agency needs to provide some clear and reasoned rationale for why it has ignored this sensible recommendation.

## Conclusion

As we emphasized last year, as well, we are not looking for the agency to just "give us more fish." What we are asking for, and believe the fishing industry and nation deserve, is a defensible process for setting catch quotas and a partner in moving forward to improve our understanding of this critical stock. As we have clearly demonstrated above, the current assessment does not meet NMFS' own guidance and recommendations on several fronts. NMFS cannot ask the fishing industry to bear yet another dramatic cut in catch based upon a process that does not follow its own recommendations. Accordingly, we ask that:

- NMFS acknowledge that the current GB YTF assessment is not suitable for providing catch advice;
- NMFS provide the public with an objective set of criteria to judge the viability of an assessment;

William A. Karp, Ph.D.

August 20, 2013

Page Six

- As an interim measure, NMFS and the Council provide catch advice using alternative catch advice strategies that rely on survey and catch indices; and
- NMFS work with FSF and other interested parties in developing and executing a research program for GB YTF, with the goal of creating a credible stock assessment.

FSF has a history of preferring to work within the management process, but its participants cannot and will not sit back passively and accept catch advice that, year after year, after year, is based upon an indefensible and ultimately arbitrary assessment. FSF remains hopeful that NMFS will finally reverse course and follow its own recommendations, follow its own guidance, and create a defensible process that leads to a result that all stake holders can believe in.

Sincerely,



Andrew E. Minkiewicz

David E. Frulla

*cc: Mr. Samuel D. Rauch, III, Acting Assistant Administrator, National Marine Fisheries Service  
Mr. John Bullard, Director, NMFS Northeast Region  
Mr. Rip Cunningham, Chair, New England Fishery Management Council  
Senator Mark Begich, Chair, Oceans, Atmosphere, Fisheries, and Coast Guard Subcommittee  
Senator Roger Wicker, Ranking Member, Oceans, Atmosphere, Fisheries and Coast Guard Subcommittee  
Rep. John Calvin Fleming, Jr., Chair, Fisheries, Wildlife, Oceans, and Insular Affairs Subcommittee  
Rep. Gregorio Sablan, Ranking Member, Fisheries, Wildlife, Oceans and Insular Affairs Subcommittee*