

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, D.C. 20007-5108

(202) 342-8400

NEW YORK, NY
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
MUMBAI, INDIA

FACSIMILE
(202) 342-8451
www.kelleydrye.com

DIRECT LINE: (202) 342-8648

EMAIL: dfrulla@kelleydrye.com

July 12, 2012

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

Mr. Sam Rauch
Deputy Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20190

**Re: Yellowtail Flounder Transfers, Windowpane
Flounder, and Accountability Measures**

Dear Mr. Rauch:

On behalf of the Fisheries Survival Fund ("FSF"), we appreciate your efforts regarding Georges Bank yellowtail flounder ("GB YT") annual catch limit ("ACL") issues. We write, however, to express our ongoing concerns regarding sub-ACLs and their accompanying accountability measures ("AM"), more generally. These issues are time-sensitive. It appears the GB YT ACL is slated for even more dramatic reductions next year, and the New England Council is considering a windowpane flounder sub-ACL for the scallop fishery.

We would like to make two main points. First, as you are aware, the Council voted to recommend NMFS reallocate GB YT from the scallop sector to groundfish fishermen, while, via an emergency measure, "indemnifying" scallopers should they exceed their reduced sub-ACL in the 2012 fishing year. FSF would like to make it absolutely clear that, absent the indemnification provision, the scallop industry does not support the reallocation. As FSF has explained, this in-season transfer of fully half the scallop fishery's GB YT sub-ACL would be done right in the middle of the scallop fishing year, and is based on absolutely no in-season information regarding the location or extent of scallop fishing and associated incidental scallop catches of GB YT.

Second, better tools for tracking incidental catches are needed before any more sub-ACLs and associated AMs, such as for windowpane flounder, are put in place. Scallop fishermen pay for observers themselves, but it takes NMFS five to six months for the observer data to be

Mr. Sam Rauch

July 12, 2012

Page Two

integrated into catch and incidental catch estimates. As a result, the scallop fishery is subject to post hoc accounting and lengthy periods of uncertainty regarding the potential imposition of AMs. We recognize the value in, and fully support, careful and deliberate consideration of final incidental catch projections. However, it is unfair and counter-productive to impose a “reactive” closure-based AM system without letting the fleet have some reasonable, real-time way of determining where their catches are in relation to the sub-ACL. We are writing directly to you on this subject because NMFS, not the New England Council, primarily controls these data and the timing and quality of related analyses.

Turning back to the GB YT management issues immediately at hand, Groundfish Framework 47 establishes the process for in-season yellowtail flounder transfers from the scallop to groundfish sectors, and is predicated on a relatively late season re-estimation of actual use based on data from the fishing season (such as catch rates and remaining access area trips and open area days-at-sea). *See, e.g.*, 77 Fed. Reg. 26104, 26114 (May 2, 2012) (Multispecies Framework 47 final rule). Framework 47’s preamble is very specific that NMFS should not put the scallop fishery at risk of triggering AMs by virtue of such a re-allocation. Accordingly, and as you recognized at the Council meeting, the indemnification provision represents an essential part of any early-to-mid season GB YT reallocation.

In part due to the difficulties with administration of the yellowtail flounder sub-ACLs, FSF is likewise concerned with the Council’s stated intention to create a windowpane flounder sub-ACL for the scallop fishery in its next groundfish framework. Imposition of sub-ACLs with no effective in-season monitoring and accounting system causes business and operational uncertainty and, frankly, subverts the deterrent purpose of having AMs. Currently, scallop fishermen have absolutely no idea how close they are to reaching the YT sub-ACLs during the course of the season. Accordingly, they are denied the opportunity to adjust their behavior or take other measures to avoid exceeding the sub-ACLs and triggering AMs at a time when such action could make a difference. The lack of such monitoring renders even the current system arbitrary and capricious were AMs ever to be imposed.

As the court in the groundfish Amendment 16 case stated in an analogous situation, “[I]n order to ensure accountability with annual catch limits, NMFS must accurately monitor catch during the fishing season.” *Oceana, Inc. v. Locke*, 2011 WL 6357795 *12 (D.D.C. Dec. 20, 2011). We recognize that a monitoring and tracking system would not be perfect, but NMFS provided real-time accounting of yellowtail bycatch for purposes of administering scallop access area quotas, and it tracks groundfish sector catches on a real-time basis. Without such a system, the scallop fishery has no reliable means of avoiding reactive AMs, save for its ongoing and highly successful efforts to reduce incidental catch of flounder in general.

KELLEY DRYE & WARREN LLP

Mr. Sam Rauch
July 12, 2012
Page Three

FSF would also request that other alternatives for AMs be considered. For example, the National Standard 1 guidelines suggest the use of a three-year running average for "fisheries [that] have highly variable annual catches and lack reliable in season or annual data on which to base AMs." 50 C.F.R. § 600.310(g)(4). Under such a system, it might be possible to avoid an AM if the sub-ACL were exceeded in only one year, so long as on average, the industry was below the ACL in the other two. This approach might provide more consistency and stronger incentives to increase efforts to avoid a stock if there had been an overage in one of the prior three years, but would not change the allocation scheme for determining the sub-ACL in any given year.

We also look forward to working with NMFS and the New England Council via the Scallop Research Set-Aside Program to develop operational and potentially gear-related methods to continue to reduce bycatch, as well as continuing to work with SMAST to expand its bycatch avoidance system that has been so successful in the Georges Bank access areas. This important work should be able to replace the ultimately counter-productive, closure-based "reactive" AM system that is currently being used for the scallop fishery's Georges Bank sub-ACL.

We appreciate your attention to these concerns and look forward to discussing these issues with you in more detail in the near future.

Sincerely,



David E. Frulla
Andrew E. Minkiewicz
Shaun M. Gehan

Counsel for the Fisheries Survival Fund

cc: Mr. Rip Cunningham, Chair
New England Fishery Management Council