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HON. JOHN M. XIFARAS \*  
RETIRED JUSTICE OF THE SUPERIOR COURT

ADMITTED TO PRACTICE  
\* MASSACHUSETTS  
° DISTRICT OF COLUMBIA  
- RHODE ISLAND  
# FLORIDA

June 13, 2013

Mr. Gene Martin, Section Chief  
NOAA Office of the General Counsel  
55 Great Republic Drive  
Gloucester, Massachusetts 01930  
gene.s.martin@noaa.gov

Dear Attorney Martin:

I am writing to you regarding conflict of interest issues involving the New England Fishery Management Council (NEFMC). As you are aware, the dramatic reductions in groundfish allocations for this season are highly controversial. These allocations will result in severe hardships throughout the fishing industry, and for northeast fishing communities and their families. As the NEFMC will continue to consider and vote on current fishery management policies, I request that you review potential conflicts of interest involving council members.

Members of the NEFMC are subject to Federal laws pertaining to government officials regarding financial conflicts of interest. Council members are prohibited from voting on Council decisions in which they have a financial interest, and must recuse themselves from voting on decisions that would have "a significant and predictable effect" on the interests of the Council member. The threshold for establishing such a conflict is if a Council member has at least a 10 percent interest in the fishery being regulated, and the Council member's vote would have an "expected and substantially disproportionate benefit to the financial interest."

In the recent past, these rules convinced NEFMC member David Goethel to voluntarily resign from the board of the non-profit Northeast Seafood Coalition to avoid any potential conflicts, and led to another Council member, Mary Beth Tooley, to refrain from voting on issues regarding scallops and herring in which her employer has a financial interest.

I am asking that you review potential conflicts of interest so that the federal conflict of interest policies are equitably enforced for all members of the Council. Specifically, it

appears that a potential conflict of interest involving council member Thomas Dempsey should be reviewed by your office.

As a Council member, Mr. Dempsey votes on NEFMC motions and proposals, including those dealing with groundfish like Georges Bank cod. According to a 2011 financial report filed with the Massachusetts Office of the Attorney General, Mr. Dempsey is also employed as the Policy Director of the non-profit Cape Cod Commercial Hook Fishermen's Association (CCCHFA). CCCHFA was a founding member of and is a participant in the Georges Bank Cod Fixed Gear Sector, which catches cod and other groundfish species. According to the organization's website, it is also "contracted annually by the Fixed Gear Sector to provide sector management services and office space."

For the 2012 fishing year, the Fixed Gear Sector's Annual Catch Entitlement (ACE) was 46 metric tons of Eastern Georges Bank cod and 1,258 metric tons of Western Georges Bank cod, which represents approximately 28 percent of all Georges Bank cod allocations. The Fixed Gear Sector leased 44 percent of this allocation to other sectors, leasing a total of 38 metric tons of its Eastern Georges Bank cod allocation and 539 metric tons of its Western Georges Bank cod allocation.

For 2013, the Fixed Gear Sector was allocated 27 percent of the Georges Bank cod ACE, with 25 metric tons of Eastern Georges Bank cod and 475 metric tons of Western Georges Bank cod.

According to a 2011 independent audit by accounting firm Sanders, Walsh, and Eaton, CCCHFA's assets include 25 fishing permits worth an estimated \$2.9 million. The organization as a whole generated \$740,838 in earnings for 2011 by leasing their permits - an estimated 28 percent of their total revenue for the year. They gained an additional \$350,170 in income from the sale of their permits. One program operated by CCCHFA is the Cape Cod Fisheries Trust, which "buys scallop and groundfish fishing permits and quota from retiring Cape Cod fishermen in order to ensure that the quota, and the fishing jobs associated with it, do not migrate away from Cape Cod." The Trust reported \$321,969 in net income from leasing its permits in 2011.

The Council's recent public comment and letter to the National Marine Fisheries Service (NMFS) on Framework 48 has potentially increased the value of CCCHFA's already-substantial allocation of Eastern Georges Bank cod. In its letter, the Council expressed opposition to the agency's proposed changes to language regulating Eastern US/Canada cod quota. The Council offered its support for the regulations as currently written, which stipulate that any fishing trip that enters both the US/Canada area and any additional area be required to have its entire catch counted against its Eastern Georges Bank cod quota, as opposed to quota from the areas in which the fish were actually caught. This arguably has the effect of artificially increasing the need for Eastern Georges Bank cod quota and makes possession of that quota significantly more valuable. CCCHFA currently holds 28 percent of the Eastern Georges Bank cod allocation, by far the single largest share of the quota.

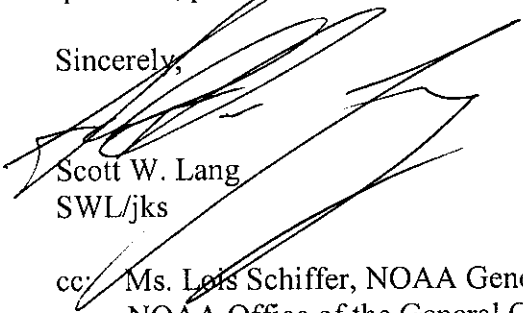
The Council's statements on Framework 48 were not publicly voted on or approved by the full Council. Although such a scenario is common, it increases the chances of a

conflict of interest arising if NEFMC members submitting statements on the Council's behalf have a stake in the issue. This, along with the fact that the CCCHFA stands to benefit from the Council's statements, creates a potential conflict regardless of the merits of the NEFMC's position.

By itself and through its role in the management of the Fixed Gear Sector, the CCCHFA has significant financial interests in the groundfish fishery, and potentially in other fisheries, including scallops. To date, Mr. Dempsey has not recused himself from voting on issues affecting Georges Bank cod in the Groundfish Committee, nor on any other fisheries. Conflicts of interest must be addressed equitably for all members of the Council, and must apply regardless of whether a Council member's employer and income source is a for-profit or not-for-profit entity.

It is my position that the integrity of the process requires clear conflict of interest policies and rules promulgated by NEFMC that pertain not only to the Northeast, but also to the entire country. Further, conflict of interest policies and rules must be transparent and must be adhered to and enforced in order to create a process that is respected and builds trust within the stakeholders and communities that NEFMC represents and serves. I await your formal response regarding this specific issue pertaining to Mr. Dempsey as well as an overall process statement. If you have any questions, please do not hesitate to contact me.

Sincerely,



Scott W. Lang  
SWL/jks

cc: Ms. Lois Schiffer, NOAA General Counsel  
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Enclosures:

- Independent Audit of the Cape Cod Commercial Hook Fishermen's Association conducted by Sanders, Walsh, and Eaton
- Financial Disclosure Form filed by the Cape Cod Commercial Hook Fishermen's Association with the Massachusetts Office of the Attorney General
- Letter from the New England Fishery Management Council to the National Marine Fisheries Service regarding the Framework Adjustment 48 Proposed Rule
- Letter from Earthjustice to the Secretary of Commerce regarding a potential conflict of interest on the New England Fishery Management Council