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December 18, 2015

John K. Bullard, Regional Administrator
Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930-2298

Re: Limited Access General Category Fishing in Nantucket Lightship Area

Dear Administrator Bullard:

On behalf of the Fisheries Survival Fund ("FSF"), we submit the following comments regarding Framework 27 to the Atlantic Scallop Fishery Management Plan ("Framework 27," "FW 27"). FSF represents the significant majority of the full-time Limited Access permit holders in the Atlantic scallop fishery. Our members are home-ported along the Atlantic coast from North Carolina and Virginia north through New Jersey, Connecticut, and Massachusetts.

Framework 27 sets scallop fishery specifications for the 2016 fishing year. The New England Fishery Management Council ("Council") made a final vote on preferred alternatives for the framework at its meeting on December 3rd, 2015. Section 2.2.3 of the framework specifies the allocation of Limited Access General Category ("LAGC") individual fishery quota ("IFQ") trips in rotational access areas. The Council voted to allocate access area trips in the Nantucket Lightship Area ("NLSA") to the LAGC fleet, while voting to disallow Limited Access vessels from receiving trips in the same area. We strongly urge you to disapprove the portion of Framework 27 related to this NLSA trip allocation.

Allowing differential access to rotational areas for various sectors of the scallop fleet would be contrary to controlling laws, regulations, and the Atlantic Scallop Fishery Management Plan ("FMP") for the reasons enumerated below. Moreover, such an allocation would be a precedent-setting attack on the very rotational management system that has been the key to restoring and maintaining the scallop fishery's sustainability and economic value. As you said at the Council meeting, this is both an allocation issue and a policy issue. An allocation issue simply cannot be addressed through a framework adjustment, nor absent preparation of an Environmental Impact Statement ("EIS"). And as for the policy issue, you said it best yourself:

John K. Bullard
December 18, 2015
Page Two

[T]he bedrock of the sustainability of this management system, that this Council has to be proud of, is rotational closures... What I'm worried about is a motion like this, despite the motivations, [takes] a chink out of this rotational closure and allows one group in early. And so next year, what's the justification for someone to come in early, and the year after, what's the rationale? And at what point do we not have the system that created the nation's most profitable, most productive, most sustainable fishery? At what point do we look and say ('it really isn't a rotational closure system anymore, it's a system where we decide who goes where at what time,') and the concept of rotational closure [is] really disappearing? We're not sure when it disappeared, we're not sure in what year it disappeared...

If you approve this measure, you will not only contravene legal authority, but future managers, industry members, and consumers alike will be able to point to this moment with certainty and say that this was when rotational management began to erode.

I. THE ALLOCATION VIOLATES COUNCIL PROCESS

A. Procedural Background

At its December meeting, the Council reviewed a draft version of Framework 27 that included three broad options for LAGC access area allocations, with each option containing 3 specific area sub-options, in addition to the No Action alternative.¹ Those options include: (1) same access area proportion as the Limited Access fleet (2,553 trips); (2) same overall allocation of 5.5% (1,523 trips); and (3) same allocation as FY2015 (2,065 trips). Each option, in turn, has a sub-option that considers allowing NLSA access to LAGC vessels, but only if the Limited Access fleet is assigned the same access. Amendment 11 to the Scallop FMP, which was implemented in 2004, allocated 5% of access area trips to the LAGC fleet in the same areas that are open to the Limited Access fleet.² Since that allocative action, LAGC access area assignments have therefore *always* been determined in lockstep with the Limited Access area assignments.

At its November 19th meeting, the Council's Scallop Committee voted to consider a new and separate alternative for Framework 27 for specifications that did not include NLSA access. A subsequent motion, specific to the LAGC, directed the Scallop Plan Development Team ("PDT") to "evaluate the biological impacts of allocating some level of access from NL equivalent to Area Option 3 Alternative 2.2.3.2.3 (Area Option 3), which would allocate 19% of the total LAGC

¹ New England Fishery Management Council, *Draft Framework 27 to the Scallop FMP* (December 1-3, 2015), at 28.

² New England Fishery Management Council, *Amendment 11 to the Scallop FMP* (July 31, 2007), at 50.

John K. Bullard
December 18, 2015
Page Three

[General Category] fleetwide trips from NL north (485 trips and 290,994 pounds).” The motion passed 5-2, with one abstention.

In response to the motion, the PDT held a conference call on December 1st, which coincided with the first day of the Council meeting at which the full Council would take final action on the framework. On December 3rd at that Council meeting, the Council received a summary from the PDT call, to supplement the timely-distributed meeting materials including the Framework 27 draft and an analysis of the impacts of all options in the FW 27 draft. (As explained above, LAGC-only access to the NLSA was not an option in that FW 27 draft.) The Council then voted to allow the LAGC fleet to access NLSA, after voting for a specifications alternative that did not allow NLSA trips for the Limited Access fleet.

B. The Action Was Not an Alternative in the Framework, and Therefore Does Not Satisfy Public Notice Requirements

The purpose of the National Environmental Policy Act (“NEPA”) is to ensure public involvement in environmental decision making processes. The Administrative Procedure Act (“APA”) supplements NEPA’s transparency requirements with detailed processes for the public to participate in the development and review of NEPA and other rulemaking documents. NEPA’s implementing regulations require that the alternatives considered by a decision maker (in this case, the Council) on any major federal action be “encompassed by the range of alternatives discussed in the relevant environmental documents.”³ The APA, in turn, requires that agencies “shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”⁴

The decoupling of the access area allocations for the LAGC and Limited Access fleets was never an alternative in Framework 27. The fact that it was not included in the draft framework document or in publicly available materials deprived the public of its legal right to provide meaningful comments on the proposed action under the letter of NEPA and the APA. Given the strong regional component of this action, there would have been substantial interest in providing such comments, but that interest was deprived of a forum. LAGC-only access to NLSA was, moreover, in no way a “logical outgrowth”⁵ of the access area options developed for FW 27, and presented in available documents, with the accompanying required analyses. As explained above, the Scallop FMP does not provide for decoupling Limited Access and General Category access to access areas, and the Council has never embarked on this path before. Furthermore, no meetings

³ 40 C.F.R. § 1505.1(e).

⁴ 5 U.S.C. § 553(c).

⁵ See, e.g., *National Min. Ass’n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C.Cir.1997).

John K. Bullard
December 18, 2015
Page Four

or hearings were held on this issue in the Mid-Atlantic—the region that would experience most heavily the negative impacts if this unprecedented approach is implemented.

C. The Action Was Not Sufficiently Analyzed

Even more alarming than the fact that the action did not satisfy public review requirements is the complete lack of analysis associated with the allocation. The Atlantic scallop fishery framework adjustment regulations specify that, if the Council decides that management modifications are necessary, it “shall provide the public with advance notice of the availability of both the proposals and the analyses, and opportunity to comment on them *prior to* and at the second Council meeting.”⁶

For the measure related to LAGC access in the NLSA, the PDT performed its biological analysis only during the Council meeting, not prior to it as required by law. Moreover, the PDT prepared no economic analyses whatsoever. By this rule alone, the measures may not be approved.

Moreover, other required analyses were entirely lacking both prior to and at the meeting during which the Council took its vote. Under NEPA, required analyses are those that describe the effects of an action on the human environment. “When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.”⁷ This principle is well-established in all the Council’s FMP framework adjustments, which follow a similar structure and include biological, economic, and social impacts in addition to impacts to protected resources and habitat.

This measure, if implemented, would unequivocally lead not only to economic impacts, but differential impacts, not only between the Limited Access and General Category, but within the LAGC itself. For instance, the Council action will precipitate regional variations in lease prices for LAGC quotas due to the higher value of scallops in the NLSA compared to the Mid-Atlantic access areas. It will also have social impacts, including geographic distributional effects and a high degree of controversy. The Council exceeded its legal authority by recommending an action to NMFS without basing that recommendation on analyses of the full suite of its potential impacts.

⁶ 50 C.F.R. § 648.55(f) (emphasis added).

⁷ 40 C.F.R. § 1508.14. An EA is required to be a version of an EIS, with analogous environmental review requirements. See 40 C.F.R. § 1508.9 (an EA “shall include... brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted”).

John K. Bullard
December 18, 2015
Page Five

D. Measures Amounting to Allocations Require an FMP Amendment

Even had LAGC-only access to NLSA been an alternative in the document, and even had it been adequately analyzed prior to the Council's vote, it nevertheless cannot be adopted in a framework adjustment action as it amounts to an allocative action. It allows one portion of the fleet to access an area where another portion is prohibited.

Whether a fishery management measure may be adopted in a framework, or whether it requires an amendment to the FMP, depends upon the extent to which the measure was anticipated and analyzed in the original FMP or a previous amendment. Only if the measure was adequately described and analyzed in, and is within the scope of, the FMP and implementing regulations, can it be adopted through a framework. Otherwise, the FMP must be amended before the measure may be implemented.⁸ NOAA's Operational Guidelines further specify that the "framework concept is not intended to circumvent the FMP amendment process that must take place when circumstances in the fishery change substantially...."⁹ Thus, the framework process is reserved only for adjustments that are truly routine and directly derived from the existing FMP and its amendments.

The level to which a proposed action has been described with specificity in previous actions is a key factor in determining what type of action is necessary for the consideration of that action. The FMP itself, as amended, typically specifies what types of adjustments may be completed in follow-on frameworks—in acknowledgment that the analysis has been completed for that category of actions. Downstream actions that cannot be anticipated or adequately analyzed in an FMP amendment are not suitable for adoption in a framework. In no instance do the Scallop FMP and its amendments contemplate or analyze the creation of access areas for the LAGC fleet only.

As stated in the background section above, since the creation of the LAGC fleet in Amendment 11 to the Atlantic Scallop FMP, the Limited Access and LAGC sectors have been assigned access area trips in the same areas. It cannot be said, then, that the tradeoffs and controversies associated with this differential allocation were considered in the scope of the amendment and analyzed therein. For all of these reasons, creating an allocation in a framework is contrary to legal and policy guidelines.

E. Any Allocation Requires an EIS

When an FMP is amended, the Council and NMFS must draft an accompanying EIS or EA to describe and analyze the range of alternatives under consideration.¹⁰ Whether the action requires

⁸ National Marine Fisheries Service, *Operational Guidelines Fishery Management Plan Process A-68* (May 1, 1997).

⁹ *Id.*

¹⁰ 42 U.S.C. § 4332(2)(c).

John K. Bullard
December 18, 2015
Page Six

an EIS or an EA depends upon the specific management options considered therein. Any management action that allocates fishery resources, particularly in a way that was unanticipated in the original FMP or any previous amendment, requires preparation of an EIS.

NMFS guidelines state that the determination of whether to prepare an EIS for a fisheries-related action is based on whether “significant beneficial or adverse impacts are reasonably expected to occur.”¹¹ Such significant impacts include not only biological, but also socioeconomic considerations.¹² Furthermore, NMFS and the Council must consider the degree to which the effects on the quality of the human environment are likely to be highly controversial in forming such a determination, and “this aspect should be used in weighing the decision on the proper type of environmental review needed to ensure full compliance with NEPA.”¹³

Allocative decisions are controversial by nature—the act of allocating necessarily ends up with winners and losers among heavily invested stakeholders. Furthermore, as described above, the allocation in question would have unprecedented impacts to various LAGC and Limited Access permit holders, with uneven impacts among the two sectors and geographically. For all of these reasons, NMFS and the Council must prepare an EIS if they choose to pursue this reallocation.

II. THE ALLOCATION VIOLATES NATIONAL STANDARD 8

National Standard Eight requires that fishery management measures shall “take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.”¹⁴ The Council’s decision record needs to address the economic impacts of NLSA access on the LAGC fleet as a whole. An unsubstantiated premise that the decision is appropriate for all LAGC participants, just because it may be in the interest of certain LAGC participants operating near the NLSA, is not an adequate basis for decision making.¹⁵ The Council’s failure to analyze and weigh impacts on affected communities therefore

¹¹ NOAA, *Administrative Order Series 216-6: Environmental Review Procedures for Implementing the National Environmental Policy Act* 6.03d.2 (May 20, 1999).

¹² “Socio-economic factors related to users of the resource should also be considered in determining controversy and significance.” *Id.* at 6.02i.

¹³ *Id.*

¹⁴ 16 U.S.C. § 1851(a)(8).

¹⁵ *Blue Water Fisherman’s Ass’n. v. Daley*, 122 F.Supp.2d 150, 169-71 (D.D.C. 2000).

John K. Bullard
December 18, 2015
Page Seven

violates National Standard 8,¹⁶ and is inconsistent with the analysis requirements contained in the National Standards Guidelines.¹⁷

III. THE ALLOCATION VIOLATES THE ACCESS AREA GUIDELINES

Amendment 10 to the Atlantic Scallop FMP defined the policies and guidelines associated with rotational management. These policies have led to the scallop fishery's long term sustainability and profitability. The guidelines describe three types of areas: (1) closed rotation; (2) re-opened controlled access; and (3) open.¹⁸ Once an area is designated as controlled access, "it is understood that a specific percentage of the TAC per access area would be allocated to the General Category fleet."¹⁹ Amendment 10 describes access area policies in terms that plainly anticipate that such areas are either open proportionally to both fleets or to neither.²⁰

While Amendments 10 and 11 recognized the share of General Category catches could vary depending on the access area, there was no provision made to open access areas just for the General Category. In authorizing modification of the initial apportionment of access between the Limited Access and General Categories, moreover, Amendment 11 discussed such variations in terms of logistics—as in, General Category vessels have a difficult time reaching Closed Area II.²¹ That is far different from the Council making an ad hoc determination a near-shore access area is "baked" enough for access by the General Category fleet, but not the Limited Access fleet.

The Scallop Advisory Panel recommended to keep NLSA closed for an additional year, with the foresight that strong biomass in the area in FY 2017 would be critical to keep the industry and the market economically stable. FSF members, too, overwhelmingly supported leaving NLSA closed and forgoing short-term economic gain in favor of long-term sustainability, in the spirit of the access area guidelines. Fishing in NLSA by LAGC vessels before it is open to the rest of the fleet—particularly due to the high probability of highgrading—puts the environmental sustainability of the resource in jeopardy, erodes confidence in the management regime, and

¹⁶ *Id.*

¹⁷ 50 C.F.R. § 600.345(c).

¹⁸ New England Fishery Management Council, *Amendment 10 to the Atlantic Scallop Fishery Management Plan* (Dec. 2003), at 5-16.

¹⁹ *Amendment 11* at 65.

²⁰ See, e.g., *Amendment 10* at 5-129 ("The general category possession limit would be zero for areas where landings from vessels on declared scallop trips have met the TAC or for areas that are closed by scallop management regulations").

²¹ *Amendment 11* at 65 ("it may be most effective to consider variable percents for different access areas. For example, the 2% allocated in Closed Area II has never been caught by the general category fishery").

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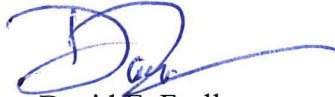
John K. Bullard
December 18, 2015
Page Eight

creates a real risk of market instability. These outcomes are antithetical to the very nature of rotational management and start down the road of eroding the past decade of management discipline and success.

* * * *

To reiterate, FSF urges you to disapprove the provision of Framework 27 that allows LAGC access to NLSA as it fails to comply with law, policy, and common sense. We appreciate the opportunity to submit these comments. Thank you for your consideration of these critical issues, and please do not hesitate to contact us if we can provide any additional information.

Respectfully submitted,



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