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June 10, 2020

Mr. Michael Pentony, Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, Massachusetts 01930

**RE: Comments on the Proposed Rule for
Groundfish Framework Adjustment 59**

Dear Mr. Pentony:

On behalf of the Stellwagen Bank Charter Boat Association that represents the for hire fleet and recreational anglers that fish in the Gulf of Maine we strongly support the proposed Framework 59 adjustment of the allocations of the total quota between the commercial and recreational fishery for Gulf of Maine cod and haddock. The proportion of quota allocated to the recreational fishery would increase from 33.7% to 37.5% for Gulf of Maine cod, and from 27.5% to 33.9% for Gulf of Maine haddock. This reallocation better reflects the complete data that should have been used, such as the inclusion of release mortality/dead discards in the recreational fishery, when the original allocations were developed.

The detrimental impact of COVID 19 to the for hire fleet is such that we request that GARFO consider liberalization of seasons and bag limits for Gulf of Maine cod and haddock this fall.

GARFO has the ability to close recreational seasons but not the ability to open, if appropriate. We request that GARFO be provided the ability to open recreational seasons when presently closed in the event that



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favorable projections for cod and/or haddock is such that future opening are possible in 2020 and beyond.

If you have any questions or comments, please email or give me a call.

Thanks

Very truly yours,

Capt. Mike Pierdinock

Capt. Mike Pierdinock
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June 15, 2020

VIA ELECTRONIC MAIL

Michael Pentony, Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930

Michael Pentony, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930

**Re: Fisheries Survival Fund's Comments on Framework Adjustment 59
to the Northeast Multispecies Fishery Management Plan**

Dear Regional Administrator Pentony:

On behalf of the Fisheries Survival Fund ("FSF"), we submit the following comments regarding the New England Fishery Management Council (the "Council")'s proposed Framework Adjustment 59 to the Northeast Multispecies Fishery Management Plan ("Framework 59"). As you know, FSF represents the significant majority of full-time Limited Access permit holders in the Atlantic scallop fishery. Our members are home-ported along the Atlantic Coast from Massachusetts through North Carolina.

In summary, FSF is concerned regarding the process via which the Council and the National Marine Fisheries Service ("NMFS") have established the Georges Bank yellowtail annual catch limits for 2020. We appreciate your attention to our concerns and suggestions regarding this Council action, as well as the Council's continued efforts to ensure the scallop fishery's sound conservation and management.

FSF remains a strong proponent of the Council process. However, FSF is concerned with the Council's complete and total reliance on the Council's scientific and statistical committee ("SSC") in dictating the terms of annual catch limits of GB yellowtail flounder.

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The SSC Cannot Statutorily Set International Catch Limits

The Magnuson-Stevens Fishery Conservation and Management Act (the “Magnuson-Stevens Act”) provides the SSC with the authority “to assist” the Council and to “provide [the] Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch.” 16 U.S.C. § 1852(g)(1)(A)-(B). The Magnuson-Stevens Act also mandates that the Council “develop annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee.” 16 U.S.C. § 1852(h)(6). Framework 59 states, in pertinent part,

For GB yellowtail flounder, the Council’s Scientific and Statistical Committee (SSC) also recommends an acceptable biological catch (ABC) for the stock. The ABC is typically used to inform the U.S. TMGC’s discussions with Canada for the annual shared quota. Although the stock is jointly managed with Canada, and the TMGC recommends annual shared quotas, *the Council may not set catch limits that would exceed the SSC’s recommendation.*

85 FR 32347-01 (emphasis added).

In actual practice, while the passage quoted directly above states the SSC’s recommendations “inform” the U.S. position at the TMGC, the SSC’s recommendations constrain the U.S. position. The Council—and, by extension, the Department of Commerce, and the nation—are being bound by the dictates of the SSC, an unelected and unaccountable body, in determining both (1) domestic catch limits of GB yellowtail flounder, and (2) the United States’ position in international negotiations with Canada regarding GB yellowtail flounder catch limits as part of the Transboundary Management Guidance Committee (“TMGC”) under the U.S./Canada Transboundary Resources Sharing Understanding (the “Understanding”).

In stating its belief that “the Council may not set catch limits that would exceed the SSC’s recommendation,” 85 FR 32347-01, the Council seems to rely on the Magnuson-Stevens Act. The Magnuson-Stevens Act, however, is not binding when it comes to international agreements. In fact, the International Fisheries Clarification Act recognizes the Understanding as a formal international process and provides the United States with flexibility in the rebuilding period and catch level requirements for GB yellowtail flounder. NOAA Fisheries Guidance Document 2018/01. The International Fisheries Clarification Act allows NMFS to, under certain circumstances, “establish catch levels for those portions of fish stocks within their respective geographic areas covered by the Understanding . . . that exceed the catch levels otherwise required under the Northeast Multispecies Fishery Management Plan.” Public Law 111–348, Sec. 202(3).

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Notwithstanding the fact that the Understanding establishes the Transboundary Resources Assessment Committee (“TRAC”) as the scientific advisor to the TMGC, NMFS is *now* reading the Magnuson-Stevens Act to elevate the SSC’s recommendations over those of the TRAC. This runs in direct contrast to NMFS’s prior (correct) understanding of the Magnuson-Stevens Act, as clarified by the International Fisheries Clarification Act.

In 2011, shortly after the International Fisheries Clarification Act was adopted, NMFS issued a Proposed Rule, in which it explained that it was proposing to *raise* the catch-limit for GB yellowtail flounder in light of the International Fisheries Clarification Act. *See* 76 FR 11858. Then, NMFS correctly explained that “the recently enacted International Fisheries Agreement Clarification Act [] provides increased flexibility to NMFS and the Council in setting higher fishing limits for those portions of stocks subject to the Understanding.” 76 FR 11860. Particularly, NMFS understood at the time that the International Fisheries Clarification Act serves to limit role of the SSC regarding stocks subject to the Understanding, including “GB yellowtail flounder.” *Id.* In fact, NMFS explained at the time, “the involvement of the SSC in the specification of the ABC for this stock is not specifically required, although the emergency rule must still be consistent with the best scientific information available.” *Id.*

Here, “the best scientific information available” is not necessarily represented by the SSC’s recommendation. GB yellowtail stock dynamics are not well understood, and the joint work product of the two affected countries’ leading groundfish scientists should be able to control over the summary recommendations of a generalist SSC. For this year, the TRAC’s recommendations would have allowed a higher U.S. GB yellowtail ACL than the SSC recommended. The proposed rule has provided no reason why NMFS and the Council should be required to adhere to the SSC’s dictates in the face of TRAC’s well-reasoned and well-based scientific conclusion of the maximum catch of GB yellowtail flounder, other than the summary and legally unsound assertion of SSC primacy that ignores the International Fisheries Clarification Act. There is no reason for Framework 59 to provide SSC untoward power. The U.S. TMGC negotiators, NMFS and the Council should be accorded the flexibility the International Fisheries Clarification Act affords for GB yellowtail flounder.

The SSC Cannot Constitutionally Set Catch Limits at All

The SSC’s untoward power regarding GB yellowtail flounder also violates Article II of the United States Constitution. The SSC consists of a Council-appointed group made up of “Federal employees, State employees, academicians, or independent experts.” 16 U.S.C. § 1852(g)(1)(C). The United States Constitution simply does not allow such a group, with no accountability, and whose decisions have no meaningful method of being reviewed, to effectively set United States domestic and international policy. That is the job of the Executive.

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Neither the President, the Department of Commerce, nor the Council have any true control over the the SSC's determination of a GB yellowtail flounder catch limit—indeed, that is the point of how the Magnuson-Stevens Act restructured SSC responsibility in 2007. If Framework 59 is adopted as written, the SSC's unilateral decision as to how much GB yellowtail flounder can be caught by United States thereby effectively will become the completely unreviewable and unappealable law of the land and the *de facto* United States position at the TMGC.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court was tasked with evaluating the constitutionality of the Public Company Accounting Oversight Board ("PCAOB"). 561 U.S. 477 (2010). The PCAOB is "a private 'nonprofit corporation,'" whose members are recruited "from the private sector." *Id.* at 484–85. Nevertheless, the PCAOB made binding decisions "with expansive powers to govern [the] entire [accounting] industry." *Id.* at 485.

Given the PCAOB's broad mandate and extensive and largely unreviewable powers, the Supreme Court determined that its structure violated Article II of the Constitution. In doing so, the Court explained,

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself."

Id. at 513–14.

In 2011, in a concurrence in *In re Aiken Cty.*, then Circuit Court Judge Brett Kavanaugh noted that Article II means what it says:

The first 15 words of Article II state quite plainly that "[t]he executive Power shall be vested in a President of the United States of America"—not some of the executive power, but all of it. And Article II later says that the President alone has the authority and responsibility to "take Care that the Laws be faithfully executed." As Professor Amar has summarized, "What Article II did make emphatically clear from start to finish was that the president would be personally responsible for his branch." Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005).

645 F.3d 428, 439 (D.C. Cir. 2011).

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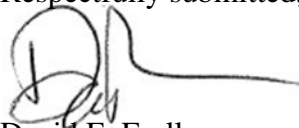
Evaluating the constitutionality of the Nuclear Regulatory Commission, Judge Kavanaugh explained, “[i]f the Commission rejects the President’s policy decision and legal interpretation then the President may be forced to continue with the Yucca Mountain project simply because the Nuclear Regulatory Commission has told him so.” *Id.* at 843. Such a result is facially inconsistent with the U.S. Constitution’s Article II, which requires that the “[t]he buck stops with the President.” *Free Enter. Fund*, 561 U.S. at 493.

Should Framework 59 allow the SSC’s unilateral determination to control here, the result would be equally infirm. If Framework 59 is adopted as written, United States domestic policy, as well as the results of bilateral international negotiations between the United States and Canada regarding the amount of GB yellowtail flounder that may be caught, will be solely by determined by the SSC. Nobody in the Executive branch would be able to countermand the SSC’s arbitrary catch limits—not even the President himself. In the face of Article II, such a result cannot stand.

The SSC is an unaccountable advisory body to the Council. The advice that the SSC provides the Council in determining catch-limits should be treated as just that: advice. Framework 59’s elevation of the SSC’s advice and recommendations to black-letter law unconstitutionally ties the hands of the Executive branch, wrongly prohibiting the Council, the Department of Commerce, or, indeed, the President from exercising their scientific and management discretion to decide whether or not to except that advice. FSF therefore respectfully requests that any Final Rule modify Framework 59 to clarify that the Council may set catch limits arrived at through the TMGC and TRAC processes without illegitimate control by the SSC.

Thank you for the opportunity to submit these comments and for your consideration of this issue. Please feel free to contact us at any time if you require additional information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Frulla", with a long horizontal flourish extending to the right.

David E. Frulla

Andrew E. Minkiewicz

Bezalel A. Stern

Counsel for Fisheries Survival Fund