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August 13, 2004

VIA ELECTRONIC MAIL

Mr. Rolland A. Schmitt
Director, Office of Habitat Conservation
NOAA National Marine Fisheries
Service, F/HC, 1315 East-West Highway
Silver Spring, MD 20910

RE: OCEANA'S PETITION RE: DEEP SEA CORAL AND SPONGES,
DOCKET No. 040517149-4149-01; I.D. 050304C

Dear Director Schmitt:

The Fisheries Survival Fund ("FSF") represents the bulk of full-time limited access scallop vessels from Massachusetts to North Carolina. The FSF is responding to the call for comments in relation to the Oceana, Inc.'s petition to declare unspecified, but apparently extensive, areas of the ocean off-limits to environmentally responsible and economically viable commercial fishing operations. Oceana seeks to short circuit legally required decision-making and notice and comment processes under the National Environmental Policy Act ("NEPA") and Administrative Procedure Act ("APA") by requesting that the National Marine Fisheries Service ("NMFS") initiate sweeping management measures essentially by fiat. For these and other reasons discussed below, FSF urges that NMFS to reject this petition for rulemaking.

The protection of rare and unique deep sea coral fields is an important and worthy goal, as, perhaps, is that of similarly unique deep sea sponge colonies (while recognizing that varieties of common sponges are ubiquitous in the marine environment), and FSF can support integration of such concerns in the appropriate fishery management structures. However, the petition submitted to NMFS paints with far too broad a brush, and draws none of the necessary connections which are required by law, specifically the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"), for identifying, designating, or protecting essential fish habitat ("EFH") for managed species.

Indeed, the MSA itself provides the proper means for raising and addressing concerns of this type at the appropriate, regional level. It is somewhat ironic, in fact, that at this very moment, many of the regional management councils, including the New England Fishery Management Council, are undertaking a full-scale reevaluation of EFH measures across most of its management plans, in part to address a court settlement in

a case brought by petitioner Oceana.¹ The regional councils are the proper forums and the fishery management plan (“FMP”) development and amendment processes the proper means through which to raise such concerns. Use of congressionally mandated management process insures that NEPA-compliant alternatives are developed, the public is afforded opportunity to comment, and that all MSA requirements (of which EFH protection is but one part) are met.

FSF would like to take this opportunity to address some specific legal requirements that we believe have been either mischaracterized or incompletely explained by petitioner. These requirements are important to the fishing industry and the agency alike because they provide the legal standards under which the fisheries of the United States are to be managed. Failure to heed these requirements can lead to harm to the commercial and recreation fishing industries, as well as unnecessary and wasteful judicial processes. Moreover, implementation of the requests made in this petition without regional consideration of specific FMP goals and objectives, can lead to harm to managed stocks of fish, such as by displacing and concentrating fishing effort.

I. “Essential Fish Habitat” is a legal concept tied to managed species

The concept of “essential fish habitat” is legal, not biological. While it refers to the natural relationship between certain types of fish (*i.e.*, those managed under the MSA²) and habitat which to them is “necessary . . . for spawning, breeding, feeding or growth to maturity,” 16 U.S.C. § 1802(10), the essence of EFH designation is to create legal duties and obligations for NMFS and the councils. Accordingly, there is no “essential fish habitat” for species that are not managed under the Act,³ and there is no statutory basis for the protection of “habitat” generally. The failure to confront this basic fact is a fatal flaw of the petition.

At its root, petitioner’s call for emergency action is based on one major, though flawed, syllogism: coral beds are often associated with sea-life, so coral must be

¹ The other spur to this widespread attention being paid to matters of marine habitat in New England and elsewhere is that many councils are now undertaking the regulatory quadrennial review of EFH provisions implemented under fishery management plans. See 50 C.F.R. § 600.815(a)(10). These reviews offer ample and appropriate opportunities for petitioner to raise the concerns touched on here, in the appropriate context of managed fisheries.

² See 16 U.S.C. § 1853(a) (describing the required provisions for FMPs, including minimization of “adverse effects” on EFH caused by fishing, *id.* (7)).

³ *Cf.* 67 Fed. Reg. 2343 (Jan. 17, 2002) (EFH Final Rule) (“EFH cannot be designated for non-managed prey species, so a list of such species is not directly relevant to the rule.”).

necessary to sea-life (which is simply a leap of logic); some of this sea-life (in some localities) are managed species under the MSA; the MSA defines EFH as 'waters and substrate' necessary to support a managed species⁴; therefore coral must meet the legal definition of EFH under the Act.

The balance of the arguments are similarly self-proving, such as 'if mobile gear were to be deployed on coral, that would cause harm; coral is EFH (see above); therefore, EFH is suffering adverse impacts from fishing within the meaning of the law.' The remedy is said to be a ban on trawling over extensive areas where coral and sponges may exist,⁵ which is asserted to be legally "practicable."⁶

This approach is the reverse of the process required under the Magnuson-Stevens Act. The Act has, as its essential purpose, the goal of managing the marine resources of this nation so that they provide ongoing opportunities for commercial and recreational uses. See 16 U.S.C. § 1801(a)(1) (finding that America's fishery resources, which "constitute valuable and renewable natural resources, . . . contribute to the food supply, economy, and health of the Nation and provide recreational opportunities"). The means to this end is achievement of "optimum yield" from managed stocks of fish and shellfish, which is defined as "the amount of fish which will provide the greatest overall benefit to the Nation, particularly with respect to food production." *Id.* § 1802(28); see also *id.* § 1851(a)(1) ("[c]onservation and management measures [that] prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.").

The protection of EFH, therefore, must be viewed as one of several elements which must be analyzed and dealt with in the context of creating or modifying management regimes for fisheries. Contrary to the assertion of petitioner, the EFH

⁴ More specifically, the regulations say "'necessary' means the habitat required to support a sustainable fishery and the managed species' contribution to a healthy ecosystem." 50 C.F.R. § 600.10 (emphasis added).

⁵ Existing seafloor mapping data is notoriously low-resolution.

⁶ In the alternative, the petition stretches the legal and semantic confusion surrounding the MSA's definition of "fishery" as both the activity of harvesting fish and a species or stocks of fish themselves. *Id.* § 1802(13). Thus, petitioner asserts that coral and sponges, as species, are "fisheries" and leaps to the unsupportable conclusion, based on the statutory use of fishery in the former and more common sense, that because fishing gear may incidentally impact some of these stocks, FMPs must be developed for them. The *coup de grace* is the conclusion that coral and sponges should be declared EFH for themselves, and the "fishery" protected by an outright ban on most trawling. This is not a serious argument and should be readily dispensed with; particularly as it leads to the conclusion that every living thing in the oceans which may interact with fishing gear, right down to sea lice, must have its own FMP.

requirement, like that to “prevent overfishing and rebuild overfished stocks,” is simply a means to the end “to protect, restore, and promote the long-term health and stability of the [managed] fishery.” *Id.* § 1853(a)(1)(A). Thus the test for whether a measure to protect EFH is practicable, *i.e.*, one where the benefits of the measures outweigh the costs,⁷ must mean – contrary to petitioner’s assertions – that there must be some evidence (not elusive “proof”) that the EFH protection measure will make a managed fishery more productive by some measure larger than the “costs” in terms of lost, but otherwise sustainable, fish harvest, increased operating expenses, or inefficiencies.

This petition fails to even begin to approach this analysis. Indeed, the entire thrust appears to be to deny that such constraints exist or that NMFS need even consider how these closures impact optimal yield in the range of fisheries it manages. Petitioner seeks, for instance, to short-circuit consideration of any of the ten National Standards for fishery conservation and management, *id.* § 1851, which are required for any agency action under the Magnuson-Stevens Act.

In summary, setting aside any consideration of the technical merits of the petition,⁸ the petition for rulemaking meets none of the applicable legal standards governing fisheries management, and must be rejected.

II. EFH protection measures must be “practicable”

Oceana reproduces for the Agency arguments it made in the United States District Court for the District of Massachusetts and, again, before the First Circuit Court of Appeals, relating to its interpretation of the meaning of “practicable” within the meaning of the law. In short, petitioners argued there, as here, that Congress intended NMFS to take any “possible” measure, no matter the economic consequences, to protect EFH. The First Circuit’s response to this argument, which is the only direct judicial interpretation of the meaning of the term “practicable” as used in the Magnuson-Stevens Act, was as follows:

[P]laintiffs essentially call for an interpretation of the statute that equates “practicability” with “possibility,” requiring NMFS to implement virtually any measure that addresses EFH and bycatch concerns so

⁷ See 50 C.F.R. § 600.815(a)(2)(iii) (“Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation, consistent with national standard 7.”).

⁸ We note only that terms used, such as “deep sea,” “communities,” “high concentrations,” and even “coral” and “sponges” are so vague as to be meaningless. They provide no justiciable standards, nor guidance to either the regulators or the regulated community.

long as it is feasible. Although the distinction between the two may sometimes be fine, there is indeed a distinction. The closer one gets to the plaintiffs' interpretation, the less weighing and balancing is permitted. We think by using the term "practicable" Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.

Conservation Law Foundation ("CLF") v. Evans, 360 F.3d 21, 28 (1st Cir. 2004). This holding is in line with prior decisions on the habitat protection mandate as part of the MSA's overall statutory management scheme. See, e.g., *CLF v. Mineta*, 131 F. Supp.2d 19, 27 (D.D.C. 2001) (NMFS has "numerous – and oftentimes competing – statutory objectives to contend with in managing the New England waters; preservation of essential fish habitat is only one of many").

These authorities demonstrate that this is a settled matter. Petitioner's attempt to essentially "relitigate" these issues through the emergency rulemaking process should be rejected.

Moreover, the petition blithely dismisses the potential costs of this sweeping proposal, and merely assumes that the "rare" habitat they assert will be protected, will lead to some future gains sufficient to overcome the costs. It would be arbitrary and capricious of NMFS, however, to make similar off-the-cuff assumptions as to the practicability of these closures.

III. The wholesale closure of grounds not fished in three years is unsupported and irrational

The notion of closing fishing grounds that have not been fished in the past three years is a non-sequitur, completely unrelated in logic and fact from the tenuous arguments made regarding deep sea sponges and corals. In short, there is no basis for implementing such a measure, which is even more remote from the applicable legal standards than the general call to close potential coral areas. As FSF will show, this proposed measure directly conflicts with the agency's statutory mandate to achieve sustainable and optimal yields from managed stocks – particularly the healthy Atlantic scallop stock, as well as certain abundant groundfish stocks, such as Georges Bank yellowtail flounder and haddock.

It may not be a matter of coincidence that three years is the precise length of time since discrete parts of the groundfish closed areas on Georges Bank were last accessed by scallop vessels; an action, incidentally, that was challenged in court by petitioners. Thus, at the time when the very first habitat-only closures on the east coast have been instituted to protect the most important offshore groundfish EFH, Oceana is seeking a *de facto* declaration that the old groundfish mortality closures should be declared habitat closures as well. This is another instance of petitioner refighting a battle through this petition that it could not prevail upon in the appropriate forum, *i.e.*, at

the Council level. This petition, it is worth noting, comes at a time when responsible and conservation-positive scallop access to parts of these areas is on the verge of approval, and while petitioner is seeking to shutter the scallop fishery in all areas of the mid-Atlantic region from Long Island, NY, southward.

In short, this element of the petition would completely undermine the conservation and management goals of Amendment 10 to the Atlantic Sea Scallop FMP, which seeks to “rebalance” fishing mortality throughout the range of the stock. The bulk of the scallop biomass is currently in the parts of Georges Bank the proposed rulemaking would close. Denying access to this important part of the scallop fishery under the guise of protecting ancient deep sea coral is not “practicable” because those scallops are not moving – they will simply die of starfish predation, disease, and/or old age – leaving no corresponding benefits to balance against the millions of dollars in lost short-term revenues from scallops alone. Moreover, there isn’t the slightest bit of evidence that any coral exists in these 400-year-old fishing grounds. Meanwhile, scallop beds in the areas Oceana has not yet sought to close would suffer from imbalanced harvest.

This is a concrete example of how this petition sets the whole purpose of the Magnuson-Stevens Act on its head and why, therefore, it should be dismissed outright.

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The FSF does not want to gainsay the importance of rare and ancient deep sea coral beds, which it considers to be important in their own right and for the ecological niche they may serve in the marine environment. However, there is no emergency to justify eschewing the legal requirements of the Magnuson-Stevens Act, or to cut the regional fishery management councils out of this process. Assuming that these areas are part of the designated EFH for some managed species (and it appears that nearly all of the U.S. Exclusive Economic Zone in the northeast that is designated essential habitat for one species or another), then the processes exist for incorporating appropriate protections exist.

The FSF will continue to work positively with NMFS, and stands ready to address any questions the agency may have regarding these comments. Thank you for your attention to this important matter.

Sincerely,

/s/

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Shaun M. Gehan
Attorneys for the Fisheries Survival Fund