

Testimony of Andrew E. Minkiewicz

Counsel, Fisheries Survival Fund

before the

Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard

United States Senate Committee on Commerce, Science and Transportation

Field Hearing on Magnuson-Stevens Act Re-Authorization

November 4, 2013

Good morning, Chairman Begich and Senator Warren. My name is Drew Minkiewicz. I am a partner in Kelley Drye & Warren, LLP of Washington, D.C. Our firm is counsel to the Fisheries Survival Fund (“FSF”). FSF represents the bulk of the full time limited access scallop fishery.

You have asked me to comment on possible changes to the Magnuson-Stevens Fishery and Conservation Management Act. While the scallop fishery has enjoyed great success under the current law, FSF strongly feels significant change is necessary. The law and NMFS are focused on the recovery of overfished stocks. As a result, managing sustainable stocks in a manner that optimizes their benefit to the nation is not prioritized and suffers from neglect. Responsible fishermen should be allowed to help fill this void. They are the losers when the government fails to make the needed investments.

Summary of Testimony

FSF requests that Congress amend the Magnuson-Stevens Act to allow the National Marine Fisheries Service (“NMFS”) to manage stable, rebuilt fisheries flexibly for success, rather than as inflexibly as the law requires for recovering stocks. Flexible management has at least two components: (i) regulatory flexibility, allowing timely decisions to be made without burdensome and unnecessary process; and (ii) management flexibility, allowing economic considerations, such as stability of market supply, to be considered in setting harvest levels. One technique that has been successful in other countries is to delegate management of a fishery to an Industry Organization, if that fishery is not experiencing overfishing and is not overfished.

The Atlantic scallop fleet has demonstrated the responsibility to be entrusted with such a role. Over the past two decades, scallopers have created the most valuable fishery in the United States, supplying world-wide markets with a world-class product. They already either conduct or pay for the vast majority of research and management functions in this fishery. NMFS has been glad to let the industry foot the bill. In fact, NMFS has often required this. But, NMFS has been slow to make its contribution to the support that we need to manage the fishery for long-term success.

With all of the challenges that NMFS is facing, proactive management of a sustainable scallop fishery is not a priority for the Agency. Managers lurch from one issue to the next, missing deadlines, creating confusion and distrust, and wasting the resource. That being the case, the industry wants to step into the breach and maximize the benefit of this fishery for the rest of the nation and put an end to the entropy that is currently growing in the fishery.

Scallopers Have Led, Not Followed, In Fishery Research and Engineering

The success of the scallop fishery, fueled by numerous industry-led innovations, has led to the creation of a fishery that was once unimaginable. That is all threatened by the proposed reduction in the catch of scallops despite an abundant resource and a documented large abundance of scallops on the verge of reaching marketable size. Wild swings in the landings of scallops will destroy the markets that scallopers have spent decades developing. Scallopers have everything to gain from a well-managed fishery and everything to lose from a poorly managed one. At present, the fishery is threatened with a management failure.

The scallop fishery has proven itself to be a responsible management partner for well over a decade. Since 1998, when scallopers formed the FSF, the industry and its scientific partners have asked for more decreases in catch than increases. Scallopers have asked for more closures of scallop grounds than openings. It was the industry which put forward the proposal to move the fishery to a rotational management scheme that has greatly improved scallop yields. On the recommendation from our scientific partners, scallopers pushed for larger 4" rings on our dredges, which allow smaller scallops to go un-harvested. All these steps have helped create the world-wide market for large, fresh U.S. Atlantic scallops.

Scallops have also made proactive gear engineering a priority. When scallopers started to see sea turtles out on the fishing grounds, they did the research and went to NMFS with solutions to reduce the impact of the fishery on the turtles. The industry, itself, called for mandatory installation of turtle chain mats (basically,

scallop TEDs) that keep turtles from entering the dredge. A couple years later, the industry helped develop and advocated for use of turtle excluder dredges that allow turtles to pass over the dredge unharmed, if they are encountered on the seafloor.

Efforts have extended to habitat research, as well. With the industry's research set-aside program, that allocates a portion of the catch to fund scientific research, industry partners developed a revolutionary underwater camera pyramid, as well as a "Habcam" system. Both systematically photograph the bottom. This not only allows scientists to assess the amount of scallops, it also enables them to delineate the bottom and the habitat features. As a result, we have more information about benthic habitat on Georges Bank than about any other ocean bottom anywhere in the United States, if not the world. The scallop industry did all of these things, because they were the right things to do.

Scallops Currently Fund Much of Their Own Management

The scallop industry is also heavily involved in paying for its own management:

- The scallop industry pays for all of its observer coverage;
- The majority of the scallop survey is industry funded and conducted on commercial scallop vessels;
- The industry is funding turtle research to meet the requirements of NMFS' biological opinion, despite NMFS describing the turtle research as an agency obligation;
- Scallops fund a bycatch avoidance system with the School for Marine Science and Technology at the University of Massachusetts-Dartmouth; and
- Scallops fund seasonal bycatch surveys to determine when is the best time to avoid the bycatch of certain groundfish stocks.

It's Time for a Change

Despite repeated requests from the scallop fishery for more resources dedicated to the management of the scallop fishery, NMFS does not and cannot direct the necessary resources to allow this fishery to maximize its potential. If, for instance, NMFS were allowed to delegate this fishery's management, with appropriate

government oversight, to an industry empowered to levy funds amongst itself, industry could do what the agency has not shown the ability to do.

Currently, NMFS is unable to implement fishing regulations for the scallop fishery in time for the beginning of the fishing year. There is a lack of transparency in how the annual catch allocation for the fishery is arrived at. The agency has had to use emergency actions repeatedly to implement common sense measures and access area closures for the fishery. The availability of the projections of scallop catch was delayed months this year because the government research cruise was scheduled later than normal, and NMFS was unable to reschedule it. By contrast, when the scallop industry heard reports of a significant concentration of juvenile scallops on Georges Bank, a research cruise on a commercial fishing vessel was out the next week to ascertain the magnitude of the population of juvenile scallops.

We look forward to working with your offices to turn this recommendation into a reality.