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BY ELECTRONIC SUBMISSION

Secretary of Commerce Wilbur Ross
Office of the Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Re: Comments in response to the National Marine Fisheries Service's notice of receipt of and request for comments on New York's petition for rulemaking regarding the commercial summer flounder fishery

Dear Secretary Ross:

The State of New York and the New York State Department of Environmental Conservation ("New York") submit this comment letter in response to the recent announcement in the Federal Register, 83 Fed. Reg. 31,945 (July 10, 2018), noticing the receipt of, and requesting comments on, a rulemaking petition submitted by New York on March 23, 2018 to the U.S. Department of Commerce, through its sub-agencies the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service ("Fisheries Service"), and to the Mid-Atlantic Fishery Management Council ("Mid-Atlantic Council" or "Council") (collectively referred to as the "Agencies"). New York's petition requests that the Agencies amend the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan ("Summer Flounder FMP" or "FMP") and the plan's implementing regulations to allocate the commercial quota for summer flounder between states in a manner that complies with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"). Subsequent to New York's filing of its petition, the Mid-Atlantic Council, in coordination with the Atlantic States Marine Fisheries Commission ("Atlantic Fisheries Commission" or "Commission"), voted to approve a draft amendment to the Summer Flounder FMP that included multiple alternatives to revise the existing commercial quota allocation.

The Fisheries Service's Federal Register notice states that these proposed alternatives include those that are "based on updated stock distribution, similar to

New York's request in this petition." New York is constrained to respond because that statement is inaccurate, and mischaracterizes both New York's petition, and the commercial quota amendment options pending before the Mid-Atlantic Council and Atlantic Fisheries Commission. In fact, none of those options adequately addresses the concerns raised in New York's rulemaking petition; nor do any of these proposed amendments bring the current, deeply flawed allocation of the commercial fluke fishery into compliance with the Magnuson-Stevens Act.¹ The proper course, therefore, is for the Agencies to adopt New York's petition and enact the rules necessary to effectuate it.

By way of background, under the Magnuson-Stevens Act, the allocation of commercial fishing quotas must comply with national standards for fishery conservation and management codified at 16 U.S.C. § 1851(a) (the "National Standards"). Among other things, the National Standards require that fishery rules be based upon the best scientific information available, not discriminate between residents of different states, consider efficiency in the utilization of fishery resources, minimize costs, and promote the safety of human life at sea.

Accordingly, New York's petition calls on the Agencies to repeal and replace the state-by-state allocation of the annual commercial quota for summer flounder adopted in 1993 (the "1993 Allocations"), which were based upon data collected during the 1980s. Even though both the summer flounder stock and commercial fishing activity have shifted northeast toward the waters off of New York since that time, the 1993 Allocations continue to allot to New York just 7.65% of the total coast wide commercial landings quota for summer flounder while allotting almost 50% of the quota to North Carolina and Virginia. As a result, the 1993 Allocations require summer flounder to be disproportionately landed in southern ports hundreds of miles from the center of the species' biomass and the center of commercial fishing activity. Given the changes to the summer flounder fishery over the last quarter century, the 1993 Allocations violate the National Standards because they are scientifically outdated, discriminatory, inefficient, costly, and unsafe.

In announcing the opportunity to comment on New York's rulemaking petition, the Fisheries Service noted that there is an ongoing process within the Mid-Atlantic Council, in coordination with the Atlantic Fisheries Commission, potentially to amend the 1993 Allocations, among other aspects of the Summer Flounder FMP. New York has participated in that process through its representatives on the Council and Commission, including by voicing its position that the 1993 Allocations violate the Magnuson-Stevens Act's National Standards. On April 30, 2018, a draft version of the FMP amendment, in the form of a public hearing document, was considered and reviewed for approval by a joint meeting of the Mid-Atlantic Council and the Atlantic Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Management Board. At that meeting, a draft that included various commercial quota allocation alternatives was approved by the Council and Commission to be put forward for public comment. One of these alternatives is expected to be selected by the Council, in coordination with the Commission, for submission to the Fisheries Service for final approval. However, the

¹ New York will separately provide detailed comments to the Mid-Atlantic Council and Atlantic Fisheries Commission explaining why none of the quota allocation alternatives now under consideration would bring the FMP into compliance with the Magnuson-Stevens Act.

draft amendment failed to include for consideration any alternatives to the existing commercial quota allocation that are consistent with the National Standards. For this reason, New York's representatives on the Council and Commission voted against proceeding with the draft amendment.

In particular, the draft amendment includes proposals to update the 1993 Allocations in consideration of stock distribution changes. However, even the proposed adjustment to the 1993 Allocations that is least unfair to New York would shift only an additional 3% or less of the quota to New York, still leaving the state with a maximum of just 10.71% of commercial landings. This minor proposed reallocation would fail to bring the distribution of the commercial quota into compliance with the standards of the Magnuson-Stevens Act: it would still require summer flounder to be disproportionately landed in southern ports hundreds of miles from the center of the species' biomass and the center of commercial fishing activity, and it would still discriminate against New York's fishing industry. And critically, this minor reallocation would still be heavily based upon the outdated landings data from the 1980s that were the basis for the 1993 Allocations.

Aside from alternatives that would simply adjust the 1993 Allocations, the draft amendment also includes quota allocation alternatives based on a combination of the 1993 Allocations and a commercial trigger. Under these options, the quota allocation departs from the 1993 Allocations only when the coast wide commercial quota is larger than recent five or ten year averages (i.e., when the summer flounder stock is healthy). These options, as proposed in the draft amendment, would provide New York with a minimal increase in its share—less than 2%—and only in years of great abundance. Otherwise, the 1993 Allocations would continue to operate. These options, too, would fail to alter the 1993 Allocations in any meaningful way that would bring the FMP into compliance with the Magnuson-Stevens Act.

The final alternative proposed in the public hearing document is known as the "scup model." This allocation method would adopt different management schemes on a seasonal basis, roughly corresponding to a winter "offshore fishery" (when summer flounder migrate offshore) and a summer "inshore fishery" (when summer flounder migrate inshore). During the winter offshore fishery, the quota would be managed on a coast wide basis, providing boats able to pursue summer flounder offshore with equal access, regardless of state of origin and landing. During the summer inshore fishery (May–October), the quota would be distributed between states in a manner similar to the current allocation scheme—specifically, based upon landings from the 1997–2016 period, which were governed by the 1993 Allocations. Unfortunately, the scup model would continue to discriminate unfairly against New York because New York's summer flounder fishing effort is comprised mainly of smaller vessels that participate in the summer inshore fishery, but are less able to participate in the offshore winter fishery. Thus, New York would derive little benefit from open competition during the winter period, and be subject to the same flawed quota allocations based upon the 1993 Allocations during the summer period.

Instead of continuing to rely on the outdated 1993 Allocations, and instead of differentiating between a summer and winter period, New York's petition has proposed that the Agencies revise the allocations in a two-phase process. The first phase is to

dispense with state-by-state allocations and to implement coast wide management of the commercial quota for an interim period while the Agencies collect information that allows them to revise the allocations so that they are consistent with the Magnuson-Stevens Act. The second phase is to use the up-to-date information to issue new state-by-state allocations. This solution would properly rely on the current distribution of fish, current fishing effort, and modern, reliable landings data to determine state-by-state allocations.

New York, through its associated councilors and commissioners attending the April 30 meeting of the Council and Commission, sought to add an additional commercial allocation alternative, similar to the proposal made in New York's petition for rulemaking, for consideration in the public hearing document put forward as the draft FMP amendment. Recognizing that an interim period of coastwide management could result in drastic changes to the pattern of commercial summer flounder landings, New York was also willing to negotiate new state allocations to limit the impacts to any one state or region of the coast. New York's representatives at the Mid-Atlantic Council moved to add these two options to the public hearing document for formal consideration, but that motion was rejected by the Council. New York's councilors then moved to delay release of the public hearing document to allow time for the full development of its proposed alternatives for consideration in the public hearing document, and that motion was also rejected by the Council. These actions by the Council deprive the public of the opportunity to even consider state quota allocation options not still yoked to the outdated 1993 Allocations.

With this letter, New York seeks to clarify to the Agencies that none of the commercial quota allocation options currently being considered by the Mid-Atlantic Council for approval by the Fisheries Service would bring the fishery into compliance with the Magnuson-Stevens Act. Regrettably, this will only further delay the process of bringing the FMP into legal compliance. The Fisheries Service should reject any proposed FMP amendment or implementing regulations that do not distribute the commercial summer flounder quota fairly and in accordance with the National Standards. Meanwhile, the Agencies should adopt New York's proposed rulemaking.

Please do not hesitate to contact this office with any questions.

Respectfully submitted,

BASIL SEGGOS
Commissioner of the New York State
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