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Nikhil Mehta
NOAA Fisheries
Southeast Regional Office
Sustainable Fisheries Division
263 13th Avenue South
St. Petersberg FL 33701

Re: NOAA-NMFS-2016-0001
Proposed Control Date for Commercial Sector of the Dolphin and Wahoo Fishery of the Atlantic

Dear Mr. Mehta,

The American Bluefin Tuna Association (ABTA) welcomes the opportunity to provide comment on the proposal for a control date in the dolphinfish fishery. ABTA (http://www.theabta.com) represents commercial handgear tuna fishermen on the US East Coast who fish for bluefin, bigeye, albacore and yellowfin tuna. As of 2015, there are 3,129 commercial vessels permitted to target tunas in the Highly Migratory Species (HMS) General Category and 3,596 vessels carrying an HMS Charter/Headboat permit (source: 2015 HMS SAFE Report).

Any HMS-permitted commercial handgear or charter/headboat vessel targeting tropical tunas (bigeye, yellowfin or albacore) will potentially incur dolphinfish catch as incidental bycatch or targeted catch by virtue of the fact that the aforementioned species preferentially inhabit the same foraging areas on the East Coast at the same time of year, in waters having very similar temperature ranges. Similarly, any commercial handgear vessels permitted for the relatively new (HMS Amendment 8) handgear swordfish permit may also interact with dolphinfish. Further, any longline vessels with HMS permits are likely to interact with dolphinfish.

We appreciate the National Oceanic and Atmospheric Administration's (NOAA) recognition of the significant negative impact to the commercial participants of the dolphinfish fishery due to the unfortunate and unavoidable decision to close the fishery on June 30, 2015, for the balance of the season. We also appreciate that the South Atlantic Fishery Management Council (SAFMC) and NOAA have undertaken to address the problems resulting in the closure with an appropriate sense of urgency, providing

the parties the opportunity to identify and apply fishery management tools that will ultimately avoid a recurrence of this closure.

1 - Summary of Comments

A. The proposed control date is prejudicial to Northeast fishermen. This proposal, if ratified, would allow for a bias, as regards certain fishing privileges, in favor of South Atlantic and Mid-Atlantic fishermen, in contravention of National Standard 4.

B. There is no justification for trip limits or a control date in the commercial dolphinfish fishery. Why?

National Standard 1 necessitates management of the fishery with the specific intent to achieve optimum yield. This is an impossibility under the current FMP. The present distribution schema by sector results in a significant excess of unutilized ACL by the recreational fishery going back several years, whereas the commercial fishery is, as of 2015, constrained by a lack of sufficient ACL. Therefore, the only viable solution is a permanent reallocation of ACL to these sectors with a view toward establishing *an equitable distribution of the resource to all the participants*, with the intent to achieve *optimum yield*; and, in so doing, we obviate the need for control date or trip limits.

C. Catch data clearly shows that there is sufficient ACL for both recreational and commercial fisheries to function normally as open access fisheries.

D. Trip limits will result in the undesirable and unnecessary discarding of catch – in contravention of National Standard 9.

2 - Biological Issues

There are presently no known biological reasons for NOAA to constrain fishing effort on dolphinfish. The only existing stock assessment (Praeger 2000), a draft exploratory assessment of dolphinfish, validates this view.

A benchmark estimate was developed for MSY of 27 M pounds (80% confidence in the range 18.8 M pounds to 46.5 M pounds). In developing the FMP for dolphinfish, the Council chose to define optimum yield as equivalent to 75% of MSY. The stock assessment advocated against using the median proxy estimate. Although the Council determined that the estimate of MSY probably underestimated the true value of MSY, they nonetheless chose to use the lowest value for MSY, instead of the median, a very

conservative and perhaps overly precautionary approach to a highly fecund, highly migratory and data-poor pelagic fish stock.

At this time, the Council has expressed that they are intent upon beginning a scoping process on Amendment 10 to the FMP in the very near term and, in view of the fact that the currently available stock assessment is 16 years old, it would be prudent to have a new stock assessment before embarking on this amendment. However, this may not be possible.

3 - Dolphinfish in the Northeast

Dolphinfish is an important fresh seafood product in the Southeast and Mid-Atlantic, where it is regularly found on restaurant menus and regularly sold by fish sellers. This has not been the case to the same degree in the Northeast in which the season for fresh dolphinfish is shorter and where dolphinfish is less well-known. However, dolphinfish is recently beginning to gain greater acceptance on restaurant menus and with fish sellers in the Northeast. This increased interest has resulted in an increase in demand that is slowly being exploited by our fish dealers. Therefore, as Northeast fish dealers succeed in further developing the wholesale distribution of dolphinfish in the region, it is expected that this will result in a corresponding increase in effort on dolphinfish by Northeast fishermen in order to meet the increased demand. Clearly, a key element necessary for expanding the market for dolphinfish in the Northeast is a regular, reliable supply of fresh fish in season, and this was impossible to achieve in 2015. The purpose in mentioning the foregoing is to apprise the Agency of the likelihood that incremental increases in landings of dolphinfish by the Northeast fishery may be a reasonable expectation, going forward.

The foregoing assumes that there is no regulation in place that will constrain the natural growth of commercial landings and the number of new entrants in the Northeast region.

It is reasonable to expect that the implementation of a control date will be viewed by commercial fishermen as a harbinger of a potential future action that could result in conversion of the present open access fishery to a limited access fishery. The existence of a control date in the commercial fishery, no matter the likelihood of the control date ever being used, may act as a deterrent to potential new entrants in the Northeast. Therefore, a potential negative outcome of a decision to implement the proposed control date could be difficulties in “growing” the Northeast dolphinfish fishery to meet anticipated increased demand.

4A - The proposed control date of June 30, 2015 would appear to be detrimental to Northeast fishermen and may be at odds with National Standard 4.

Typically, dolphinfish begin to appear in Northeast waters in their northerly migration around the beginning of July whereas the dolphinfish commercial fisheries in the South and Mid-Atlantic typically become active earlier in the year. Heaviest landings by longline occur in the South Atlantic during the second quarter. Based upon an average of 2010-2015 landings data segmented by quarter and gear-type, approximately 64% of handgear landings and approximately 90% of longline landings occur in the first two quarters (Source: trip ticket dataset provided by SEFSC). In 2015, 100% of the ACL was fully utilized by June 30, before the fish reached the Northeast in their annual northerly migration.

Any commercial Northeast fisherman contemplating participation in the dolphinfish fishery in 2015 may have decided not to secure a dolphinfish/wahoo permit for 2015 because of NMFS' Southeast Fishery Bulletin of June 19, 2015, announcing the closure of the commercial dolphinfish fishery on June 24 (later revised to June 30) 2015. These fishermen, whether new entrants or existing permit holders, would not have met the proposed control date requirement.

However, most, if not all, new or existing participants in the South Atlantic or Mid-Atlantic commercial dolphinfish fishery would likely have secured permits for 2015 well in advance of the proposed control date.

Further, if this control date is to be used in any future fishery management action and if it is ultimately to also take into account individual landings associated with this permit, Northeast fishermen would clearly not have been able to achieve any landings in 2015 due to the closure of the fishery. This would disadvantage Northeast fishermen as compared with South Atlantic or Mid-Atlantic fishermen who would have had no difficulty achieving landings well before the closure.

Consequently, Northeast fishermen are, in either or both of the above cases, disadvantaged as compared with fishermen from Mid-Atlantic or South Atlantic states.

National Standard 4

NS4 prohibits discrimination in the allocation of fishing privileges. The provision specifies, "[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual corporation, or other entity acquires an excessive share of such privileges." 16 U.S.C. § 1851(a)(4). NS4 guidelines define "allocation" and "assignment" as follows:

> *An "allocation" or "assignment" of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals. Any management measure (or lack of management) has incidental allocative effects, but only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4. Adoption of an FMP (or other management measure) that merely perpetuates existing fishing practices may result in an allocation, if those practices directly distribute the opportunity to participate in the fishery. Allocations of fishing privileges include, for example, per-vessel catch limits, quotas by vessel class and gear type, different quotas or fishing seasons for recreational and commercial fishermen, assignment of ocean areas to different gear users, and limitations of permits to a certain number of vessels or fishermen.* 50 C.F.R. § 600.325(c)(1)

NS4 guidelines explain that an FMP "may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the [optimum yield], and if the measures conform with paragraphs (c)(3)(i) through (c)(3)(iii) of this section." 50 C.F.R. § 600.325(c), (c)(3)(i)-(iii) (requiring such measures to be implemented with "[f]airness and equity," to "[p]romote conservation" and to avoid giving "excessive shares" of fishing privileges to any person or entity).

Particularly relevant in this case, an "allocation need not preserve the status quo in the fishery to qualify as 'fair and equitable,' if a restructuring of fishing privileges would maximize overall benefits." 50 C.F.R. § 600.325(c)(3)(i)(B). This regulation is relevant in the case of dolphinfish where catch data shows that the recreational fishery has consistently under-utilized ACL, whereas the commercial fishery has not.

The foregoing point also raises a related issue, that of "optimum yield". The achievement *on a continuing basis* of "optimum yield" is an overarching, primary goal, reflected in National Standard One. In the recent history of the dolphinfish fishery, it is impossible to find one year in which optimum yield can be said to have been achieved. The achievement of optimum yield is constrained by the inequitable distribution of the resource to the user groups.

In implementing this control date, NOAA would be granting greater fishing privileges to one sector of the dolphinfish fishery over another, in two ways:

1. Northeast fishermen would be unfairly disadvantaged by this control date, as previously discussed.
2. The implementation of a control date that potentially constrains growth in the commercial fishery unnecessarily, as a direct consequence of the inequitable

distribution of ACL between the recreational and commercial fisheries (having historically resulted in consistent under-utilization of the ACL) clearly disadavantages the commercial fishery as a whole.

4B - Maximum Sustainable Yield and Optimum Yield in the Dolphinfish Fishery

The courts have found that a measure which gives advantage to one sector of a fishery at the expense of another does not violate NS4, provided *the measure benefits conservation of the fishery as a whole*. See, e.g., Alaska Factory Trawler Ass'n V Baldridge, 831 F.2d 1456, 1464 (9th Cir. 1987). Given the overarching tenets of maximum sustainable yield and optimum yield in the National Standards, it cannot be said that maintaining excessive and long-standing under-utilized quota (held hostage) by the dolphinfish recreational fishery to the detriment of the commercial fishery and to the fishery as a whole, particularly in view of the recent closure and the recently implemented ruling on trip limits is a condition *that benefits conservation of the fishery as a whole*.

Further, the perpetuation of the present imbalance in distribution of ACL between the commercial and recreational fisheries in which the recreational fishery has had excessive ACL for years is a condition that will likely result in negative outcomes such as those that occurred in 2015. The status quo may possibly result in constraining the number of participants in the commercial fishery unnecessarily, a significant negative economic event.

Finally, the recently enacted trip limits cannot possibly avoid dead discarding of dolphinfish by the longline fishery and therefore cannot be said to *benefit conservation of the fishery as a whole*.

4C - Maintain an open access fishery

It is a fair statement that, in the main, the commercial dolphinfish fishery is an incidental fishery, not a targeted fishery. Any discussion of "avoidance strategies" suggesting that commercial longline or handgear fishermen are capable of intentionally reducing or eliminating interaction with dolphinfish is not taking into account the reality on the water.

There are commercial vessels that target dolphinfish but, clearly, they are a smaller component in the commercial fishery. There is ample evidence to support this. Any fisherman - recreational or commercial - targeting tropical tunas will invariably catch dolphinfish. For this reason alone, *every effort should be made* to maintain the commercial dolphinfish fishery as an open access fishery. To contemplate limited access alternatives does not take these fundamental facts into account particularly if there are

no biological reasons for constraining catch. Further, *any* constraints imposed in the form of trip limits in the commercial fishery will invariably result in dead discarding, a wasteful practice that is potentially in violation of National Standard Nine.

National Standard 9

NS9 requires NMFS to "avoid or minimize bycatch" and "minimize the mortality of bycatch which cannot be avoided". 16 U.S.C. § 1851(a)(9). See also § 1853(a)(11), requiring all FMPs to contain measures to minimize bycatch and bycatch mortality. NS9 guidelines explain that bycatch may "impede efforts to protect marine ecosystems and achieve sustainable fisheries" by increasing the uncertainty as to the amount of fish killed by fishing activities and by precluding "more productive uses of fishery resources" 50 C.F. R. § 600.350(2)(b). In contravention to NS9, the decision to implement a trip limit for dolphinfish is likely to result in possibly excessive but certainly unwanted mortality of this important food source.

I thank you in advance for your time and consideration of the foregoing.

Cordially,

David Schalit
Vice President
American Bluefin Tuna Association

cc: Rich Ruais, Executive Director, ABTA
Ralph Pratt, President, ABTA

Margo Schulze-Haugen, NOAA