UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
One Blackburn Drive
Gloucester, MA 01930-2298

FEB 27 2006

Daniel Furlong, Executive Director
Mid-Atlantic Fishery Management Council
Room 2115 Federal Building
300 S. New Street
Dover, DE 19904

Dear Dan:

This letter is to advise you that the National Marine Fisheries Service (NOAA Fisheries Service), in response to a Government Accountability Office (GAO) report entitled "Individual Fishing Quotas: Management Costs Varied and Were Not Recovered As Required" (GAO-05-241/March 2005), has committed to work with the Mid-Atlantic Fishery Management Council on adding individual transferable quota (ITQ) program cost recovery to the Atlantic Surfclam and Ocean Quahog Fishery Management Plan (FMP) as currently required in section 304(d)(2) of the Magnuson-Stevens Fishery Conservation and Management Act.

In order to fulfill this commitment, I would like to establish an ITQ Cost Recovery Committee to develop a program to recover costs in the surfclam and ocean quahog fisheries comprised, in part, by representative stakeholders. To facilitate the development of this Committee, I would like to request that you please appoint well-qualified individuals to serve on this Committee. This Committee may also serve to develop a cost recovery program for the golden tilefish fishery, should the Council adopt an individual fishing quota amendment to that FMP. My staff lead for the development of the cost recovery program will be Brian Hooker who may be reached at 978-281-9220.

Sincerely,

Patricia A. Kurkul
Regional Administrator

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

FEB 3 2009

Richard Robins, Jr., Chairman
Mid-Atlantic Fishery Management Council
Federal Building
300 South New Street
Dover, DE 19904-6790

Dear Rick:

As you are aware, the Council is currently developing Amendment 14 to the Atlantic Surfclam/Ocean Quahog (SC/OQ) Fishery Management Plan (FMP). Amendment 14 is primarily intended to define what constitutes an excessive share in the fishery, and to fully implement limited access privilege program (LAPP) requirements, specifically for individual transferable quotas, as stipulated in the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under section 304(d)(2)(A) of the MSA, the Secretary is directed to collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any LAPP.

The SC/OQ FMP has been operating under an ITQ system since 1990, without a cost-recovery program. In development of a cost-recovery program under Amendment 14, Council staff has indicated they believe that the management costs of managing the pre-LAPP fishery in place prior to 1990 should be compared with the current management costs of the LAPP fishery in determining what is recoverable under the MSA. This approach would define the incremental costs as the difference between the pre-LAPP management costs and the current LAPP management costs. It is widely known that the SC/OQ fishery was very costly to manage prior to the ITQ system implemented in 1990; thus, any comparison between the pre-LAPP and current LAPP fishery would not yield a recoverable cost. Council staff cites the following two factors as rationale for using the above approach to calculate what is recoverable under section 304(d)(2)(A) of the MSA: 1) The 2005 Government Accountability Office report to Congress that stated that management costs decreased after implementation of the SC/OQ ITQ program; and 2) that industry contributes substantial funding for the management of the SC/OQ resource by providing for additional science that is used in the SC/OQ stock assessment process. Despite this rationale put forward by Council staff, NMFS does not interpret section 304(d)(2)(A) of the MSA to allow for the consideration of these factors.

NMFS has interpreted section 303A(e), together with section 304(d)(2)(A) of the MSA, to require that for the collection of fees in LAPP fisheries, the individuals who are granted a temporary property interest in a particular public trust resource provide at least some compensation for the management of that resource. The agency has interpreted sections 304(d)(2)(A) and 303A(e) of the MSA such that recoverable costs in existing LAPP fisheries are calculated by isolating the LAPP-specific aspects of the current fishery. Therefore, recoverable costs would be those that would not otherwise exist, but for the LAPP, and would be incremental to the management costs of a traditional non-

LAPP version of the fishery (i.e., a fishery managed by the monitoring of a quota with in-season closures). In this way, SC/OQ limited access privilege shareholders would be funding a portion of the management, data collection, and enforcement costs of the LAPP for which they hold a temporary interest to the public trust resource. Given this, the Council should include a collection-of-fees option in Amendment 14 that is consistent with NMFS's interpretation of the cost-recovery provisions of the MSA.

My staff will assist Council staff in the assembly of the cost data necessary to develop this alternative within the document. I look forward to working with the Council to complete this important amendment.

Sincerely,

for Patricia A. Kurkul
Regional Administrator

UNITED STATES DEPARTMENT OF COMMERCE
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Gloucester, MA 01930-2276

SEP 30 2009

Richard Robins, Jr., Chairman
Mid-Atlantic Fishery Management Council
Federal Building
300 South New Street
Dover, DE 19904-6790

Dear Rick:

Thank you for your September 11, 2009, letter regarding Amendment 15 to the Atlantic Surfclam/Ocean Quahog (SC/OQ) Fishery Management Plan (FMP). Amendment 15 is primarily intended to define what constitutes an excessive share in the fishery, and to fully comply with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) for limited access privilege programs (LAPP) such as the SC/OQ individual transferable quota (ITQ) program.

As you know, the SC/OQ FMP has been operating under an ITQ system without a cost-recovery program since 1990. It is important to note that section 304(d)(2)(A) of the MSA directs the Secretary of Commerce to collect a fee to recover the "actual costs directly related to the management, data collection, and enforcement," of any LAPP [emphasis added]. In practice, NOAA's National Marine Fisheries Service (NMFS) has determined that this requires the collection of a fee to recover costs that are specific to, or associated with, the LAPP. As stated in your letter, the Council proposes that the costs to be recovered are the net incremental costs, defined by comparing the costs of the pre-LAPP fishery with the current costs of the LAPP fishery. However, there is a significant difference between "net incremental" costs and "actual" costs. It is widely known that the SC/OQ fishery was more costly to manage and enforce prior to the ITQ system; thus, any comparison between the pre-LAPP and current LAPP fishery would not be informative as to the actual costs to the Government for this program, nor would this calculation yield a recoverable cost. We do not think there is any reasonable interpretation of section 304(d)(2)(A) that would allow for a subtractive calculation (pre minus post-LAPP costs) by which no costs are recovered in a LAPP. Allowing this type of subtractive approach would allow a fishery that was more costly to manage or enforce prior to a LAPP (i.e., the SC/OQ fishery) to essentially absolve itself of any cost-recovery payment for the duration of the FMP, which would be inconsistent with the plain language of the MSA.

In February 2009, I sent a letter to the Council regarding the NMFS policy on what costs are recoverable in the SC/OQ fishery. To restate: NMFS policy is that the costs to be recovered are the LAPP-specific costs related to the management, data collection, and enforcement of the SC/OQ IFQ program. These costs are positive, and are likely to be a minor percentage of the ex-vessel value of the fishery.

My February 2009, letter used an example of how LAPP-specific costs may be calculated for the fishery, which stated that "recoverable costs would be those that would not otherwise exist, but for the LAPP, and would be incremental to the management costs of a traditional non-LAPP version of the fishery (i.e., a fishery managed by the monitoring of a quota with inseason closures)." Your letter contends that the traditional non-LAPP version of the fishery is the pre-LAPP fishery. However, this term was intended to describe a hypothetical current non-LAPP version of the SC/OQ fishery, i.e., a fishery managed by quota monitoring. A comparison between a hypothetical current non-LAPP version of a SC/OQ fishery and the current LAPP SC/OQ fishery yields costs that necessarily exist due to the ITQ program, i.e., the management costs incurred as a result of processing ITQ allocation transfers, or the database system support to track ITQ allocations.

The first paragraph of your letter states: "Prior NMFS documents indicate that NMFS' position on cost-recovery is that net incremental costs of the LAP program are subject to cost-recovery, not the cumulative costs or the total costs." I believe that the distinction between pre- and post-LAPP costs and recoverable costs are clearly articulated in NMFS's response to the 2005 Government Accountability Office (GAO) report (page 35 of GAO-05-241, Individual Fishing Quotas), as shown below:

> In summary, NOAA stresses the distinction between (1) changes in pre- and post-IFQ costs and (2) recoverable costs, and points to the surf clam and ocean quahog program as an excellent example. As GAO reports, management costs in this fishery have decreased after 1990, and NOAA believes this reduction in costs should be an important consideration when fishery management councils are debating the adoption of an IFQ program. At the same time, the attributable costs of the surf clam and ocean quahog program, that under law must be recovered, are positive.

NOAA's response to the GAO report also states that recoverable costs are those that are directly attributable to the IFQ program (first paragraph, page 35) and, to clarify, my February 2009, letter did not state that NMFS is seeking to recover cumulative or total costs, as stated in your September 2009, letter.

The NOAA technical memorandum, "The Design and Use of Limited Access Privilege Programs (NMFS-F/SPO-86, page 91)," states that the relevant costs to recover are the incremental costs, i.e., those costs that would not have been incurred but for the IFQ program. The technical memorandum cites a NMFS 2003 report from the Alaska Region, "Report to the Fleet, Restricted Access Division, Alaska Region," as the basis for this policy. This Alaska Region report states that:

> "COSTS OF MANAGEMENT AND ENFORCEMENT: The other part of determining the fee is calculating costs associated with managing and enforcing the IFQ Program. Note these costs are incremental (that is, costs that would not have been incurred but for the IFQ Program). To arrive at these costs, in early September 2005 NMFS agency units and the International Pacific Halibut Commission (IPHC) each calculated their own IFQ-associated costs. NMFS Alaska Region

agency units submitting costs included NMFS/RAM, NMFS Sustainable Fisheries, and NMFS Office of Law Enforcement. Table 4.2 shows the costs by agency and operating unit."

The report does state that the costs to be recovered are the "incremental costs." However, they are calculated by determining current IFQ-associated costs (LAPP-specific costs). These "incremental costs" are not described as "net incremental costs," or defined as the difference between the pre- and post-LAPP fishery, as stated in your letter. Rather, they are calculated by isolating the IFQ-associated costs from each division, and can only be positive. This is entirely consistent with the policy as described in my February 2009, letter, i.e., to recover the LAPP-specific costs in the SC/OQ FMP. Similar methods to discern costs that are directly related to the LAPP, or are LAPP-specific, are in use to calculate the recoverable costs in other limited access privilege programs.

My staff will assist Council staff in the development of this alternative within the document. I look forward to working with the Council to complete this important amendment.

Sincerely,

for Patricia A. Kurkul
Regional Administrator