

Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment
Summary of 4 Public Hearings Comments

Monday, July 10, 2017: Warwick, Rhode Island

Hearing Officer: Peter deFur

MAFMC Staff: José Montañez

Attendance (2): Dave Wallace (Wallace and Associates), Daniel Cohen (Galilean Seafoods, LLC; Atlantic Cape Fisheries)

Daniel Cohen - Galilean Seafoods, LLC; Atlantic Cape Fisheries

Excessive Shares

- Associated with Galilean Seafoods and its affiliates, fishing vessels Enterprises and Atlantic Fisheries, working on several east coast fisheries, including surfclams.
- Involved in the industry during the time that the limited entry fishery was developed in 1977 but did not own any clam boats then or have any clam allocation because boats were sold prior to the implementation of the limited access system. Bought first clam boat in 1980. Involved as an advisor with the Council's management process since that time until the development of the IFQ system in 1990.
- While he agrees that the Council should review FMPs (Fishery Management Plan) to be sure they are meeting goals and objectives and whether they need to be fine-tuned, the Council should not call this an amendment process. In the event the scoping process indicates that no changes need to be made to the current management structure, then this effort will waste a lot of Council and NMFS staff time.
- Council and NMFS have extensively discussed the excessive shares topic when the ITQ program was implemented and agreed that the Sherman Antitrust Laws [Act] would not allow for an individual, corporation, or other entity to acquire an excessive share of the clam ITQ privileges that would result in market power or control the market place.
- National Standard 4 does not indicate at what level [market level] market power is to be addressed. For example, in the harvesting sector, there cannot be excessive control of the market place even if an entity/individual controls 100% of the clam ITQ as they produce [in commerce] an ingredient item (and not a center of the plate item), and there is a very large production from around the world for that ingredient item.
- The ITQ system is supposed to allow industry for the most effectively and efficiently mechanism to deliver to the public the harvest of a public resource as cheap as possible (by lowering production costs) and as accessible as possible to the public to consume.
- Should not use social objectives to set the cap as this will force the fishery to be inefficient and industry would not be able to deliver to the public an inexpensive protein product.
- If you need to use a percentage cap definition; then, it should be 100%. We need a wording definition not a percent definition. We should say unless the control is such that an entity/individual controls the market place, then the Sherman Antitrust Laws should come into play and their rules apply. This is what the original definition under Amendment 8 stated.

- We are competing in the market place not only with domestic production but international production as well. For example, Clearwater in Canada which harvests surfclams, a slightly different species, we harvest *Spisula solidissima* (Atlantic Surfclam) and they harvest *Spisula polynyma* (Arctic Surfclam) which looks exactly the same except for some discoloration. In addition, they also catch some *Spisula solidissima* mixed with other species. They make fresh, frozen, and cans products to compete directly with our product as an ingredient in soups. They [Clearwater; one company] own 100% of the allocation in Canada, so we are already competing against a company that has the entire clam allocation for a nation.
- When we look at competing in the market place, we have one of the largest fisheries in the world that produces fish meal (an ingredient) and is not under an ITQ system. It is a quota based fishery and one company produces/controls over 90% of the fishery (Omega Protein). This fishery is actually a more critical food stuff when compared to surfclams and one company controls the bulk of the production.
- Another fishery that we manage and is by default close to 100% controlled by a single company (The American Red Crab Co.) in New Bedford, MA. Again, this is just one company producing crabs that compete with other crab products in the market place.
- The clam fishery then is not unique [in the consolidation process], but they are unique in that the clam fishery is very industrialized when compared to some of those other examples above. The integration of the clam fishery provides steady product, supply, and jobs.
- The golden tilefish IFQ program has a high accumulation cap and tilefish is a center of the plate product which would make it more valuable, and still is one small fish competing in the market place.
- Do not see the public benefit of imposing a percentage cap.
- GARFO says that there is no definition of excessive shares and yet GARFO's office successfully defended Amendment 8 in litigation and argued that antitrust rules could address potential market power issues. Need to bring this record to the attention of NMFS.
- The ITQ system allows people to control their destiny. The current rules have allowed for vertical integration needed for the fishery to operate efficiently.
- Significant financing is needed in this industry. Allocation holders use their allocation and its asset value to finance their operations. The system has created efficiencies.
- Do not want the Council to pull the rug out of this management regime. This will affect the financing that is needed for the industry to operate. We need market stability.

Goals and Objectives

- In general, the goals and objectives all had to do with addressing the significantly overfished status of the fishery in 1977, and the existence of significant excess harvest capacity and pressures on people to fish in bad weather, multiple crew use, and overload. Because time allowed for fishing. In 1977, they were allowed about 96 hours/week for fishing and it decreased to 6 hours every two weeks in 1990. The goals and objectives in Amendment 8 were developed to address these problems.
- The goals and objectives in Amendment 8 allowed for safe fishing, better use of capital, and better husbandry of the resource.
- The goals and objectives are reasonable and they continue to help. Would not like to see any changes made to them.

- Do not have to go thru the full extent of an Amendment to review how well goals and objectives have worked. Hopefully the public scoping meetings will reveal that the goals and objectives in the FMP are working and this can be taken out of the proposed Amendment.
- Would have liked to see the work on goals and objectives that the Fisheries Forum has conducted thus far.
- Goals and objectives have provided a lot of flexibility to address issues in the fishery since they were developed, in fact they had helped address issues that we not even anticipated when these were developed (cooperative research, surveys, etc.). The goals and objectives developed by the Council in Amendment 8 and implementing an ITQ has fostered flexible management and husbandry of the resource.
- Changing the goals and objectives will delegitimize the Council's success in this management program.

Dave Wallace, Wallace and Associates

- Firm represents a portion of the surfclam and ocean quahog industry.
- Confused about the way the goals and objectives are being addressed. The goals and objectives were a separate issue at first and then included in this Amendment.

Goals and Objectives

- Involved in the fishery prior to the MSA implementation in 1976.
- The clam fishery was the first fishery managed under Federal rules.
- Owned a clam boat and two shucking plants before there were any federal regulations on fisheries.
- The clam fishery was the first fishery to be managed under the Federal system was because they were conducting a booming and bust business which magnified the lack of balance and the industry recognized that they were the problem.
- When industry found a big bed of clams they would hammer it, land lots of clams, and prices would be depressed. Then, the fishery would collapse, the price would skyrocket, and customers would be upset. More people would jump into the clam business because of the attractive clam prices and the cycle would continue.
- Industry wanted to fix the boom and bust cycle in the clam fishery and worked with managers to develop the ITQ system. At first, we had the rudimentary limited access fishery which was very complicated. Had about 168 boats harvesting the 1.8-million-bushel quota very fast. Fishery was managed on a day to day basis, and a large amount of technical support was needed (Council and NMFS).
- Clam prices would range from \$8 to \$12 per bushel. When prices were \$12/bushel, lots of people would enter the fishery and when the price went down to \$8/bushel people would go out of business.
- Industry wanted to address the problem associated with the limited access program and allow people to exit the fishery without going bankrupt.
- The limited access program required substantial management efforts from the Council and NMFS.

- So, some very smart people; Pete Jensen, Lee Anderson, and other people from academia developed the FMP goals and objectives under Amendment 8 to address the problems under the limited access program.
- The group of objectives were developed to be flexible enough to allow the NMFS and Council to get out of the time consuming day-to-day management.
- The goals and objectives were developed to provide flexibility, allow the industry to operate efficiently, and decrease the regulatory burden. The allow for changes to be made by industry and not the government as long as overfishing is not occurring and regulations are not broken.
- Already have huge penalties for violating regulations. We have not seen any violations in the last 20 years (except for some state operators).
- Recommends that not a single word to the current goals and objectives be changed. If the Council agrees with this recommendation, nothing needs to be done about it and this can be dropped out of the Amendment. If the Council agrees with this recommendation the NMFS would not be involved in the process.
- Do not need to change something that is working well.
- Industry has help with the assessment process by providing an efficient survey platform.
- If you want to change something then state that the goal is to sustain an efficient clam fishery and the best management plan in the Country or the world. Because we have high ranking federal scientists indicating that the Surfclam and Ocean Quahog FMP this is the best managed fishery in the Country and potentially the world. Why would want to mess with it?

Excessive Shares

- Excessive share(s) is a quagmire that the Council has no clue how complicated that is.
- Expert witness for the Justice Department (not for the industry) in 1992 when a few processors sued to undo Amendment 8 [these processors did not have quota and wanted a cap accumulation to be specified]. Judge Doumar [who was the most antigovernment federal judge that Wallace had heard of] ruled on the notion of excessive shares – that the best way to assess excessive shares was to use the provisions under the Sherman Antitrust Act as intended by the NMFS and Council under Amendment 8.
- Processors represented by Tom Alspach furiously fought back trying to force a cap, especially a very low percentage cap, they wanted to keep a lot of very poor fishermen completely dependent on them so they could abuse them.
- Judge Doumar concluded that the antitrust laws under the Sherman Antitrust Act was a perfectly reasonable way to control what could be construed as excessive shares because antitrust has a whole series of thresholds that you must have to then say this is an excessive share or restriction on trade.
- We need to make sure that the industry has the flexibility to operate and make the adjustments necessary as the world changes. If we do not do that, we are going to go back to the day-to-day management of the fishery.
- The existing function of antitrust is perfectly adequate to address this issue, as soon as John Bullard leaves this issue will go away. He is the only person [that he knows] that seems to be focus on the same process that they did in New England to address excessive shares and what a mess that is. The excessive share cap in the scallop fishery has frozen 370 boats into the business. Job well done!

- Omega Protein used to be Zapata fisheries (based in Huston Texas) and James Howard Smith Co. (based in New Jersey). Each company had about 45 percent of the menhaden business. When they were to merge, they understood that there could had been possible antitrust issues as the merger was over \$50 million. So, they approached the Department of Justice and explained that they sell protein units that are set worldwide at a specific price that competes with other proteins (e.g., corn); therefore, even though they had 90 percent of the menhaden business they could not control pricing or drive the market. So, having 90 percent of the business was not anticompetitive at all and the merger was approved.
- The Surfclam and Ocean quahog fishery competes with shrimp, finfish, chicken, pork, etc. and cannot control pricing. You can buy boneless chicken for ~\$1.90 per pond, just pure protein. You cannot buy any clam meat for \$1.90 per pound. In addition, we are selling a minor ingredient product (to make clam sauce, clam soup) to Sysco, Campbell's soups, Heins, General Mills and they set prices. When they sell canned clams to Sysco, US Food Service, Red Lobster, etc. they [processors] also have no means to influence prices.
- Bottom line - we do not need a limit on excessive shares. Commissioned reviews on excessive shares and work done by Lee Anderson and Mark Holiday indicate that antitrust formulas are good to address this issue and that no market power exists in the industry. So, no justification for having a cap.

Tuesday, July 11, 2017: Internet Webinar

Hearing Officer: Stew Michels

MAFMC Staff: Jessica Coakley, José Montañez

Attendance (4): Peter Himchak (LaMonica Fine Foods), Tom Hoff (Wallace and Associates), Dave Wallace (Wallace and Associates), Joyce Rowley (News correspondent).

Dave Wallace, Wallace and Associates

Goals and Objectives

- About the objectives, we have looked at them very closely on multiple occasions. I am an advisor and was interviewed by the Duke University group. The objectives that have been in place for 30 years, they have served the clam industry very well, to the point that the clam industry is considered the best fishery in the United States and maybe the world.
- The fact of the matter is what is so great about it is, it is extremely flexible and allows the individual companies and people that are participating in the fishery to manage themselves versus a whole series of complex rules that make it very cumbersome for both the industry and government to try to remotely manage a highly dynamic ever-changing fishery and the environment in which the critters live.

Excessive Shares

- As far as excessive shares are concerned, the fact is the excessive shares issue was raised all the way back in the beginning of Amendment 8. There were a group of processors who sued to try to undo Amendment 8 in the eastern district of VA. The suit was also focused on a percentage of the quota which would limit the amount of ITQs that each individual or corporation could control. That was part of the suit. The federal government, the National Marine Fisheries Service, and the Department of Justice prevailed in the suit in every way.

- So, to then go back, it was considered back then and actually highly debated to have, whether there should be a percentage, whether anti-trust regulations, which was the National Marine Fisheries Services' idea would prevail governing who owned what portion of the clam ITQs. National Standard 4 was exactly the same back in the '80s when this was written so this is not a new requirement. This is an old requirement.
- National Marine Fisheries Service approved it [Amendment 8] 30 years ago and implemented it 27 years ago and it has served very well. There have been a number of different groups who have been hired to look at this and it was peer reviewed and they all used the formulas in the anti-trust statutes to conclude that there is no excessive shares in the clam fishery, and so if we then, if the Council decides to implement a percentage cap, the only thing that can be expected, if the cap is high enough, industry will not bring suit.
- IF the cap is too low and too restrictive what will happen is the industry will file suit and we will just use the court's opinion and the National Marine Fisheries Services' opinion of 27 years ago. This is actually an impossible situation for NMFS. They defended in court their decision that anti-trust was a perfectly adequate way to protect this industry. The courts agreed with them. They decided to change their position and if it goes so far, the courts are going to say, how did you do this. We agreed with you originally and continue to agree with your position originally. It's clear that if we go down this path, that's what's going to happen.
- I strongly urge the Council to seriously consider if they want to get into this because it is far more complicated than most people imagine and none of the real serious issues have been addressed. That's all I have to say. Thank you.
- Question – Dave, what does the industry think is a reasonable cap? That would not disrupt the way the industry operates?
 - Response - As you know actually when Lee Anderson was involved, he and I had a discussion and if you remember way back when there was a whole series of percentages, the top one was 70% and if my recollection is clear, that was the number that Lee and I came to the conclusion that at that point no one in the clam industry was going to be bent out of shape over it. They would accept it, not because they like it but because it's not worth fighting over. But if you go down to 20 -30-40%, there's no question that in my mind that you are, that's implemented then NMFS need to know that they will be sued the day they implement it, because that will be prepared. You know, maybe they don't care, but they're going to be embarrassed because the justification of the suit is a court ruling in their favor.

Tom Hoff, Wallace and Associates

Goals and Objectives

- I'm Tom Hoff and I work with Wallace and Associates.
- First of all, I would like to address the objectives.
- The four objectives I would advocate that not a single word be changed in them. Therefore, you don't need to include them in any amendment.
- Part of that rationale is, as I mentioned down in Norfolk last month, the sub-group of the Committee that developed those objectives, were kind of in my mind the fathers of fishery management. You had Dr. Lee Anderson, Dr. Bill Hargis from VIMS, you had state directors Pete Jensen and Russ Cookingham from NJ, and Regional Director Dick Shaffer.

- They fought over those objectives and the Council fought over them word-by-word for almost a year, from 86 to 87. So, I would advocate for the amount fought by very good, knowledgeable people, and the amount of effort, they should not be changed at all.
- The government regulations and the private costs of this FMP have been minimized which was one of the goals and objectives.
- Industry has spent nearly 30 years operating under these four objectives and they made their business decision based on those objectives. So, I would strongly advocate that those four objectives remain unchanged.

Excessive Shares

- In terms of excessive shares, Dave covered a lot of the background and I'm sure if Tom Alspach is here which I'm sure he is, he will, he will be covering even more.
- I've been involved in this clam fishery for about 35 years and I've never seen an issue that is such a needless morass of sucking time and resources as this one issue of excessive shares.
- I have never seen the clam industry so united and opposed to one idea as they are to these excessive shares.
- When you came into clams in 2011, we had that 3-expert workshop up at Woods Hole, and they concluded that there was no control of market power back then. I can't image that anything has changed in the last six years. The workshop concluded as I'm sure you are very familiar, that excessive shares all comes back to how you define the relevant market.
- That's going to get you in such a can of worms that you're never going to get out of it José.
- Prior to you joining the clam group, we held scoping issues (?) specifically on excessive shares in the spring of 2009. We had 3 alternatives that we went out to public hearing with. The first one was a no-action alternative. The second one was to implement a percentage share cap and we had percentages of 22-33-50-70%. The third alternative adopt the Department of Justice horizontal merger guidelines. Now the reason we picked those specific percentage shares during the scoping hearings in the spring of 2009 was that the 22% represented the maximum that any entity had at that point in ocean quahogs. The 33% was kind of arbitrary and copious and simply it was designed to make sure there were at least people involved at all times. The 50% followed the tilefish example that you developed where I think you had 49% but you rounded it to 50% and said excessive shares over 50% that's what it would be. The 70%, as Dave pointed out, was between him and Lee, was that it also had justification of the Justice's guidelines of mergers and up to that point had not been an issue of excessive shares.
- We went to public scoping just as you're doing now, it was much more fully attended than I think these meetings based on last night and today and we had one comment positive comment saying that it should be 50%. Everyone else, all other comments both written and verbal supported the no action alternative and everyone argued that the Amendment's anti-trust regulations were sufficient.
- That's the background of what we did a decade ago. As you said early on, this has been going on since 2006, a little bit more than 10 years. Thank you.

Peter Himchak, LaMonica Fine Foods

Excessive Shares

- I'm filling in for LaMonica Fine Foods.
- I don't have the history in surfclam and quahogs that my two predecessors have.
- Let me give you my take on these excessive shares issue. I came on the Council in 2008 and I had not had much exposure in managing surfclam and quahogs. At that time, there were a series of Friday afternoon workshops with the economists where the clam industry represented its or trying to teach individuals on how the clam industry operated with allocations, vessel, processors plants.
- The three economists, came out with a report and they really didn't understand what they should've gotten. Even the NMFS socio economics branch was not very complementary on what they reported in context with what they were assigned to do.
- Let me give you my crude understanding of this. I associate excessive shares as market power. If you have 90% of allocation, in certain instances you may be able to call the shots because the prices are whatever and people are going to pay it. I don't see that with the clam industry. I get a lot of this from listening to webinars for hours.
- Who really had the market power? If the clam industry, if the processors, drive up the prices on their products then the soup companies and other food companies they will just convert our lines over and say well, we'll just make cream of chicken soup. This is the way I'm trying to understand it.
- Who really has the market power? The clam industry, if they go up too high on a price well then, they are hurting themselves. They don't have the power. I would argue that coming up with a percentage seems to be a futile exercise and that the status quo, and I don't know how you define the status quo?
- So that's my take on excessive shares. Whatever currently exists is working and to create something, the only thing I see is a percentage or some other mechanism. Well the percentage doesn't seem the way to go. So, that's my take on excessive shares, my humble opinion.

Goals and Objectives

- On the objectives, and I did have the benefit of talking to the Fisheries Forum people for a rather long period of time.
- You mentioned something outdated, the only thing I can see on the four objectives that might be outdated is the word in objective #1 where it says observe and rebuild. I mean, we just had two benchmark assessments that were pretty darn good. I don't know if you need the work rebuild in there. It's a minor issue.
- I don't see a compelling reason to change any of the objectives, I'm not very good at wordsmithing and this could go on forever. What's written on here, and I did have a lengthy talk with the Fisheries Forum people.
- When I see things like, #2 is a gem, you've got to realize how wonderful it is to have a management uncertainty of zero. Even 3 is great, efficiently, consistent, economically, efficient utilization. The industry, the ability and the quota over since the last, well initially since I was on the Council, I don't think the quota has changed since 2008. You have long-term industry planning and investments in the fishery.

- Bottom line, I don't see any compelling reason to change the objectives that pretty much describe a very well-oiled machine in the management of these two species. That's it.

Wednesday, July 12, 2017: Cape May, New Jersey

Meeting Facilitator: Jessica Coakley

MAFMC Staff: José Montañez

Attendance (3): Daniel P. LaVecchia (LaMonica Fine Foods), Josh O'Conner (NOAA Port Agent), Dave Wallace (Wallace and Associates)

Dave Wallace, Wallace and Associates

Goals and Objectives

- I would like to talk about some of the things that some of the people said, that I may or may not agree with, but I'd like to point them out.
- One the webinar yesterday, a person said that after looking at the goals and objectives that he thought there would be a possible word dropped in the goals and objectives and that is the word rebuild.
- I thought about that and as I have said in the past, I guess I have reviewed this at least 50 times in the last 2 months. I tried to approach it as the people who wrote it. I thought about it 30 years ago.
- They were very capable and knowledgeable people who spent a lot of time and energy developing this. So, the word rebuild currently is not needed, however, if you think about it in the big terms at some point in the future, you may need it because there may be environmental systems that take place beyond the control of overfishing because we don't overfish and overfishing is not occurring. If we remove that then we may have to go back and readdress it.
- So, I strongly suggest you not change any of the wording on the goals and objectives so it goes forward for the next 30, 40, 50 years addressing all the possible things that could impact all the things that fisheries management deals with.
- This is a remarkable group of objectives and there is a huge amount of wisdom in them, it was expansive and far-reaching and I can't figure out how to make it better. If I thought that I could make it much better I would propose it. I don't have any idea how to do that, so I think that leaving it alone and in place is the proper thing to do. So, that's goals and objectives.

Excessive Shares

- On the 2 previous meetings on excessive shares, in the first meeting I guess I would go back and say, I don't know how you're going to fix these excessive shares other than maintaining status quo.
- Don't forget that a US Federal Judge agreed with NMFS who insisted that anti-trust was the right way to do it and Joel MacDonald and the Regional Administrator and the Secretary of Commerce signed off on that.
- There was a lawsuit brought by a few processors to have Amendment 8 thrown out. If it wasn't thrown out then to go back and have the Council affix a percentage of ownership for ITQs to individuals or corporations. The judge also ruled that against that. He left

standing that this will be controlled by anti-trust, which in my opinion is perfectly reasonable.

- There is no requirement in National Standard 4 that says you have to have a percentage, quite to the contrary, it just says that you will just make sure that you will have no excessive shares.
- The simplest way to do that is to have anti-trust laws prevail because there is a whole series of formulas that all experts address this problem, went back 10 years ago and used, back to the anti-trust statutes and the formulas that they use. If you're going to go back and use anti-trust formulas, just use anti-trust.
- You don't need to make it more complicated by arbitrarily picking a number. Lee Anderson, when he was the Chairman of the Council the last time and he was also the Chairman of the Surfclam Committee at that time. He and I had an interesting debate about how this should be done. I first said, if you are going to do this Lee, you're going to have to set the number high enough unless you want to get into litigation. I don't think you would have a good case in litigation because you have to go up against the ruling from a federal judge. You will have to overturn a federal judge's ruling and you may have to go to the Court of Appeals to do that because they are the only ones who can overrule the judge. In the conversation, he said the Dept. of Justice has a formula that says that if the number is 70% or less of two companies combining for their total penetration of the market, or control of supply, whichever way you want to look at it that they will have no problems in approving that.
- In the first go around where you had the group of alternatives, that number was in there. I think it was like 22%, 22% is straightforward. That's what Snow's and Bumblebee own in ocean quahog. Somebody that had 25%, had 33%, had 50%, and maybe 70%.
- In this group of scoping meetings on Monday, another individual proposed 100% and used a justification for Omega Protein. When they merged JH Smith & Co. and Zapata and created Omega Protein, Omega Protein controls the menhaden business in the Atlantic Ocean and in the Gulf of Mexico. They have about 90% and the rest is small bait fisheries, Lund's Fisheries and others right here in NJ. There is no reason that 100% couldn't be considered. You can actually justify it.
- Every person who looked at it, all the experts said, that all the clam industry has no market power. They don't control the market, they don't control the competition. The supply is set by the federal government. They can't be manipulated by supply. There is no reason unless you want to get into social engineering, which happens all the time. In New England, just go back and read the implementation of excessive shares in the groundfish fishery which was put into effect a couple of months ago. It started off saying that no owner or vessel could own more 1/2%. When the black cod and sablefish ITQ system went into effect in Alaska, it was limited to 1%. I wrote a very strong letter to the Secretary of Commerce saying you should reject it because this is nothing more than blatant, self-interest of a couple of small boat owner who had enough power to get this through and it should be rejected because it's completely unreasonable. I stick by that.
- We need to be expansive. The clam industry is an industrial fishery. It's not a mom and pop finfish fishery where if you can't sell them to a dealer you put them on the back of a pick-up truck and sell them off the back of the pick-up truck. We catch 32 cages and a container that takes a large crane and a fort truck to pick up. We have to sell to a dealer. There are two-handfuls of processors. Those processors buy those clams because they have

to be removed from the sale and made into a saleable product, as in a whole state they are not a saleable product.

- To treat this as a mom and pop operation is ludicrous and absurd.
- I am sure there is going to be a big push to do that but I think by the time it's all over everybody is going to throw their hands up and say the status quo is the right thing to do because we haven't figured out how to carve up this baby without being arbitrary and capricious, which will then bring a lawsuit, which will then just have the judge throw it out. The industry would have to suffer a lot of pain in that process. If it were to happen and be implemented, then we can file the lawsuit.
- The clam industry is more united on this point than it ever was back in 1990. I represented the boats at the time that were going to get the ITQs. Dan and other people represented the processors who bought the clams from the boats but didn't own any boats. That conflict existed before this idea. Don't forget that everyone said, Greenpeace wrote a nice, big white paper and I was enemy #1. But enemy #1 didn't realize that he was advocating for ITQs, but he was going to get killed by that because these big multi-national corporations, which were in the business at the time, Gorton's of Gloucester, Doxie, Snow and then American Original would just buy up all the quota, then it would just be controlled by multi-national corporations. Greenpeace was wrong, the exact opposite happened. What happened was that all of a sudden, the multi-national corporations couldn't make these huge profits that they were making before. The fishermen were making money so that now they are not poor and beat up like they had been for a long time. Then these multi-national companies wanted to get out of the business because their shareholders weren't happy with a 5% profit margin, they wanted a 25% profit margin. They sold their assets.
- Dan had a little plant, he bought a great big plant from General Mills. The Truax's bought Sea Watch from the Japanese. American Original which was grossly mismanaged and split up and sold off. Castleberry bought Snow, Castleberry was then bought by Bumblebee. Bumblebee is the only major company that owns quota. Now the 900 ib. gorillas in the room are General Mills, Campbell's Soup, H.J. Heinz Co., and Red Lobster. They are the buyers on that side. On the other side are the food distributors who these little tiny companies, Sysco and U.S. Food Service. They were going to merge and the Dept. of Justice said no because that would be restraighnten (?) trade, because Sysco has like 50% of the market and U.S. Food Service has like 30%. I can assure that the clam industry who sells fried clams, chopped clams and clam juice, and some clam chowder doesn't have any market power over them at all.
- About 10 years ago, Campbell's Soup and Progresso decided to get into a competition on selling clam chowder and talking about how many ounces of clams that were in every case and in every can. They were putting more and more in and they had this big national program to promote this and it was a boon for the clam industry until we ran out of clam quotas. Then we had to raise the price and they were both furious. They said we have the solution, we are going to deemphasize clams, they are going to be at very high prices, we're just going to raise prices and we're not going to sell any by design. We have the slots, we're going to keep the slots, and that policy is in place today. The clam industry thought that we were really clever in having this short burst of very high sales and then we got to raise the price for a little bit and then our market collapsed. We shot ourselves in the foot. We had no control over it what-so-ever. If Sysco sets the specs, you have to pack their label, so they can switch up suppliers, and if they can't find a supplier to provide them with

a product that they want at this price, they raise the price to \$200 a case and just don't sell any. They don't take it out of their mix. They just run their inventory down to almost zero, have it so expensive that nobody will buy it. All the restaurants then take clam chowder off the menu, and when you go off the menu it takes years to get it back on the menu.

- Those big companies are the people who control the clam fishery and you have nothing to say about that what-so-ever.
- Not only that, and I don't know this for a fact but most of the clam processors that I know do not own any quota.
- In theory, they could buy 100% of all the clams, surfclams and ocean quahogs, and they would buy them from a bunch of whole different people who own the quota, but you don't regulate them. You only regulate the ITQs. They don't own any so you don't regulate them.
- This notion of oh yeah, they buy them so that they are the owner, they are in control, that's not going to fly. In that case, then you'll need to go to Campbell's Soup, General Mills, and H.J. Heinz Co., which is owned by Warren Buffet by the way, which is not a tiny company, it is a gigantic consortium of companies, so if you take that position, then you have to say, oh we have to go regulate Campbell's Soup, General Mills, and Warren Buffett.
- Good luck! People will just laugh themselves silly.
- Snow use to have their own fleet of boats, a shucking plant, a processing plant. They couldn't make any money with the boats. Couldn't make any money with the shucking plant, so they contract that out. They have the quota, they have the customers. They chop clams to put in clam chowder and all the rest of it is for the poor guys, They're the ones that do all the hard work and they get beat over the head and have lower prices of course. That exists today and has existed for a long time.
- Progresso owned a shucking plant and a boat, the American Patriot belonged to them. They ran into the same problem that everyone else did a long time ago in 1976 with the Fisheries Management Conservation Act passed also the Clean Water Act, that was amended but it was already in place. It was very, very lenient, it was then going to require an MPS discharge permit and that was going to be at clean water drinking standards (inaudible).
- There were 50 little clam hand-shucking plants and (inaudible) just happened to own one. They said I was discharging ¼ million gallons of water from the plant and it had clam particles in it, into a bay and I sat on an acre, ½ acre lot, and they said you have to stop discharging that water. I said if I don't have any place to discharge the water, I can't run. They said that's not our problem. Well you 30 days, here's the cease and desist, otherwise we're going to charge you \$10,000 per day. That was in the late '70's.
- All the clam plants went out. All of little clam plants were hooked to municipal sources. Sea Watch's plant in New Bedford, the waste water treatment plant is bigger than the plant and they take it down to 200 and they can discharge it into the municipal sewer. I would guess just the waste water treatment plant cost \$3-4 million.
- They have a multi-million-dollar sewer bill. He's hooked to Millville's sewer system and I know when General Mills had it they had a huge lagoon. I remember what the electric bill on that was. Anybody can go in the clam business, great time to go in, there's plenty of surplus. Two-million bushels of quahogs and one-million bushels of surfclams.
- You could make a really nice business out of just using that. All you have to do is 2 or 3, \$3 million boats, you have to build a \$25 million plant, then you have to have operating capital for inventory because you have to manufacture where inventories are high, but most

of them sit on it because the curves go in reverse and so the cash flow in the clam industry is dismal. What happened is if you get 4 turns a year out of your money, so if you're grossing \$100 million per year, you have to have \$25 million of credit or cash just to keep your business because you're only turning it 4 times per year. If whatever your sales are going to be you have about 25% of that in liquid assets so you can just pay your bills. Anybody that has \$4 or \$5 million can jump right in.

- Then they have to go to all the customer and talk to them because they are going to say well we already have suppliers so you're going to have to supply at a lower price to get in. OF course, whoever is going to get bumped out says they're not going to drive me out because of price. But if you have a lot of money you could actually, A & P did that in the grocery store business in NYC and had a huge anti-trust fine against them many years ago when they would go into a neighborhood and a lot of little stores and then they would cut the price and drive all the little guys out, the mom and pops, and then they would raise the price.
- Walmart does that today and nobody has sued them that I know of successfully for doing that kind of thing. Go to any place that has a big Walmart store and go downtown and see what you have, you have a whole lot of vacant stores because they put them all out of business.
- The clam industry is not in charge of our own destiny. The only thing that we can do is request that we have favorable regulatory rules and request that we have a quota that will fulfill our needs and we never ask for more that could be easily justified by the sustainability of the fishery.
- I represent clam processors who are vertically integrated because we are required to because there was a big conflict between boat owners, the quota holders, and the processors. The leverage was with the boat owners. You want my clams then buy my clams. You buy my boats and I'll rent you my quota.
- So, if you're going to get in the percentage, somewhere between 70% and 100%, is where that number should fall.

Daniel P. LaVecchia, LaMonica Fine Foods

Goals and Objectives

- Good to be here this evening. I was just reading over the hard-copy of the scoping document.
- Just to go back to 1988, I was there, a lot younger, but we both were there. My family owns the shucking plant and all we do is shuck.
- We shucked a lot of clams for Howard Johnson's and we shuck clams for Snow's. So, when Amendment 8 came into existence, we weren't happy with the management plan that was in effect then, but when Amendment 8 came into play we were basically out of business, unless the fishermen would now sell us their product, before they would depend on the plant to carry them.
- We would buy engines, store rope for the, it was a true partnership. I'm not saying it was always harmonious but it was a partnership, we needed each other.
- The day Amendment 8 went into effect, the fishermen, the guys who had been working the clam boats and owning the clam boats, but didn't invest all the money in the clam boats, ended up with all the allocations and the boats. So, we had we had to buy clams from them

at whatever price they wanted. That's where the problem really happened. There are no problems now that I see with somebody owning too much of the clam industry. If you go back to the objectives, objective 1 has been accomplished and is still being accomplished.

- The stock has been rebuilt, they stabilized the harvest rates.
- It minimized the short-term economic dislocations.
- If you look at the fishermen, it was good in one way, back then I was young and against it, now that I have a little more experience in the business the older guys, the older families I should say, because it was a family business. The wives, the husbands they worked together, they did the books at home and the billing at home, the guys would go out to fish, it was just the way it was back then.
- We didn't have cages back then, we used to put them in tubs, bags, and we would unload by hand. Those guys had no way out of the fishery back then. They had old boats that they scrounged together, most of them. Whenever they could build a new boat, it wasn't like a boat of today. They'd get a boat, build it themselves, there were shipyards all over the place. There was one right here in Cape May, there was probably 5 on the Morris River, and they had one in Wildwood.
- They didn't have anything to sell but some old boat, so they worked with their families, their sons.
- So, Amendment 8, when they got some of that allocation was really good for them because it gave them a little power so they could come to somebody, like my family, and say hey look, we've been doing this our whole lives, we're tired, it's a risky business, it's dangerous, we would like to sell you our boats and lease you our allocation. At least in my experience, that's what happened to us. The plan, unless we made that deal with them, we couldn't get clams. So, we made the deal, we bought the boats and leased the allocation for a 20-year term, in 4-5-year increments.
- I won't get into the details of that because it's private but that was basically what happened. In my opinion, we had to buy the boats, they would've won.
- We had to buy the boats. We had to go to the bank, borrow the money, give them the cash for the boats, and then lease the allocation for 20-years.
- Didn't buy the allocation so we had to lease and that rent we knew every year.
- Whether we caught the clams or not, pretty steep, but we did it.
- We survived. Clamming was good. But what it did was it minimized the short-term dislocation for the people we bought it from. It probably made them wealthier than what I think they should've been. If that had not have happened, they probably had no exit strategy in their business, except to fish until they died. Then the son takes the boat or the wife sell it for whatever the market will be.
- In #2 of the objective, it says to simplify to the maximum extent the regulatory requirements, again, that's done, again back in '88, '87, through the whole 80 and back into the late '70s when the FMP first went into effect, the Magnuson Steven Act. There were actually agents at the dock.
- NMFS ran the clam business on a day-today basis. One and 2 have been accomplished, 2 is still being accomplished, as is 1.
- I don't see any regulatory issues the way we are being managed right now. You catch the clam, put a tag on it, the dock reports it, the plant reports it, it ends up at the fisheries service, they match it up, if they don't match up we get a phone call, we actually call them if we're missing a tag, it's a great system.

- The government did something right, they got that one right. It works good.
- As far as a management resource without a lot of enforcement. Nobody wants the police at their place every day. And that's the way it used to be. At least once a week there was an enforcement agent. That was their job, you had to stop what you were doing, take them around, check the clams, but now with the tag you don't have to. It's been awhile since we've had enforcement. They come to the dock but not too much anymore.
- Number 3 has been accomplished. So, we operate efficiently, consistence with the conservation of the resources, the harvesting capacity is in balance with the processing, the biological process, I mean the biological capacity has actually increased. You ask, should there be any changes.
- For 1, 2, & 3, I don't think there needs to be any changes. I really think the system is working well.
- Four, I don't know how much more flexible we could be. We probably used to be more flexible, the management, participants, and industry. But I don't know how that would ever get solved. It's a slow process with changes, whether you want something done or we go to you.
- The clam industry may be this thought somehow or somebody owned all the clams, they could raise the price to whatever they wanted or even if you owned the majority of them and that is just not true when it comes to the clam business. We are an ingredient to food people. We not a product that somebody needs so bad that they are going to pay anything to get it. I don't any product that really is that way, because you are going to find an alternative.
- Dave brought up the point about Campbell's Soup and Progresso when they had that war, the clam war, the clam chowder war. Just to refresh your memory that's, back when Donovan McNabb played for the Philadelphia Eagles, he was on the commercial with his mom, those were the clam chowder commercials.
- What happened was, whoever he was advertising for, whether it be Campbell's or Progresso, probably Campbell's, Progresso said well we have to do something, they're cleaning our clock, so Progresso doubled the amount of clams in their soup. So, the competitor reacted to that and sucked up every clam out of the market. Campbell's back in the day only bought from two companies, they wouldn't buy from my company because they had commitments. We had to sell our clams to the intermediary company to be resold to Campbell's. But they actually called us up and said we will pay any amount because Campbell's had fill those orders and so did Progresso. Now there were two people who had to make a profit on it. So, the price went up to Campbell's and they said well clams were \$1 per pound we can't pay \$2 per pound, but we'll have to pay \$2 per pound because we're paying Danny \$1 per pound. We have a right to make money on them. So, they said we're not doing this anymore and that is exactly what happened. They folded. What happened was we were getting paid so much from the intermediary company we supplied that cut-off to the other people that were selling clams. They took it off the menu.
- The clam industry still has not rebounded from that, 100% it has not rebounded from that problem and what was that 12, 15 years ago. And then we had a recession. So, try to corner a market is unreasonable. It's a great idea to just sit around and go oh man, if I could own every clam, they just have to come to me for the clams.
- Look at chili. Most clams end up in clam chowder, what is not sold is fried clams, you're getting clams in clam chowder, it's an ingredient, there is more potatoes in clam chowder

than clams. When ground beef went up you used to have a lot of chili. You have to remember everybody was advertising chili. Ground beef went up, where's the chili. Do you see it advertised much anymore? You go the soup station in the supermarket there's chili there every once-in-a-while. Clam chowder used to be on the menu 5 days a week. It's now on the menu on Friday's in most of the restaurants in the country who still serve clam chowder, because clams are expensive now. Ground beef is expensive now. I had one soup manufacturer in the mid-west, who is a big chili manufacturer, a small clam chowder manufacturer because of their location, say that chili was their #1 selling soup, and now it is cheese and broccoli. That was a while back, chili may be back as the #1, I don't know. Clam chowder, even if we did have a lot of clams, I mean there's still clams in the ocean, nobody is building boats to get them because clams are expensive. There are other proteins that take the place of clams. Chicken noodle soup, chicken is a cheaper protein. Popeye's, you talked about Red Lobster, we use to sell to Red Lobster, 2 million pounds of clam strips. We used to split with Sea Watch. We used to sell 4 million pounds of clam strips. I tried to raise my price a nickel, I lost the business over it because I was inflexible, a nickel, now Sea Watch has the business. Now their clam strip sales are down to a million and a half pounds. I don't really know what is because that restaurant, Red Lobster was sold off. I believe it's because they didn't buy my clam strips. Popeye's about 10 to 12 years ago was looking for an alternative for a Lent special to put clam strips on the menu. We were courting Popeye's for about 18 months, 6 months before lent the previous year, we came this close and we knew we were competing with shrimp, whether they were going to go with popcorn shrimp or clam strips on the menu. Shrimp are more sexy than clam strips, people just like shrimp more than they like clam strips, there's nothing we can do about that. Popeye's loved the clam strip, they were going to put their spicy coating system on it but when the shrimp came in the clam strips obviously were not in there, you can see the shrimp in the advertising. So, to think that if you owned all the clams that you could control the market that is just not true. Buyers control the market. Bids we get from Sysco, US Food Service, IMA, PFG, every one of our bid sheet requests we put our cost on that bid sheet. I can tell you yes, we fight tooth and nail not to do it and in some cases, we won't do it, but they want to know cost, they want to know our overhead, what we pay for the clams. And if you sign that bid they have auditing rights. If you're selling Sysco, if you are nationwide supplier, and you have all that business and you sign a contract with them, a multi-year contract, they can say we think you are charging us too much, we want to come in and audit your books and see how much your costs really are. It's just not that simple in today's market with all the technology and all the smart people that are out there working for these major companies to try to get over on them by jacking their price up.

- Dave talked about the multinationals getting out of the clam business. He mentioned the Japanese, actually that company was (?), huge Japanese food company, they dwarfed the clam business, hundreds of millions of dollars, billions, they go out of the clam business. Doxie was another major company, owned the boats, owned the shucking plant, they sold out to Snow's and then Snow's was bought by Castleberry. The minute Castleberry bought it he gave Peter LaMonica and I we were partners back then, they got rid of their boats, we bought their boats, and we shucked all their clams. This deal went a little different, they didn't want to do any shucking, any harvesting, all they wanted to do was can clams and market. Just like Progresso, just like Campbell's, just like Heinz. They don't want to get their hands dirty. It's a dirty business, it's very tough. I bought the plant I'm in now, the

one you passed, that was owned by Gorton's, who was owned by General Mills, Riggins and Robins owned that place, who probably had a plant right next to your plant on the Morris River. They sold to Unilever and the way I got that plant was Unilever said we own a cannery, we don't want to own a cannery, get rid of it, sell it. I just happened to be lucky to be in the right place at the right time. They didn't want any part of the clam business and they had a viable business. This was Gorton's brand and they walked away from it. They kept, they wanted the frozen food part of it which was the clam strips and I don't know who makes it for them anymore and I don't even know if they make them anymore, but we don't do it.

- So, I don't know what a percent cap should be, (inaudible) to have control of the market, because we do not control the market in any way, shape, or form. We buy clams, we figure out our cost, we bring them to the plant, we shuck them, figure out the cost there, we put all those costs together, we put our overhead on it, put some profit on it and we sell and hope we get paid, and in most cases, we get paid.
- That's really how it goes, the customers are in control of us, more even so than the regulators and now with MSC coming in, the advent of MSC they are in tune to the regulating bodies than the National Marine Fisheries Service. So more than ever these lines are starting to come together. They want to know where we're getting the clam from, what are management plans are and what we're making on the product, what is costs us to harvest, it's tough to try to sneak one by on these customers today.
- There are people still getting in the clam business. A small plant just opened in New England that I think. It's like a 10-person shucking operation. They have 2 or 3 little boats, Nantucket Shoals Seafood. He was a small operator. He still owns 3 small clam boats. He broke away from Galilean. It's a small operation but he will eventually grow and buy another boat. You know, there is still allocation available.
- So, nobody is going to own 100% of it. I just don't see it. I don't see putting a cap on it.
- A low ceiling to hurt the people that are already in it.
- We've made huge investments into this business. It would hurt us unfairly I think. Maybe the number is 80%. I don't know about 100%. The last man to sell out would want so much money. Then you have anti-trust. You know, if one of my competitors start buying somebody else, I'm going to step in. That's really all I must say.
- I think would be somewhere in the high numbers say the 80 percentile if you could even acquire that much. Thank you.

Dave Wallace, Wallace and Associates

- I would like to add one more thing that most people don't know.
- We have other regulators other than the National Marine Fisheries Service.
- We have one that is pretty obvious and that is the federal and state food safety people, FDA, then all the state health departments. We also have the U.S. Coastguard.
- The Congress 4 or 5 years ago passed a law that said any new vessel after July 1, 2014, I think, has to be an inspected vessel if it's over 70' in length. There were a whole lot of (inaudible) vessels prior to that date, had it welded in and certified to try to beat the system to some extent. However, the Coast Guard finally said we won't accept any of those anymore because they were never a real contract to build (bill) with us, those were just trying to beat the system.

- Seven years ago, a new clam vessel was launched that cost between \$3 and \$4 million.
- A month ago, a vessel just a little bit bigger than that but the same general design was launched and it is 3 times as expensive just to comply with all the new regulations.
- The other problem that that law says that any vessel over 25 years old then it must have an inspection every few years and it has to meet a whole new set of safety that inspected vessels have to meet but they don't have to tear the engines apart like you have to do with an inspected vessel. At some point the maintenance on those older vessels is going to be so staggering that you're going to have to build new vessels to replace them.
- The clam industry has to be able to make money and can't be beat up by the fisheries regulations.
- We are already being beat up by the FDA regulations, they are just getting tighter and tighter.
- I used to be on the Board of Directors of Interstate Shellfish (interference) for a number of years, so we are in a situation where the federal fisheries regulations and state fisheries regulations are actually being usurped as far as the severity of the other regulatory agencies.
- If the clam industry has a chance, I don't know what the scallop industry is going to do. Their boats fish 50 days a year and you're going to have to replace a 100' scalloper that going to cost \$4 or \$5 million, you'll never pay for it with 50 days per year. The reason they are making money now is because they are using old vessels that are paid for, but I don't know how they are going to do it.
- So, what we need to make sure is that we don't get regulated to the point that we can't make the adjustments that these other regulatory agencies are demanding that we make. We don't have a choice.
- If you need a new vessel then these are the standards. The first thing you have to do is write the American Bureau of Ships and write a check for \$140,000 for them to start looking at the plans of the ship. They went through it weld by weld, they looked at every weld and every specification and so this is what we have to look forward to?
- In Canada, they have inspected vessels, they have clam enterprise allocations for Clearwater Seafood is 100% of the surfclam (inaudible) quota by Clearwater, they are shuck (?) fishing on Backrow (?) Banks and Grand (?) Banks. They have to shuck at-sea because they are 200 miles off shore.
- Their new vessel [Clearwater Seafood], which is an inspected vessel cost \$75 million. It is very effective. They are catching so many clams that they are dumping them in the United States, so we have that competition to deal with also. They have taken a huge of the chopped 51-ounce clam business.
- When I was Chief Operating Officer of American Original we sold 500,000 cases, that was a long time ago. Now the whole market may be that but Clearwater has maybe half of that because it's a good product and it's cheap. That's the other nightmare scenario that we have to deal with. If people want to turn the screws on the clam industry and their regulator then everybody else goes along with it except for the clam industry kicking and screaming. You can put them out of business, we know we can be regulated out of business.
- There are lots of people on the Council who actually don't even contemplate that. They think oh that's a good idea and then when we ask, can we get fined for having mixed clams, quahogs in the surfclam cages or surfclams in the quahog cages, oh no you can't do that because we have to have excessive shares, excessive shares has been going on for 10 years and it's going to go, at best it's going to go another 10 years.

- If you actually decide to get into this you going to find out what a bag of worms this is.
- You don't have any definitions of the things you talk about. Simple ones. You want to set a cap, set a cap on what? Set a cap on surfclams, going to set a cap on (inaudible), going to set a cap collectively, is the cap on the total quota, or is it on what's caught.
- There is this notion that clams are under the control of whoever is leasing them so they should be punished. Let no good deed go unpunished. We run into that all of the time.
- This is the best management fishery in the country and there are lots of people who say, oh, we have to hurt them.
- We need to make sure that the Mid-Atlantic Council and the National Marine Fisheries Service doesn't break the best managed fishery in the United States, and it's possible.

Monday, July 17, 2017: Berlin, MD

Hearing Officer: Howard King

MAFMC Staff: José Montañez

Attendance (5): Debbie Rouse (DNREC-DE), Dave Wallace (Wallace and Associates), Tom Alspach (Sea Watch International), Guy Simmons (Sea Watch International), Earl Gwin (Incoming/appointed Council member for 2017, MD)

Tom Alspach, Sea Watch International

- Represents Sea Watch International Limited.
- Processor of surfclam and ocean quahog. With processing plants in New Bedford, MA; Easton, MD; Milford, DE; Mappsville, MD.
- Presentation indicates that GARFO has indicated that the FMP is not in compliance with NS4. So, is it the position of GARFO that the NMFS and the Council has for the last 27 years operated the FMP outside the law? Not in complying with the law.
 - Response - I cannot comment of their view on that issue [that the FMP has operated outside the law]. However, I can tell you that general council has indicated that we are not in compliance [deficiency] with NS4.
- The second question is regarding possible alternatives for defining excessive shares. The scoping materials provides as examples a specific percentage to set a cap or a measurable definition of what constitutes an excessive share. My question is what is the definition of a measurable definition?
 - Response – For example it could a type of index such as the HHI index¹ that the Department of Justice [DOJ] uses to assess market power. We do not have specific ideas [a list] of potential measurable definitions to be incorporated into the analysis and we are seeking information from stakeholders about potential measurable definitions that we could consider. If you don't want a percent cap, then is there something else that could be used? Something that can be measurable so when that threshold level is crossed we know that is excess accumulation of shares.
- Is there something in NS4 that says that it has to be measurable?

¹ The Herfindahl-Hirschman index (HHI) is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers, and can range from close to zero to 10,000. The U.S. Department of Justice uses the HHI for evaluating potential mergers issues.

- Response - No, I don't think so, but it has to be measurable so we know when the line has been crossed. But again, the FMAT has not met to address these issues. When the FMAT meets, that group may come up with something else that is a good measure [of excessive accumulation].
- So, the Secretary of Commerce, the National Marine Fisheries Service (NMFS), and the Mid-Atlantic Council said in 1990 that the definition of excessive shares is a number of shares that would violate the Antitrust Laws. Where all of them wrong?
 - Response – No, I don't think that they were wrong. The issue is that the NMFS has now indicated that there has to be something that is measurable, something that we know that if reached, at that point, there is an excessive share accumulation. I don't know where the FMAT and Council discussions will go regarding what constitutes an excessive share accumulation. But, I think that we will have a wide range of alternatives. During some of the scoping meetings people have mentioned concerns because of low percentage share accumulations in other fisheries (1%, 2%, 5%, etc. caps). I cannot tell what the FMAT will recommend and I don't want to speak on their behalf, but I think that the FMAT will consider upper limits that are high. The issue from the perspective of Amendment 8 is that the DOJ will only review mergers and things along that line but if there is an excessive share accumulation [that could potentially lead to market power], the DOJ may not be reviewing that. That is why we need some type of measure or value and when that value is crossed, then we know that there is excessive share accumulation.
- You realize that the Courts have struggled for 150 years with defining what amount of a product or service or whatever constitutes an excessive share and they have not been able to do it. This has never been done what we are embarking right on now.
- The practice has always been to have as one of the alternatives a status quo alternative. I have argued in the papers [comments] that I have submitted that the status quo for excessive shares is what the Council and the Secretary of Commerce said it was when they adopted Amendment 8 [27 years ago] and that the Antitrust Laws control what an excessive share is. Will there be an status quo alternative in the Amendment?
 - Response – Yes.
- The quantification of shares held by individuals from the newly implemented reporting program has been completed for the first year and now is being done for the second year.
 - The data has been collected, still working on assessing the level of business relationships between different corporations and companies [individuals]. This will help in assessing share accumulation levels but work still in progress.
- Would you need to have that work done before the FMAT assessing alternatives? Let's say that a range of alternatives of various percentages are developed, then wouldn't you need the current share accumulation levels to help identify range of alternatives?
 - Response – I don't really think so. The reason is because whatever value is chosen to reflect what an excessive share accumulation is, that value is not connected to what the accumulations are right now, now this is my opinion, the FMAT may think otherwise. Ideally, it would be good for us to have the current share accumulation levels sorted out to better understand what is going on. The hopes are that by the time the FMAT meets to develop alternatives that information will be available.

- Will the ownership data be made available?
 - Response – The quota allocation data is available right now at GARFO’s website. The quota allocation data information from the new data collection protocol will be available as long as there are no confidentiality issues (e.g., lease price, sale price). So, for some type of information there may be aggregate tables. But the overall ownership, as far as share accumulation or control, as far as the percentages for the whole fishery that will be available. For example, for the golden tilefish fishery [IFQ] we have collected information (e.g., prices on sale/lease of IFQ) for some time and cannot disclose some of it because of confidentiality issues. Because of low number of transactions. I don’t expect that this will be an issue for SCOQ because of the large number of transactions.
- The Council has been working on this excessive share definition for at least a decade now without success. The problem with continuing to push forward with this effort, in the perspective of the clam industry I represent and others in the industry as well, is that this is a solution in search of a problem.
- It is clear that we have an industry where no one has anything close to market power; three independent economists [commissioned studies] studied the industry and concluded that have. We take only 50-60% of the available ITQ, so no one can claim that they cannot compete because they cannot get ITQ shares.
- There are plenty of ITQ owners out there would be delighted to sale or lease ITQ shares for reasonable amounts of money; since they are getting zero for them right now.
- The whole effort of excessive shares was driven by the notion that we need to prevent one or more strong actors from making an industry anticompetitive and we do not have or have ever had that issue, part because of the unique nature of our fishery. After ten years of addressing this problem from time to time, if it is a problem, you have not had any members of this industry coming to you and saying . . . I cannot compete, I am being foreclosed from the market, I cannot get in because someone bigger than me is keeping me out. That is not happening and is not going to happen.
- So, in those circumstances, to go thru this two year or more process of trying to establish what has to be an arbitrary number (%) seems a colossal tax payers waste of money. Because there is no problem that is being addressed by this action. Apparently for some notion of some layer at GARFO that says that we are not in compliance with NS4. To which I have to say, his predecessor did not think so, the Department of Commerce did not think so for 27 years either.
- I don’t understand why we are pursuing this as vigorously and rigorously as we are at this time.
- Thank you for the chance to speak.

Dave Wallace, Wallace and Associates

- Represents the majority of the processors, crews, and vessels.
- I probably have already given more comments than everyone else put together.

Goals and Objectives

- I want to talk about the notion that the goals and objectives need to be reconsidered. And, that they are going to use the reconsidered and they want to use the summer flounder model as an example of how you have to change goals and objectives.

- There could never been a bigger mess in fisheries management than summer flounder. Biomass implication [in bad shape], fish are too small, need to catch bigger fish, commercial and recreational allocations, state-by-state ITQ, they don't call it an ITQ, but that is what it is.
- The SCOQ fishery is much less complicated, so why would get lumped into that category when revising the goals and objectives? Why do we want to use the same approach to develop goals and objectives?
 - Response – We are not using the same overall approach to develop goals and objectives as it was done for summer flounder. We are just using the Fisheries Forum to contact stakeholders and managers to ask for their input regarding the current goals and objectives in the FMP. I could be wrong but I think that the goals and objectives of the summer flounder program are not completed yet. The Fisheries forum did not develop goals and objectives for summer flounder as far as I know, they just facilitated information gathering and discussions. The Fisheries Forum is helping the Council obtain valuable information regarding stakeholders and managers views on the current goals and objectives for the SCOQ FMP. This information is very valuable to the Council and it will be the Council that has the final decision on what those goals and objectives will look like if changes are made.
- The NEFSC assessment scientists have for 25 years have been saying the SCOQ FMP from their perspective is the best managed fishery in the United States and perhaps the world. The MAFMC for the last 25 years has taken bows for generating the best FMP in the United States and maybe the world.
- The way they got there was through this extensive goals and objectives, they are all goals in the FMP. There are four objectives in the FMP that are extremely flexible and have helped managed the fishery in the past and can also address potential future issues.
- The goals and objectives are flexible with an easily managed fishery. But if you want to change them; then, you are really looking for some way to change the management system. Because now, the goals and objectives we have and the management system we have match.
- If you change the goals and objectives then you have to change the management system to make them complement each other.
- The industry truly believes that this is well managed fishery, we don't overfish, we don't have an enforcement problem, it just goes on and on and on.
- Our product is an ingredient and not a center of the plate product. So, Campbell's soup, General Mills, H.J. Heins Co., Red Lobster, Sysco, U.S Food Service, those are the people that you need to manage because they are the people that control the business. They have the market share, they are not regulated at all.
- The people that I represent are adamant that the current goals and objectives need to be maintained.
- We need to have input into the FMAT's considerations and they cannot just go on operating in a vacuum. That is what they do now and that is not fair. In the good old days, the industry actually generated most of the ideas for the FMP. Since Amendment 8, we had a whole bunch of amendments; no one of them did anything except take away the rights that amendment 8 provided.
- It looks like there are people in authority that cannot stand a well manage fishery and they have to go and manage it for us. We have suffered from 13 years of that before Amendment 8, when we were in a time allocation system, and a fixed quota, and NMFS headquarters

in Gloucester had three of four people working full time just to try to stay ahead because the fishery changed so fast, and they have to develop one amendment after another just trying to control it.

- Take home message, do not change the goals and objective, leave as them as they are.

Excessive Shares

- It was the NMFS's idea to use the Antitrust Status to manage excessive shares.
- It was even litigated in front of Judge Doumar when the processors sued against Amendment 8. Tom forgot to tell you that Judge Doumar ruled that the excessive shares structure in the plan was adequate and within the law and that there was no real reason to change it.
- If you change, it will become arbitrary. You collect all these data but still when you make the decision that nobody can have more than 5%. People whom invested tens of millions of dollars to buyout the people that wanted to leave since we were grossly over capitalized [will be hurt].
- This was an industry funded buyout, so if you want to completely destroy it and brake all the people in it, then set a low cap.
- In the three meeting before, there were two statements indicating that if you wanted to be arbitrary then set the cap at 100% [first meeting]. Another person said 80% and the last go around. When the excessive share amendment that got table, it had 70% as its highest value.
- Those number have been thrown out, all for the same reason. They are so high there is no way they can be obtained.
- The point is, you still will not have market power at those high values.
- Omega protein is a classic example of that. Where James Howard Smith Co. and then Zapata wanted to merge, they each had over 45% of the menhaden fishery in the gulf and in the Atlantic.
- They went to the Department of Justice, they indicated that they [sell protein units] compete against corn, soybean, and worldwide production of fish meal, we do not control this market whatsoever. The Department of Justice said that is no market power and merger was approved. They have ninety something percent of the entire quota and everybody knows it.
- We are in a very similar position. We compete against all the proteins. Boneless skinless chicken breast in the supermarket I shop in is \$1.90 per pound. You cannot buy clam meat for \$1.90 per pound.
- The Council, in my opinion is being bullied by the NMFS. That already has said that this issue in unresolvable. And, we are back here again to go thru the same exercise. Einstein said, that if you do an exercise and it fails, you are just stupid to do it again. We would hope that the Council is wise enough not to do that.

Surfclam Ocean Quahog Excessive Shares Amendment
Scoping Meeting

Mid-Atlantic Fishery Management Council

July 10, 2017
Warwick, RI

-- PLEASE PRINT CLEARLY --

<u>Name</u>	<u>Company/Organization</u>	<u>City, State</u>
<u>DAVID WALLACE</u>	<u>WALLACE ASSOC</u>	<u>W.D.</u>
<u>Daniel Cohen</u>	<u>Galilee Seafoods, LLC (ACF)</u>	<u>R.I. & NJ</u>

July 12, 2017
Cape May, NJ

-- PLEASE PRINT CLEARLY --

<u>Name</u>	<u>Company/Organization</u>	<u>City, State</u>
<u>Daniella Vecchia</u>	<u>LaMonica Fine Foods</u>	<u>Cape May, NJ</u>
<u>Josh O'Connor</u>	<u>NBAA Port Agent</u>	<u>Northfield, NJ</u>
<u>DAVID H WALLACE</u>	<u>ACE</u>	

July 17, 2017
Berlin, MD

-- PLEASE PRINT CLEARLY --

<u>Name</u>	<u>Company/Organization</u>	<u>City, State</u>
<u>Debbie Bruce</u>	<u>DNREC - DE</u>	<u>Dover, De.</u>
<u>DAVE WALLACE</u>		
<u>Tom Alszach</u>	<u>SeaWatch Datacenter</u>	<u>Easton, MD</u>
<u>Guy Simmons</u>	<u>SeaWatch Int</u>	<u>Easton, MD</u>
<u>EARL R GUIN</u>		<u>OCEAN CITY MD</u>

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EASTON, MARYLAND 21601
(410) 822-9100

ADMITTED IN MARYLAND, FLORIDA
AND THE DISTRICT OF COLUMBIA

FACSIMILE: (410) 822-2550
talspach@goeaston.net

May 23, 2017

VIA ELECTRONIC MAIL

Dr. Jose L. Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Re: Excessive Shares Scoping Document

Dear Jose –

I understand that you are in the process of preparing a “scoping document” for the Council’s forthcoming consideration of an “excessive shares” definition for the surfclam/ocean quahog fishery FMP.

I further understand that this scoping document will be presented at the June Council meeting in Norfolk, and I request that you include with the briefing book materials a copy of this correspondence.

It should be important for the scoping document to address three points that have come out of prior discussions about an excessive shares definition, all of which will bear upon what the Council ultimately elects to do. Those three points/issues are as follows:

1. The MAFMC is not required to define an “excessive share” by way of a percentage cap on ITQ share ownership.

I hope that this issue finally was put to rest at the Council meeting in December, when Kevin Collins, NOAA General Counsel, just as his predecessor Joel McDonald had explained, advised that an excessive share need not be defined by way of a percentage cap on share ownership. As both Messrs. Collins and McDonald explained, the language in the Magnuson Act addressing percentage caps (section 303A(c)(5)) pertains only to ITQ plans established after 2007, and does *not* pertain to the surfclam/quahog fishery. Rather, it is only National Standard 4 that relates to establishment of an excessive share definition, and NS 4 does not mandate that a percentage cap must be placed on share ownership.

2. A “status quo/no action” alternative for an excessive shares FMP amendment already exists.

It is general practice, and indeed I believe it is a requirement, that an FMP amendment must include for consideration a “no action” alternative so that the “status quo” remains in place. This should be true of the excessive shares proposed amendment, and it is important to acknowledge that the status quo/no action alternative would *not* be “no excessive shares definition.”

This is because the status quo excessive shares definition is that which has been in place since Amendment 8 was adopted in 1990 – namely, that an excessive share is an amount of ITQ ownership that would enable the holder of shares to violate the federal antitrust laws. This position is explained at Appendix 6-2 of Amendment 8 to the SCOQ FMP (June 20, 1990), concluding that the federal antitrust laws will cover any “abuse of excessive shares.”

Of course it would be possible to tinker with this status quo definition of an excessive share, as recently was done in connection with the excessive share definition for the New England Council’s multi-species plan. There, an excessive share essentially was defined as an amount of share ownership that would enable the holder to exercise anti-competitive market power. This is similarly the approach that the three economists who analyzed the SCOQ fishery several years ago adopted in their review. In both instances, these were applications of existing federal antitrust law principles to control excessive share ownership, and that is what the status quo option should be in the forthcoming scoping document.

3. The Council, or the FMAT, must collect and consider a substantial array of market/economic data and information to support any excessive shares definition expressed as a percentage cap on ownership.

Despite the fact that it is not legally required, if the Council nevertheless should attempt to define an excessive share by way of a percentage cap, extensive economic data must be collected and analyzed.

NOAA/NMFS retained a team of independent economists who issued a peer reviewed report in 2013 that, among other things, identifies the necessary economic data that must be collected to support any defensible excessive shares definition expressed as a “percentage cap” on share ownership. As the economists explained: “There is a certain amount of information on competition that must be available to regulators for any meaningful determination and implementation of an excessive share cap.”

The economists further explained that “the relevant information the regulators must collect” includes at a minimum the following:

- (a) the scope, quantity, and flexibility of supply of substitute products;
- (b) the level of excess capacity in harvesting and processing;

- (c) the degree of product heterogeneity;
- (d) the relative bargaining power of buyers and sellers (in both the markets for shellstock, and for the finished seafood products);
- (e) the ability to price discriminate;
- (f) ease of entry for new competitors; and
- (g) efficiencies (or economies of scale) that can be obtained through a higher degree of share ownership.

The economists added that the foregoing information “would be required for ITQ transactions as well as related industry activities including fishing (harvesting) and processing.” Information on product substitution must be assembled in “sufficient detail for the determination of relevant markets”

Needless to say, accumulation and analysis of the foregoing information and data will be expensive and time consuming. But as the independent economists have explained, there will be no credible or defensible basis for an excessive shares “cap” unless all of this relevant underlying economic data is fully processed as a predicate to the Council’s final action.

It is perhaps worth noting that, in contrast, if the Council elects to stay with its current excessive shares definition – i.e., an excessive share is an amount of ITQ ownership that enables the holder to exercise market power in contravention of the federal antitrust laws – then this analysis of economic data is not now necessary at all, and would not need to be compiled unless, at some point in the future, it were alleged that a shareholder is exercising such market power. This has not happened over the past 26 years, and plainly cannot and will not happen as long as there is ample opportunity for any competitor to enter an industry where we are harvesting only 50% to 60% of the available supply.

Thank you for considering these comments, and I trust that the above concerns will be incorporated into the scoping document.

Very truly yours,



Thomas T. Alspach

TTA/tsd
cc: Surf Clam Committee
Industry Advisory Panel

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July 12, 2017

VIA ELECTRONIC MAIL

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Re: SCOQ Excessive Shares Amendment Scoping Comments

Dear Dr. Montanez:

The MAFMC should adopt as its preferred alternative for the definition of “excessive shares” the status quo, which has been in effect in the SCOQ industry since the passage of Amendment 8.

That status quo definition, which was recommended by the MAFMC and approved by the Secretary of Commerce in 1990, provides that an excessive share of ITQ privileges is an amount that enables an industry participant to act in contravention of the federal antitrust laws (i.e., to raise prices arbitrarily or to exclude competition). Explaining how Amendment 8 would satisfy the “excessive shares” criterion in National Standard 4, the Council stated that, in regulating ITQ transfers among owners, “the antitrust laws are already in force which would cover the abuse of excessive shares.” Amendment 8 to SCOQ FMP, at App. 6-2 (June 20, 1990).

Notwithstanding this, the “Scoping Guide” for the current exercise states that “Amendment 8 to the SCOQ FMP implemented an ITQ management program that did not include a specific cap or measures which limit the maximum amount of shares (e.g., percentage) that could be owned by a single entity.”

This is an astonishing claim – that for the past 27 years this Council and its predecessors, and the Regional Administrator and his predecessors, have administered a fishery management plan that ignores NS 4 and federal law. Furthermore, the foregoing statement from the Scoping Guide distorts and misstates the plain language of NS 4 by making the bogus claim that an “excessive share” must be some specific “percentage” or measurable amount of total ITQs.

Contrary to the Scoping Guide NS 4 does **not** require an ITQ management program to “include a specific cap,” or to include “measures which limit the maximum amount of shares (e.g., percentage) that could be owned by a single entity.” In fact, NS 4 states only that an ITQ program must be carried out in a “manner” to ensure that no “entity acquires an excessive share”

of ITQ privileges. There is no quantified “measure” of ITQ shares, or “percentage cap” on ITQ shares, required by NS 4.

The Council should retain the status quo definition of an “excessive share” as its preferred alternative because that definition is the only means through which the Council may effectively manage the fishery consistently with the goals and objectives of the current FMP. That status quo definition – that an “excessive share” is an amount of ITQ ownership that enables an entity to violate the antitrust laws – provides a necessary flexible standard that will continue to foster the FMP objective of providing “a management regime and regulatory framework which is flexible and adaptive” and that will “allow industry participants to achieve economic efficiency.”

There can be no arbitrary magic percentage of ITQs that constitutes an excessive share, because the amount of ITQs that would enable an entity to act anticompetitively – to arbitrarily raise prices or to exclude competition – has and will continue to vary with prevailing circumstances. The ability of an entity to obtain and abuse market power depends on a multitude of ever changing factors, including the number of other competitors, the availability of competing products and the existence of product substitutes that always will constrain any entity’s anticompetitive impulses. This is why the federal antitrust laws, the application of which depends upon economic analysis of factors like the foregoing, provides the only effective yet flexible standard for determining when an abusive “excessive share” of the product – here, ITQs – is present.

For these reasons the Council should also reject the alternative of attempting to define an “excessive share” as a specific percentage or quantified measure of ITQ shares. Any effort to establish a defensible percentage cap on, or quantified allowance of, ITQ shares not only would be unnecessary but also would be hugely expensive and time consuming. One cannot simply pluck an acceptable percentage cap or measurable allowance out of thin air; rather, extensive economic data must be collected and analyzed.

NOAA/NMFS retained a team of independent economists who issued a peer reviewed report in 2013 that, among other things, identifies the necessary economic data that must be collected to support any defensible excessive shares definition expressed as a “percentage cap” on share ownership. As the economists explained: “There is a certain amount of information on competition that must be available to regulators for any meaningful determination and implementation of an excessive share cap.”

The economists further explained that “the relevant information the regulators must collect” includes at a minimum the following:

- (a) the scope, quantity, and flexibility of supply of substitute products;
- (b) the level of excess capacity in harvesting and processing;
- (c) the degree of product heterogeneity;
- (d) the relative bargaining power of buyers and sellers (in both the markets for shellstock, and for the finished seafood products);
- (e) the ability to price discriminate;
- (f) ease of entry for new competitors; and

(g) efficiencies (or economies of scale) that can be obtained through a higher degree of share ownership.

The economists added that the foregoing information “would be required for ITQ transactions as well as related industry activities including fishing (harvesting) and processing.” Information on product substitution must be assembled in “sufficient detail for the determination of relevant markets”

Needless to say, accumulation and analysis of the foregoing information and data will be expensive and time consuming. But as the independent economists have explained, there will be no credible or defensible basis for an excessive shares “cap” unless all of this relevant underlying economic data is fully processed as a predicate to the Council’s final action.

It is perhaps worth noting that, in contrast, if the Council elects to stay with its current excessive shares definition – i.e., an excessive share is an amount of ITQ ownership that enables the holder to exercise market power in contravention of the federal antitrust laws – then this analysis of economic data is not now necessary at all, and would not need to be compiled unless, at some point in the future, it were alleged that a shareholder is exercising such market power. This has not happened over the past 26 years, and plainly cannot and will not happen as long as there is ample opportunity for any competitor to enter an industry where we are harvesting only 50% to 60% of the available supply.

Finally, the Scoping Guide requests comment on whether the existing goals and objectives for the SCOQ FMP should be altered or revised in any way. The short answer to this, with a very minor exception, is “no.”

The exception is that in objective 1 the phrase “and rebuild” could/should be deleted, as the SCOQ resource is in excellent shape and no stock rebuilding is now necessary, nor will it be required within the foreseeable future.

Apart from this minor change, the goals/objectives should remain as currently stated. These guidelines have served our industry well for the past 27 years, much thought and deliberation went into their initial construction and adoption, and the principles included therein are as complete, useful and applicable for our industry today as they were at the outset.

The foregoing comments are submitted on behalf of Sea Watch International, Ltd., a processor of surfclams and ocean quahogs harvested from federal waters, with facilities in New Bedford, Massachusetts; Easton, Maryland; Milford, Delaware and Mappsville, Virginia. Thank you for your consideration of these comments.

Very truly yours,



Thomas T. Alspach, General Counsel
Sea Watch International, Ltd.

Montanez, Jose

From: Thomas T. Alspach <talspach@goeaston.net>
Sent: Friday, July 21, 2017 6:06 PM
To: Montanez, Jose
Cc: Luisi, Michael; deFur, Peter; King, Howard; Moore, Christopher
Subject: SCOQ Excessive Shares Amendment Scoping Comments

Dear Dr. Montanez:

Please enter the following comments into the record, in supplementation of my written comments filed on July 12, 2017.

Thank you for your efforts in ferreting out the case referenced in your email attached, which is indeed the decision in which Judge Boudin, of the US District Court for the District of Columbia, addressed the meaning/definition of the term "excessive shares" under National Standard 4 of the MSA, and in particular how that term should be applied in the context of the clam fishery.

As explained in my previous submission, in 1990 the Secretary of Commerce and the MAFMC determined that the "excessive shares" criterion was satisfied by Amendment 8, and its distribution of ITQ shares, because "antitrust laws are already in force which would cover the abuse of excessive shares." July 12 correspondence, at 1. At that time the Secretary and Council further explained that if future concentration of share ownership should cause concerns about stifled competition, there would be a referral to the Department of Justice to determine whether antitrust legal constraints in fact should be applied.

So this was the "manner" in which the Secretary and the MAFMC elected to carry out Amendment 8 while ensuring that "no particular individual, corporation, or other entity acquires an excessive share" of ITQ privileges, as required by NS 4.

In June 1990 certain participants in the SCOQ fishery challenged Amendment 8 in federal court on multiple grounds, including the ground that the amendment did not establish a "cap" or some other quantified definition of an "excessive share" of ITQ privileges, and that therefore NS 4 was not satisfied. As you can see at pp. 13-14 of the opinion referenced below, Judge Boudin flatly rejected this claim -- the very same claim that we are hearing from NMFS and some Council staff again today.

Referring to the manner in which the Secretary of Commerce and MAFMC had elected to regulate "excessive shares" Judge Boudin stated that "The Secretary's judgment of what is excessive in this context deserves great weight," and further observed that "the Council and the Secretary considered the problem [of excessive shares] and addressed it by providing for monitoring and review of "industry concentration," and for "the possibility of referral to the Department of Justice" if concerns of impact upon competition should arise.

The SCOQ industry has been regulated for 27 years in a "manner" that ensures no one "acquires an excessive share" of ITQ privileges, by way of the procedure just described, and which a federal court has determined to be entirely compliant with NS 4. Nevertheless, at the hearing on July 17, you asserted that the MAFMC somehow is required now -- after 27 years -- to define an excessive share by way of a percentage cap, or some other quantified amount that is a hard number of shares. Where does the Council, or those directing the Council, find this claimed requirement in NS 4? That standard requires only that an ITQ scheme is "carried out" in such a "manner" that no entity acquires an excessive share of such privileges. In 1990 this Council's predecessors, the Secretary of Commerce and a United States District Court judge all agreed that the "manner" in which we are guarding against excessive shares right now is fully consistent with the law, and specifically with the language of National Standard 4.

The Council should now act responsibly by abandoning the current entirely unnecessary and pointless exercise of “redefining” what constitutes an excessive share, in order to address a problem that does not exist. Surely we have far better things to do with shrinking taxpayer dollars.

Thomas T. Alspach

From: Montanez, Jose [mailto:jmontanez@mafmc.org]
Sent: Tuesday, July 18, 2017 2:11 PM
To: Alspach, Tom
Subject: court case

Hi Tom,

Here is the case told you about

<http://law.justia.com/cases/federal/district-courts/FSupp/762/370/1619911/>

If you find any information for the other court case that David and you have mentioned before about Amd 8 (%cap issue), please let me know.

Best,

/
jm



BUMBLE BEE SEAFOODS

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July 12, 2017

Dr. Christopher Moore, Executive Director
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, Delaware 19901

RE: SCOQ EXCESSIVE SHARES AMENDMENT SCOPING COMMENTS

Dear Dr. Moore:

I am writing to provide Bumble Bee Seafoods scoping comments on the Council's Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment.

EXCESSIVE SHARES

The Council has asked for comments and options to ensure that no individual, corporation, or other entity acquires an excessive share of the SCOQ ITQ privileges. We believe this initiative is driven solely by the need to meet a regulatory requirement and is not indicative of any issues within the fishery. The current system, which relies on U.S. anti-trust laws, is functioning properly and there has been no evidence that a person or company is capable of market or price manipulation.

As the Council is aware, Bumble Bee Seafoods is one of the largest holders of OQ quota (21.78%). We contract with other companies to harvest and shuck our quahogs which are then delivered to our Cape May factory for processing. Since 2010 we have only utilized approximately 70% of our quota annually. During that same time-period, the industry as a whole has harvested less than 59% of the quota annually. Market conditions are the single biggest reason why over 40% of the annual quota remains unharvested. Clams and clam products have a limited market due to foreign competition, alternative/substitute products and an overall trend away from canned products.

We are deeply concerned that should the Council decide to impose a numerical cap that is lower than our current quota, Bumble Bee Seafoods would be forced to sell some of our quota. Under a forced divestiture, we would not expect to receive full value for our quota as the market and prospective buyers would be aware of the situation. Similarly, if in the future Bumble Bee Seafoods decided to voluntarily sell some of our quota, a low cap could prevent potential buyers from purchasing Bumble Bee's quota. A low numerical cap or a freeze at current quota levels would limit our ability to purchase additional quahog quota, should the company decide to grow and expand its' clam business. Under any of these scenarios we would expect Bumble Bee to suffer financial losses. Should the Council go forward with a numerical cap we ask that it not penalize any current



quota holder and allow for additional growth. For example, a cap at current levels plus 20% (20% of the amount currently owned) would not force any quota holder to sell and would allow for some limited growth.

GOALS AND OBJECTIVES

Bumble Bee Seafood supports the Council's effort to revise the goals and objectives for the OQSC FMP as they are not consistent with today's fishery and management issues. Provided below is a list of revised/rewritten goals and objectives which we believe more accurately reflect today's fishery:

1. Conserve and sustainably manage the Atlantic surf clam and ocean quahog resources throughout the management unit to prevent overfishing and ensure that the resource is not overfished while achieving optimum yield from the resource.
2. Promote opportunities for government and industry scientific research, especially into the effects of warming ocean temperatures and changing ocean conditions on the OQSC resources, and research necessary for sound management decisions.
3. Provide a simplified management regime and regulatory framework that minimize government and industry cost while allowing participants to achieve economic efficiency including efficient utilization of capital resources by industry.
4. Promote compatible management regulations between state and Councils jurisdiction.
5. Strengthen coordination between the New England Fishery Management Council and the Mid-Atlantic Fishery Management Council so that actions by one Council do not negatively impact the ability of industry to achieve optimum yield.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Lischewski", written over a light gray rectangular background.

Christopher D. Lischewski



Surfside Foods, LLC

Phone: (856) 785-2115 * Fax: (856) 785-0975

July 18, 2017

2838 High Street
PO Box 692
Port Norris, NJ
08349

VIA ELECTRONIC MAIL

Dr. Christopher Moore
Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Re: Atlantic Surfclam and Ocean Quahog Excessive Share Amendment
Scoping Comments

Dear Drs. Moore and Montanez:

Surfside Foods, LLC is a vertically integrated harvester and processor of Atlantic Surfclams and Ocean Quahogs. We operate eight vessels along the mid-Atlantic coast and have processing plants in Port Norris and Millville, New Jersey. We appreciate the opportunity to raise our concerns at the time the Mid-Atlantic Fishery Management Council is scoping for an Excessive Share and Goals and Objectives amendment to the Atlantic Surfclam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP).

The existing SCOQ FMP Goals and Objectives continue to be appropriate for managing the surfclam and ocean quahog fishery. The objectives are clear, they continue to be relevant and they continue to reflect the social and economic circumstances of the SCOQ fishery. We do not believe there are any revisions to the SCOQ FMP Goals and Objectives that would be useful. **Rational:** Stabilizing harvest rates, simplifying regulatory requirements and providing for efficiency by using a flexible and adaptive regulatory framework has provided maximum benefit to society since these goals and objectives became

QUALITY SEAFOOD PRODUCTS

the cornerstone of our FMP more than 25 years ago and they will remain relevant into the foreseeable future.

Changes in the SCOQ Fisheries since the goals and objectives were put in place are well documented and well known. The biomass located on Georges Bank has risen from the mid-teens as a percentage of the total to now more than 50%. Areas of resource off the Carolinas and Virginia have declined considerably. The fishing fleet has moved to the north and east to continue to harvest commercial quantities. Processing plants have moved and consolidated due to the availability and cost of quantities of fresh water and wastewater restrictions. Fishermen are testing catch for paralytic shellfish poisoning to protect the consumer. Coast Guard regulations and the ITQ system have made the industry safer for fishermen. Requirements of classification of all new built vessels over 79' are adding considerable expense for those wishing to build new vessels.

The SCOQ FMP goals and objectives have allowed industry participants to adapt to these changes and will allow the necessary adaptation well into the future.

The federal antitrust laws will continue to ensure that no entity acquires an excessive share of SCOQ quota. The only useful, practical excessive share definition is: an amount of ITQ ownership that enables the holder to exercise market power in contravention of the federal antitrust laws. **Rational:** An attempt to define an excessive share as a percentage cap, less than that needed to exercise market power will be in direct conflict with the SCOQ FMP Goals and Objectives. An arbitrary percentage cap will fail to allow industry to operate efficiently, to simplify regulatory requirements and provide for an adaptive, flexible regulatory framework.

The markets that the SCOQ fishery counts as competition are wide and diverse at every level. The labor forces, from the fishermen on the vessels to the processors in the plants and those that transport the product all have many options outside the industry that compete for their services. Atlantic surfclam and ocean quahog products compete for the consumer with clam product produced in other countries, other seafood alternatives and other protein choices we are all familiar with in our grocery stores.

Participants have shown that owning quota share isn't required to participate in the fishery at any level nor does having quota share guarantee that share will always be utilized in the market place. It will be difficult to show that there is any level of SCOQ Individual Transferable Quota share, where an individual, corporation or other entity would be able to exercise market power in the SCOQ Fishery; consumers, labor markets and other industry participants have too many options for the exercise of market power to occur.

Best regards,

A handwritten signature in black ink, appearing to read "Peter A. LaMonica". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter A. LaMonica
Surfside Foods, LLC



July 19, 2017

Dr. Christopher Moore, Executive Director
Mid-Atlantic Fishery Management Council
800 North State Street
Suite 201
Dover, Delaware 19901

RE: Comments on SCOQ Excessive Shares Amendment Scoping Comments

Dear Dr. Moore:

Kindly accept these comments from La Monica Fine Foods, Millville, New Jersey on the Scoping Document entitled, "Atlantic Surf Clam and Ocean Quahog Excessive Shares Amendment" presented in a series of public scoping meetings between July 10 and July 17, 2017. While representative of La Monica Fine Foods made oral comments at both the July 11, 2017 webinar and the July 12, 2017 Scoping Meeting in Cape May, NJ, I wish to re-iterate and expand on the oral comments that were made for the public record. The above cited document also includes a second issue regarding the Goals and Objectives for the Fishery Management Plan (FMP) for Atlantic Surf Clam and Ocean Quahog Fishery, as written in Amendment 8, the Draft of which was adopted by the Mid-Atlantic Fishery Management Council (MAFMC) in 1988, with eventual final approval by the National Marine Fisheries Service (NMFS) in 1990.

La Monica Fine Foods strongly supports the continuance of the current Individual Transferable Quota (ITQ) management process without the addition of any new excessive shares definition, and especially objects to a proposed option that defines excessive shares that is based on a percentage cap to limit the maximum amount of shares (e.g. percentage) that could be owned by a single entity. La Monica Fine Foods supports the status quo definition from Amendment 8, wherein, an excessive share is an amount of ITQ ownership that would enable the holder of shares to violate antitrust laws. The clam industry as it currently exists is in complete compliance with the status quo definition of excessive shares from Amendment 8 and in complete compliance with anti-trust laws. As to the Goals and Objectives issue within the Atlantic Surf Clam and Ocean Quahog Excessive Shares Amendment, La Monica Fine Foods strongly supports the continuance of the four (4) objectives as they appear in Amendment 8 of the FMP for both surf clams and ocean quahogs. There is no compelling reason to revise, or worse yet, re-write objectives for an FMP that has served the managed resources extremely well since first written in 1988, nearly 30 years ago.

La Monica Fine Foods, founded in 1923 as a small seafood shop that specialized in fresh, locally harvested seafood, has a long and storied history in the seafood harvesting and processing industry. Today, La Monica Fine Foods is a bustling seafood supplier for the retail and restaurant trades, having the largest hand shucking plant with more than 200 employees and operating its own fishing fleet. It is proud to be vertically integrated from boat to customer to retain the quality and control throughout the processing, packaging, and delivery of its finished

products. La Monica Fine Foods has enjoyed a long and cooperative relationship with the NMFS and the MAFMC in the conservation and management of both surf clams and ocean quahogs.

EXCESSIVE SHARES

The issue of what constitutes an excessive share has been discussed by the MAFMC and its Council members for at least the last 10 years. During that time period there has been a constant turnover of Council members and even some MAFMC staff. No progress was ever made on the excessive shares issue and it is likely that the majority of Councilmembers lack the historical knowledge in both the surf clam and ocean quahog fisheries to understand why this Amendment is now being advanced. The MAFMC has even gone to the lengths of contracting three (3) economists at considerable expense to help define a concept that the clam industry maintains is unnecessary and already exists as the status quo language of compliance to anti-trust laws, as stated in Amendment 8. "Excessive shares" equates to "market power" and in the current operations of both the surf clam and ocean quahog fisheries, no entity has, or could conceivably acquire, the market power necessary to control pricing of product on the markets. The products of both the surf clam and ocean quahog fisheries compete with imports and many additional food products, such as chicken and beef, that the next layer of processing, the soup companies and major food networks, can resort to should one or more clam industry companies demand an unreasonable price for their products. This begs the question, "Who really has market power when it comes to surf clams and ocean quahogs?". It is not the clam industry but rather the layer of food production and distribution that exists with the major soup companies and food distribution processing and distribution companies.

As to the requirement of Nation Standard 4 (NS4) which states that, "if 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". The current landings for both surf clams and ocean quahogs have remained below their Annual Catch Limits (ACLs) for many years and there are available allocations in both fisheries whereby an individual, entity, or corporation is able to invest in the fishing vessels and shore side plant facility to participate in either clam fisheries.

GOALS AND OBJECTIVES

Within the Excessive Shares Amendment, the MAFMC is undergoing a process to review and possibly revise goals and objectives for both the surf clam and ocean quahog fisheries. The industry recognizes that this issue is part of the MAFMC's 2014-2018 Strategic Plan and has given close scrutiny to the four (4) objectives that were written for Amendment 8 in 1988. The current surf clam and ocean quahog FMP objectives were written for Amendment 8 which established the current ITQ fisheries for both surf clams and ocean quahogs. A careful read of the current four (4) objectives is dominated by the following concepts:
"conserve and rebuild resources by stabilizing annual harvest rates and minimizing short term economic dislocations; simplify the regulatory process; minimize government and private cost of

administering the ITQ program; minimize costs for complying with regulatory reporting, enforcement, and research for the ITQ program; provide the opportunity to operate efficiently and conservatively; bring harvest capacity in balance with processing and biological capacity; allow participants to achieve economic efficiency; allow efficient utilization of capital resources by the industry; provide a flexible and adaptive management regime; allow regulatory framework to address short term events; and allow regulatory flexibility to address long term industry planning and investment;. **Who could write a set of objectives that would better suit the current ITQ management program for both surf clams and ocean quahogs? No one!**

The current objectives need no update, revision, or worse yet, a major re-write. They continue to define a management regime that one could argue is one of the best managed programs of not only the MAFMC but the entire USA, as well. There is no compelling reason to change in any way the four (4) objectives written for Amendment 8. They remain as relevant today as they were in 1988 when first written. Remarkably, under the MAFMC's Allowable Biological Catch (ABC) Control Rules, both the surf clam and ocean quahog fisheries enjoy a management uncertainty of zero percent when establishing ACLs in the quota setting process each year. I know of no other fishery that can claim that model of efficiency statement. The surf clam and ocean quahog ITQ management system has been operating amicably and efficiently with the industry, the NMFS and the MAFMC for 25 years.

On another topic not contained within the Scoping Document, the industry recommends that in matters of developing administration rules for a fishery, it would be wise to include industry members on any Fishery Management Action Team (FMAT) as working partners since it is the industry members that usually better understand the operations within their fisheries on a day to day basis. Relying only on NMFS and MAFMC staff, as the sole members of an FMAT, without including industry participation may result in proposed rules that are off-base, unrealistic, unnecessary, and inefficient.

La Monica Fine Foods appreciates the opportunity to submit these comments on the Atlantic Surf Clam and Ocean Quahog Excessive Shares Amendment. The clam industry welcomes additional dialogue with the FMAT, NMFS and the MAFMC throughout the proceedings of this Amendment.

Sincerely,



Daniel P. La Vecchia, President
La Monica Fine Foods

Dr. Christopher Moore

Dr. Jose Montanez

Mid-Atlantic Fishery Management Council

800 North State Street, Suite 201

Dover, DE 19901

July 20, 2017

“SC/OQ Excessive Shares Amendment Scoping Comments”

Dear Drs. Moore and Montanez:

Please accept these comments on the Scoping Document entitled, “Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment” which was presented during 4 public scoping meetings between July 10 and July 17, 2017. Representatives of our company made oral comments during the scoping meetings and now I simply wish to reiterate those comments in writing.

I work part time for Wallace and Associates. Our company represents most of the surfclam and ocean quahog fisheries and they all strongly agree that this Amendment is totally not needed. Prior to joining Wallace and Associates five years ago, I worked for 30 years for the Mid-Atlantic Fishery Management Council where the majority of that time I was the lead staff for surfclams and ocean quahogs. I was the lead staff when this issue arose nearly 15 years ago and I was the Chair of the FMAT from the beginning of that entity until my retirement. This issue of “excessive shares” has been a conundrum and a morass sucking time and resources since its initiation. Personally, I can tell you that I have never seen the clam industry so united and opposed to one idea as they have since the beginning of the issue of excessive shares. In this time of government budgetary constraints, why would you invest even one penny of taxpayer monies, or industry’s dollars, for defining something that is already covered by US government antitrust legislation?

The genesis of this excessive share issue dates back to a 2002 Government Accountability Office (GAO) report that assessed existing ITQ programs and ways they could be improved. The GAO issued a favorable report regarding how existing ITQ programs were working and included several recommendations for the future, one of which related to the definition of an “excessive share”. “To help prevent an individual or entity from acquiring an excessive share of the quota in future IFQ programs, (emphasis added) we recommend that the Secretary of Commerce require regional fishery management councils to define what constitutes an excessive share for the fishery.” The GAO plainly was not directing this recommendation to preexisting ITQ programs, such as the surfclam and ocean quahog FMP, but instead only to new ITQ programs adopted in the future.

These two fisheries were the first ones in this country managed under the Magnuson Act with the development of an FMP in 1977. The industry needed federal involvement because they had overfished the surfclam resource. In the past 40 years, the surfclam resource was quickly rebuilt and the resources have never been overfished nor has overfishing occurred since the initiation of management. The first 13 years of management was hellacious with draconian government micromanagement. (Regrettably, I was there.) Fishing effort was limited to as little as 24 -- six hour days a year. Then in 1990, ITQs were implemented and the fishery went from one of the most intensely micromanaged to one where industry meets with the Council and the Agency only once or twice a year. This fishery is successful without government intrusion.

The industry completely opposes attempts at redefining excessive shares. There already exists an excessive share definition for ITQs in Amendment 8 (MAFMC 1990) that complies with National Standard 4. The MAFMC, with the approval of the Agency, stated that the “excessive share” limitation of NS 4 was met because “antitrust laws are already in force which would cover the abuse of excessive shares”. There was even an industry lawsuit brought in Federal court against the Council and the Agency over this when the ITQ program was initiated and the Agency won with this definition!

In the spring of 2009 the Council held Scoping meetings on an Amendment that included this issue of “excessive shares”. That Scoping document had three Alternatives: A) No Action, B) Implement a % Share Cap – with sub-alternatives of 1) 22%, 2) 33%, 3) 50% and 4) 70%, and then C) Adopt DOJ Horizontal Merger Guidelines. From those entire Scoping meetings in 2009, which I staffed every one, there was only ONE written comment that supported a 50% share cap. EVERYONE else that orally provided comments or provided them in writing supported the No Action alternative. Everyone argued that the dependence on Amendment 8 antitrust regulations were sufficient.

The Agency and Council, in 2011, spent over \$140,000 to fund a CIE panel of three economic experts that were charged to look at excessive shares and their conclusion was that no individual or entity owns ITQ shares in excess in order to hold “market power”. I was one of two Council staff (Dr. Montanez was the other) who worked with HQ and Woods Hole to make this panel of experts happen. Surfclam and ocean quahog landings for the past several years have been less than about 2/3rds of each species annual quota. There is plenty of quota should new entities wish to enter the fishery or expand their existing markets. Currently the markets are simply not demanding the entire quota, but should someone become creative and develop or expand existing markets – there is certainly no anti-competitive market control occurring that would preclude that. Addressing the relevant “market” as the CIE panel of experts stated is absolutely critical and where this Amendment is going to bog down completely. As one of the experts said: “protein competes with protein”. Roughly 10% of total US landings of surfclams and ocean quahogs come from State waters. Forty percent of the clam meats in this country right now come from Canada. Those two sources of meats are totally outside the control of the Council and Agency. Then there is the cheap finfish, squid and imported shrimp that compete with clam

meats, not to mention other cheap agricultural protein of chicken and pork. This is a quicksand pit that will suck staff time for years. I could rant on and on about this being a horrible idea and simply an unnecessary and futile expansion of government. This seems to be an attempt to get back to the pre-ITQ level of government micromanagement of these fisheries.

Finally, I would just like to say a few words on the Objectives. Please do not change ONE word! Those Objectives were developed over nearly a year by some of the “Forefathers” of fisheries management (Drs. Lee Anderson, Bill Hargas and State Directors Peter Jenson and Russell Cookingham) for Amendment 8. Nearly every word was fought over by the Council. Those 4 Objectives have been the guiding force for the regulation of these resources and fisheries for nearly 30 years. They are the basis for the Council’s flagship FMP and one that the rest of the country often attempts to emulate. Amendment 8’s Objectives have allowed consolidation decisions and all other business decisions to be made efficiently by businessmen. They have been flexible and adaptable. They have minimized government regulations as well as private costs of this management system. The Objectives and thus, the rules that businesses have been operating under should not be changed at all now.

In summary, I, on behalf of nearly all of the clam industry, completely oppose this proposed Amendment. There is no reason for an Amendment for excessive shares or for a change in any of the Objectives. These two issues were fully addressed in Amendment 8 and should not be at all changed. No proposed or implemented rule during the past 40 years of Federal management has so unified the industry in opposition as this excessive shares issue. These two fisheries are generally considered some of the best managed fisheries in this country if not the entire world. Surfclams were overfished prior to management, but were rebuilt quickly under management and the ocean quahog resource was never at risk. The industry, NMFS, and the Mid-Atlantic Fishery Management Council (MAFMC) have successfully operated efficiently and cooperatively since implementation of the ITQ allocations in 1990. This fishery management system is NOT broke. Please don’t go backwards to the days of government micromanagement with it.

Thank you for your consideration of these comments. Please do not hesitate to contact me should you have any questions.

Sincerely yours,

Thomas B. Hoff Ph.D.

2227 Trumbauersville Road

Quakertown, PA 18951

215-536-3543

Montanez, Jose

From: edward v cattell <edward.cattell@icloud.com>
Sent: Friday, July 21, 2017 10:04 AM
To: Montanez, Jose
Cc: edward cattell; Raymond Bogan
Subject: Comments on proposed amendment to ASC/OQ plan

Dear MAFMC members:

I am an attorney representing Atlantic Surf Clam / Ocean Quahog fishers and lenders to that industry.

I have been engaged in the representation of these interests as far back as 1976 and the first passage of the Magnuson Fisheries Act.

I have watched the evolution of the Management Plan for this fishery from its first (deadly) efforts to limit fishing effort to the most recent, and, in my view, highly successful ITQ plan.

One of the goals of the 1988 plan was to consolidate the fishery, allowing those fishers with minimal ITQ allocation to sell or lease their holdings to others, who, it was expected, would accumulate sufficient ITQ to support a viable full time fishery. This goal has been achieved producing efficiencies in the fishery and in enforcement and management of the fishery.

At this time, there are several large holders of ITQ. Their ITQ holdings support their own fleets as well as vessels owned by independent vessel owners who harvest for them and sell their own catches to them. Several of these interests are vertically integrated operations, owning ITQ and vessels as well as packing facilities. Recently constructed clamming vessels cost in excess of \$7 million, a very significant capital investment.

ITQ has been used as collateral for loans allowing the expansion and modernization of the industry. Unlike the Multi-species fishery, which is mostly fish to table, clams require industrial level machinery to shuck, cook and can the product. The assurance of a steady stream of product to the customer base (makers of clam chowder, clam strips, and other commercial food products, as well as supermarkets) allows for broad based marketing efforts to consumers, increasing retail consumption of the product.

Any change in the plan which adversely effects the ownership of ITQ by the current holders could have wide and long range consequences. Any forced divestiture would adversely affect the market price for ITQ, which, in turn, would reduce its collateral value to the lenders holding that collateral.

A reduction of collateral could result in forced defaults on loans, collateralized with the ITQ. This would adversely affect both the fishery enterprises and the lenders. Many small holders, particularly older individuals, still rely on the income from leases of their ITQ holdings to larger entities. Any action adversely effecting market price will reduce their income, or force them to place their holdings on the market at lesser value.

Consequently, it is my request that any proposed changes to the plan:

1. Do not require any forced divestiture of ITQ now held.
2. Take no action which will result in a reduction of the market value of ITQ.
3. Take no action which will adversely effect or limit the Transferability of ITQ.
4. Take no action which would adversely effect the value of large capacity vessels recently built or now under construction for this fishery.
5. Take no action which would have an anti-competitive effect on the fishery.

Thank you for your consideration and providing this opportunity to engage in the development process.

Edward V. Cattell, Jr., Esq.
Sinn Fitzsimmons Cantoli Bogan West & Steuerman
501 Trenton Ave.
PO Box 1347
Point Pleasant Beach, NJ 08742

Direct Phone 609-335-5013

Bottom Works, LLC

1905 Riverside Drive
Atlantic City, NJ 08401

July 18, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Comments on Excessive Shares Amendment

Dear Dr. Montanez:

Bottom Works, LLC is the operator/owner of a number of surf clam and ocean quahog vessel that fish out in the Mid-Atlantic and New England. Our vessels mostly catch ocean quahogs and land them in both the north and south. We also operate an unloading dock in Atlantic City, New Jersey. Our company does not own ITQs but receive surf clam and ocean tags from the owners of the ITQs for us to catch.

The two issues in this Amendment that are currently being proposed do not warrant an amendment to the Surf clam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives and excessive shares of the surf clam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cape. That cape only applies to ITQs which were implemented after 2006. The clam ITQ went into effect January 1, 1990, 16 years before that new requirement of the MSA when into effect.

Successful management of the surf clams and ocean quahogs fishery is based on the FMPs four Objectives which were developed in late 1980s and implemented in Amendment 8 in 1990. Industry has spent the past 27 years operating under Amendment 8's Objectives which have allowed consolidation and all other business decisions to be made efficiently by the participants in the fishery. **Please do not change one word in the Objectives of the SCOQ FMP.**

Likewise, **do NOT change anything regarding the current Amendment including excessive shares.** Amendment 8 provides that an excessive share of ITQ privileges is an amount that enables an industry participant to act in violating federal antitrust laws. The Council explained how Amendment 8 would satisfy the excessive shares criterion in National Standard 4 by the

Bottom Works, LLC

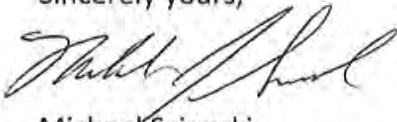
1905 Riverside Drive
Atlantic City, NJ 08401

fact that "the antitrust laws are already in force which would cover the abuse of excessive shares".

In summary, I would like to strongly advocate that NO Amendment for excessive shares or for a change in any of the Objectives be moved at this time. These two issues were fully addressed in Amendment 8 and should not be changed at all.

Please consider our comments and thank you.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael Scienski", written in a cursive style.

Michael Scienski
Bottom Works, LLC

Bottom Works, LLC

1905 Riverside Drive
Atlantic City, NJ 08401

July 19, 2017

Dr. Christopher Moore
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
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“SC/OQ Excessive Shares Amendment Scoping Comments”

Dear Drs. Moore:

Please accept our comments on the Scoping Document entitled, “Atlantic Surf clam and Ocean Quahog Excessive Shares Amendment.”

- The four objectives of the Surf clam and Ocean Quahog Fishery Management Plan serve the fishery and the nation in the short and long term well and **must not be changes**.
- An Excessive Shares amendment is a waste of tax payers money and the Mid Atlantic Fishery Management Council, along with National marine Fisheries Service’s time, and **should not go forward**

The four Objectives of Individual Transferable Quotas (ITQs) Fishery Management Plan (FMP) in 1990 were key to the development and implementation of the FMPs. The Objectives were discussed and contemplated during numerous Council meetings in the mid- 1980s and have proven to create flexible and adaptable regulations which have allowed government and industry costs to be minimized under the ITQ system. Industry has spent nearly the past 30 years operating under Amendment 8’s Objectives which have allowed consolidation decisions and all other business decisions to be made efficiently by businessmen. The Objectives and thus, the rules that businesses have been operating under should not be changed at all.

We strongly believe that the two issues for which this Amendment is currently being scoped does not warrant an amendment to the Surf clam and Ocean Quahog FMP. This SC/OQ fishery has been called the “best managed fishery in the US – if not the world” by a former NOAA Chief Scientist and also a former NOAA Fisheries Director of Policy who happens to be a member of the MAFMC SSC. Since implementation of management in 1977, the surfclam resource was rapidly rebuilt and neither species has experienced overfishing nor has either been overfished in the past nearly 40 years.

Likewise, do NOT change anything relative to “excessive shares” with a new Amendment. The status quo definition of excessive shares was recommended by the MAFMC in the late 1980s and approved by the Secretary of Commerce in 1990. Amendment 8 provides that an excessive

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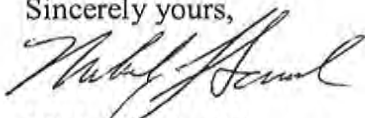
Truex Enterprises is the owner of a number of surf clam and ocean quahog vessel that fish in the Mid-Atlantic and New England. The families that own the company have been in the clam business for generations and have invested years of hard work and large amounts of money in the industry. We have played by the rules and invested in building a business for the future. It is important that current ITQ system remain unchanged, otherwise the government will have failed us in our quest to produce high quality seafood for the betterment of our customers, suppliers and employees.

Finally, as the Industry Advisors strongly advocated, we hope the MAFMC would focus their surf clam and ocean quahog efforts on our very real concerns about being closed out of fishing areas in New England. The scallop and ground fish fishing industries in New England are strongly advocating areas where we fish, be closed, so that they can operate in areas that are beneficial to them. The fact that we fish on fairly uniform sandy areas without structure and there are few, if any scallop or ground fish, in these areas is irrelevant to their industry's willingness to sacrifice our surf clam and ocean quahog fisheries in order to appear to close areas. The council's help is needed to protect the clam industry as we and utilize significant amounts of the resources of both species in New England while taking the pressure off the small young surf clam that have set offshore of the Mid-Atlantic

In summary, we would like to strongly advocate that NO Amendment for excessive shares or changes in any of the Objectives be moved forward at this time. These two issues were fully addressed in Amendment 8 and should not be changed.

Thank you for your consideration of these comments.

Sincerely yours,



Michael Scienski
Bottom Works, LLC

TMT Clam Dredgers, LLC

700 N. Maryland Avenue
Atlantic City, NJ 08401

July 18, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

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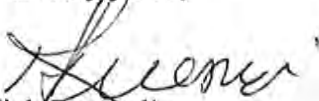
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Sincerely yours,



Nick Ruemeli

TMT Clam Dredgers, LLC

TMT Marine Terminal LLC

1041 S. Main Street
West Creek, New Jersey 08092

July 20, 2017

Mr. Jose Montanez
Mid-Atlantic Fishery Management Council

Excessive Shares and Goals and Objectives Proposed Amendment Comments

Dear Mr. Montanez:

TMT Marine Terminal, LLC and other related companies owners would like to comment on the clam excessive shares and objectives of the surf clam and ocean quahog proposed amendment 18. The group are owners of a number of surfclam vessel and ITQs. These boats fish in New England and Mid-Atlantic. Their vessels land their surf clams in New Jersey and New York. Some of their companies own ITQs and rent some surf clam ITQs to catch which help cover the overhead cost of the vessels.

The owners are concerned about possible changes in the surf clam ocean quahog fishery management plan objectives which has served the industry well for almost thirty years. The current objectives are designed for flexibility and allow the operators the efficiency necessary to deal with the never ending changes in the ocean, the clam fishery and the market place. The owners believe the current objectives do not warrant an amendment to the Surfclam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives or excessive shares of the surfclam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cape. That cape only applies to ITQs which were implement after 2006. The clam ITQ had been in effect for 16 years before MSA percentage requirement was added and it was not retroactive.

The clam surfclams and ocean quahogs management plan is based on the four objectives which were developed for the ITQ system and implemented in Amendment 8. For 27 years the fishery has operated under Amendment 8's objectives which allows consolidation and all other business decisions to be made efficiently by the participants in the fishery. The objectives for the clam ITQ FMP do not need to be changed.

TMT Marine Terminal LLC


1041 S. Main Street
West Creek, New Jersey 08092

The owners of these companies also request that there be no changes regarding the current FMP including excessive shares. The current regulations provides that no participant has an excessive share of ITQ privileges which is an amount that enables a company behave in a way that violates federal antitrust laws by imposing market power on the industry. The Mid Atlantic Council in Amendment 8 addressed the National Standards 4 of the MSA suggesting that it was adequate protection against a company obtaining an excessive share. The NMFS agreed with the council and implemented that prevision in Amendment 8 Therefore, the excessive shares protection is in effect under the antitrust laws of the United States. It complies with NS 4 and there is no good reason to change it.

The owners suggest that the current four objectives and excessive shares which are currently in the regulations be kept with no changes. The public and industry are being protected under the current amendment.

Thank you for consider our comments.

Sincerely yours,



Martin Truex

Managing Member

TMT Marine Terminal, LLC

South Jersey Surf Clam, LLC

P.O. Box 727
Manahawkin, NJ 08050

July 18, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Comments on Excessive Shares Amendment

Dear Dr. Montanez:

South Jersey Surf Clam, LLC is the operator/owner of a number of surf clam and ocean quahog vessel that fish out in the Mid-Atlantic and New England. Our vessels mostly catch ocean quahogs and land them in both the north and south. We also operate an unloading dock in Atlantic City, New Jersey. Our company does not own ITQs but receive surf clam and ocean tags from the owners of the ITQs for us to catch.

The two issues in this Amendment that are currently being proposed do not warrant an amendment to the Surf clam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives and excessive shares of the surf clam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cape. That cape only applies to ITQs which were implemented after 2006. The clam ITQ went into effect January 1, 1990, 16 years before that new requirement of the MSA when into effect.

Successful management of the surf clams and ocean quahogs fishery is based on the FMPs four Objectives which were developed in late 1980s and implemented in Amendment 8 in 1990. Industry has spent the past 27 years operating under Amendment 8's Objectives which have allowed consolidation and all other business decisions to be made efficiently by the participants in the fishery. **Please do not change one word in the Objectives of the SCOQ FMP.**

Likewise, **do NOT change anything regarding the current Amendment including excessive shares.** Amendment 8 provides that an excessive share of ITQ privileges is an amount that enables an industry participant to act in violating federal antitrust laws. The Council explained how Amendment 8 would satisfy the excessive shares criterion in National Standard 4 by the

South Jersey Surf Clam, LLC

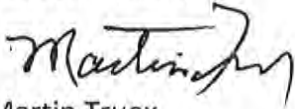
P.O. Box 727
Manahawkin, NJ 08050

fact that "the antitrust laws are already in force which would cover the abuse of excessive shares".

In summary, I would like to strongly advocate that NO Amendment for excessive shares or for a change in any of the Objectives be moved at this time. These two issues were fully addressed in Amendment 8 and should not be changed at all.

Please consider our comments and thank you.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Martin Truex". The signature is stylized with a large, sweeping initial "M" and a long, horizontal stroke extending to the right.

Martin Truex
South Jersey Surf Clam, LLC

South Jersey Surf Clam, LLC

P.O. Box 727
Manahawkin, NJ 08050

July 19, 2017

Dr. Christopher Moore
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

“SC/OQ Excessive Shares Amendment Scoping Comments”

Dear Drs. Moore:

Please accept our comments on the Scoping Document entitled, “Atlantic Surf clam and Ocean Quahog Excessive Shares Amendment.”

- The four objectives of the Surf clam and Ocean Quahog Fishery Management Plan serve the fishery and the nation in the short and long term well and **must not be changes**.
- An Excessive Shares amendment is a waste of tax payers money and the Mid Atlantic Fishery Management Council, along with National marine Fisheries Service’s time, and **should not go forward**

The four Objectives of Individual Transferable Quotas (ITQs) Fishery Management Plan (FMP) in 1990 were key to the development and implementation of the FMPs. The Objectives were discussed and contemplated during numerous Council meetings in the mid- 1980s and have proven to create flexible and adaptable regulations which have allowed government and industry costs to be minimized under the ITQ system. Industry has spent nearly the past 30 years operating under Amendment 8’s Objectives which have allowed consolidation decisions and all other business decisions to be made efficiently by businessmen. The Objectives and thus, the rules that businesses have been operating under should not be changed at all.

We strongly believe that the two issues for which this Amendment is currently being scoped does not warrant an amendment to the Surf clam and Ocean Quahog FMP. This SC/OQ fishery has been called the “best managed fishery in the US – if not the world” by a former NOAA Chief Scientist and also a former NOAA Fisheries Director of Policy who happens to be a member of the MAFMC SSC. Since implementation of management in 1977, the surfclam resource was rapidly rebuilt and neither species has experienced overfishing nor has either been overfished in the past nearly 40 years.

Likewise, do NOT change anything relative to “excessive shares” with a new Amendment. The status quo definition of excessive shares was recommended by the MAFMC in the late 1980s and approved by the Secretary of Commerce in 1990. Amendment 8 provides that an excessive

South Jersey Surf Clam, LLC

P.O. Box 727
Manahawkin, NJ 08050

share of ITQ privileges is an amount that enables an industry participant to act in contravention of the federal antitrust laws. The MAFMC explained how Amendment 8 would satisfy the “excessive shares” criterion in National Standard 4 stated that by regulating ITQ transfers among owners, “the antitrust laws are already in force which would cover the abuse of excessive shares”. Industry actually sued over this very provision of the FMP and a Federal judge ruled in favor of the Council and Secretary and against industry. It makes absolutely no sense to try and change nearly 30 years of management and a Federal judge’s ruling.

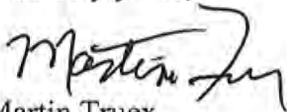
Truex Enterprises is the owner of a number of surf clam and ocean quahog vessel that fish in the Mid-Atlantic and New England. The families that own the company have been in the clam business for generations and have invested years of hard work and large amounts of money in the industry. We have played by the rules and invested in building a business for the future. It is important that current ITQ system remain unchanged, otherwise the government will have failed us in our quest to produce high quality seafood for the betterment of our customers, suppliers and employees.

Finally, as the Industry Advisors strongly advocated, we hope the MAFMC would focus their surf clam and ocean quahog efforts on our very real concerns about being closed out of fishing areas in New England. The scallop and ground fish fishing industries in New England are strongly advocating areas where we fish, be closed, so that they can operate in areas that are beneficial to them. The fact that we fish on fairly uniform sandy areas without structure and there are few, if any scallop or ground fish, in these areas is irrelevant to their industry’s willingness to sacrifice our surf clam and ocean quahog fisheries in order to appear to close areas. The council’s help is needed to protect the clam industry as we and utilize significant amounts of the resources of both species in New England while taking the pressure off the small young surf clam that have set offshore of the Mid-Atlantic

In summary, we would like to strongly advocate that NO Amendment for excessive shares or changes in any of the Objectives be moved forward at this time. These two issues were fully addressed in Amendment 8 and should not be changed.

Thank you for your consideration of these comments.

Sincerely yours,



Martin Truex
South Jersey Surf Clam, LLC

Oceanside Packer, Inc.
1065 S. Main Street
West Creek, New Jersey 08092

July 20, 2017

Mr. Jose Montanez
Mid-Atlantic Fishery Management Council

Excessive Shares and Goals and Objectives Proposed Amendment Comments

Dear Mr. Montanez:

Oceanside Packers, Inc. and other related companies owners would like to comment on the clam excessive shares and objectives of the surf clam and ocean quahog proposed amendment 18. The group are owners of a number of surfclam vessel and ITQs. These boats fish in New England and Mid-Atlantic. Their vessels land their surf clams in New Jersey and New York. Some of their companies own ITQs and rent some surf clam ITQs to catch which help cover the overhead cost of the vessels.

The owners are concerned about possible changes in the surf clam ocean quahog fishery management plan objectives which has served the industry well for almost thirty years. The current objectives are designed for flexibility and allow the operators the efficiency necessary to deal with the never ending changes in the ocean, the clam fishery and the market place. The owners believe the current objectives do not warrant an amendment to the Surfclam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives or excessive shares of the surfclam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cap. That cap only applies to ITQs which were implement after 2006. The clam ITQ had been in effect for 16 years before MSA percentage requirement was added and it was not retroactive.

The clam surfclams and ocean quahogs management plan is based on the four objectives which were developed for the ITQ system and implemented in Amendment 8. For 27 years the fishery has operated under Amendment 8's objectives which allows consolidation and all other business decisions to be made efficiently by the participants in the fishery. The objectives for the clam ITQ FMP do not need to be changed.

Oceanside Packer, Inc.

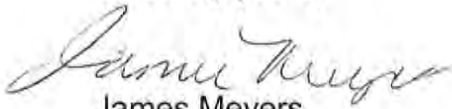
1065 S. Main Street
West Creek, New Jersey 08092

The owners of these companies also request that there be no changes regarding the current FMP including excessive shares. The current excessive shares are controlled using federal antitrust laws. The current regulations provides that no participant has an excessive share of ITQ privileges which is an amount that enables a company behave in a way that violates federal antitrust laws by imposing market power on the industry. The Mid Atlantic Council in Amendment 8 addressed the National Standards 4 of the MSA suggesting that it was adequate protection against a company obtaining an excessive share. The NMFS agreed with the council and implemented that prevision in Amendment 8 Therefore, the excessive shares protection is in effect under the antitrust laws of the United States. It complies with NS 4 and there is no good reason to change it.

The owners suggest that the current four objectives and excessive shares which are currently in the regulations be kept with no changes. The public and industry are being protected under the current amendment.

Thank you for consider our comments.

Sincerely yours,



James Meyers
Managing Member
Oceanside Packer, Inc.

Ellen W. LLC
1041 S. Main Street
West Creek, NJ 08092

July 18, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Comments on Excessive Shares Amendment

Dear Dr. Montanez:

Ellen W. LLC is the operator/owner of a number of surf clam and ocean quahog vessel that fish out in the Mid-Atlantic and New England. Our vessels mostly catch ocean quahogs and land them in both the north and south. We also operate an unloading dock in Atlantic City, New Jersey. Our company does not own ITQs but receive surf clam and ocean tags from the owners of the ITQs for us to catch.

The two issues in this Amendment that are currently being proposed do not warrant an amendment to the Surf clam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives and excessive shares of the surf clam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cape. That cape only applies to ITQs which were implemented after 2006. The clam ITQ went into effect January 1, 1990, 16 years before that new requirement of the MSA when into effect.

Successful management of the surf clams and ocean quahogs fishery is based on the FMPs four Objectives which were developed in late 1980s and implemented in Amendment 8 in 1990. Industry has spent the past 27 years operating under Amendment 8's Objectives which have allowed consolidation and all other business decisions to be made efficiently by the participants in the fishery. **Please do not change one word in the Objectives of the SCOQ FMP.**

Likewise, **do NOT change anything regarding the current Amendment including excessive shares.** Amendment 8 provides that an excessive share of ITQ privileges is an amount that enables an industry participant to act in violating federal antitrust laws. The Council explained how Amendment 8 would satisfy the excessive shares criterion in National Standard 4 by the

Ellen W. LLC
1041 S. Main Street
West Creek, NJ 08092

fact that "the antitrust laws are already in force which would cover the abuse of excessive shares".

In summary, I would like to strongly advocate that NO Amendment for excessive shares or for a change in any of the Objectives be moved at this time. These two issues were fully addressed in Amendment 8 and should not be changed at all.

Please consider our comments and thank you.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Leroy E. Truex". The signature is stylized and cursive.

Leroy E. Truex
Ellen W. LLC

Ellen W. LLC
1041 S. Main Street
West Creek, NJ 08092

July 19, 2017

Dr. Christopher Moore
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

“SC/OQ Excessive Shares Amendment Scoping Comments”

Dear Drs. Moore:

Please accept our comments on the Scoping Document entitled, “Atlantic Surf clam and Ocean Quahog Excessive Shares Amendment.”

- The four objectives of the Surf clam and Ocean Quahog Fishery Management Plan serve the fishery and the nation in the short and long term well and **must not be changes**.
- An Excessive Shares amendment is a waste of tax payers money and the Mid Atlantic Fishery Management Council, along with National marine Fisheries Service’s time, and **should not go forward**

The four Objectives of Individual Transferable Quotas (ITQs) Fishery Management Plan (FMP) in 1990 were key to the development and implementation of the FMPs. The Objectives were discussed and contemplated during numerous Council meetings in the mid- 1980s and have proven to create flexible and adaptable regulations which have allowed government and industry costs to be minimized under the ITQ system. Industry has spent nearly the past 30 years operating under Amendment 8’s Objectives which have allowed consolidation decisions and all other business decisions to be made efficiently by businessmen. The Objectives and thus, the rules that businesses have been operating under should not be changed at all.

We strongly believe that the two issues for which this Amendment is currently being scoped does not warrant an amendment to the Surf clam and Ocean Quahog FMP. This SC/OQ fishery has been called the “best managed fishery in the US – if not the world” by a former NOAA Chief Scientist and also a former NOAA Fisheries Director of Policy who happens to be a member of the MAFMC SSC. Since implementation of management in 1977, the surfclam resource was rapidly rebuilt and neither species has experienced overfishing nor has either been overfished in the past nearly 40 years.

Likewise, do NOT change anything relative to “excessive shares” with a new Amendment. The status quo definition of excessive shares was recommended by the MAFMC in the late 1980s and approved by the Secretary of Commerce in 1990. Amendment 8 provides that an excessive

Ellen W. LLC
1041 S. Main Street
West Creek, NJ 08092

share of ITQ privileges is an amount that enables an industry participant to act in contravention of the federal antitrust laws. The MAFMC explained how Amendment 8 would satisfy the “excessive shares” criterion in National Standard 4 stated that by regulating ITQ transfers among owners, “the antitrust laws are already in force which would cover the abuse of excessive shares”. Industry actually sued over this very provision of the FMP and a Federal judge ruled in favor of the Council and Secretary and against industry. It makes absolutely no sense to try and change nearly 30 years of management and a Federal judge’s ruling.

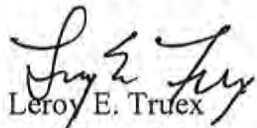
Truex Enterprises is the owner of a number of surf clam and ocean quahog vessel that fish in the Mid-Atlantic and New England. The families that own the company have been in the clam business for generations and have invested years of hard work and large amounts of money in the industry. We have played by the rules and invested in building a business for the future. It is important that current ITQ system remain unchanged, otherwise the government will have failed us in our quest to produce high quality seafood for the betterment of our customers, suppliers and employees.

Finally, as the Industry Advisors strongly advocated, we hope the MAFMC would focus their surf clam and ocean quahog efforts on our very real concerns about being closed out of fishing areas in New England. The scallop and ground fish fishing industries in New England are strongly advocating areas where we fish, be closed, so that they can operate in areas that are beneficial to them. The fact that we fish on fairly uniform sandy areas without structure and there are few, if any scallop or ground fish, in these areas is irrelevant to their industry’s willingness to sacrifice our surf clam and ocean quahog fisheries in order to appear to close areas. The council’s help is needed to protect the clam industry as we and utilize significant amounts of the resources of both species in New England while taking the pressure off the small young surf clam that have set offshore of the Mid-Atlantic

In summary, we would like to strongly advocate that NO Amendment for excessive shares or changes in any of the Objectives be moved forward at this time. These two issues were fully addressed in Amendment 8 and should not be changed.

Thank you for your consideration of these comments.

Sincerely yours,



Leroy E. Truex
Ellen W. LLC

Barney's Dock Inc.
P.O. Box 727
Manahawkin, New Jersey 08050

July 20, 2017

Mr. Jose Montanez
Mid-Atlantic Fishery Management Council

Excessive Shares and Goals and Objectives Proposed Amendment Comments

Dear Mr. Montanez:

Barney's dock and other related companies owners would like to comment on the clam excessive shares and objectives of the surf clam and ocean quahog proposed amendment 18. The group are owners of a number of surfclam vessel and ITQs. These boats fish in New England and Mid-Atlantic. Their vessels land their surf clams in New Jersey and New York. Some of their companies own ITQs and rent some surf clam ITQs to catch which help cover the overhead cost of the vessels.

The owners are concerned about possible changes in the surf clam ocean quahog fishery management plan objectives which has served the industry well for almost thirty years. The current objectives are designed for flexibility and allow the operators the efficiency necessary to deal with the never ending changes in the ocean, the clam fishery and the market place. The owners believe the current objectives do not warrant an amendment to the Surfclam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives or excessive shares of the surfclam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cape. That cape only applies to ITQs which were implement after 2006. The clam ITQ had been in effect for 16 years before MSA percentage requirement was added and it was not retroactive.

The clam surfclams and ocean quahogs management plan is based on the four objectives which were developed for the ITQ system and implemented in Amendment 8. For 27 years the fishery has operated under Amendment 8's objectives which allows consolidation and all other business decisions to be made efficiently by the participants in the fishery. The objectives for the clam ITQ FMP do not need to be changed.

Barney's Dock Inc.
P.O. Box 727
Manahawkin, New Jersey 08050

The owners of these companies also request that there be no changes regarding the current FMP including excessive shares. The current excessive shares are controlled using federal antitrust laws. The current regulations provides that no participant has an excessive share of ITQ privileges which is an amount that enables a company behave in a way that violates federal antitrust laws by imposing market power on the industry. The Mid Atlantic Council in Amendment 8 addressed the National Standards 4 of the MSA suggesting that it was adequate protection against a company obtaining an excessive share. The NMFS agreed with the council and implemented that prevision in Amendment 8. Therefore, the excessive shares protection is in effect under the antitrust laws of the United States. It complies with NS 4 and there is no good reason to change it.

The owners suggest that the current four objectives and excessive shares which are currently in the regulations be kept with no changes. The public and industry are being protected under the current amendment.

Thank you for consider our comments.

Sincerely yours,



Leroy E. Truex
President
Barney's Dock, Inc.

F/V Misty Dawn Inc.

1065 S. Main Street
West Creek, NJ 08092

July 18, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Comments on Excessive Shares Amendment

Dear Dr. Montanez:

F/V Misty Dawn, Inc. is the operator/owner of a number of surf clam and ocean quahog vessel that fish out in the Mid-Atlantic and New England. Our vessels mostly catch ocean quahogs and land them in both the north and south. We also operate an unloading dock in Atlantic City, New Jersey. Our company does not own ITQs but receive surf clam and ocean tags from the owners of the ITQs for us to catch.

The two issues in this Amendment that are currently being proposed do not warrant an amendment to the Surf clam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). There is absolutely no reason to change the objectives and excessive shares of the surf clam and ocean quahog fishery management plan. There is also nothing in the MSA or NS 4 that says that the clam FMP is required to use a percentage cape. That cape only applies to ITQs which were implemented after 2006. The clam ITQ went into effect January 1, 1990, 16 years before that new requirement of the MSA when into effect.

Successful management of the surf clams and ocean quahogs fishery is based on the FMPs four Objectives which were developed in late 1980s and implemented in Amendment 8 in 1990. Industry has spent the past 27 years operating under Amendment 8's Objectives which have allowed consolidation and all other business decisions to be made efficiently by the participants in the fishery. **Please do not change one word in the Objectives of the SCOQ FMP.**

Likewise, **do NOT change anything regarding the current Amendment including excessive shares.** Amendment 8 provides that an excessive share of ITQ privileges is an amount that enables an industry participant to act in violating federal antitrust laws. The Council explained how Amendment 8 would satisfy the excessive shares criterion in National Standard 4 by the

F/V Misty Dawn Inc.

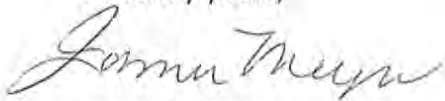
1065 S. Main Street
West Creek, NJ 08092

fact that "the antitrust laws are already in force which would cover the abuse of excessive shares".

In summary, I would like to strongly advocate that NO Amendment for excessive shares or for a change in any of the Objectives be moved at this time. These two issues were fully addressed in Amendment 8 and should not be changed at all.

Please consider our comments and thank you.

Sincerely yours,

A handwritten signature in cursive script that reads "James Meyers".

James Meyers
F/V Misty Dawn, Inc.

F/V Misty Dawn, Inc.

1065 S. Main Street
West Creek, NJ 08092

July 19, 2017

Dr. Christopher Moore
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

“SC/OQ Excessive Shares Amendment Scoping Comments”

Dear Drs. Moore:

Please accept our comments on the Scoping Document entitled, “Atlantic Surf clam and Ocean Quahog Excessive Shares Amendment.”

- The four objectives of the Surf clam and Ocean Quahog Fishery Management Plan serve the fishery and the nation in the short and long term well and **must not be changes**.
- An Excessive Shares amendment is a waste of tax payers money and the Mid Atlantic Fishery Management Council, along with National marine Fisheries Service’s time, and **should not go forward**

The four Objectives of Individual Transferable Quotas (ITQs) Fishery Management Plan (FMP) in 1990 were key to the development and implementation of the FMPs. The Objectives were discussed and contemplated during numerous Council meetings in the mid- 1980s and have proven to create flexible and adaptable regulations which have allowed government and industry costs to be minimized under the ITQ system. Industry has spent nearly the past 30 years operating under Amendment 8’s Objectives which have allowed consolidation decisions and all other business decisions to be made efficiently by businessmen. The Objectives and thus, the rules that businesses have been operating under should not be changed at all.

We strongly believe that the two issues for which this Amendment is currently being scoped does not warrant an amendment to the Surf clam and Ocean Quahog FMP. This SC/OQ fishery has been called the “best managed fishery in the US – if not the world” by a former NOAA Chief Scientist and also a former NOAA Fisheries Director of Policy who happens to be a member of the MAFMC SSC. Since implementation of management in 1977, the surfclam resource was rapidly rebuilt and neither species has experienced overfishing nor has either been overfished in the past nearly 40 years.

Likewise, do NOT change anything relative to “excessive shares” with a new Amendment. The status quo definition of excessive shares was recommended by the MAFMC in the late 1980s and approved by the Secretary of Commerce in 1990. Amendment 8 provides that an excessive

F/V Misty Dawn, Inc.

1065 S. Main Street
West Creek, NJ 08092

share of ITQ privileges is an amount that enables an industry participant to act in contravention of the federal antitrust laws. The MAFMC explained how Amendment 8 would satisfy the "excessive shares" criterion in National Standard 4 stated that by regulating ITQ transfers among owners, "the antitrust laws are already in force which would cover the abuse of excessive shares". Industry actually sued over this very provision of the FMP and a Federal judge ruled in favor of the Council and Secretary and against industry. It makes absolutely no sense to try and change nearly 30 years of management and a Federal judge's ruling.

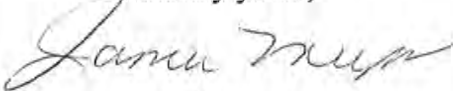
Truex Enterprises is the owner of a number of surf clam and ocean quahog vessel that fish in the Mid-Atlantic and New England. The families that own the company have been in the clam business for generations and have invested years of hard work and large amounts of money in the industry. We have played by the rules and invested in building a business for the future. It is important that current ITQ system remain unchanged, otherwise the government will have failed us in our quest to produce high quality seafood for the betterment of our customers, suppliers and employees.

Finally, as the Industry Advisors strongly advocated, we hope the MAFMC would focus their surf clam and ocean quahog efforts on our very real concerns about being closed out of fishing areas in New England. The scallop and ground fish fishing industries in New England are strongly advocating areas where we fish, be closed, so that they can operate in areas that are beneficial to them. The fact that we fish on fairly uniform sandy areas without structure and there are few, if any scallop or ground fish, in these areas is irrelevant to their industry's willingness to sacrifice our surf clam and ocean quahog fisheries in order to appear to close areas. The council's help is needed to protect the clam industry as we and utilize significant amounts of the resources of both species in New England while taking the pressure off the small young surf clam that have set offshore of the Mid-Atlantic

In summary, we would like to strongly advocate that NO Amendment for excessive shares or changes in any of the Objectives be moved forward at this time. These two issues were fully addressed in Amendment 8 and should not be changed.

Thank you for your consideration of these comments.

Sincerely yours,



James Meyers
F/V Misty Dawn, Inc.

Mary J. LLC
700 N. Rhode Island Ave Atlantic City, NJ
08401

July 19, 2017

Dr. Christopher Moore
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

"SC/OQ Excessive Shares Amendment Scoping Comments"

Dear Dr. Moore:

Please accept our comments on the Scoping Document entitled, "Atlantic Surf clam and Ocean Quahog Excessive Shares Amendment."

- o The four objectives of the Surf clam and Ocean Quahog Fishery Management Plan serve the fishery and the nation in the short and long term well and must not be changes.
- o An Excessive Shares amendment is a waste of tax payers money and the Mid Atlantic Fishery Management Council, along with National marine Fisheries Service's time, and should not go forward

The four Objectives of Individual Transferable Quotas (ITQs) Fishery Management Plan (FMP) in 1990 were key to the development and implementation of the FMPs. The Objectives were discussed and contemplated during numerous Council meetings in the mid- 1980s and have proven to create flexible and adaptable regulations which have allowed government and industry costs to be minimized under the ITQ system. Industry has spent nearly the past 30 years operating under Amendment 8's Objectives which have allowed consolidation decisions and all other business decisions to be made efficiently by businessmen. The Objectives and thus, the rules that businesses have been operating under should not be changed at all.

We strongly believe that the two issues for which this Amendment is currently being scoped does not warrant an amendment to the Surf clam and Ocean Quahog FMP. This SC/OQ fishery has been called the "best managed fishery in the US — if not the world" by a former NOAA Chief Scientist and also a former NOAA Fisheries Director of Policy who happens to be a member of the MAFMC SSC. Since implementation of management in 1977, the surfclam resource was rapidly rebuilt and neither species has experienced overfishing nor has either been overfished in the past nearly 40 years.

Likewise, do NOT change anything relative to "excessive shares" with a new Amendment. The status quo definition of excessive shares was recommended by the MAFMC in the late 1980s and approved by the Secretary of Commerce in 1990. Amendment 8 provides that an excessive

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Atlantic City, NJ 08401

share of ITQ privileges is an amount that enables an industry participant to act in contravention of the federal antitrust laws. The MAFMC explained how Amendment 8 would satisfy the "excessive shares" criterion in National Standard 4 stated that by regulating ITQ transfers among owners, "the antitrust laws are already in force which would cover the abuse of excessive shares". Industry actually sued over this very provision of the FMP and a Federal judge ruled in favor of the Council and Secretary and against industry. It makes absolutely no sense to try and change nearly 30 years of management and a Federal judge's ruling.

Truex Enterprises is the owner of a number of surf clam and ocean quahog vessel that fish in the Mid-Atlantic and New England. The families that own the company have been in the clam business for generations and have invested years of hard work and large amounts of money in the industry. We have played by the rules and invested in building a business for the future. It is important that current ITQ system remain unchanged, otherwise the government will have failed us in our quest to produce high quality seafood for the betterment of our customers, suppliers and employees.

Finally, as the Industry Advisors strongly advocated, we hope the MAFMC would focus their surf clam and ocean quahog efforts on our very real concerns about being closed out of fishing areas in New England. The scallop and ground fish fishing industries in New England are strongly advocating areas where we fish, be closed, so that they can operate in areas that are beneficial to them. The fact that we fish on fairly uniform sandy areas without structure and there are few, if any scallop or ground fish, in these areas is irrelevant to their industry's willingness to sacrifice our surf clam and ocean quahog fisheries in order to appear to close areas. The council's help is needed to protect the clam industry as we and utilize significant amounts of the resources of both species in New England while taking the pressure off the small young surf clam that have set offshore of the Mid-Atlantic

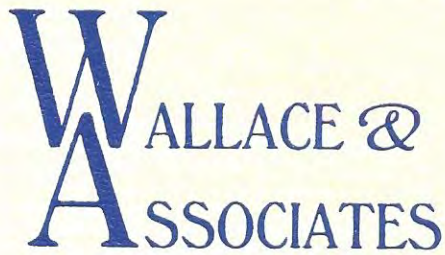
In summary, we would like to strongly advocate that NO Amendment for excessive shares or changes in any of the Objectives be moved forward at this time. These two issues were fully addressed in Amendment 8 and should not be changed.

Thank you for your consideration of these comments.

Sincerely yours

John Shannon

Mary J. LLC



July 20, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Comments on Surfclam and Ocean Quahogs, Goals and Objectives and Excessive Shares
Proposed Amendment 18

Dear Dr. Montanez:

Wallace and Associates represent many of the processors in the surfclam and ocean quahog (SCOQ) industry and many of the Individual Transferable Quota (ITQ) owners. Four primary members of our firm have more than one hundred years of experience with fisheries and I have been involved with the clam industries since before the Magnuson Stevens Fishery Conservation and Management Act (MSA) went into effect in 1976. The SCOQ fishery management plan (FMP) is considered the best managed fisheries in this country if not the entire world. Surfclams were overfished prior to management, but were rebuilt quickly under federal fishery management and the ocean quahog resource was never at risk because it was a virgin biomass when the clam management plan went into effect. The National Marine Fishery Service (NMFS), the Mid-Atlantic Fishery Management Council (MAFMC) and industry have operated efficiently and cooperatively since implementation of the ITQ allocations system in 1990.

However, this proposed Amendment has pitted the industry against NMFS. Never in the past 27 years of ITQ management has the relationship among the Council, NMFS, and industry been this strained. **Wallace and Associates' clients are totally opposed to the development of Amendment 18. It is simply not necessary.**

Amendment 8 has an excessive shares definition. The Council should retain the status quo definition of excessive shares as an amount of ITQ ownership that enables an entity to violate the antitrust laws. The MAFMC explained how Amendment 8 would satisfy the "excessive shares" criterion in National Standard 4 when they developed the amendment's antitrust requirement that is still in force and completely covers the possible abuse of excessive shares". Some industry members sued Amendment 8 demanding a percentage cap be placed on the ITQs, over

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the current provision of the FMP. A Federal judge ruled in favor of the Council and NMFS against industry. It makes absolutely no sense to try and change nearly 30 years of effective management and a Federal judge's ruling.

Several sets of independent experts were hired by the Council and NMFS which examined the issue of excessive shares in the clam fisheries. None of these groups agreed with each other, and in one case the members of the CIE peer-review openly disagreed amongst themselves. The biggest issue that the CIE workshop agreed on was that the Council needed to address the relevant "market". They concluded there was no control of "market power" in 2011 and the market has not noticeably changed in many years. Two of the contractors that review excessive shares used Department of Justice antitrust formulas in their considerations and concluded that antitrust was not a problem in this fishery. **If the antitrust formulas are being used to determine antitrust behavior by the experts why would a percentage be used instead, unless the real objective is social engineering?**

There are several ways a company can control some part of the industry by controlling supply, controlling the market place, or simply selling below cost until the completions are broke, at which point, they then can raise prices. None of these situations have ever occurring in the clam fisheries, are not likely to ever occur and a percentage cap will not solve some of the antitrust issues. The supply of raw product is controlled by the estimated biomass as assessed in the NMFS stock assessments and then through government quota setting. For the past 35 years the estimated biomass has been very high with the quota for ocean quahogs never caught and the quota for surfclams has not been taken for many years. It should be noted that both quotas could easily and safely doubled, based on the most recent stock assessments, if industry had needs for increased raw product.

At this time, most decision-makers do not understand how complicated this excessive shares issue really is. First, both clams are used as ingredients in other products except for a very small fraction of the overall production which are made into clam strips that are the only clam product that is a "center of the plate" product. What is even more difficult is that clams are relatively expensive compared to imported shrimp, squid, and some finfish products. Other meats like chicken and pork are also competitors of clam meats. As is often said: "protein competes with protein".

Many of the shucking companies do not own any quota, but rather simply buy clams from boats that provide the ITQs. The Council and NMFS do not regulate the processors except they must report their clam purchases. Since shucking companies are not regulated by the ITQ management system, in theory one could buy as many clams as they want, with no limitations. Therefore, how can the council and federal government justify their proposed excessive shares concept?

There is no limited entry in the surfclam or ocean quahog fisheries. Any U.S. citizen that wants to be involved in one or both of these fisheries can rent or buy ITQs. Anyone can build a clam boat or a processing plant at any time. The clam processors customers, both restaurant chains and food distributors, are willing to negotiate with anyone that wants to sell them clam products.

Any discussion associated with excessive shares will focus on the EEZ landings. Approximately 15 percent of the surfclam landings come from State waters and a very large percent of the surfclam meats sold in the US are being imported from Canada. Clearwater Fine Foods, a Canadian company with 100 percent of the arctic surfclam quota is over supplied and dumping large amounts of frozen and canned clam meat in the U.S. market at very low prices. This competition is very difficult for the U.S. producers to compete with because the Canadians have a weak dollar and there are no controls over their imports into this country. The strong U.S. dollar also makes exports of U.S. clam products to Asia very difficult if not impossible. However, Clearwater controls that market with high volume and prices, which is where they make all of their money.

Prior to 1990 and implementation of Amendment 8, the clam market was controlled by large multinational corporations, however, with the implementation of ITQs, these large companies could not make sufficient profits their shareholders demand and the independent boat owners were willing to pay more than anyone else to purchase the processing plants. Most of the pre Amendment 8 boat owner's families were in the clam boat business before implementation of the Magnuson Act in 1976. Those families now own most of the processing plants as well as most of the boats. They worked hard, after Amendment 8 went into effect, to get the share that they were catching before Amendment 8 when it was reallocated to those that did not have much quota. The same families that were catching clams in 1990 are still in business today. They bought out members of industry that wanted to get out of the fishery for whatever reasons. This is exactly what Amendment 8 was designed to do, **an industry funded buy out of a grossly overcapitalized fishery**. That allowed the industry to balance production with demand without having the need for the Council, NMFS, or Congress to be involved. The clam ITQ system was the model used by other fisheries in the U.S. to solve the problem of gross overcapitalization without government funded buyouts.

During the scoping hearings, there were a number of comments regarding what happens if the excessive shares amendment goes forward? At three different scoping meeting, percentages were proposed, in the first meeting, 100 percent of the quota was suggested, at the second webinar meeting the number was 70 percent, which was one of the number used in the original proposed amendment which was drooped by the council years ago, and at the third meeting the excessive share suggested number was 80 percent. In most of the scoping meeting it was pointed out that this is a complex amendment because setting a percentage will be after the fact which makes it completely arbitrary. In that case the only way not to have a suit brought against the percentage is to have it high enough that no company will spend the money fighting it.

Remember, Omega got their merger approved between Zappa and H. J. Smith Company. were the new company would have 90 plus percent of the menhaden fishery in the U.S. by the Department of Justice because they would not have market power. They compete with fish meal from around the world and corn and soy beans. The clam industry competes with clams, shrimp, chicken and pork from around the world. Neither company controls the market place.

The clams industry is a very capital intensive, with new boats having to meet the new USCG standards equivalent to passenger ships. The new Coast Guard regulations also require more stringent maintained on currently operating vessels and has raised the cost of complying with the new rules on both old and new vessels. This is an industrial fishery with very expensive vessels and processing plants that require large inventories. It is far from a “mom and pop” type finfish fishery where their product can be sold off the back of pick-up trucks. **This firm strongly suggest the council leave the current management measures alone. The current rules provide for adequate control of excessive shares. The current regulations allows flexible in the fishery, adaptable regulations and have allowed the government and industry costs to be minimized under the ITQ system.**

On the subject of goals and objectives, **do not change one word!** The current objectives were developed over a long time for Amendment 8 and had nearly every word fought over by the Council. These four objectives have been the guiding force for the regulation of these resources for nearly 30 years. They are the basis for the Council’s flagship FMP. The FMP that the council has talked about as an example of how fisheries can be managed without the government and councils spending time and money on managing and enforcing the fishery. It is self-funded and a rational way to fund overcapitalized fisheries. . Amendment 8’s objectives have allowed consolidation and all other business decisions to be made efficiently by industry. The objectives and thus, the rules that businesses have been operating under should not be changed. **The current amendment complies with NS 4.**

It should be noted that just one word change in the objectives of the FMP would require a full blown amendment. What is more troubling is that currently the objectives guide the FPM. If the objectives are changes then the FMP must be changed. **How is the council going to make the current FMP better?** It is the industry’s fear that the only thing that can be done, is to make the current FMP worse. The industry cannot think of anything that can make the FMP better except to allow mixed clams in a cages, which the council has ruled out and NMFS has said it can fix administratively. So, what is the Council trying to fix by changing the objectives and possibility undermining the best managed fishery in the United States? **Neither the objectives or the current FMP need to be changed, and the excessive shares is a non-issue and never has been.**

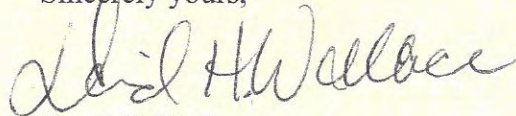
On a different subject. the industry ask that the MAFMC focus their clam efforts on our serious concern about being closed out of fishing areas in New England. The scallop and groundfish

fisheries in New England are strongly advocating closing areas where clam vessels fish, so that they can open areas that are beneficial for them. The fact that the clam industry fishes in areas where there no scallop or groundfish, so the closures harm only the surfclam fishermen. , Their willingness to sacrifice the surfclam fishery in order to fish in areas proposed to be closed by the New England Council's PDT on Nantucket Shoals and for trade a large closure for clam operations on Georges bank for one of the most complex habitats on the banks that has been closed to all bottom tending mobile gear, is outrageous and discriminates against a Mid Atlantic Council fishery. The clam industry ask for your help in opposing these two section of the New England Habitat Amendment.

On behalf of our clients, I would like to strongly advocate that no Amendment go forward for excessive shares or any changes be made in the objectives. These two issues were fully addressed in Amendment 8 and should not be changed. No proposed or implemented rule during the past 40 years of Federal management has so unified the industry in opposition to a clam Amendment. This fishery management system in NOT broke, please don't try to fix it. That would only make the FMP go backwards for industry and resources.

Thank you for your consideration of these comments.

Sincerely yours,

A handwritten signature in cursive script that reads "David H. Wallace". The signature is written in dark ink and is positioned above the printed name.

David H. Wallace



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Dr. Christopher Moore
Dr. Jose Montanez
MAFMC
800 N. State Street, Suite 201
Dover, DE 19901

Re: Atlantic SCOQ Excessive Share Amendment Scoping Comments

Dr. Moore and Montanez,

Atlantic Capes Fisheries Inc. and Galilean Seafood Inc. manage, operate and process Atlantic Surf Clams from eight [8] vessels.

We feel that the SCOQ FMP Goals and Objectives as they are stated remain appropriate to the fishery. They are relevant to the fishery in the way that it operates today and require no changes. The current goals and objectives allow for any variations to how the fishery operates from harvest to processing. We have been able to be adaptable, thereby seeing no need for change.

We also feel that the Council should retain the status quo definition of an excessive share as the preferred alternative. There is no basis for redefining what an excessive share of SCOQ quota would be. Federal antitrust laws will continue to ensure that no entity acquires an excessive share of SCOQ quota. The variability in the marketplace worldwide precludes and one entity from controlling prices or demand. Defining what level of participation besides 100% would be impossible. To attempt to establish an excessive share percentage would be costly and time consuming only for it to be an arbitrary percentage at best.

Best Regards,

Chris Shriver
General Manager
Atlantic Capes Fisheries Inc.
Clam Division
Galilean Seafood Inc.

CC: Daniel Cohen, Sam Martin, Peter Hughes



July 21, 2017

Dr. Jose Montanez
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, DE 19901

Re: SCOQ Excessive Shares Amendment Scoping Comments

Dear Dr. Montanez:

On behalf of the National Fisheries Institute's Clam Committee, I write regarding the development of a possible Excessive Shares Amendment to the Atlantic Surfclam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP).

The NFI Clam Committee is a group of domestic clam producers who maintained robust and thriving surfclam and ocean quahog populations for over 20 years. As the first U.S. seafood companies to implement an individual transfer quota (ITQ) system in 1990, the surfclam and ocean quahog industries have led responsible resource management and maintained healthy competition. The Excessive Shares amendment as contemplated by the Council would disregard surfclam and ocean quahog's successful management history by overriding established antitrust protections with unnecessary and duplicative measures.

The Scoping Guide for the Excessive Shares Amendment proposes that the SCOQ FMP specifically define a maximum share amount to be held by a single entity through a percent cap or other measure. The Scoping Guide cites National Standard 4 (NS4) of the Magnuson-Stevens Act as the mandating regulation. However, NS4 does not require an explicit numerical definition of maximum shares. NS4 only requires that an ITQ management program have in place protections against an excessive acquisition of shares.

Since inception, the SCOQ FMP has maintained protections against excessive shares. The SCOQ FMP defined an excessive share as any amount of ITQ ownership that could lead to violation of antitrust laws. This guiding proviso has enabled the surfclam and ocean quahog fisheries to compete economically and thrive ecologically. We urge the Council to maintain its use.

In 2011, NOAA/NMFS commissioned a team of independent economists to examine the surfclam and ocean fishery from an anticompetitive perspective. In their report (attached), the economists concluded that regardless of shares held by one entity, no anticompetitive market power could be exerted due to the volume and variety of available clam products as well as competing protein products. In addition, the prevalence of imported clam product also acted as a check on unbalanced market control. For the Council to establish a definite limit on shares after

a determination has been reached eliminating its need would be redundant and a waste of resources.

Further, surfclam and ocean quahog are exemplars of responsibly administered quota share fisheries with harvest levels only at 50%-60% of total available catch. The abundance of uncaught product and unused quota makes new entry and new competition possible, thus preventing consolidation of market power by a single entity. This renders the creation of an excessive shares cap unnecessary.

The establishment of an excessive shares percentage is not mandated by the Magnuson-Stevens Act and is unwarranted within the present surfclam and ocean quahog markets. The NFI Clam Committee urges the Council to defer to the effective antitrust protections already in place within the Surfclam and Ocean Quahog Fisheries Management Plan which have sensibly and sustainably guided these fisheries for 27 years.

Sincerely,

A handwritten signature in black ink, appearing to read "John Connelly". The signature is written in a cursive, flowing style with a prominent loop at the end.

John Connelly
President

Recommendations for Excessive-Share Limits in the Surfclam and Ocean Quahog Fisheries

Glenn Mitchell

Steven Peterson

Robert Willig

May 3, 2011

About Compass Lexecon

One of the world's leading economic consulting firms, Compass Lexecon provides law firms, corporations and government clients with clear analysis of complex issues. We have been involved in a broad spectrum of matters related to economics and finance – providing critical insight in legal and regulatory proceedings, strategic decisions and public policy debates. Our experience and expertise apply to virtually any question of economics, in virtually any context of the law or business.

At Compass Lexecon, we believe that critical economic issues – whether in connection with litigation, regulatory review, strategic planning or other corporate activities – are best understood when subjected to a rigorous empirical analysis. Our firm is known for developing a thorough understanding of the issues that face our clients, relating those issues to relevant economic theory, and then supporting our analysis with solid and persuasive empirical evidence. One of our most valuable assets is our ability to present complex concepts and data in an understandable manner. Our successes in the courtroom and before regulatory agencies over the years have validated our approach.

Compass Lexecon was formed in January 2008 through the combination of Competition Policy Associates (COMPASS) and Lexecon, two of the premier economic consulting firms in the world. For the past five years, Compass Lexecon has been ranked as one of the leading antitrust economics firms in the world by the Global Competition Review.

Founded in 1977, Compass Lexecon's Chicago office pioneered the application of economics to legal and regulatory matters. We currently have a professional staff of more than 200 individuals, including 60 highly skilled Ph.D. economists and econometricians and more than 60 other individuals with advanced degrees located in seven offices.

Our practices are led by some of the most recognized and respected economic thinkers in the world including six former chief economists of the Department of Justice Antitrust Division. We maintain relationships with numerous high-profile academic affiliates, including Nobel Prize winners.

Antitrust, our founding practice area, remains a central part of our business. Our practice areas have expanded to include other areas of litigation including securities and financial markets, intellectual property, accounting, valuation and financial analysis, ERISA, corporate governance, bankruptcy and financial distress, derivatives and structured finance, class certifications and employment matters. In all these areas, we often provide detailed damages analyses. Our non-litigation-related practice areas include matters such as business consulting, regulatory investigations and public policy.

Compass Lexecon is a wholly owned subsidiary of FTI Consulting, Inc., a global business advisory firm.

For more information, visit www.compasslexecon.com

**For more information about this report, contact Glenn Mitchell:
gmitchell@compasslexecon.com**

Executive Summary

A. Assignment

We have been asked to give independent advice to the National Marine Fisheries Service (“NMFS”) and the Mid-Atlantic Fishery Management Council (“Council” or “MAFMC”) on determining how, in order to protect against market power without constraining the workings of competition, to set an excessive-share limit in individual transferable quota (“ITQ”) systems in general, and in the Surfclam and Ocean Quahog (“SCOQ”) fisheries in particular. This draft report provides our recommendations on: 1) an operational rule or process that could be used to set such an excessive-share limit in terms of the maximum percentage of quota that can be owned or otherwise controlled by a single individual or entity; and 2) application of this rule or process using available data to determine an appropriate excessive-share limit in the SCOQ ITQ system.

B. The Surfclam and Ocean Quahog Fisheries

Surfclams and Ocean Quahogs are bottom-dwelling species of clams that are harvested off of the East Coast of the United States using vessels equipped with hydraulic dredges. The harvest supports processing of Surfclams and Ocean Quahogs in a number of states.

Fisheries are a well known example of a common-pool renewable resource. Regulation of fisheries limits access and fishing effort (e.g., by limiting vessel size or regulating the design of other equipment). In 1990, the SCOQ fisheries adopted an ITQ system under which the fishery regulator sets a total allowable catch (“TAC”) separately for each of the two species to prevent over-exploitation of the resource, and allocated ITQs permitting harvest of a share of the TAC (the body of this report provides details about how the program is administered). ITQs are transferable, which allows shifts in production to industry participants that may be more efficient and, consequently, that value the quota more highly than the original owner. Participants in the fishery report that there are various types of transactions involving ITQs that commonly occur, including permanent ITQ transfers, long-term ITQ leases (e.g., five years), and transfers of bushel tags.¹

Currently, there are eight processing firms that purchase catch from the SCOQ fisheries. Some processors have developed quota ownership through either the acquisition of vessels and accompanying quota or the acquisition of quota directly, and it is common for processors to enter into long-term contracts (e.g., five years or more) to lease quota from quota holders. Processors also enter into exclusive contracts with vessel owners to harvest clams. Processors aim to meet the schedules set by their customers, many of which are large consumer goods companies, such as Progresso or Campbell’s, or large food service companies, such as Sysco. A consequence of the need to harvest and process clams to meet a schedule is that virtually all clams are sold under contract between processors and harvesters, or are harvested by processor-affiliated vessels.

¹ Excessive Share Technical Meeting, October 22, 2010.

C. Market Power and Competition in ITQ-Regulated Fisheries

This report addresses the question of whether market power can be exercised through the ownership and withholding of quota in the SCOQ fisheries. The exercise of market power in an ITQ-regulated fishery can occur when a quota owner has the ability and the incentive to affect the price of the regulated harvest or of the quota through its use or suppression of use of quota. When the incremental quota transactions of a harvest seller affect the price the quota owner receives for its entire quota holdings, the quota owner may have the incentive to withhold quota to increase the market price. When incremental quota transactions of a harvest buyer affect the harvest price, the quota owner may have the incentive to withhold quota to decrease the harvest price. Furthermore, firms may have an incentive to withhold quota in order to foreclose competitors from the market.

The regulation of market power requires a trade-off between potentially increasing efficiency by controlling market power and potentially reducing efficiency by over-regulating market transactions. In the SCOQ fisheries, an overly restrictive cap could limit the growth of an efficient firm when there is no material threat of the exercise of market power. Furthermore, conditions in the fisheries have changed over time and will change in the future. Thus, a share cap established at an appropriate level could over time become inefficiently high or low.

The U.S. Department of Justice and the Federal Trade Commission (“Agencies”) have responsibility in the United States for determining if a proposed merger would threaten competition. The *Horizontal Merger Guidelines* helps firms know whether their merger is likely to be opposed by the Agencies. The *Horizontal Merger Guidelines* describes market concentration thresholds (for sets of products or services determined to be together in a relevant market) and other considerations that, if satisfied, would indicate that a merger is unlikely to create market power. A standard measure of the level of concentration is the Herfindahl-Hirschman Index, or HHI.² Based on thresholds described in the *Horizontal Merger Guidelines*, markets with HHIs below 1500 are considered unconcentrated; markets with HHIs between 1500 and 2500 are considered moderately concentrated; and markets with HHIs greater than 2500 are considered highly concentrated.³ The *Guidelines* also describes the methods the Agencies use to evaluate the competitive impact of proposed mergers.

Levels of concentration vary in the different sectors of the SCOQ industry: quota ownership, harvesting, and processing. Since the initiation of the ITQ system and quota allocation to the vessel owners participating in the SCOQ fisheries, a number of quota owners have sold their quota permanently and left the fisheries. Despite the exit of some

² The HHI is equal to the sum of the squared market shares of the participants in the market. Thus, if there are three firms with shares of 50 percent, 30 percent, and 20 percent, the HHI is equal to 3800 ($3800 = 50^2 + 30^2 + 20^2 = 2500 + 900 + 400 = 3800$).

³ See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, p. 19.

quota owners from the fisheries, the ownership of quota in the SCOQ fisheries is unconcentrated, but the use of quota is highly concentrated. An NMFS study found that the HHI of ownership of Surfclam quota in 2009 was 1167, and the HHI of ownership of Ocean Quahog quota was 993.⁴ NMFS has also conducted an analysis of quota usage by examining records showing the harvest amounts for vessels in the SCOQ fisheries and tracing their ownership. The HHI of harvesting activity for Surfclams in 2008 was 4080 and the HHI of harvesting activity for Ocean Quahogs was 2653. The HHI of harvesting activity for SCOQ combined was 2890.⁵

NMFS data also show that the concentration of harvesting has risen substantially in the last decade, largely as the result of the backward integration of clam processors into harvesting. The processing sector itself has also changed. In 1979, there were 44 plants that processed either Surfclams or Ocean Quahogs.⁶ Today, there are 12 plants.⁷ The HHI of purchases by processors grew between 2003 and 2008 from 2068 to 3134 for Surfclams and from 3431 to 4369 for Ocean Quahogs.⁸

It is possible for market power to be created or exercised at any of these stages of activity through a variety of means. Our analysis here, however, is targeted at the possibilities for the creation or exercise of market power specifically through the ownership or contractual control of quota. Large holdings of quota, whether amassed through permanent transfers of quota allocation, long-term leases of quota, or annual purchases of bushel tags, raise the risk that large quota holders will be able profitably to withhold quota and raise the price of clams and of quota. However, different types of ownership and control have different implications for the likelihood that a large quota holder could profitably exercise market power.

There are a number of factors that may constrain the exercise of market power throughout the various levels of activity in the SCOQ fisheries. For example, if it were the case that demand were highly elastic and substitutes were amply available, then small changes in price would lead to large changes in the quantity demanded. The demand for quota is ultimately derived from the demand for clam products and, therefore, demand for quota would then be elastic as well. Then, large reductions in output caused by price

⁴ Social Sciences Branch of the Northeast Fisheries Science Center, “Excessive Share Issues in the Surfclam and Ocean Quahog ITQ Fishery,” Report to the Surfclam and Ocean Quahog FMAT, August 12, 2009, p. 12. As discussed in detail in this report, the available data may not always clarify ownership sufficiently to determine shares correctly.

⁵ NMFS Data.

⁶ The available data do not report the number of firms operating these plants (“Amendment #3 to the Fishery Management Plan for the Surf Clam and Ocean Quahog Fisheries and Supplemental Environmental Impact Statement,” April 1981).

⁷ Mid-Atlantic Fishery Management Council in cooperation with the National Marine Fisheries Service, “Overview of the Surfclam and Ocean Quahog Fisheries and Quota Considerations for 2010,” May 2009.

⁸ NMFS Data.

increases would generally limit the potential for the significant exercise of market power (because moving the market price substantially would require withholding, without revenue, a large quantity). Also, processors sell to large buyers, whose possible options to switch supply sources would constrain price increases for clam meat from the SCOQ harvest (and, consequently, would constrain prices for the SCOQ ITQ). Additional important factors may include the existence of excess unused quota (held in small accumulations) and excess harvesting and processing capacity.

D. Conclusions Regarding Market Power in the Fisheries

The evidence we analyzed does not support a conclusion that market power is currently being exercised through withholding of quota in the SCOQ fisheries.⁹ In particular, processors report that once it is clear that there will be excess quota available in a season (well before the end of the season, leaving sufficient opportunity to continue to harvest if harvesters and processors deem there to be sufficient demand), the price of quota is very low. This is inconsistent with the exercise of market power based on quota holdings.

E. Excessive-Share Guidelines

The excessive-share proposal is laid out as a series of steps in Table ES-1. These steps allow for the possibility that, under some circumstances that can be objectively assessed, the appropriate excessive-share cap is 100 percent. If it can be shown that ownership of all of the quota were to pose no risk for the exercise of market power, then the appropriate regulations would be no regulation at all. This does not appear to be the case for the SCOQ ITQ system under current conditions, but it is a valid theoretical possibility for ITQ programs in general.

F. Issues for Additional Consideration: Open Auction(s) for ITQ Sponsored by the Regulators

Our recommendations depend on conclusions and assumptions that are in some instances guided by the limited body of information provided to us by industry participants. Additional information could be useful for optimal administration of the fisheries. For example, information on the value of quota expressed in short-term (“spot”) ITQ transaction prices in an efficient, liquid market would be an excellent source of objective evidence that would aid in managing the fisheries. In the current circumstances, such evidence could validate claims that quota have low value and are not being withheld from the market despite harvests below the TAC. It also happens to be the case that spot ITQ transaction prices could be beneficial to industry participants in general, and in particular to small quota holders that likely have less information on the value of quota than larger holders engaged in many quota transactions. One way to provide accurate price signals to the market and to the regulators is for the regulators to sponsor an open auction during each season for a modest portion of the rights to harvest

⁹ We do not analyze whether market power is exercised through the withholding of harvesting or processing, or through exclusionary conduct other than conduct involving quota ownership.

Recommendations for Excessive Share Limits in the SCOQ Fisheries
Mitchell, Peterson and Willig. May 3, 2011.

TAC from each fishery. Details for the design and implementation of such an auction would require additional economic analysis not covered in the scope of this report.¹⁰

¹⁰ See U.S. Department of Commerce, *The Design and Use of Limited Access Privilege Programs*, Lee G. Anderson and Mark C. Holliday, eds., NOAA TM NMFS-F/SPO-86, pp. 124-135.

Table ES-1:

Step 1: Assess availability of requisite information on quota ownership and control	The regulator must be able to define clearly what constitutes relevant ownership and control of ITQ shares, accurately calculate existing levels of quota holdings and concentration, and be able to identify the quota owners and their affiliations that create aligning interests.	The Council must be able to determine which entities are affiliated and then accurately assess quota holdings and transactions.
Step 2: Assess availability of requisite competitive information	The relevant information to be collected includes the scope and quantity of substitute products, the level of excess capacity, the degree of product heterogeneity, the relative bargaining power of buyers and sellers, the ability to price discriminate, ease of entry, and efficiencies (or economies of scale).	The Council must determine the relevant markets and have access to other information about competitive constraints.
Step 3: Establish whether threshold condition requiring no calculation of cap applies	A TAC sufficiently restrictive to remove any incentive to withhold quota would obviate the need for an excessive-share cap. The relevant “sufficiently restrictive” level is the quantity that would be produced if there were only a single entity producing in the industry – the “monopoly” output.	The TAC in each of the SCOQ fisheries does not restrict output in a competitive market, so TAC is not below the monopoly output.
Step 4: Establish appropriate concentration thresholds	Use the information on competitive constraints to determine an appropriate concentration condition under the analytical framework of the <i>Horizontal Merger Guidelines</i> , and to guard against the possibility of the foreclosure of competitors.	Prevent a relevant product market HHI from exceeding 2500 and ensure independent harvest supply sufficient to support at least three efficient processors.
Step 5: Determine relationship between the excessive-share cap and market concentration	Assess concentration of substitute products and size of competitive fringe; calculate maximum number of quota allocations that can exist at the cap; include one additional quota holding that captures remainder; and calculate the HHI for the resulting set of relevant market shares. It may be possible to meet the concentration conditions set in Step 4 even when share ownership is very highly concentrated or 100 percent, depending on the breadth of the market, the size of the fringe, and the sources of supply to processors.	To apply these calculations first requires the determination of relevant markets. Figure 13 illustrates calculations under various assumptions.
Step 6: Identify regulatory and practical constraints	An appropriate cap for one set of market conditions may be too high or too low under other conditions – how to address this depends on legal and practical constraints.	Two options: fixed cap or two-part cap with flexible short-term holdings.
Step 7: Set the excessive-share cap	Identify the excessive-share cap based on the first six steps; exempt current large holdings, but do not allow them to grow further.	Fixed cap at 30-40%; two-part cap at 30% for long-term and 40-60% for short-term.

Table of Contents

I. Introduction.....	1
A. Statement of Work/Terms of Reference	1
B. Consultant Roles and Biographies	2
C. Overview.....	3
II. Background on the Surfclam and Ocean Quahog Fisheries and on the Clam Processing Industry.....	3
A. The Fisheries.....	3
B. Regulation of the Surfclam and Ocean Quahog Fisheries	4
C. The Processing Sector.....	7
III. The Economics of Market Power	7
A. What Is Market Power?	7
B. Market Power in an ITQ-Controlled Fishery.....	9
C. Regulating Market Power in ITQ-Regulated Fisheries Using an Excessive-Share Cap	10
D. The <i>Horizontal Merger Guidelines</i>	13
IV. The Structure of the Clam Harvesting and Processing Industry.....	15
A. Quota	16
B. Harvesting.....	18
C. Processors	18
V. Potential Market Power Concerns and the Competitive Constraints on the Exercise of Market Power in the Surfclam and Ocean Quahog Industry	20
A. The Exercise of Quota-Based Market Power.....	20
B. Competitive Quota Ownership	22
C. The Relevant Market(s) for SCOQ Clams and Clam Products	22
D. Potential Competing Sources of Supply and Substitute Products	24
E. Large Buyers.....	25
F. Vertical Integration of Processors into Harvesting.....	25
G. Excess Supply of Harvesting Capacity	26
H. Conclusions Regarding the Presence of Market Power in the Fisheries	26
VI. Excessive-Share Proposal.....	28
A. Step 1: Assess Availability of Requisite Information on Quota Ownership and Control	28
B. Step 2: Assess Availability of Requisite Competitive Information.....	30
C. Step 3: Establish Whether Threshold Condition Requiring No Cap Applies.....	32
D. Step 4: Establish Appropriate Concentration Thresholds.....	33
E. Step 5: Determine Relationship Between the Excessive-Share Cap and Market Concentration.....	34
F. Step 6: Identify Regulatory and Practical Constraints.....	37
G. Step 7: Set the Excessive-Share Cap	39
H. Issues for Additional Consideration: Open Auction(s) for ITQ Sponsored by the Regulators	41

*Recommendations for Excessive Share Limits in the SCOQ Fisheries
Mitchell, Peterson and Willig. May 3, 2011.*

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I. Introduction

A. Statement of Work/Terms of Reference

We have been asked to give independent advice to the National Marine Fisheries Service (“NMFS”) and the Mid-Atlantic Fishery Management Council (“Council” or “MAFMC”) on determining how, in order to protect against market power without constraining the workings of competition, to set an excessive-share limit in individual transferable quota (“ITQ”) systems in general, and in the Surfclam and Ocean Quahog (“SCOQ”) fisheries in particular. Specifically, the NMFS has requested the following:

Using the rule prescribed under the "U.S. Department of Justice Horizontal Merger Guidelines" or another accepted rule if appropriate for determining market power, describe a process or rule that will allow for a theoretically sound procedure to specify the maximum possible allowable percentage share of quota ownership that will prevent an entity from obtaining market power. This can include market power (monopoly/oligopoly) in the final product market, the input market (monopsony/oligopsony) for the fishery resource, or the quota share market. If market power already exists in any of these markets, describe a process or rule that will allow for a theoretically sound procedure to prevent market power from increasing.¹¹

This report provides our recommendations on: 1) an operational rule or process that could be used to set an excessive-share limit in terms of the maximum percentage of quota that can be owned or otherwise controlled by a single individual or entity; and 2) application of this rule or process using available data to determine an appropriate excessive-share limit in the SCOQ ITQ system.

The recommendations presented in this report are based on the economic analysis of the SCOQ fisheries. The underlying economic principles regarding market power are the same for other fisheries, but the application of the principles may need to be modified to address different circumstances or additional market power issues that may arise.¹² Our recommendations allow for the possibility that, under some circumstances that can be objectively assessed, the appropriate excessive-share cap is 100 percent. If it can be shown that ownership of all of the quota were to pose no risk for the exercise of market power, then the appropriate regulations would be no regulation at all. This does not appear to be the case for the SCOQ ITQ system under current conditions, but it is a valid theoretical possibility for ITQ programs in general.

¹¹ Statement of Work for Independent Experts to Provide Advice on Setting of an Excessive Share Limit in the Surfclam/Ocean Quahog ITQ Fishery.

¹² For example, different species harvested from a multi-species fishery might face substantially different levels of competition from competing species and fisheries. The establishment of an appropriate excessive-share rule would have to take the competitive circumstances for the different species into account.

B. Consultant Roles and Biographies

The report was prepared and written under the direction of Professor Robert Willig. Dr. Steven Peterson and Dr. Glenn Mitchell drafted the report and performed the economic analyses underlying the report and its conclusions.

Dr. Robert Willig is Professor of Economics and Public Affairs at the Woodrow Wilson School and the Economics Department of Princeton University. Earlier, he was Supervisor in the Economics Research Department of Bell Laboratories. His teaching and research have specialized in the fields of industrial organization, government-business relations, and welfare theory. From 1989 to 1991, Dr. Willig served as Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice, where he led the development of the 1992 *Horizontal Merger Guidelines*. Dr. Willig is the author of *Welfare Analysis of Policies Affecting Prices and Products*, *Contestable Markets and the Theory of Industry Structure* (with William Baumol and John Panzar), and numerous articles on subjects including merger analysis, IO theory, and merger guidelines. Dr. Willig is also co-editor of *The Handbook of Industrial Organization*, *Can Privatization Deliver? Infrastructure for Latin America*, and *Second Generation Reforms in Infrastructure Services*, and has served on the editorial boards of *The American Economic Review*, *The Journal of Industrial Economics* and the MIT Press Series on regulation. He is also an elected Fellow of the Econometric Society and an Associate of The Center for International Studies. Dr. Willig has served as a consultant and advisor for the Federal Trade Commission and the Department of Justice on antitrust policy; for OECD, the Inter-American Development Bank, and the World Bank on global trade, competition, regulatory and privatization policy; and for governments of diverse nations on microeconomic reforms. He has advised many corporations on antitrust and regulatory issues, and on pricing, costing, and business organization.

Dr. Steven Peterson is a Senior Vice President with Compass Lexecon and is based in Boston, Massachusetts. He specializes in the economics of antitrust and competition, estimation of damages, and regulation and public policy. In his antitrust work, Dr. Peterson has consulted with clients engaged in negotiations with the U.S. Department of Justice and customers to resolve allegations of price-fixing in both the United States and Europe, and he has evaluated the competitive impact of proposed mergers. Dr. Peterson has consulted extensively in regulated industries, including regulation of common-pool resources. Dr. Peterson consulted extensively with British Petroleum addressing the Prudhoe Bay Unit operating agreement and whether the unit interest owners' interests were sufficiently aligned under the agreement to avoid waste in the production of oil and gas from the unit. Dr. Peterson has also consulted on competition issues related to the transfer of slots (landing rights) between Delta Air Lines and U.S. Airways at LaGuardia Airport and Reagan National Airport. This work addressed the competitive effects of the proposed transaction and the liquidity of the market for slots at slot-controlled airports in the United States. Dr. Peterson has a Ph.D. in economics from Harvard University and a B.A. with highest honors in economics from the University of California, Davis.

Dr. Glenn Mitchell is an expert in the application of microeconomics and statistics to the analysis of competition, regulation, asset valuation, and transfer pricing. He has provided testimony for regulatory review of environmental and transportation matters, and for civil action relating to allegations of securities fraud. In the area of competition analysis, Dr. Mitchell has provided consulting services for matters involving allegations of restraint of trade, including monopolization, vertical restraints (in the United States, Europe, and Asia), tying, exclusive dealing, collusion, and predatory pricing; and he has extensive experience with regulatory review of mergers and joint ventures in the United States and Europe. Additionally, he has conducted transfer pricing studies; analyzed the regulation of greenhouse gas emissions; calculated of lost profits and reasonable royalties related to allegations of patent infringement; and prepared valuations of non-traded goods and services, as well as intangible assets. Dr. Mitchell holds a Ph.D. and an M.A. in economics from the University of California at Santa Barbara (where he received a Jacob Javitz Fellowship from the Department of Education, and a Transportation Economics Award from the Western States Coal Association), and he has a B.A. in economics with highest honors from the University of California at Davis. He has a research background in applied microeconomics, environmental and natural resource economics, econometrics, industrial organization, and finance. Specific research topics include energy and technological development, resource valuation, and markets for tradable pollution allowances. He has also taught economics as an Adjunct Professor at the University of Southern California Marshall School of Business.

C. Overview

Section II provides a brief summary of relevant facts about fisheries in general and the SCOQ fisheries in particular. We then discuss the concept of market power in Section III, along with the economics of regulating the exercise of market power. In Section IV, we provide some detailed analysis of industry structure of the SCOQ fisheries, and in Section V we analyze the ways that market power might be exercised in the SCOQ fisheries as well as existing competitive constraints that currently serve to prevent or limit the exercise of market power. We then conclude in Section VI with our proposed guidelines for defining an excessive-share cap and the application of those guidelines to the SCOQ ITQ system.

II. Background on the Surfclam and Ocean Quahog Fisheries and on the Clam Processing Industry

A. The Fisheries

Surfclams and Ocean Quahogs are bottom-dwelling species of clams that are harvested off the eastern coast of the United States. The Surfclam fishery has been active for longer than the Ocean Quahog fishery, which has been developed more recently in part to encourage an alternative to Surfclams and ease potential pressure from over-harvesting.¹³ Ocean Quahogs differ from Surfclams in that their habitat lies further from shore and the harvested clams tend to be smaller.

¹³ Communication with NMFS personnel.

Both species are harvested using boats equipped with hydraulic dredges that pump water to disturb the seabed and uncover the clams. Surfclam and Ocean Quahog harvesting areas cover a broad area off the East Coast of the United States, from the Mid-Atlantic states up into New England. The range of clam population areas is wide enough to support processing activities in several states. In recent years, harvesting activity has shifted northward following changes in clam population densities, which has resulted in some shifts in the location of processing plants.

Some vessels operate in both the Surfclam and the Ocean Quahog fisheries. This indicates that vessels will harvest in the fishery that offers the higher return to time and effort. Surfclams yield more meat per bushel of clams than do Ocean Quahogs. As a result, the per-bushel price of Ocean Quahogs is lower than the per-bushel price of Surfclams. The prices are more comparable, however, if they are adjusted for the meat yielded by each bushel.

Ocean Quahogs provide a substitute product for Surfclams for some, but not all, post-processing uses. Imports of other clam species also provide a substitute for some uses (and a small portion of the domestic Surfclam and Ocean Quahog harvest is exported). Processors report competition from imported clams from a number of countries, including Canada, Thailand, Chile, and others.¹⁴

For both of these species, population growth is relatively unrelated to existing population. Because of this, federal regulation is targeted to limit harvesting to the level where each species could be expected to continue to be harvested at a constant rate for a given number of years. There are also state-regulated clam fisheries that are closer to shore than the federally regulated fisheries. Fluctuations in environmental conditions can depress clam spawning and inhibit population growth and replenishment. When conditions cause populations to become substantially depressed, regulators tighten regulations or close the clam fisheries until the population can stabilize.

B. Regulation of the Surfclam and Ocean Quahog Fisheries

Fisheries are a well known example of a common-pool resource. This is a resource, such as a fishery or a commonly grazed field, where there is no limitation on who may use the resource or on the intensity of use. The likely result of free entry into the exploitation of the resource, however, is that the resource will be overexploited, which, in economic terms, will be inefficient.¹⁵ Each party using the resource considers only the benefit it will receive and the private cost of obtaining that benefit. The resource

¹⁴ Excessive Share Technical Meeting, October 22, 2010; written responses from processors. Imported processed meat provides competition for the products supplied by processors to end use customers, but not for the supply of clams harvesters supply as input to processors.

¹⁵ The term “efficiency” has a specific economic meaning. When goods and services are allocated efficiently, it is not possible to re-allocate them so that at least one party is better off without making anyone else worse off. An equivalent definition is that the marginal benefit of output (the value to society of an incremental increase in output) is equal to the full marginal cost of producing the output (including costs borne by all participants, not just the producer).

users do not consider the negative effect of their use on other users of the resource. Obviously, a fish caught by one fisher cannot be caught by another. Therefore, each user has a negative effect on the productivity of the efforts of other users.¹⁶

A fishery is also a renewable resource. When there is no fishing activity, the fish stock will grow to the point where there is insufficient food or resources for the stock to grow further. The growth rate of the stock each year at such a state would be zero. When fishing activity removes part of the stock of fish each season, the stock of fish may decline, depending on how quickly the remaining stock can grow and replenish itself. Equilibrium occurs when the harvest rate each season is equal to the rate at which the stock replenishes itself.

Open access creates incentives for fishers to expend too much effort individually than the effort that would (in the aggregate) maximize the economic return on the fishery. This can lead to overfishing, meaning that the fish stock has been reduced to a level where the annual catch is lower than could be achieved (with the same or less effort) were stocks allowed to rise.¹⁷

To address the oversupply of fishing effort in open-access fisheries, it is common to regulate them by limiting entry or regulating fishing effort. This was the case for the SCOQ fisheries. Heavy fishing pressure in the 1960s and 1970s led to depleted stocks.¹⁸ The regulatory response was to declare a moratorium on new entrants into the fisheries in 1977. The moratorium kept the number of boats operating in the fisheries roughly constant, but did allow vessel owners to replace boats with newer vessels having greater fishing capacity (thereby allowing fishing effort to continue to rise).¹⁹ In 1990, regulators replaced the moratorium with an ITQ program to cap the SCOQ harvest.

Under the ITQ program, regulators set the total allowable catch (“TAC”) separately for Surfclams and for Ocean Quahogs. The program allocated quota to vessel owners that had permitted vessels operating in the fisheries between 1970 and 1988, allowing each to harvest a share of the TAC. Different formulas were used in different regions and for Surfclams and Ocean Quahogs, but the primary factor used to determine the initial allocations of quota was the average catch of each vessel during eligible

¹⁶ See, e.g., Gordon, H. Scott, “The Economic Theory of a Common-Property Resource: The Fishery,” *The Journal of Political Economy*, Vol. 62, Issue 2, April 1954.

¹⁷ For a discussion of these issues see National Research Council, *Sharing the Fish, Toward a National Policy on Individual Fishing Quotas*, 1999 (hereinafter “Sharing the Fish”), pp. 22-23; Clark, Colin W., *Mathematical Bioeconomics: The Optimal Management of Renewable Resources*, Second Edition (New York: John Wiley & Sons, Inc. 1990), Chapter 2. The definition of overfishing varies.

¹⁸ *Sharing the Fish*, p. 60.

¹⁹ *Sharing the Fish*, p. 61.

years.²⁰ The quota are transferable; shares of TAC may be sold or leased to other fishers (or to anyone, although only licensed vessel owners can harvest in the SCOQ fishery).

Quota holders each have control over a share of the fishery's TAC (under the regulations, ITQ is not an actual property right and can be revoked by changes in the regulations). The fishery is no longer open access, and harvesting rights for those active in the fishery are strictly limited. Under these circumstances, each vessel owner has the incentive to harvest its share of the TAC as efficiently as possible. This means that if one vessel owner has a larger, more efficient vessel than another ("more efficient" means lower cost per unit of harvest), the more efficient vessel owner may value quota more highly than the other. Under these circumstances, both parties can gain by temporarily or permanently transferring quota to the more efficient vessel owner.

To the extent that there is economic rent for the SCOQ resource ("economic rent" is the social value in a scarce fishery resource above and beyond the production cost of harvesting the resource), under the ITQ program such rents flow to the owners of the quota. In an economically efficient ITQ fishery, harvesting capital, vessels, and labor (the "factors of production") should earn competitive returns and competitive wages, and quota holders should receive the additional benefit of economic rents. The *distribution* of wages and economic rents among the industry participants, which can be of interest to social planners and industry participants (and the focus of economic research), is not analyzed in this report. To assess the risk of market power and the use of an excessive-share rule to control quota-based market power in the SCOQ fisheries, it is only relevant that the factors of production make competitive returns and that quota holders receive no more than the competitive economic rents from the resource.

The use of quota in the SCOQ fisheries is administered as follows. The regulator has a list of ITQ owners along with the share of harvest allocated to each. This list is updated as ITQ owners transfer their shares (transfer reporting is mandatory). Each season, the regulator calculates the actual harvest associated with each share by multiplying the share by the TAC that has been set for the season. The regulator then issues to each quota owner numbered bushel tags in accordance with the owner's share of the allowed harvest. When the vessel operators bring harvested clams to shore, they must provide sufficient tags to cover the bushels of clams harvested. Participants in the fishery report that there are various types of transactions involving ITQ that commonly occur, including permanent ITQ transfers, relatively long-term ITQ leases (i.e., five or more years), and transfers of bushel tags.²¹

²⁰ In some regions, vessel capacity was also used to establish initial quota holdings (Sharing the Fish, p. 63).

²¹ Excessive Share Technical Meeting, October 22, 2010.

C. The Processing Sector

Currently, there are eight processors that purchase catch from the SCOQ fisheries. All of them process Surfclams, but only four process Ocean Quahogs.²²

Processors were not directly incorporated into the initial allocation of quota, although processors owning licensed vessels did receive the allocations associated with those vessels. Over time, some processors or processor affiliates have developed quota ownership through either the acquisition of vessels and accompanying quota or the acquisition of quota directly, and it is common for processors to enter into long-term contracts (five years or more) to lease quota from quota holders. Processors also enter into exclusive contracts with vessel owners to harvest clams. In these cases, either the vessel owner or the processor may be responsible for supplying quota for the catch.²³

Processors aim to meet the schedules set by their customers, many of which are large consumer goods companies, such as Progresso or Campbell's, or large food service companies, such as Sysco. This means that processors must be able to direct vessels to harvest at certain times, weather permitting. These scheduling requirements mean that it is not generally possible for a vessel to harvest for more than one processor and still meet the scheduling needs of the processors.²⁴ Vessels must have quota at the time they harvest clams. Therefore, processors or fishers must arrange for the quota that the vessels require prior to leaving port.

A consequence of the need to harvest on a schedule is that virtually all clams are sold under contract between processors and harvesters or are harvested by processor affiliates. Therefore, processors do not "post" a price that they are willing to pay for clams at unloading points. There is no "spot" market for Surfclams or Ocean Quahogs.²⁵

III. The Economics of Market Power

A. What Is Market Power?

In perfectly competitive markets, participants act as if their levels of purchases or sales in the market do not influence the equilibrium market price. The result of competition in such a market is that sellers will expand their output (driving prices down) until the market price no longer covers the cost of further expansion. Similarly, consumers will increase their purchases (driving prices up) until the market price exceeds the benefit of further purchases. The price that brings supply and demand into balance in these circumstances is the competitive price and there are no further gains from trade – the purchasers' costs to expand output further would exceed the consumers' benefit from additional supply.

²² NMFS Data.

²³ Excessive Share Technical Meeting, October 22, 2010.

²⁴ Excessive Share Technical Meeting, October 22, 2010.

²⁵ Processors buy unprocessed clams from one another when there are equipment breakdowns or other unusual events, but such purchases are rare.

Figure 1 shows the market equilibrium in a perfectly competitive market. The downward sloping demand curve indicates the amount that consumers are willing to pay for the good for each output level. Similarly, the upward sloping supply curve shows the cost that competitive suppliers must be paid to bring the indicated quantity to market. Equilibrium occurs at the price, P_C , where the amount supplied equals the quantity demanded, Q_C .

In less competitive markets, some market participants may recognize that the level of their sales or purchases influence market price. Sellers large enough for their increased output to lower the price of their entire market output each have a unilateral incentive to withhold supply from the market (and elevate price above the competitive level). Figure 2 shows a market where a firm has withheld supply from the market. The market price, $P_{MKT PWR}$, is above the competitive level, and output, $Q_{MKT PWR}$, is below the competitive level. This is inefficient because buyers would be willing to pay more than enough to cover the cost of increased output: consumers' willingness to pay (as indicated by the height of the demand curve) exceeds the cost for producers to expand output (as indicated by the height of the supply curve). The exercise of market power restricts the gains from trade to less than would be realized in a competitive market.

For sellers in a market to have market power, it must be the case that the sellers can withhold supply without that supply being replaced by other firms in the market or by entry of new firms into the market. Under normal circumstances the high prices that could be generated by withholding supply would attract new firms to the market. This is relevant to the market for quota because regulators fix the amount of quota available (by setting the TAC). Therefore, if a firm (or firms) were to withhold quota, additional quota might be forthcoming from small, unconsolidated quota owners, but industry participants cannot "produce" additional quota – there can be no entry or expansion into the market for quota to offset the effects of withholding.²⁶

It is also possible for buyers to exercise market power. Just as a large seller may recognize the effect of its purchases on the market price of its product, a large buyer may recognize the elevating effect of its purchases on market price. In this case, the buyer will recognize its effect on price and will, therefore, have the unilateral incentive to reduce its purchases of the input in order to reduce the market price of the input *below* the competitive level.

The creation or exercise of market power can involve conduct more complex than withholding supply from the market. Certain types of "exclusionary" or "predatory" conduct might create barriers to entry or foreclose competitors from a market. Such conduct may not provide an immediate benefit and is likely to be costly, but may eventually pay off if firms reasonably expect to benefit from consequently reduced competition in the long run. Since ITQ holdings are by their nature exclusionary (there is a fixed supply, so a market participant holding one unit of quota prevents any other participants from relying on that unit for production), assessment of market power must

²⁶ There may, however, be entry or expansion in the market for clam meats or clam products.

include a long-term assessment of the potential for exclusionary conduct through the withholding or manipulation of ITQ supply.

B. Market Power in an ITQ-Controlled Fishery

A fishery regulated by an ITQ program presents some unique issues for the analysis of market power. As described above, the exercise of market power requires withholding supply from the market in order to raise prices (and, in some cases, other conduct that will eventually lead to the ability to affect price by withholding supply). If the total supply for a market comes from an ITQ-regulated fishery, the regulation of the fishery itself may limit supply. This is illustrated in Figure 3. The figure shows the demand for fish from a fishery and the supply of fish from the fishery. The vertical line represents the maximum harvest, or TAC, established by the regulators of the fishery. In this case the TAC is below the competitive market output level. Therefore, the TAC is a “binding” constraint on output. The market price is equal to P_{TAC} , which is above the competitive price. The market price is also above the cost of bringing additional fish to market, as indicated by the height of the supply curve where it intersects the vertical line where output equals TAC, or C_{TAC} .

The regulated outcome for the market as a whole is similar to the outcome that results from the exercise of market power – lower quantity and higher price than the competitive equilibrium. In this case, however, the restriction on output comes from the regulation of the fishery rather than from the exercise of market power by fishers or quota holders. The exercise of market power can involve an economically inefficient withholding of supply, but regulation limiting the fishery’s harvest can actually increase efficiency by limiting excessive fishing effort. In the market outcome illustrated in Figure 3, the right to fish is valuable. The value to a small harvester of additional quota to bring one more unit of fish to market as shown on the graph is the difference between the market price of fish and the cost of bringing more fish to market. This is the difference between P_{TAC} and C_{TAC} .²⁷

The output of a fishery could be below the TAC, with or without the exercise of market power. If demand for the output of a particular fishery is low, the TAC may exceed the competitive catch. In this case, competitive forces limit the output of the fishery rather than regulation. Under these circumstances, the regulation is not “binding” because it does not limit the harvest from the fishery. This result is illustrated in Figure 4. The figure shows that the equilibrium price of fish, P_C , and the cost of

²⁷ A large harvester would recognize the negative effect of the additional catch on the price it received for its entire harvest and would place a lower value on the quota. Note that a firm may have market power in the fishery illustrated in Figure 3. The outcome shown will occur whenever the TAC is below the equilibrium output, whether it would reflect market power or not. See Anderson, Lee G., “The Control of Market Power in ITQ Fisheries,” *Marine Resource Economics*, Vol. 23 (hereinafter “Anderson”), pp. 25-35.

harvesting additional fish (as indicated by the height of the supply curve at the equilibrium quantity) are the same, so the value of quota in this example would be zero.²⁸

Alternatively, it could be the case that the TAC does not bind and that participants in the fishery (which could be quota holders in the case of an ITQ-regulated fishery) are withholding supply to raise prices. This outcome is illustrated in Figure 5.²⁹ One difference from the competitive equilibrium situation described above in Figure 4, however, is that in the situation illustrated in Figure 5, the unused quota has value to a small harvester (because the market price for each unit harvested still exceeds the cost of harvesting an additional unit). The value of quota to a small harvester is the difference between the price of fish and the cost of harvesting additional fish and is labeled in the figure.

Comparison of these cases illustrates a possible effective metric for identifying market power in the SCOQ fisheries. When the harvest in a season will clearly fall below the TAC (but while there is still time to harvest additional clams), then the price of quota sold for a single season is a good indicator of market power. If the harvest is below the TAC in a season because of low demand for the output of the fishery, quota do not restrict the catch, and the value of quota for the season should be essentially zero.³⁰ Alternatively, if the harvest is low as the result of the withholding of quota, the price of quota will be positive.

C. Regulating Market Power in ITQ-Regulated Fisheries Using an Excessive-Share Cap

Having access to a fishery with output limited by regulation is valuable when the regulation restricts competition from expanding output and eroding profits or rents from harvesting. Access to an ITQ fishery is controlled by access to tradable quota, so rents would be expected to flow not to vessel owners but to quota owners. In an ITQ-regulated fishery, the stream of rents attributable to access to the fishery have been severed from

²⁸ The price of quota may be greater than zero in a real-world fishery with excess quota because there may be uncertainty at the beginning of the season as to whether there will, in fact, be excess quota at the end of the season. Moreover, harvesters must purchase quota. In a real-world fishery, no quota holder has any incentive to sell quota to a harvester for a price so low as to not even cover transactions costs and the time involved in the sale. These considerations indicate that when harvests are generally below the TAC, the price of quota may be positive, but should be quite low.

²⁹ Figure 5 shows the TAC set at a level greater than the competitive equilibrium. It could also be the case that the TAC is below the competitive equilibrium but greater than the equilibrium output with market power.

³⁰ The price of quota will be essentially zero for all quota that are available for lease in the market. However, the price of quota traded under previously struck, long-term contracts may be quite different (because the price in a long-term contract may be based on expectations about the value of quota at the time the contract is struck). Prices may also vary throughout the season. If there is an expectation at the beginning of the season that demand will exceed the available quota, prices at the beginning of the season may be high and later fall when it becomes clear that quota will, in fact, exceed demand.

the actual harvesting of fish. The incentive for quota owners (which can include parties otherwise not participating in the fishery other than through quota control) is to maximize the stream of income they can earn from their quota holdings.

Two incentives could induce quota owners to withhold quota from the market to increase the value of their quota. First, by withholding quota, the output of the fishery will be decreased, raising the price of fish, and all else equal, increasing the value of quota. This is standard seller market power: withholding the supply of quota raises the price of fish and of quota. However, a quota owner may also be a buyer of harvesting services. If a large quota owner were to contract with vessel owners to harvest fish, the quota owner may recognize that its purchases of harvesting services increase their price. In such an instance, the quota owner would reduce its purchases of harvesting services to avoid running up their price, and withhold quota from the market to prevent other processors from competing to purchase those services. Of course, both of these effects (withholding to increase the value of the resource vs. withholding to decrease the demand for harvesting) may occur at the same time.³¹

Another concern is that a large quota owner could withhold quota from a processor and foreclose competition from that harvester by making it impossible or too expensive for the harvester to obtain clams to process (withholding to decrease competition in processed fish). Such a strategy is more complicated than the straightforward exercise of market power described above and may not be profitable in the short run. However, a strategy to withhold quota to foreclose competition from other processors (or harvesters) can be profitable if prices can be raised once the competition has been eliminated.

An excessive-share cap operates by limiting the amount of quota that any quota owner can hold. Small quota owners cannot effectively raise the price of quota through withholding because if a small quota owner were to engage in costly withholding of even a large share its quota, the effect on the market price would be small, and the withholding would be unprofitable for the small quota owner. A similar argument holds for attempts by quota owners to exercise monopsony power over harvesters. An excessive-share cap can also limit the ability of a quota holder to foreclose competition because a sufficiently low cap will guarantee that a minimum number of quota holders will exist.³²

1. The Regulation of Market Power

The justification for regulating market power is that the exercise of market power hurts consumers and causes economic inefficiency. Some industries are subject to direct regulation and all are subject to the scrutiny of the antitrust laws, which forbid anticompetitive conduct that creates or perpetuates significant monopoly (market) power. Antitrust laws also forbid mergers that will significantly weaken competition and increase the market power of the merging parties. An ITQ excessive-share rule would be

³¹ See Anderson.

³² For example, an excessive-share cap of 40 percent guarantees there will be at least three quota holders.

related to this category of regulation because it would restrict some purchases or control transactions of quota by large quota holders.

The government has an interest in controlling the exercise of market power through control of quota. In the SCOQ fisheries, the government created fishing rights to regulate and improve the efficiency of the fisheries. The government, therefore, has an interest in seeing that the ownership of rights that it created does not become the mechanism through which participants in the fisheries consolidate market power to the detriment of consumers and to the detriment of the efficiency of the fishery. The exercise of market power through ownership of quota is directly counter to the goal of creating quota to enhance the efficiency of the fisheries.

2. A Share Cap Is Potentially a Blunt Instrument

Regulating market power, however, is not without its own hazards, because it imposes limits on what firms can do. These limits may be inefficient in their own right if they proscribe efficiency-enhancing activities or transactions. Regulation may require a trade-off between potentially increasing efficiency by controlling market power and potentially reducing efficiency by over-regulating market transactions.

An excessive-share cap may limit the growth of firms in the SCOQ fisheries.³³ Regulations that limit the size of firms may also limit the growth of efficient firms, which may lower the overall efficiency of the harvesting and processing activities in the SCOQ fisheries. An overly restrictive cap could limit the growth of an efficient firm when there is no material threat of the exercise of market power. This is just one example of how an efficient rule must balance the costs of the regulation with the potential benefits.

Restricting the regulatory consideration to an excessive-share rule precludes many options for achieving an efficient balance of regulation. It is possible for regulators to permit an efficient firm to grow while controlling the exercise of market power by limiting other aspects of the firm's conduct: for example, conduct that might raise a competitor's costs or preclude a competitor from expanding. Regulation of market power based on a portfolio of administrative and regulatory tools may also be able to better balance the need to control market power with the goal of enhancing efficiency as economic conditions change.

This is relevant to the determination of an appropriate level for the excessive-share cap. Conditions in the fisheries have changed over time and will change in the future. Thus, a share cap established at an appropriate level could over time become inefficiently high (offering too little constraint on the exercise of market power) or low (offering too much constraint on efficient competitive activity in the industry). This problem may be best addressed through periodic review of the excessive-share cap, with reviews being accelerated when changing economic conditions in the fisheries warrant.

³³ The precise effects will depend on the definition of contractual control of quota, the level of the cap, the contracting practices typical in the fisheries, and the administrative rules for associating quota with industry participants for purposes of assessing shares.

Alternatively, it may be possible to design an excessive-share rule that permits a high degree of quota ownership while preserving the incentive for quota holders to compete.

D. The Horizontal Merger Guidelines

The U.S. Department of Justice and the Federal Trade Commission (“Agencies”) have responsibility for investigating mergers in the United States and determining if a proposed merger would threaten competition should the merger be consummated. When the Agencies find that a merger would significantly weaken competition and create market power, they are able to file litigation opposing the merger. A court ultimately decides whether the merger may proceed or not.

Of course, firms that may seek to merge have an interest in knowing whether their merger is likely to be opposed by the U.S. Department of Justice or the Federal Trade Commission. The *Horizontal Merger Guidelines* is a means to that end. The *Horizontal Merger Guidelines* accomplishes two things. The *Horizontal Merger Guidelines* describes the methods used to define relevant markets for competitive analysis and calculation of market concentration thresholds. The *Guidelines* also describes the methods the Agencies use to evaluate the competitive impact of proposed mergers.

1. Relevant Market Definition

In competition analysis, the concept of the market used is the “relevant market.” A relevant market has two dimensions – a product dimension, which includes the product that is central to the analysis and its close substitutes, and a geographic dimension, which encompasses the locations of the sources of supply that buyers view as close substitutes.³⁴ The standard approach to defining the boundaries of the relevant product and geographic markets is the hypothetical monopolist test. This test identifies products and sources of supply that are reasonably interchangeable with one another.

The hypothetical monopolist test evaluates whether a profit-maximizing firm that is not subject to regulation and that is the only present and future seller of a group of products could profitably raise the price of those products by a small but significant non-transitory increase in price (a “SSNIP”).³⁵ To implement the test, a SSNIP is typically taken to be a five percent increase in price. To begin, one or more products are selected as the members of the candidate market.³⁶ If a hypothetical monopolist could profitably raise prices of *at least one* of the products by about five percent, this group of products is accepted as constituting a relevant product market.³⁷ If a hypothetical monopolist cannot profitably raise the price of the products by about five percent because customers would

³⁴ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010 (hereinafter “*Horizontal Merger Guidelines*”), pp. 8-9 and p. 13.

³⁵ *Horizontal Merger Guidelines*, p. 9.

³⁶ In merger analysis the price increase is determined based on prices prior to the merger. For the analysis of competition more generally, it is appropriate to assess whether the price increase would be profitable relative to the competitive price level.

³⁷ *Horizontal Merger Guidelines*, p. 9.

shift their purchases to products outside of the candidate market, the candidate market is too small.³⁸ When a candidate market is found to be too small to serve as a relevant market, it is expanded by adding the next best substitute product into the candidate market and the test is performed again. A similar process is used to determine the boundaries of the relevant geographic market.³⁹

The relevant market is usually taken to be the smallest market (smallest set of products and geographic areas) that satisfies the hypothetical monopolist test.⁴⁰

One consideration when assessing the boundaries of a relevant market is the ability of suppliers to price discriminate (i.e., charge different customers different prices that are not related to cost). When a hypothetical monopolist is able to target a group of customers with specific prices, it is necessary to examine the competitive options facing those customers specifically. The reason certain customers may be targeted is that sellers may recognize that the customers have fewer competitive options, or less ability to shift their purchases away from some of the products in the candidate relevant market, than other consumers. Assessing the relevant market for customers that face a shorter list of competitive options is appropriate when there is the prospect that some customers will be subjected to differential treatment with adverse competitive consequences.⁴¹

2. Market Concentration Thresholds and Further Analysis of Competitive Effects

The standard measure of concentration used in competition analysis is the Herfindahl-Hirschman Index (“HHI”). The HHI is calculated by squaring the market share of each firm in the industry and adding up the squared market shares. Thus, a market with three firms with market shares of 50 percent, 30 percent, and 20 percent has an HHI of 3800 ($50^2 + 30^2 + 20^2 = 2500 + 900 + 400 = 3800$). The *Horizontal Merger Guidelines* classifies markets into three categories based on HHIs. Markets with an HHI below 1500 are considered unconcentrated; markets with an HHI between 1500 and 2500 are considered moderately concentrated; and markets with an HHI greater than 2500 are considered highly concentrated. It is important to note that these concentration calculations are intended to be applied *after* first determining the full set of relevant products constraining the prices of the merging firms, what the *Horizontal Merger Guidelines* calls the relevant market. With regard to merger enforcement, the Agencies

³⁸ The boundaries of the relevant market are determined by demand substitution or the willingness and ability of customers to switch their purchases to other products when the prices of the products in the candidate market rise.

³⁹ *Horizontal Merger Guidelines*, pp.13-14.

⁴⁰ *Horizontal Merger Guidelines*, p. 10.

⁴¹ If prices are individually negotiated with customers, the hypothetical monopolist test may indicate that relevant markets may be as small as a single customer. *Horizontal Merger Guidelines*, pp. 12-13.

are unlikely to oppose a merger that results in an unconcentrated market or where the change in HHI is small (e.g., less than 100).⁴²

There are many mergers that do not fall within the “safe harbor” concentration thresholds of the *Horizontal Merger Guidelines*, but remain unopposed by the Agencies because the transactions appear unlikely to create market power. When the safe harbor concentrations are exceeded, further analysis of other considerations is often necessary to determine whether a proposed merger will threaten competition and, if so, what remedies may be available. The *Horizontal Merger Guidelines* describes the additional methods the Agencies use to evaluate transactions that would exceed the safe harbor concentration thresholds.

A clear implication of the *Horizontal Merger Guidelines* is that context matters. Large market shares or high levels of concentration are sometimes acceptable and are at other times a threat to competition, depending on circumstances. Thus, applying only the safe harbor thresholds in the *Horizontal Merger Guidelines* to quota ownership would not be an appropriate method to determine the level of an excessive-share cap in the SCOQ fisheries. The *Horizontal Merger Guidelines* does, however, describe the appropriate economic methods to use to assess what size of share would likely allow a firm to exercise market power under a given set of economic circumstances. A combination of the safe-harbor concentration thresholds and the economic methods described elsewhere in the *Horizontal Merger Guidelines* underpins our analysis of the appropriate level for the excessive-share cap.

IV. The Structure of the Clam Harvesting and Processing Industry

The Surfclam and Ocean Quahog harvesting and processing industry has three segments:

- Quota owners or holders: the firms and individuals that own or control the quota rights to harvest clams;
- Harvesters: fishers and the capital (fishing vessels) they use;
- Processors: specialized firms that process harvested clams into shucked clam meat or other products for their customers.

To the extent harvesters or processors own quota or control it through contracts, an excessive-share rule may affect their ability to accumulate quota. Therefore, an excessive-share rule may affect competition and concentration in the harvesting and processing sectors, and the effect of the rule may enhance or diminish economic efficiency, depending, in part, on whether there is market power in the harvesting or processing sectors. However, a cap on the amount of quota any single entity can own or control will not directly limit the exercise of market power by harvesters or processors if that market power is based on factors other than quota ownership or control. The analysis here is targeted at the possibilities for the creation or exercise of market power

⁴² *Horizontal Merger Guidelines*, p. 19.

specifically through the ownership or contractual control of quota. We do not address the control of market power founded on industry characteristics other than quota holdings.

A. Quota

We will first discuss the concentration of current SCOQ quota holdings and usage. Throughout this section, we calculate HHI values and compare them to thresholds discussed in the *Horizontal Merger Guidelines*. Concentration measures provide a helpful index, but are pertinent to the analysis of market power only when based on shares in a relevant market containing all close substitutes of the products of interest. Thus, concentration measures of quota ownership do not necessarily provide evidence of market power, even if they are high, to the extent SCOQ clams compete with other clam products.

When the Surfclam and Ocean Quahog fisheries implemented the ITQ system, the initial allocations of quota were allocated to the vessel owners that had harvested Surfclams and Ocean Quahogs between 1970 and 1988.⁴³ This led to highly diffuse quota ownership.⁴⁴ Since that time, many of the initial quota owners have sold their quota and left the fisheries. Increased concentration of quota ownership is a natural consequence of the elimination of excessive fishing effort and underutilized capital from the fisheries.⁴⁵ Despite the exit of quota owners from the fisheries and the resulting increases in the concentration of ownership, the existing allocation of the quotas to harvest Surfclams and Ocean Quahogs remains unconcentrated.

A single entity or firm can own more than one individual quota allocation, and evaluating concentration requires determining who owns each quota allocation and the relationships among owners. In 2009, NMFS found there were 56 individual Surfclam quota allocations that were owned by 49 independent entities. The HHI of initial Surfclam quota ownership in 2009 was 1167. The concentration of Ocean Quahog quota ownership was similarly low. NMFS identified 45 individual Ocean Quahog quota allocations in 2009 that were owned by 37 independent entities. The HHI of the initial Ocean Quahog ownership in 2009 was 993.⁴⁶ Examination of the quota transfers in 2009 showed no permanent transfers that would have changed these HHIs for 2010.⁴⁷

⁴³ Sharing the Fish, p. 63.

⁴⁴ Social Sciences Branch of the Northeast Fisheries Science Center, "Excessive Share Issues in the Surfclam and Ocean Quahog Fishery: Report to the Surfclam and Ocean Quahog FMAT," August 12, 2009 (hereinafter "Excessive Share Issues"), p. 12.

⁴⁵ See, e.g., Stanley Wang, "The Surfclam ITQ Management: An Evaluation," *Marine Resources Journal*, Vol. 10, No. 1, 1995, pp 95-96.

⁴⁶ One of the goals of the ITQ system was to eliminate excessive fishing effort, and by that measure, the system has largely been a success (Excessive Share Issues, p. 12).

⁴⁷ Bank of America permanently transferred its full Ocean Quahog quota to Bumble Bee Foods. Bumble Bee Foods held no other quota. Therefore, this transfer has no effect on the HHI for Ocean Quahog quota ownership. See 2009 Ocean Quahog allocation and trading data.

The existing ownership of SCOQ quota remains unconcentrated and would not raise market power concerns even if the markets for SCOQ quota were not subject to meaningful competitive discipline from close substitutes or other factors. Based on the latest *Horizontal Merger Guidelines*, markets with HHIs below 1500 are considered to be unconcentrated.⁴⁸

Data reliably showing the ownership and control of quota following transfers in the SCOQ fisheries are not available. Information showing the parties to quota transfers does not show the ownership relationships among the final quota holders. The need for harvesters to hold quota at the time of harvesting raises further complications: some harvesters own or contract for their own quota, whereas in other cases processors obtain quota and transfer it without charge to their harvesters (which may be affiliated or independent). When the processor owns quota or contracts for quota on behalf of a harvester, the transfer data will show the quota has been transferred to a harvester, but will not show whether the processor retains control of the quota in such transactions (“control” in this context means the power to decide whether the quota will be used to harvest clams). A complete understanding of the actual ownership and control of quota requires analysis of the contracts under which quota were transferred to the final owner or holder. An additional problem arises from the reporting of quota when used. The owner of quota is supposed to report to NMFS the specific tags (quota) that are used throughout the season. However, in many instances, it is not the recorded owner but another entity that reports the quota used.⁴⁹ This is most likely a problem with related entities reporting the use of quota, which is another aspect of determining final quota ownership or control.

To circumvent these issues, NMFS calculated the shares of the reported harvest by the vessels in the fisheries and traced the ownership of the vessels.⁵⁰ This analysis of harvesting concentration provides the best available evidence on the concentration of quota ownership following transfers to processors and harvesters.⁵¹ However, this measure of concentration may misestimate the concentration of quota holdings by attributing quota to independent harvesters when the quota are, in fact, owned or controlled by a processor or other entity. The concentration of harvesting in the Surfclam and Ocean Quahog fisheries is described below.

Information on whether owners merged or there were changes in the control of firms that own quota is not available.

⁴⁸ *Horizontal Merger Guidelines*, p. 19.

⁴⁹ NMFS Data.

⁵⁰ Excessive Share Issues, pp. 12-13, and NMFS Data.

⁵¹ Processors may provide tags to independent harvesters with which they have contracted. In this case the processor is directing the use and receiving the benefits of the quota, but the harvested clams would be attributed to the independent harvester rather than to the processor.

B. Harvesting

The harvesting of Surfclams and Ocean Quahogs is substantially more concentrated than the initial ownership of quota in the fisheries. This higher concentration reflects the concentration of used quota after they have been transferred to harvesters. NMFS has compiled data showing the ownership of the vessels that reported harvesting Surfclams and Ocean Quahogs. According to these data, 32 vessels harvested Surfclams in 2008. The data also show that 14 firms owned these vessels. The same data show that 18 vessels, owned by nine firms, harvested Ocean Quahogs in 2008.⁵² A total of 17 firms harvested Surfclams and Ocean Quahogs in 2008.

Even though many firms harvest clams in the two fisheries, the measure of concentration is high because some firms harvest large shares. The HHI in 2008 was 4080 for Surfclam harvesting and 2653 for Ocean Quahog harvesting, and 2890 for combined harvesting of both species. These concentration measures are above the threshold established in the *Horizontal Merger Guidelines* for a market to be considered highly concentrated. Moreover, the concentration of harvesting in the fisheries has risen substantially over the last decade. In 1998, the HHI was 1561 for Surfclam harvesting, 1853 for Ocean Quahog harvesting, and 1016 for combined harvesting of both species.⁵³ By the standards of the *Horizontal Merger Guidelines*, the concentration of harvesting has increased from the moderately concentrated range (or the unconcentrated range for the combined harvest) in 1998 to the highly concentrated range in 2008.

Many processors are vertically integrated into vessel ownership and harvesting. In fact, processors have increasingly expanded their businesses “upstream” into the harvesting sector. Figure 6 shows the landings of Surfclams and Ocean Quahogs by processors. Between 1998 and 2008, processors never harvested less than 50 percent of the total Surfclam harvest. Since 2005, processors have harvested approximately 80 percent of the total Surfclam harvest. The processor share of the Ocean Quahog harvest grew from about 20 percent to 50 percent between 1998 and 2008. The increasing concentration of harvesting may be the result of vertical integration of the relatively concentrated processor segment into harvesting.

C. Processors

The processing segment of the clam industry has undergone significant consolidation over the last 30 years. In 1979, there were 44 plants that processed either Surfclams or Ocean Quahogs. The available data do not report the number of firms that operated these plants.⁵⁴ Today, eight firms process Surfclams and four firms process

⁵² Eight vessels harvested both Surfclams and Ocean Quahogs. Thus, 24 vessels exclusively harvested Surfclams and ten vessels exclusively harvested Ocean Quahogs. There were 42 total vessels active in the two fisheries.

⁵³ NMFS Data.

⁵⁴ Mid-Atlantic Fishery Management Council in cooperation with the National Marine Fisheries Service and the New England Fishery Management Council, “Amendment #3 to the Fishery

Ocean Quahogs. These processors operate a total of 12 plants.⁵⁵ There has been little change in the number of firms processing Surfclams over this period. The number of firms processing Ocean Quahogs, however, has fallen from seven to four.

NMFS data on processor purchases of Surfclams and Ocean Quahogs show that there was a modest amount of entry and exit in the processing sector between 2003 and 2008. For example, in 2006, the Truex Group and the management team of the largest processor, Sea Watch, acquired Eastern Shore Seafood.⁵⁶ Despite processor exit, processors report that they have excess capacity to process clams. These facts – the exit of processors from processing Ocean Quahogs while continuing to process Surfclams (noted in the previous paragraph) and the exit of processors from acquiring SCOQ harvests entirely – are not consistent with a finding that processors are exercising market power and earning above-competitive long-run profits.

Despite a relatively constant number of firms processing either Surfclams or Ocean Quahogs, the concentration of the processing sector grew substantially between 2003 and 2008 as relatively large firms exited or merged and the entering firms remained relatively small, allowing incumbent firms' shares to grow. The HHI of Surfclam purchases by processors grew from 2068 to 3134 between 2003 and 2008. Similarly, the HHI of Ocean Quahog purchases grew from 3437 to 4369 over the same period. Notably, concentration has fallen somewhat after peaking in the Surfclam and Ocean Quahog fisheries at 3675 and 4629, respectively, in 2007. The HHI of processor purchases for Surfclams and Ocean Quahogs combined has also grown, from 2226 in 2003 to 3479 in 2008.⁵⁷

The HHI of the Surfclam and Ocean Quahog processing sectors is in the highly concentrated range based on the thresholds in the *Horizontal Merger Guidelines*. We address only whether processors have market power that is based on their quota ownership; we do not address whether processors have market power arising from the high concentration or other characteristics of the processing sector. That participants in the highly concentrated processing sector are likely to be the large holders of quota is relevant to establishing the excessive-share cap at a level that precludes creation or increase of market power through quota holdings. As described elsewhere in this report, a processor holding a large amount of quota may be able to gain market power in the markets for specific clam products or limit competition by withholding quota from

Management Plan for the Surf Clam and Ocean Quahog Fisheries and Supplemental Environmental Impact Statement," April 1981; see also Excessive Share Issues, p. 11.

⁵⁵ Mid-Atlantic Fishery Management Council in cooperation with the National Marine Fisheries Service, "Overview of the Surfclam and Ocean Quahog Fisheries and Quota Considerations for 2010," May 2009 (hereinafter "Quota Considerations"), pp. 17-18.

⁵⁶ Quota Considerations, p. 5.

⁵⁷ NMFS Data.

competing processors. Today, however, no processor reports that it is unable to purchase or lease sufficient quota for its business needs.⁵⁸

V. Potential Market Power Concerns and the Competitive Constraints on the Exercise of Market Power in the Surfclam and Ocean Quahog Industry

We begin this section by describing the kinds of market power that quota holders (through either ownership or contractual control) might exercise. We then discuss the limits on the exercise of market power imposed by a number of existing competitive constraints in the SCOQ fisheries.

A. The Exercise of Quota-Based Market Power

The exercise of quota-based market power theoretically could occur at different levels of the SCOQ industry.⁵⁹ For example, the exercise of market power theoretically could occur in the market for the leasing and sale of quota. Processors and harvesters would then pay increased prices for quota, and the withholding of quota would reduce the output of the fishery. An increase in the prices of processed SCOQ clam products would occur if a reduction in the supply of SCOQ clam products could not be readily offset by increased production from state fisheries, by increased imports of substitute clam products, or by other substitutes. However, if these possible offsets were ample, the quota owners would be unlikely to be able to raise the price of quota unless the reduction in the demand for harvesting and processing services led to a reduction in the prices of those services, in which case quota owners could raise the price of quota without a material increase in the cost of SCOQ clam products. Harvesters and processors would suffer from the exercise of market power while consumers would largely be protected by their ability to substitute to other products.

Another theoretical alternative for the exercise of market power is that the harvesters or processors buy or lease the quota from the allocation owners under long-term contracts and accumulate sufficient quota to exercise market power during the term of the contracts. If the long-term contracts were to have fixed prices, it is the lessees that would benefit from any increased pricing during the term of the contracts. Thus, contractual holders of quota might have the incentive to withhold quota that they control through contracts. However, different types of ownership and control have different implications for the likelihood that a large quota holder could profitably exercise market power. For example, leases with market-driven flexible pricing pose less of a risk that the lessee would withhold quota in that it is the lessor that would capture much of the benefit of price increases (diluting any incentive for the lessee to withhold quota).⁶⁰

⁵⁸ Excessive Share Technical Meeting, October 22, 2010.

⁵⁹ As described above, the exercise of market power occurs when quota holders are able to withhold quota to reduce the output of the fisheries, raising the price of clams and/or clam products. This requires that the harvest fall not only below the competitive harvest level but also below the TAC.

⁶⁰ It is possible for a large quota holder to purchase quota on an annual basis or through a lease with annual price redeterminations and withhold some of that quota to drive up prices within a season. Profitably doing so, however, would require that the demand for clams and for quota be relatively

Harvesters holding or controlling large accumulations of quota could “withhold quota” from the market by restricting their harvesting of clams. To the extent that state fisheries could not expand their output, the result of reducing the clam harvest would be higher clam prices to processors. The processors would buy fewer clams and would lower their output of SCOQ products. As above, if the reduced output of SCOQ products could not be replaced by substitute clams or other substitutes, the price of SCOQ products customers pay will rise.

Processors holding or controlling large accumulations of quota (which may occur through the typical contracting practices in the SCOQ fisheries, through either quota held by processors themselves or quota held by harvesters that are affiliated with processors) theoretically might be the beneficiaries of increases in the price of SCOQ clam products, increases in the price of quota, or decreases in the price of harvested clams (which might be achieved through monopsony power).

High levels of concentration in the processing sector may mean that large quota accumulations do not lead to any *increase* in market power in the processing sector. Even if there were just one processor that had no long-term quota ownership or control, that processor could still determine how much output to produce and the amount of harvesting services to buy. Negative effects of market power (above-competitive prices for SCOQ products and below-competitive prices for quota and harvesting) could theoretically occur regardless of whether a monopoly processor controls any quota.

In the above example, the processor’s market power does depend on barriers to entry that prevent additional competition. Because quota is necessary to harvest Surfclams and Ocean Quahogs, processors holding large accumulations of quota could theoretically keep other processors from expanding or keep new processors from successfully entering the SCOQ processing industry by withholding unused quota. Thus, a key theoretical threat from large processor accumulations of quota is that they could be a means to foreclose competing processors. In fact, accumulation of SCOQ quota ownership could be used as a means to commit to the exclusion of other processors over a long enough period of time to drive other processors from the market.

As one final example of the exercise of market power, it is possible (in theory) for a large quota holder to abstain from harvesting in the beginning of the season, allowing other quota holders to use their quota. When other quota holders were out of quota, the large quota holder would be in the position of a quota monopolist at the end of the season. We do not address dynamic, intra-season quota accumulations in our analysis, in part because we assume that the regulator would not have the resources to continually monitor and enforce an excessive-share cap other than on a seasonal basis. In addition, however, consumer demand for a regular flow of clam products and the ability for other

inelastic. The evidence for the SCOQ fisheries is that the demand for clams and quota is quite elastic. Below we address the proper method of associating quota for purposes of assessing shares. The general rule is that the party that controls the use of the quota and would obtain the benefit of the price increase from withholding quota should be associated with the quota for share calculations.

quota holders to observe and adjust to the intra-season withholding could constrain the effectiveness of such a strategy.⁶¹

We now turn to a broader discussion of some of the factors that may constrain the ability of quota holders to exercise market power in the SCOQ fisheries.

B. Competitive Quota Ownership

As described above, the initial ownership structure of Surfclam and Ocean Quahog quota ownership is quite competitive. Moreover, there appears to be quota available from unconsolidated quota holders, even after temporary transfers of quota. For example, there are allocations of quota that are unused.⁶² This unconsolidated ownership or control of unused quota can be a check on the exercise of market power by quota holders, by providing a source of additional quota should large quota holders attempt to withhold quota.

C. The Relevant Market(s) for SCOQ Clams and Clam Products

The breadth of the relevant market makes a significant difference in the assessment of a reasonable level of an excessive-share cap. Consumer demand drives a definition of relevant markets that hinges on whether a hypothetical monopolist could profitably raise price. When demand is highly elastic and substitutes are amply available, small changes in price lead to large changes in the quantity demanded. The large reductions in output caused by price increases generally limit the potential for the significant exercise of market power (because moving the market price substantially requires withholding, without revenue, a large quantity). The demand for quota is ultimately derived from the demand for clam products. If demand for clam products is elastic, then demand for quota will be elastic as well. Thus, determining an excessive-share cap for the SCOQ ITQ requires a clear definition of relevant markets for products from the SCOQ fisheries.

We do not make a final assessment of the relevant markets for clams and clam products. Instead, we provide some direction that will help the Council determine whether or not the relevant market is limited to clams or includes other seafood products or if the relevant markets are smaller and should be defined to be particular clam products. These assessments should be able to be made based on the Council's

⁶¹ Similarly, we have not addressed other possible strategies that involve developing and exercising market power over time. For example, we do not evaluate whether it would be possible to import sufficient clams to drive down the value of quota for the purpose of accumulating quota at a low price. Such a strategy would not seem to be necessary given the current excess supply of quota, despite import levels that have been relatively constant during the last decade.

⁶² NMFS Data. This has occurred while quota owners are actively seeking to lease or sell their quota holdings. Excessive Share Technical Meeting, October 22, 2010, and personal communications with NMFS personnel.

experience with the SCOQ industry and interviews of purchasers of SCOQ clam products.⁶³

Surfclams and Ocean Quahogs are processed into a variety of different demanded products. Some parts of the Surfclam are desirable for fried seafood platters or strip products. Other parts of the Surfclam may be chopped up for use in chowder. Ocean Quahogs have a somewhat less desirable color and flavor and are processed for use in lower-quality chowder products.⁶⁴ SCOQ processors may sell fresh, frozen, or canned clam products (intermediate products) to companies that make final products, like seafood platters or chowder, or processors may make final products themselves.

It is possible that all of the differentiated products compete vigorously with one another and/or with imported clam products as discussed in the next section. In fact, many SCOQ processors assert that they face broad actual and potential competition for their processed clam products from imports. However, if there were particular clam products without good substitutes, they could possibly allow a hypothetical monopolist to profitably raise prices just for those products, which might imply a relevant market definition excluding imports or other substitutes. At least one processor has presented evidence that imported clams and other proteins are not important sources of competitive discipline on the domestic clam industry.⁶⁵

The following examples outline how an analysis of relevant markets could proceed:

Example 1: If it were the case that the foot of the Surfclam is valued for a particular use, buyers of the Surfclam foot might have more limited options to use other parts of the clam or other species of clam than buyers of other parts of the clam. This would suggest that the foot of the Surfclam should be evaluated to determine whether it belongs in its own relevant product market (could a hypothetical monopolist controlling 100 percent of the available supply of the Surfclam foot profitably increase the price above the competitive level?). If buyers of the foot could readily switch their purchases to products made from other parts of Surfclams, Ocean Quahog clam meat or to products made from imported clam meat, rendering any attempted price increase unprofitable, then the candidate relevant product market would have to be broader.

Example 2: If buyers like Campbell's and Progresso purchase large amounts of fresh or fresh-frozen clam meat of a certain type for their chowder products, it is appropriate to examine their ability to substitute to other products. If a hypothetical monopolist controlling all supply of the kind and grade of SCOQ clam meat Campbell's and Progresso purchase could profitably raise the price above the competitive level, then this type of clam meat would constitute its own relevant product market. If, however,

⁶³ See *Horizontal Merger Guidelines*, pp. 11-12, for a discussion of the kinds of information that are generally informative about the boundaries of relevant markets.

⁶⁴ Quota Considerations, p. 13.

⁶⁵ Letter from Michael LaVecchia, LaMonica Fine Foods, March 31, 2011.

buyers like Campbell's and Progresso would shift their purchases to a different kind or grade of SCOQ meat or to imported clam meat, rendering the attempted price increase unprofitable, then the relevant product market would have to be broader.

Example 3: Ocean Quahogs are processed into chopped clam meat, which is canned and sold for use in chowder. Perhaps it is the case that buyers of canned clam meat and Ocean Quahog meat for chowder could readily switch to imported clams and to certain parts of Surfclams were the price of Ocean Quahog meat to rise relative to the prices of alternatives. Then, a price increase of Ocean Quahog meat would not be profitable to a hypothetical monopolist. Therefore, the hypothetical monopolist test would indicate that the relevant market that includes Ocean Quahogs also includes imported clam products and certain portions of the Surfclam.

D. Potential Competing Sources of Supply and Substitute Products

If there were elastic sources of products that consumers would readily purchase rather than SCOQ clams (if there were an increase in the price of SCOQ clams or clam products), then the potential for profitably withholding quota would be greatly reduced.

There are a number of other sources of clams that compete with Surfclams and Ocean Quahogs harvested from the federally regulated fishery. In addition to the federally regulated fisheries, there are state-regulated Surfclam fisheries in New York and New Jersey. Figure 7 shows the landings of Surfclams from state fisheries relative to the landings from the federally regulated Surfclam fishery. Production from state-regulated Surfclam fisheries has declined over the last several years, largely as the result of reduced populations of clams.⁶⁶ In fact, no landings were reported in New Jersey in 2008 or 2009.⁶⁷ Nevertheless, the New York fishery has provided significant additional clams to the supply from the federally regulated Surfclam fishery. Moreover, as in the federally regulated fishery, the harvest has in some years fallen short of the available quota.⁶⁸

In addition to other sources of fresh, unprocessed Surfclams and Ocean Quahogs, there are substantial imports of clam meats into the United States. Figure 8 shows that in 2008, the federal Surfclam and Ocean Quahog fisheries produced approximately 83 million pounds of meats.⁶⁹ In the same year the United States imported approximately 33 million pounds of fresh or canned clam meats and exported over 13 million pounds of

⁶⁶ Quota Considerations, pp. 7-11.

⁶⁷ Quota Considerations, p. 9.

⁶⁸ There is also an Ocean Quahog fishery in Maine. It is a small-scale fishery relative to the federally regulated Ocean Quahog fishery. The fishers use smaller boats and target smaller Quahogs for sale in a fresh, half-shell market in Maine. Prices for Maine Ocean Quahogs are much higher than for clams from the federally regulated fishery. Ocean Quahogs from Maine have significantly different characteristics than those from the federal fishery. There is likely to be relatively little substitution between Maine Quahogs and Ocean Quahogs from the federal fishery. Quota Considerations, pp. 15-16.

⁶⁹ Assumes 17 pounds of meat per bushel of Surfclams and 10 pounds of meat per bushel of Ocean Quahogs.

fresh or processed clam meats. Thus, imports amounted to nearly 40 percent of the domestic production of the federally regulated clam fisheries and exports amounted to just under 16 percent of the production of the federally regulated clam fisheries.⁷⁰

Processors report that there can be limitations on the ability of their customers to substitute to imported clams. Specifically, processors report that imported clams can have a different taste and texture than domestic clams, but that the processors' food service company customers could use food-science technology to switch from domestic to foreign supplies if prices warranted. This description indicates that the potential for substitution may be present, but investigation would be required to demonstrate that it would occur in response to a relatively small but significant price increase for SCOQ clam products.

The significant amounts of clam products imported into the United States, the reported large number of sources of competition and potential competition from imported clams, and the fact that incremental sales of processed (shucked) clams are exported onto the world market indicate that the domestic clam processors face elastic demand for at least some significant portion of their products. Processors argue that these factors keep them from raising prices for fear of losing these customers' business over the longer term.⁷¹

E. Large Buyers

The processors that source clams from the federal SCOQ fisheries report that they sell a large proportion of their output to large food service companies. Campbell's and Progresso produce clam chowder and are reported to be the largest buyers of clam meat. In addition, the processors sell to other food service companies such as Sysco and others. The processors report that these large sophisticated buyers are able to exert significant pricing power because of their large purchases and because they have the capability to substitute imported clams for domestic clams in their products if prices warrant. The threat of entry created by the ability of major customers to use other sources of clams has the potential to limit any efforts by processors to raise prices above competitive levels, and processors report feeling the effects of this pressure from their large customers.⁷²

F. Vertical Integration of Processors into Harvesting

Processors' backward integration into harvesting over the last five to seven years has corresponded to an increase in concentration in harvesting. The backward integration

⁷⁰ Processors report that imported clams are available from a relatively large number of countries, including Canada, Thailand, Vietnam, China, and Chile. Excessive Share Technical Meeting, October 22, 2010, and processor responses to written questions.

⁷¹ It is possible that clam meat competes with other proteins in some uses. Data are not available to rigorously evaluate whether other proteins, such as chicken or shrimp, compete with clam meat sufficiently that the prices of these substitute proteins substantially constrain the price of clam meat. See Letter from Michael LaVecchia, LaMonica Fine Foods, March 31, 2011.

⁷² It is also relevant that downstream clam meat purchasers could, if they desired, acquire quota, which would help guarantee sufficient supply and prevent processors from raising prices.

into harvesting, however, may actually improve the economic performance of the fisheries and their harvesting and processing sectors. One theoretical concern that arises from the existence of a concentrated processing sector is that it would exercise monopsony power over harvesters.⁷³ To exercise monopsony power, processors would reduce their demand for harvesting services, lowering the market price of harvesting services and increasing profits to the processing sector. Of course, if a processor owns a harvester, that firm would not benefit by underutilizing its owned harvesting assets in order to depress the price of harvesting services.⁷⁴ The processor will be motivated to use its own harvesting capacity if the incremental value of the harvest to the processor exceeds the incremental cost of harvesting, without regard for the effect of the additional harvesting on the market price of harvesting services. As a result, vertically integrated processors will increase harvest levels over those non-vertically integrated processors would choose were they to have influence over the market price of harvesting services.

G. Excess Supply of Harvesting Capacity

Processors report that there is excess harvesting capacity in the Surfclam and Ocean Quahog fisheries. This excess capacity is the result of vessels that are available to harvest clams, but are not currently contracted to do so, and the ability of vessels actively harvesting in the fisheries to harvest additional clams.⁷⁵ Analysis of landings by vessel shows that most vessels landed fewer bushels of clams in 2008 than the maximum number of bushels that they harvested over the period 1998-2008.⁷⁶ This finding supports the processors' assertion that the vessels currently operating in the fisheries could expand output if demand warranted.⁷⁷ Harvesters with excess capacity will have strong incentives to use their vessels intensively in order to maximize the return on their primary capital asset. Moreover, the excess supply of harvesting capacity implies that harvesting services will be supplied quite elastically. A highly elastic supply of harvesting services indicates that withholding of quota in an effort to exercise monopsony market power against harvesters is unlikely to be profitable.

H. Conclusions Regarding the Presence of Market Power in the Fisheries

Given the constraints discussed above, it may not be surprising that the evidence we analyzed does not support a conclusion that market power is currently being exercised through the withholding of quota (or, apparently, through other means as well).

⁷³ As described below, the evidence does not support the conclusion that the processing sector has exercised market power in the Surfclam or Ocean Quahog fisheries.

⁷⁴ See, e.g., Perry, Martin K., "Vertical Integration: The Monopsony Case," *The American Economic Review*, Vol. 68, No. 4, September 1978, pp. 561-570.

⁷⁵ Excessive Share Technical Meeting, October 22, 2010.

⁷⁶ NMFS Data.

⁷⁷ Landings per unit effort, i.e., bushels harvested per hour of fishing, have fallen quite dramatically for Surfclams. This indicates that the current stock of vessels may not be able to harvest as many clams as it did in earlier years.

Figure 9 shows Surfclam quota, landings, and the percent of quota landed for the period 1979 through 2008. Since the implementation of the current ITQ-based regulatory regime in 1990, the Surfclam harvest has been at or near the full quota level. The last five years, however, have seen production somewhat below quota. Figure 10 shows Ocean Quahog quota, landings, and the percent of quota landed for the years 1979 through 2008. The story for Ocean Quahogs is quite different from that for Surfclams. Since 1990, years when the full quota were utilized are the exception rather than the rule. Moreover, Ocean Quahog landings have been on a downward trend since the early 1990s, with the exception of a temporary increase during 2001-2004, which includes years in which processors report high demand and high prices (despite tension with Figure 12).⁷⁸

Figure 10 indicates that the Ocean Quahog fishery is performing today in line with historical trends, particularly if prices are now lower than in the early part of the decade. The significant underutilization of quota is, in part, the result of the TAC being set at a relatively high level compared to historical norms. Figure 9 shows Surfclam landings have fallen below quota since 2004. However, this underproduction has been accompanied by a significant decrease in the efficiency of harvesting operations. Figure 11 shows the landings per unit effort, or bushels harvested per hour of fishing, for both Surfclams and Ocean Quahogs. Surfclam landings per unit effort fell by 50 percent between 2000 and 2008. Figure 12 shows the prices processors paid to harvesters for Surfclams and Ocean Quahogs.⁷⁹ Prices for both species were quite flat, but showed some increase in 2008 and 2009. A price increase during these years is not surprising because fuel costs rose rather dramatically in 2008, and processors report levying fuel surcharges on their customers for at least some period of time to cover increased harvesting costs. Most importantly, the price increases are not associated with years where harvests fell relatively more below quota (e.g., 2005).

An important piece of evidence that supports the conclusion that quota is not being withheld from the market is the reports by processors that once it is apparent quota will be in excess supply in a season, the price of quota is quite low.⁸⁰ As described above, if quota were being withheld from the market to exercise market power, its price would be high because withholding would make quota scarce. This appears not to be the case currently as there are reports that quota owners are not able to lease their quota to harvesters or processors. Another piece of evidence is the low concentration of quota ownership before contractual transfers to processors and harvesters. These low levels of concentration are inconsistent with the exercise of any meaningful market power through the withholding of quota. However, the concentration of quota ownership and control following transfers, some of which are under long-term contracts with fixed prices, appears to be much higher than the initial concentration of quota holdings. The presence

⁷⁸ Excessive Share Technical Meeting, October 22, 2010.

⁷⁹ These prices include transactions between processors and their affiliated harvesters. Therefore, there is some question as to whether these fully reflect arm's-length prices.

⁸⁰ Prices are low early enough in the season that additional clams could be harvested if there were sufficient demand.

of these long-term contracts for quota may present a potential difficulty with respect to assessing market power.

VI. Excessive-Share Proposal

An excessive-share rule can be an effective instrument for limiting the exercise of market power through the withholding of quota. It is unlikely to be an effective rule, however, for completely preventing the creation or exercise of market power in the harvesting or processing sectors of the Surfclam and Ocean Quahog industry (through means other than withholding quota) or preventing the exercise of any market power that already exists. Given that the fishery remains under the jurisdiction of U.S. antitrust law in general, there will continue to be safeguards in place (other than the excessive-share cap) to protect against any general exercise of market power through such means as collusion on prices and output, or concerted foreclosure strategies.

As discussed in general terms above, establishing an overly restrictive regulation may not serve to increase economic efficiency. Setting a share cap that is too low could harm the economic efficiency of the fishery itself and of the processing sector. As described above, an excessive-share rule that strictly defines ownership or control of quota could limit the share of the Surfclam and/or Ocean Quahog catch a processor could purchase, which may prevent the firm from realizing efficiency-enhancing economies of scale. The excessive-share proposal described below reflects these concerns, while still providing constraints on the exercise of market power through the ownership and control of quota.

The proposal is laid out in a series of steps. For each step, we discuss the general principles that would apply to many fisheries, and then we explain the result of applying those principles to the SCOQ fisheries. At the end we introduce one additional idea for further analysis beyond the scope of the current report.

A. Step 1: Assess Availability of Requisite Information on Quota Ownership and Control

In order to apply principles like those found in the *Horizontal Merger Guidelines* and to reach informed conclusions regarding the acceptable degree of concentration of quota holdings, the regulator **must** be able to accurately calculate existing levels of concentration. The regulator must be able to define clearly what constitutes relevant ownership and control of ITQ shares, and be able to identify the quota owners and their affiliations that create aligning interests.

The guiding principle in determining the relevant “owner” of quota for the purpose of implementing an excessive-share cap is to identify who can make binding decisions about the use of the quota and who bears the risk of (or stands to benefit from) quota price changes. It is this entity that possibly has the ability and incentive to withhold quota anticompetitively and should be associated with the quota for purposes of the excessive-share rule. In the SCOQ fisheries, the regulator will need to obtain information showing who the contractual holders of quota are, and may have to require quota holders to report their affiliations to the regulator. Once an excessive-share rule has been implemented, the need for baseline information will be reduced and quota

holders may be able to report their holdings and changes in affiliation only when their holdings exceed some reasonable threshold.

As described below, the excessive-share cap is a cap on the amount of quota that any group of affiliated quota holders to which the excessive-share rule applies can accumulate, or use, during the course of a season. If that group of affiliated quota holders acquires additional quota during a season, then its total quota holdings must be tallied to ensure that they remain under the cap for the season.

Application of Step 1 for SCOQ Fisheries:

In the SCOQ fisheries, affiliations among quota holders may be based on either family ties or commercial interests. The Council must determine which entities are affiliated and then accurately assess quota holdings and transactions in order for any excessive-share cap to be meaningful.

Once the Council determines which entities buy and sell quota, it is necessary to assign holdings to each entity.⁸¹ This should be done prior to the beginning of a season. In some cases, associating quota with those controlling it prior to the season will be straightforward. For example, a quota allocation owner that has not contracted to lease out its quota for the upcoming season would be assigned the quota that it owns. Quota that has been leased under a long-term fixed-price contract would be assigned to the entity that leased the quota from the owner.⁸² In this case, it is the party that contracted for the quota (the lessee) that may have the incentive to withhold quota to raise its price. If, however, a long-term contract has prices that are set to market levels, it is the owner of the quota that retains the risk that the quota's value will change. For transfers lasting only one season, the quota should be assigned to the acquiring party if the transfer has occurred by the time of the preseason audit of quota holdings. Transfers occurring during a season must also be reported and tracked.

Similar rules should apply to contracts between processors and harvesters that involve quota. To the extent a harvester is obligated to use quota on behalf of the processor (and will not reap the benefits of price changes), the quota should be assigned to the processor. For example, if a processor offers a harvester (that owns the quota) a fixed price for clams and the harvester is obligated to reserve the quota necessary to supply these clams, the processor would be assigned the quota (the processor controls the use of the quota and would benefit from an increase in the value of clams and quota).

If, however, the supply agreement does not obligate the harvester to reserve the quota for the processor, or has the harvester bearing the risk of price changes, then the

⁸¹ No quota should be double-counted as applying to more than one party's shares (although holdings can be split: for example, associating 50 percent to each half of a joint venture between two parties with equal votes). In other words, the sum of the shares associated with all parties for the purpose of evaluating the cap should equal 100 percent of the TAC.

⁸² "Fixed-price" means the price of the quota (per bushel of harvest allowed) is set for the duration of the contract (it need not be the same price throughout the term of the contract, but the level at any point during the term is predetermined at the onset of the contract).

quota should be assigned to the harvester. This is because it is the harvester rather than the processor that benefits from an increase in the price of quota. Therefore it is only the harvester that could possibly have the incentive from this quota to contribute to price elevation. For example, if a processor contracts with a harvester (that owns quota) for 15 bushels at market price per bushel (perhaps by matching best price offered by any processor at time of delivery), then the harvester would be assigned the quota.⁸³

B. Step 2: Assess Availability of Requisite Competitive Information

There is a certain amount of information on competition that must be available to regulators for any meaningful determination and implementation of an excessive-share cap.

A regulator relying on the framework provided in the *Horizontal Merger Guidelines* must have sufficient information to evaluate the state of competition in the marketplace in a manner consistent with the *Guidelines*. As described earlier in this report, the *Horizontal Merger Guidelines* specifies thresholds for moderately concentrated and highly concentrated markets. In some markets, high concentration does not stand in the way of vigorous competition, while in others high concentration threatens the exercise of market power. The *Horizontal Merger Guidelines* also describes a number of economic conditions that influence whether markets are likely to operate competitively and whether a proposed transaction is likely to provide the capability and incentive to exercise market power under different market conditions. Under some industry conditions, a transaction resulting in moderate concentration could be deemed problematic, while under other conditions, a transaction resulting in high concentration may still be acceptable.

The relevant information the regulator must collect includes the scope, quantity, and flexibility of supply of substitute products, the level of excess capacity in harvesting and processing, the degree of product heterogeneity, the relative bargaining power of buyers and sellers, the ability to price discriminate, ease of entry, and efficiencies (or economies of scale). This information would be required for ITQ transactions as well as related industry activities including fishing (harvesting) and processing. Information on product substitution should have sufficient detail for the determination of relevant markets, as described in the *Horizontal Merger Guidelines*. The product of this inquiry will be an informed, fact-based judgment regarding the highest degree of concentration that would be consistent with a well-functioning, competitive market.⁸⁴

⁸³ We note that such contractual arrangements may not currently be present in the SCOQ fisheries.

⁸⁴ This exercise applies the principles of the *Horizontal Merger Guidelines* in a manner that is different from the typical application. When determining whether to intervene to prevent a merger, the U.S. Department of Justice and the Federal Trade Commission use the *Horizontal Merger Guidelines* to determine if the merger threatens competition, based on the characteristics of the markets where the merging firms overlap. Here, the principles underlying that type of determination are being used to assess the maximum level of competition that is consistent with a competitive market for quota, based on the characteristics of the market in which that quota is used.

Application of Step 2 for SCOQ Fisheries:

A key issue for assessing competition in the Surfclam and Ocean Quahog fisheries is the degree of competition the fisheries experience from competing clam products (and possibly other products). Industry participants note that there are several uses for which either Surfclams or Ocean Quahogs are acceptable, but there are also at least some uses for which only Surfclams may be acceptable. Similarly, some processors report that there are some uses where imported clams compete with SCOQ clams.⁸⁵ The question is whether the degree of substitution among imported and domestic clam meat is sufficiently high to place them in a single relevant market.⁸⁶ It is not necessary that two products be perfect substitutes in order to be in the same relevant market. What is necessary is that a hypothetical monopolist controlling all of one product could not profitably raise the price for that product because the monopolist would lose sales as the result of buyers' switching to other products in at least some uses, though not necessarily all uses.

Detailed data on quantities and prices would allow for a quantitative analysis to determine whether product substitution rises to the level necessary to include all products relating to Surfclams, Ocean Quahogs, and imported clam meat in the same relevant market, or various combinations into smaller relevant markets. These data, however, are not available to us. Therefore, the Council must assess whether there is sufficient information to define relevant markets and how to remedy any information insufficiency, and after appropriate analysis, determine the relevant markets.

Specifically, the questions that remain unanswered by our analysis are: 1) Would a hypothetical owner of the entire Surfclam harvest (or all processed Surfclam meat) be able to raise price profitably above the competitive level to some or to all buyers, or would there be sufficient substitution to Ocean Quahogs to constrain such a price increase? 2) Would a hypothetical owner of the entire Ocean Quahog harvest (or all processed Ocean Quahog meat) be able to raise price profitably above the competitive level to some or to all buyers, or would there be sufficient substitution to Surfclams to constrain such a price increase? If the answer to both of these questions is that a single owner could not profitably raise the price of Surfclams or Quahogs, then the relevant market may include the combination of Surfclams and Ocean Quahogs in the federally regulated fishery. Next: 3) Would a hypothetical owner of the entire SCOQ harvest (or all processed SCOQ meat) be able to raise price profitably above the competitive level to some or to all buyers, or would there be sufficient substitution to imports (and/or harvests from state-regulated fisheries) to constrain such a price increase? If increased imports of

⁸⁵ Excessive Share Technical Meeting, October 22, 2010, and processor responses to written questions. One processor has provided information indicating that imported clam meat may not be a meaningful source of competition to domestic clam meat. Letter from Michael LaVecchia, LaMonica Fine Foods, March 31, 2011.

⁸⁶ It may be the case that imported clam meat competes with some processed clam products. For example, imported canned clam meat may compete with domestic canned clam meat, but imported clam meat may not compete materially with fresh or frozen domestic clam meat.

clam meat would constrain the pricing of SCOQ clam meat to the competitive level, then the relevant market includes imports (and harvests from state-regulated fisheries).

Other information about competitive constraints also appears to be generally favorable to the hypothesis that large share accumulations may not confer market power, but again we do not have sufficient detail for rigorous quantitative analysis. For example, industry participants report that downstream buyers are large and have considerable buying power, and that demands for clam meat and clam products are highly elastic. We do not have data to confirm these reports. Given the apparent unanimity of agreement among the industry reports, however, we proceed on the assumption that there is a high degree of buyer power and that the processors face relatively elastic demand for their processed clam products.

A relevant efficiency consideration related to an excessive-share cap is whether inhibiting firm growth increases costs (by suppressing economies of scale). Restrictions on quota holdings may limit the size of processors or harvesters. Whether this is economically costly depends on whether there are economies of scale in processing.⁸⁷ We proceed on the assumption that there may be scale efficiencies in processing within the range of excessive-share caps that we consider, but not in harvesting.⁸⁸

C. Step 3: Establish Whether the Threshold Condition Requiring No Cap Applies

This step addresses a threshold condition for determining whether any excessive-share cap is required. As discussed earlier in the report, a TAC that binds the quantity of harvest below a certain level serves to eliminate the possibility of raising prices by withholding supply. A TAC sufficiently restrictive to remove any incentive to withhold quota would obviate the need for an excessive-share cap.

The relevant “sufficiently restrictive” level is the quantity that would be produced if there were only a single entity producing in the industry – the “monopoly” output. If the TAC is set below the monopoly output, the market power of quota holders is irrelevant because there would be an incentive to produce at the TAC regardless of quota concentration.

⁸⁷ We do not have access to cost information that permits us to evaluate the degree to which processors may or may not have unexploited returns to scale. The exhaustion of returns to scale depends the capacity of efficiently sized equipment used by the processors and the degree to which the processing equipment is potentially useful for processing seafood products other than clams.

⁸⁸ In other words, a processor may be able to reduce the average incremental cost of processing by securing ownership or control of additional quota in excess of the lowest range of the share caps discussed in our analysis. For harvesting, however, we proceed on the assumption that there are no scale economies available within the range of share caps discussed in our analysis – in other words, if a single harvester were to harvest an amount equal to the lowest range of the share caps we discuss, then the harvester would be experiencing constant or increasing average costs with additional harvests.

Application of Step 3 for SCOQ Fisheries:

The TAC in each of the SCOQ fisheries currently does not restrict output in a market that appears to be operating competitively, so the TAC is not below the monopoly output. Therefore, the threshold for requiring no excessive-share cap has not been met.

D. Step 4: Establish Appropriate Concentration Thresholds

The next step is to use the information on competitive constraints to determine an appropriate concentration condition under the analytical framework of the *Horizontal Merger Guidelines*. In addition, the excessive-share cap should be set to guard against the possibility of the foreclosure of competitors by denying them access to quota.

The *Horizontal Merger Guidelines* offers little direct guidance relating to size limits for individual firms. Previous versions of the *Horizontal Merger Guidelines* have noted that a firm with a 35 percent market share could possibly have unilateral market power.⁸⁹ However, the current version offers no such guidance. The *Horizontal Merger Guidelines* does, however, provide extensive discussion of market concentration.

We propose that the regulator assess, as a threshold, the highest level of concentration of quota holdings (and number of industry participants) at which, and at lower levels too, the market is likely to be free of capabilities and incentives to exercise market power or engage in predatory conduct. Then, the regulator can mathematically determine the level of the excessive-share cap that just prevents that threshold level of concentration from being exceeded.

Application of Step 4 for SCOQ Fisheries:

As we have discussed above, downstream market conditions appear to provide substantial competitive constraints on SCOQ industry participants. Downstream demand for Surfclam and Ocean Quahog products appears to be relatively elastic. Large sophisticated buyers with numerous product development options appear to have considerable bargaining power with respect to clam processors. There is no indication that either of these conditions is likely to change in the foreseeable future. Under such conditions, the *Horizontal Merger Guidelines* suggests that a moderately concentrated market for clam products would not be a cause for concern. Thus, an appropriate SCOQ excessive-share cap would be set to prevent a relevant product market that includes Surfclam and/or Ocean Quahog products from becoming highly concentrated (HHI above 2500).

The proposed limit on concentration in the market for clam products (that are in the same relevant markets as Surfclams or Ocean Quahogs) can be directly related to the appropriate restrictions on quota holdings. As shown above in Figure 2, the theoretical withholding of quota would reduce the output of clams from the federally regulated fisheries, raising the prices of clams and clam products, and possibly reducing the price

⁸⁹ See, e.g., U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, Revised April 8, 1997, p. 25.

of harvesting.⁹⁰ Then, quota owners would benefit from quota withholding because it would directly reduce the harvest of clams, raising the price of clams and clam products. Therefore, to assess this theoretical possibility, those who own or control quota can be treated as controlling a share of clam output that is equal to the amount of quota that they control, recognizing that the relevant share may be based on total clam output that is larger than the output of the federal fisheries – this is discussed in further detail in Step 5.

Additionally, processing is a stage of the industry where the potential for predatory conduct through quota accumulation could possibly exist because holding quota back from use could choke off input supply to competing processors. For such conduct to confer a long-run benefit on the holder of the unused quota, it would be necessary to reduce the set of effectively competing processors so that outside options are permanently restricted for harvesters and for downstream purchasers. It may be sufficient for at least two or three processor firms to be operating (given that large buyers can stimulate competitive bidding for supply agreements), although having additional smaller capacity beyond those two or three would provide an additional margin of protection. An excessive-share cap restricting long-term quota holdings to 40 percent or less of the harvest supply to processors would prevent unilateral quota accumulation from becoming a means to reduce processor participation to fewer than three firms.

The discussion above applies specifically to the SCOQ ITQ system, where processors specialize in the input from the SCOQ fishery. When the input to processors comes entirely from a regulated fishery with an ITQ system, then a given share of the quota corresponds to the same share of the input to processors. When processors receive input from multiple sources beyond the regulated fishery, however, then a given share of the quota will correspond to a smaller share of input to processors. It is possible that sources of supply from outside the regulated fishery alone could support three or more processors at an efficient scale, in which case no long-term quota holding restriction would be necessary to prevent foreclosure.

E. Step 5: Determine Relationship Between the Excessive-Share Cap and Market Concentration

The next step is to determine the relationship between possible excessive-share caps and the maximum possible level of relevant market concentration. This relies on market delineation and also on persistent structural features of the quota market, as explained below.

First, it is straightforward to find the maximum level of quota holding that is consistent with a given maximum possible level of concentration: assess concentration of substitute products (not regulated by the quota) within the same relevant market; assess the share of the market occupied by small (“fringe”) market participants; calculate the

⁹⁰ The available evidence suggests that harvesting services are supplied quite elastically and that there is little threat that quota holders could profitably exercise monopsony power to the detriment of harvesters. Moreover, processors are substantially vertically integrated into harvesting. Processors will employ their own harvesting capacity based on its incremental cost.

maximum number of independent quota allocations that can exist at the maximum holding size, include one additional quota holding that captures any remainder; and calculate the HHI for the resulting set of shares of these possible market participants.

For example, a maximum firm size of 25 percent of the market would allow for four firms at 25 percent each (no remainder) for an HHI of 2500. A maximum firm size of 30 percent would allow for three firms at 30 percent and one at 10 percent for an HHI of 2800. Additionally, the aggregate share held by quota holders with very small shares also bounds the maximum concentration possible at any given cap level. A firm with 1 percent share contributes only one point to the HHI. If 25 percent of the market is shared by a relatively large number of small firms (25 firms at 1 percent each, for example), then those firms contribute very little to the HHI in the aggregate even though they limit the scope of large holdings. Therefore, when there is a competitive fringe, the remaining quota holders can have relatively larger market shares for any given measure of concentration. If such a market had a maximum firm size of 35 percent, for example, then there could be just two large firms at 35 percent, one firm at 5 percent, and a “fringe” of 25 firms at 1 percent each. The resulting HHI would be 2500 (whereas the HHI associated with a 25 percent maximum firm size and no fringe would also be 2500).

The calculation of concentration can be done directly with ITQ shares only if the output of the fishery coincides with a *relevant* product market. If the relevant market is larger than the fishery, then a given share of quota holding would correspond to a smaller share of the relevant market.⁹¹ For example, if the fishery accounted for only one-half of the output of the relevant market, then a holding of 40 percent of the quota in the fishery would correspond to only 20 percent of the output in the relevant market.

Application of Step 5 for the SCOQ Fisheries:

We have made a number of calculations that determine the maximum excessive-share cap that is consistent with the relevant market having concentration no higher than the desired threshold. To apply these calculations first requires the determination of relevant markets, as discussed in Step 2. As already discussed, the withholding of quota might be beneficial to the quota holder because withholding quota limits the output of clams and raises the price of clams. The quota holder would capture the benefit of the increased price of clams. Therefore, it is appropriate to treat quota holders as controlling an amount of clam output equal to their quota holdings. We evaluate the quota holdings within the context of the larger market for clams and clam products for purposes of our calculations, while recognizing that we have not here delineated the relevant market with the confidence that more complete data could provide.

⁹¹ If the relevant product market is smaller than a fishery (if, for example, there are distinct geographic markets with separate supply and demand, and no cross-substitution), then an excessive-share cap applied to the whole fishery may be ineffective for controlling market power. We do not believe that the relevant products market(s) here are smaller than the individual species within the SCOQ fisheries.

Figure 13 illustrates how the maximum concentration of the overall market for clams varies with different levels of the excessive-share cap and with different aggregate levels of fringe holdings of quota and for different levels of competing non-SCOQ clams.⁹² The figures shown are shares of quota, which the regulator must identify to implement any excessive-share cap. Adjustments to the SCOQ quota shares are made in the calculation to account for additional output in the larger relevant market in the calculation of the HHI. The calculations assume that the individual fringe quota holdings and suppliers of substitute products in the relevant market are all individually very small and hence contribute nothing to the HHI, even as they may in aggregate represent a significant market share. If it were the case that there were large importers, the calculation could be readily adjusted to reflect the actual sizes of the importers providing competing products.

The top panel of Figure 13 shows the levels of concentration for combinations of excessive-share cap and aggregate fringe quota holdings for Scenario 1, in which we assume the relevant market includes both Surfclams and Ocean Quahogs from the SCOQ harvests, but nothing else.⁹³ Therefore, for purposes of this discussion, the share caps and ownership shares are for the combined fisheries. In the table, HHIs less than 1500 are shaded light blue and HHIs greater than 2500 are shaded yellow. The table shows that at low levels of aggregate fringe holdings, the highest excessive-share cap consistent with a moderately competitive market is 25 percent. However, if the aggregate fringe holdings grow, the share cap could rise to 30 percent or 35 percent and still meet the recommended threshold. An excessive-share cap of 30 percent to 35 percent would guarantee that three to four fishery participants held quota, which would limit the potential for predation or foreclosure effected by withholding quota from competitors.

The second panel of Figure 13 shows the results for Scenario 2, which assumes that there are non-SCOQ clams (i.e., imported clams and clams from state fisheries) that are good substitutes for SCOQ clams and the quantity of these competing clams is equal to 10 percent of the SCOQ harvest.⁹⁴ The table shows that for even low aggregate quota holdings by the fringe, the excessive-share cap can be as high as 35 percent while maintaining a moderately concentrated market for all clams that compete with SCOQ clams. This implies at least three firms holding quota, which may provide some constraint against predation or foreclosure of competitors.

Scenario 3 shows the results under the assumption that non-SCOQ clams are available in amounts equal to 20 percent of the amount of the SCOQ TAC. In this

⁹² We do not have sufficient price and quantity information to determine whether imported clams compete with domestic clams in some or all applications. Here we limit our analysis to competition from other clams and do not consider whether clams are highly substitutable with other proteins. Non-SCOQ clams are competing Surfclams and Ocean Quahogs that are not harvested from the federal SCOQ fisheries.

⁹³ This scenario does not account for competition from state fisheries as well.

⁹⁴ In this calculation, “imports” reflects the supply of clams from outside the SCOQ fisheries that compete with SCOQ clams. These could include domestic clams from state fisheries.

scenario, a 40 percent excessive-share cap is appropriate for a wide range of competitive-fringe levels.

Scenario 4, illustrated in the fourth panel of Figure 13, shows the results if the level of imported clams that compete with clams from the SCOQ fisheries rises to 40 percent of the SCOQ harvest. In this case, the excessive-share cap can rise to 60 percent even if the aggregate fringe holding of SCOQ quota is as small as 5 percent.⁹⁵ With such a high share cap, however, two firms could control all of the holdings. An excessive-share rule that permits two firms to hold the entire quota fails to meet the desired safe target for preventing predation (i.e., foreclosure of entry or expansion by processors).

The analysis above raises the question of how to apply the results found in Figure 13. The answer depends on the degree of substitution among different clam products. For example, if it were the case that neither Ocean Quahogs nor any imported clams competed with Surfclams, it would be appropriate to apply the results of Scenario 1 to the Surfclam fishery. Similarly, if Surfclams and Ocean Quahogs are good substitutes in all uses for one another, but no imports are good substitutes for the domestic clams, then it would be appropriate to apply the results of Scenario 1 to the Surfclam and Ocean Quahog fisheries on a combined basis. If imports compete with domestic clams, then it would be appropriate to apply the results from Scenario 2 or Scenario 3 (or a scenario with an appropriate level of imports) to the domestic fisheries on a separate or combined basis, depending on the level of substitution between them.

F. Step 6: Identify Regulatory and Practical Constraints

The next step is to identify the regulatory and practical constraints on the regulator charged to implement the proposed cap. As can be seen in the examples from Step 5, the excessive-share cap necessary to limit concentration to the desired level depends on the level of sales of products (imports) that are close substitutes for clams from the federal fisheries. Of course, the level of sales of competing products and other market conditions may change over time. Therefore, an excessive-share cap on quota holdings that is appropriate under one set of market conditions may be too high or too low under different circumstances. The best way to address this variety of possibilities is dependent on the legal foundation for the regulation and the practical capabilities of the regulator.

If the legal foundation mandates that the excessive-share cap must protect the fisheries against market power under any conceivable market conditions, then it is relatively easy to identify a cap by examining the relationship between the excessive-share cap and concentration under the least-competitive conceivable market conditions. If the legal foundation requires a balance between regulating market power and allowing for efficient industry operation, then a more measured approach is necessary.

Likewise, legal and practical considerations may provide implementation options for the regulator. One such option discussed in detail for this fishery is to set a relatively

⁹⁵ Higher levels of fringe holdings are consistent with still higher excessive-share caps. Of course, the possible extent of the competitive fringe is limited by the size of the large market participants.

restrictive cap for long-term holdings, but to allow a higher excessive-share cap by allowing short-term quota accumulation at a higher level. The excessive-share cap would be adjusted from season to season to reflect changing market conditions (although the cap on long-term holdings would be fixed). This approach allows for more flexible capacity developments by industry participants without allowing any participants to obtain permanent accumulations that could be used to exclude competitors.

Application of Step 6 for SCOQ Fisheries:

We consider two options for implementation, to allow for different interpretations of the mandate for an excessive-share cap.

The first option is to establish a fixed excessive-share cap that strikes a moderate balance between protecting against market power and allowing for efficiencies of scale by selecting the highest possible cap that appears sufficient to prevent a highly concentrated relevant product market for most of the range of foreseeable market conditions. This requires some balancing of efficiencies by the regulator, but provides the market with a clear and certain rule under which to operate going forward. The downside of this option is that there may be seasons when the excessive-share cap is overly restrictive (harming productive efficiency) or overly permissive (allowing market power), depending on changing conditions in the fishery.

The second option is to establish a more stringent cap for long-term holdings (to prevent exclusionary conduct), but allow for larger accumulations in the short term so as not to constrain efficient scale and to allow for adjustments to the excessive-share cap from year to year as market conditions change (the sum of a quota holder's long-term holdings and short-term accumulations would be subject to the overall excessive-share cap). We call this a "two-part cap." The preference for short-term accumulations in the two-part cap limits the share of long-term quota controlled by any single party, which limits the ability to foreclose competitors by withholding quota on a committed multi-season basis.⁹⁶

To the extent Surfclams and Ocean Quahogs are in the same relevant market, it is appropriate to calculate a single excessive-share cap and to apply that common cap independently to both species together in the fisheries. However, applying the same share cap to each species separately would achieve the same or greater level of protection against market power with possibly little or no additional threat of efficiency loss.

Alternatively, it may be the case that a quota holder of the entire Surfclam quota might be able to profitably withhold supply or price discriminate against some buyers if there are some applications where Ocean Quahogs or imports are not a good substitute

⁹⁶ We note that throughout this discussion we refrain from assessing prospects for exercising market power through the timing of quota holding or use within a given season. For the SCOQ market, there appears to be sufficient ability to shift supply throughout the season that such intra-season conduct would not be effective. That may not be the case for other fisheries, in which case the implementation of the excessive-share cap may have to incorporate an assessment of the ownership shares of remaining unused quota during the course of a season.

for Surfclams. If the Council determines that Surfclams and Ocean Quahogs are not in the same relevant market, then the calculations illustrated in Figure 13 can be readily adapted to each individual fishery, incorporating a separate assessment of the fringe and the level of competing products from outside of each of the federally regulated fisheries.

G. Step 7: Set the Excessive-Share Cap

The final step is to identify the excessive-share cap based on the considerations above.

We understand that the excessive-share cap is not intended to force the divestiture of quota. Therefore, to the extent that any industry participant already owns or controls a share in excess of what is determined to be the appropriate excessive-share cap, we recommend that existing shares in excess of the cap be exempted from the rule but not allowed to grow further.⁹⁷

Application of Step 7 for SCOQ Fisheries:

The correct application of the principles above requires proper determination of the relevant markets in which Surfclams and Ocean Quahogs are sold and the degree to which non-SCOQ clams and processed clam products compete with SCOQ products. Based on some processors' large contractual holdings of quota, the primary competitive risk in the SCOQ fisheries appears to be that processors will use control of large accumulations of quota to exercise market power. The uncertainty regarding the appropriate relevant markets for SCOQ clams and clam products means that our recommendations are conditional on the regulator's ultimate findings regarding the relevant markets.

Our recommendations flow from Figure 13. If there are SCOQ products that do not face meaningful competition from outside of the federal fisheries, the excessive-share threshold would have to be relatively lower than if there were competing products. For example, if there are Surfclam products that do not face competition from imported clams, processors with large accumulations of Surfclam quota would be able to limit their output of Surfclam products, and by refusing to sell their unused quota avoid entry or expansion by other processors. A potential check on this exercise of market power would be available from competing processors' ability to obtain Surfclams from state fisheries. As shown above, the harvest from New Jersey's and New York's state fisheries has been declining. If it is anticipated that the output of the New York state Surfclam fishery will be at about 10 percent of the level of the federal Surfclam fishery, the second panel of Figure 13 indicates that an excessive-share cap of 30 percent to 35 percent would be appropriate to restrain the market for Surfclam products from becoming highly concentrated, assuming a relatively low level of fringe quota ownership. If the harvest from state fisheries is expected to be higher over time, a higher excessive-share cap could

⁹⁷ If some of the holdings that exceed the excessive-share cap are term-limited contractual holdings, the Council should consider whether the contracts that lead to the excessive-share cap's being exceeded should be permitted to be renewed upon their expiration.

be implemented. A similar approach should be used to determine an appropriate excessive-share cap for Ocean Quahogs.

If SCOQ products face higher levels of competition from non-SCOQ clams and/or products, Figure 13 illustrates that higher excessive-share caps could be implemented. However, for the option of a single fixed cap, we recommend an excessive-share cap that does not exceed 40 percent for each of the Surfclam and Ocean Quahog fisheries. As shown in Figure 13 (for Scenario 3), an excessive-share cap of 40 percent would be appropriate whenever imports and state-regulated harvests exceed 20 percent of the relevant Surfclam and/or Ocean Quahog harvest and the aggregate share held by the fringe holders is small. Further, a 40 percent excessive-share cap would provide a modest level of protection against the risk that processors could foreclose entry or expansion by withholding unused quota from the market. An excessive-share cap of 40 percent assures that there would be at least three processors operating at reasonable output levels. As noted earlier, if it were the case that processors received input supply from multiple sources beyond the regulated fishery, then risk of foreclosure may be minimal or non-existent regardless of quota share ownership, in which case it may be appropriate for any restrictions on quota ownership to be guided entirely by Table 13.

For the option of a two-part cap, we recommend that long-term holdings be capped at 30 percent, and that the total excessive-share cap (i.e., long-term holdings plus short-term holdings) be selected and announced before the start of each season to meet the threshold concentration level (HHI no more than 2500) based on the relevant market determination and the size of the fringe.

For example, if the SCOQ fisheries are determined to be in a single relevant market with competition supplying an additional 40 percent of quantity from imports and harvests from state-regulated fisheries (as in Scenario 4), then the total excessive-share cap (long-term cap plus short-term cap) would 60 percent of the SCOQ TAC for the season (inclusive of the 30 percent cap on long-term holdings). A quota holder with long-term quota holdings of 20 percent would be able to buy additional quota representing 40 percent of the TAC on a seasonal basis ($60 - 20 = 40$).

If non-SCOQ clam products that are substitutes for the SCOQ harvest constitute only 20 percent of the SCOQ TAC, then the total excessive-share cap would be 40 percent of the SCOQ TAC for the season (in this case the cap on long-term holdings would still be 30 percent). The sum of the quota holder's long-term holdings and short-term accumulations would have to fall below the overall cap in any season.

The 30 percent cap on long-term accumulations prevents parties from obtaining quota share high enough to preclude competitors to a point where the total number of competitors would be fewer than four within the SCOQ fisheries. A party seeking to foreclose the entry or expansion of processors, for example, would be forced to compete each season with those potentially foreclosed processors for quota beyond the initial 30 percent cap. Although such a strategy might be successful in any given season, it is less likely to be successful for the multiple seasons it could take to drive competition from the market, and the commitment strategic value of the long-term holdings would be limited to just 30 percent.

The potential benefit of designing the excessive-share cap in this fashion depends largely on the importance of long-term contracting for efficient capital investment in vessels and processing. Suppose, for example, that securing supply for more than 30 percent of quota through long-term contracts is a necessary prerequisite to efficient investment in processing (perhaps scale benefits are significant at 40, 50, or 60 percent of the TAC, but capital investment is too risky without a solid source of supply lasting several years). In such a case, the ability to secure quota for more than 30 percent of the TAC only through seasonal contracts for bushel tags may inhibit efficient investment. In this case, however, the efficient equilibrium for processing would involve only one or two very large processors, and there could be concern that there may not be sufficient competitive pressure to ensure that such a small number of processors would pass on to customers the cost benefits of efficient production scale through lower prices. This would be a situation for which an excessive-share cap is an insufficient instrument for controlling market power and ensuring an efficient outcome.

H. Issues for Additional Consideration: Open Auction(s) for ITQ Sponsored by the Regulators

As discussed above, our recommendations depend on conclusions and assumptions that are in some instances guided by a limited body of information provided by industry participants. One important example of this is the assumption that the TAC is currently above the competitive output level because industry participants report that there is quota readily available in the market and that the price for quota is very low when all supply needs have been met during the season.

Additional information based on independent objective evidence could be useful for optimal administration of the fisheries. . For example, information on the value of quota expressed in short-term (“spot”) ITQ transaction prices in an efficient, liquid market would be an excellent source of objective evidence that would aid in managing the fisheries. In the current circumstances, such evidence could validate claims that quota has very low value and is not being withheld from the market despite harvests below TAC.

It also happens to be the case that spot ITQ transaction prices could be beneficial to industry participants in general, and to small quota holders in particular, that likely have less information on the value of quota than larger holders engaged in multiple quota transactions. Thus, large quota holders with access to more information have the potential to use that information at the expense of smaller quota holders and possibly take advantage of asymmetric information in some ITQ transactions. For industry participants in general, a valid price signal for ITQ during a season provides important information that could guide vessel owners and processors in the allocation of their labor and capital resources effectively – helping them allocate resources to the more profitable fishery, for example.

One way to provide the accurate price signal to the market and to the regulators is for the regulators to sponsor an open auction during each season for a modest portion of the TAC from each fishery. We understand that there exist provisions in the regulations for the NMFS to use some quota to encourage free entry into the fisheries. Reserving a

Recommendations for Excessive Share Limits in the SCOQ Fisheries
Mitchell, Peterson and Willig. May 3, 2011.

small portion of that quota to sell at open auction would serve exactly that purpose, and would provide yet another check on the exercise of market power through the possible withholding of quota. Details for the design and implementation of such an auction would require additional economic analysis not covered in the scope of this report.⁹⁸

⁹⁸ See U.S. Department of Commerce, *The Design and Use of Limited Access Privilege Programs*, Lee G. Anderson and Mark C. Holliday, eds., NOAA TM NMFS-F/SPO-86, pp. 124-135.

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Figure 1
Competitive Market Equilibrium

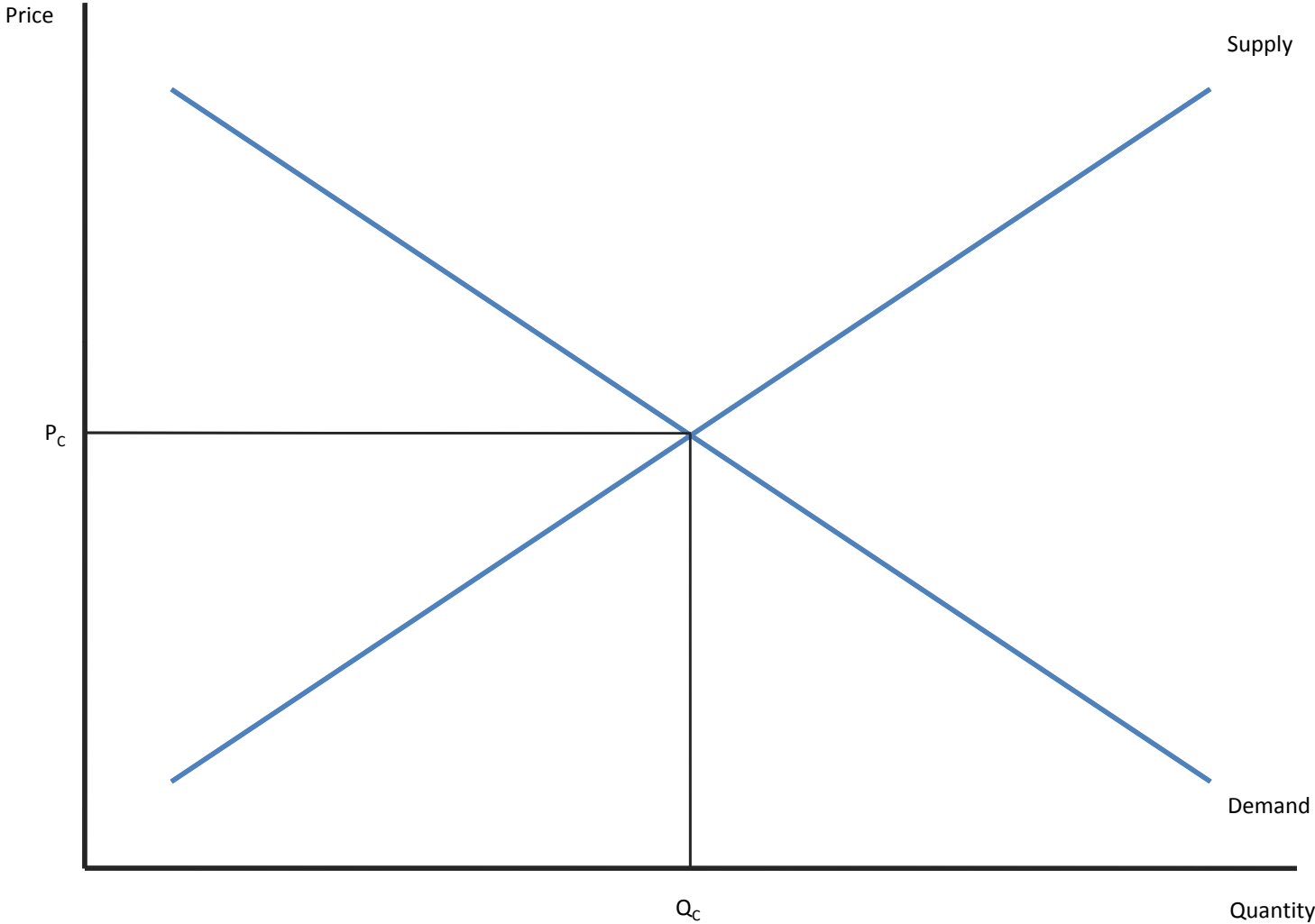


Figure 2
Equilibrium in a Market with Market Power

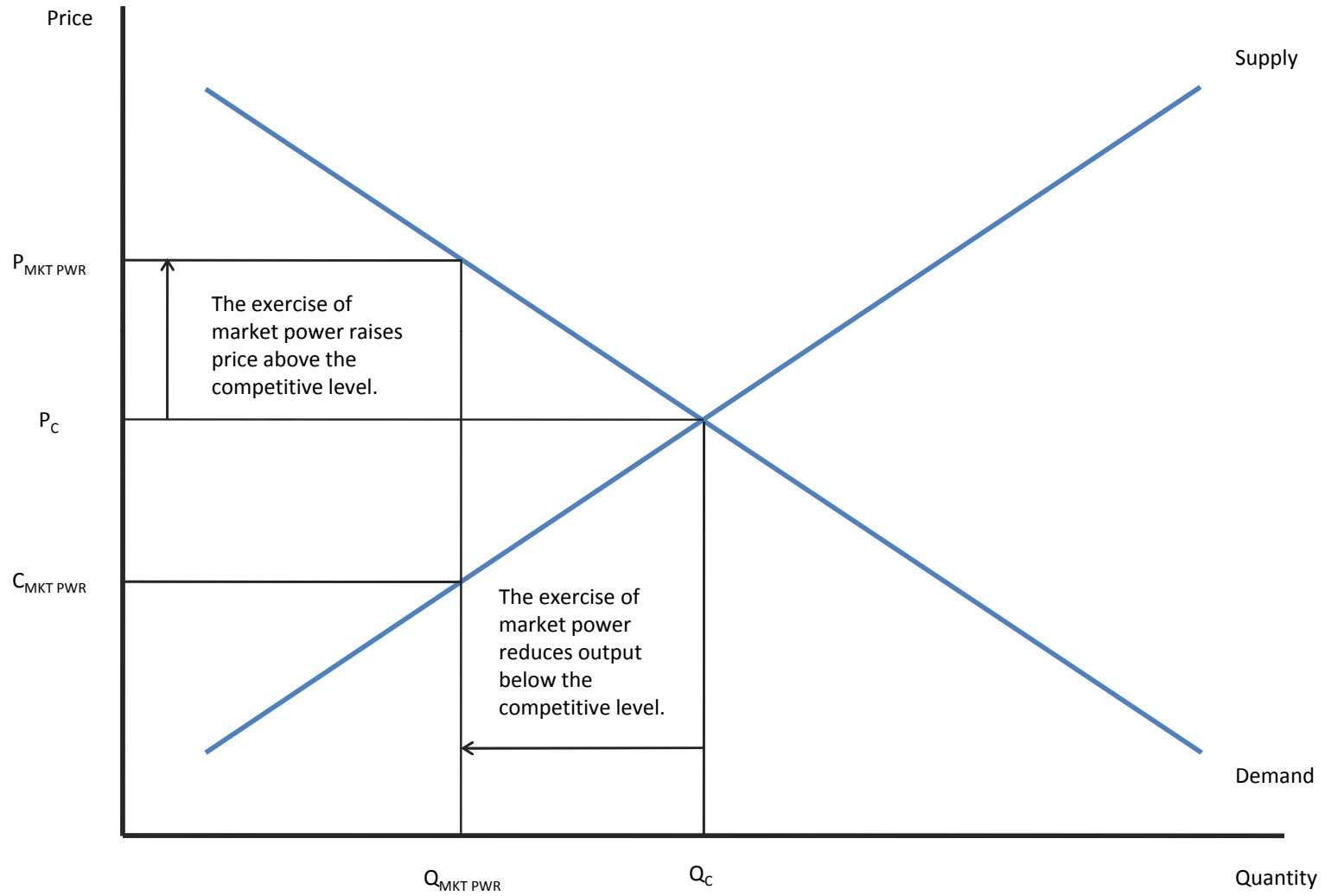


Figure 3

Competitive Equilibrium in a ITQ-Regulated Fishery with Binding TAC

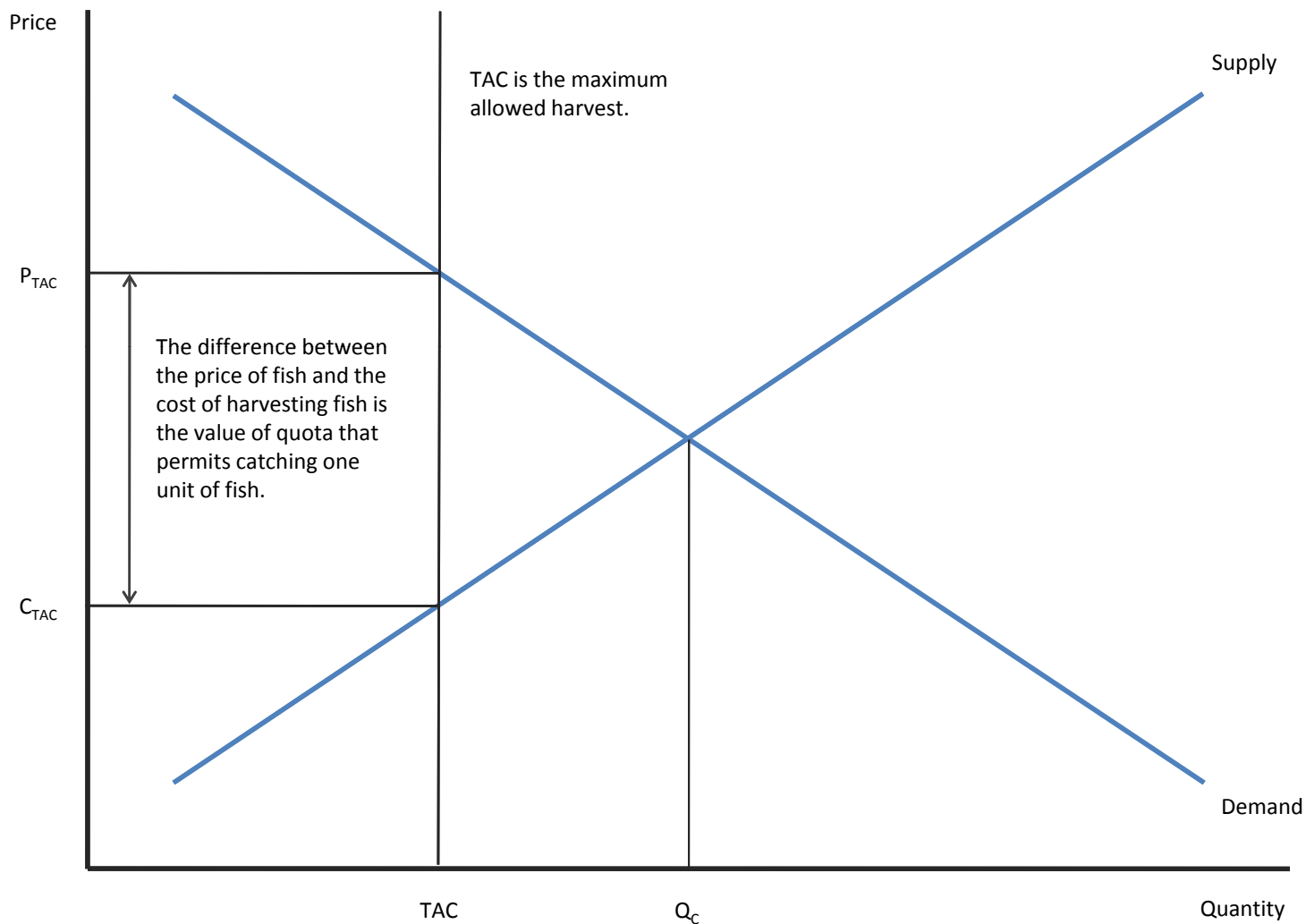


Figure 4
Competitive Equilibrium in a Fishery with Non-Binding TAC

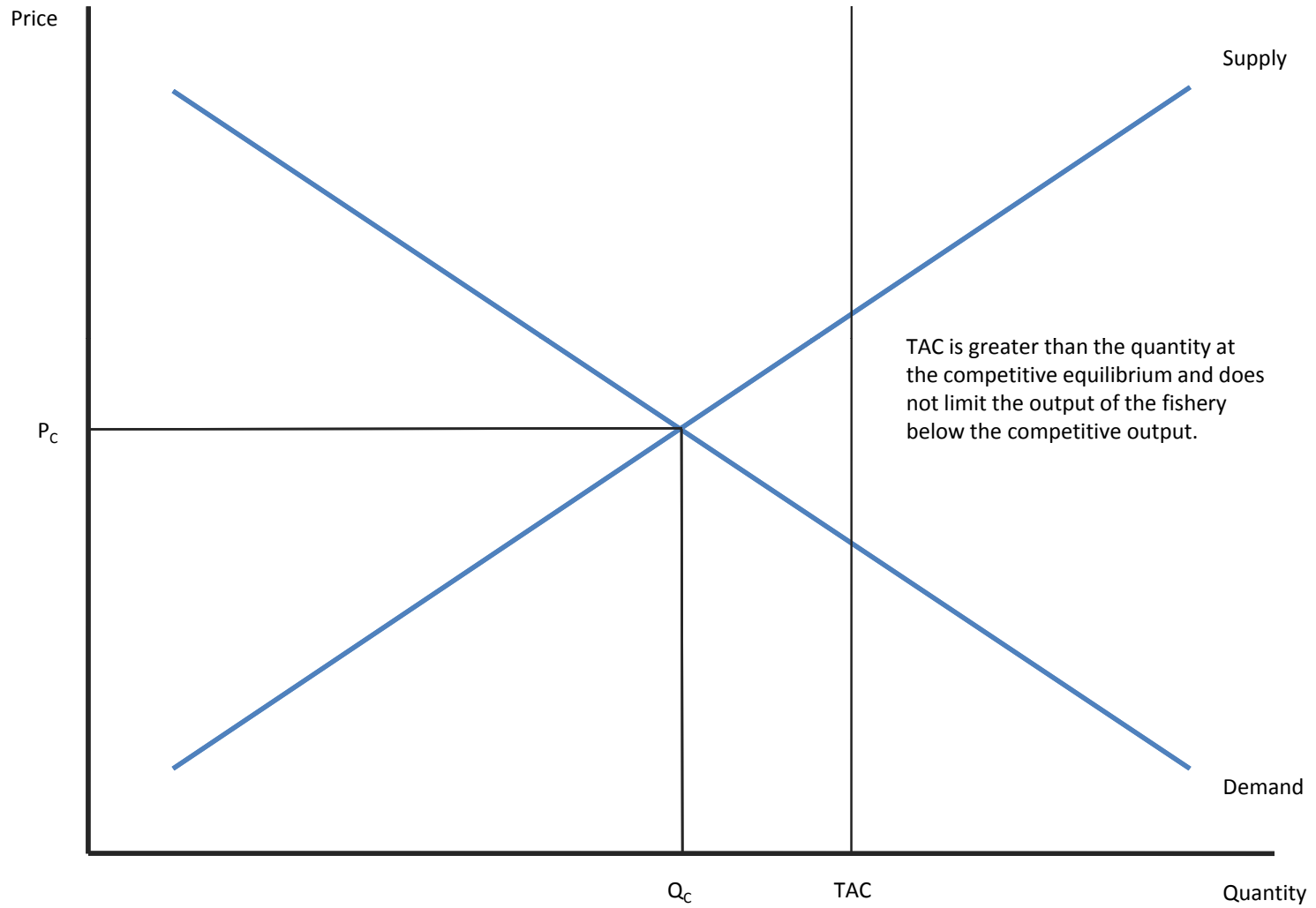


Figure 5

Competitive Equilibrium in a ITQ-Regulated Fishery with Binding TAC

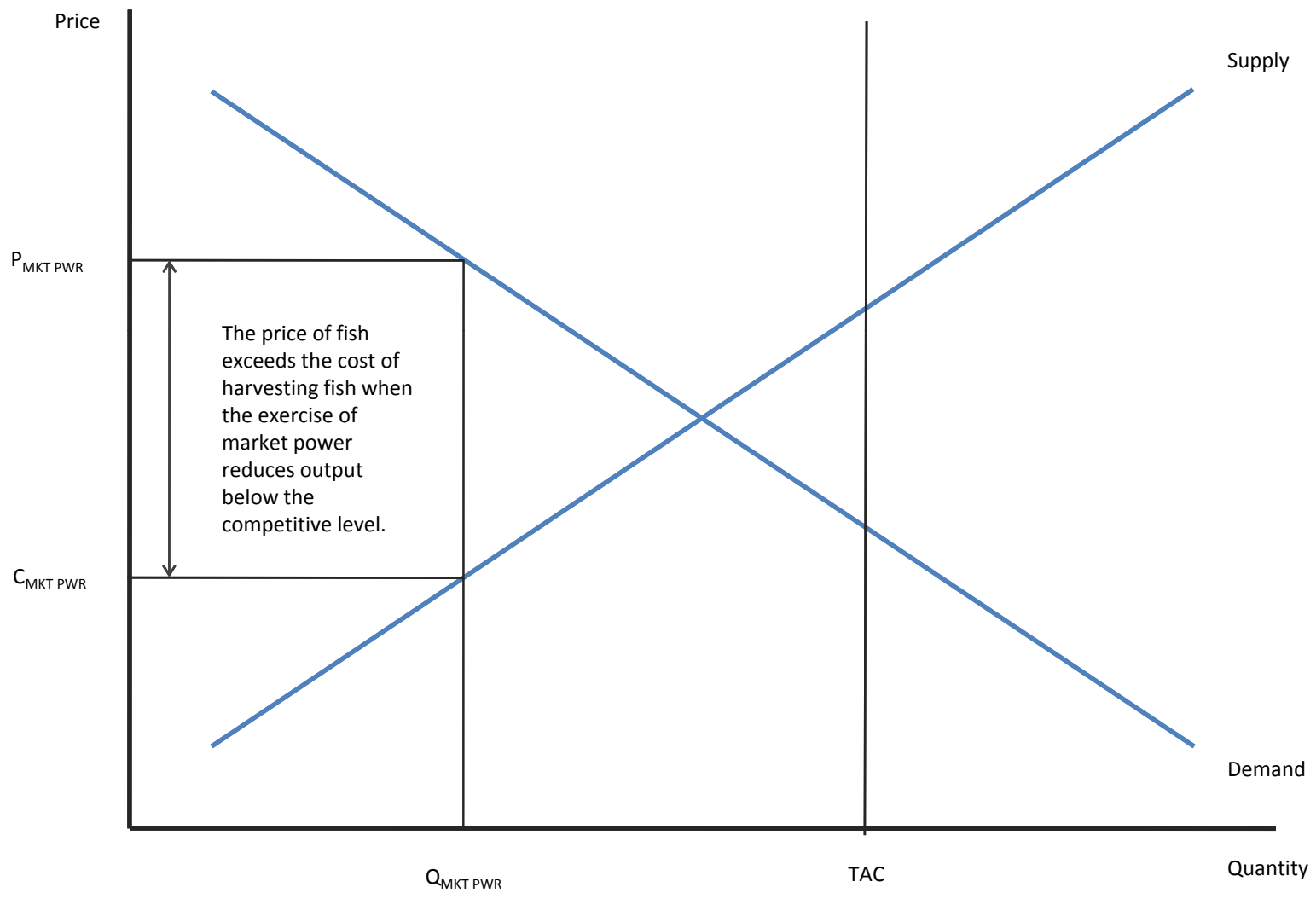


Figure 6

Share of Surfclam and Ocean Quahog Harvest by Processors

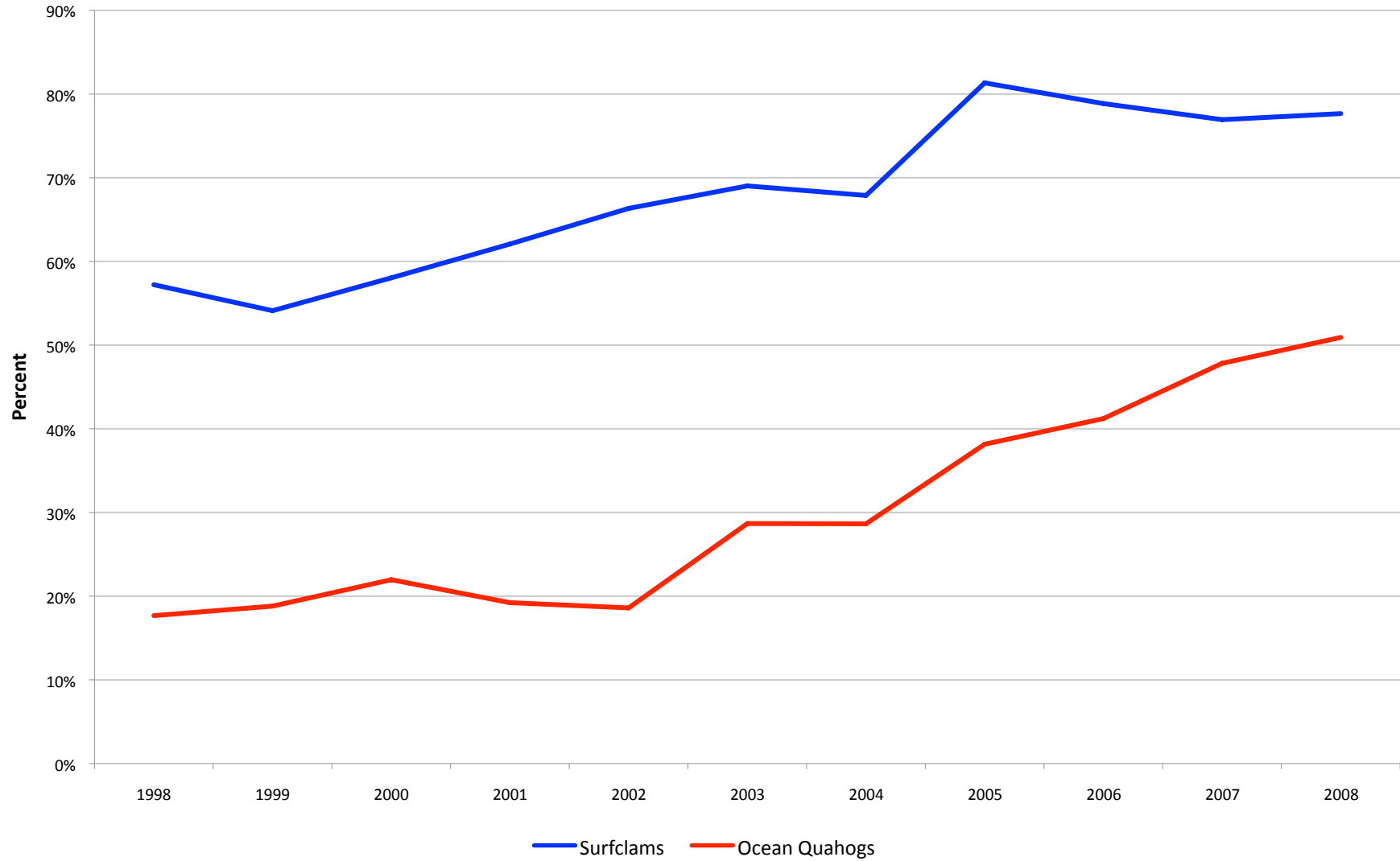


Figure 7

New York and New Jersey Surfclam Harvest v. Federal Fishery Harvest

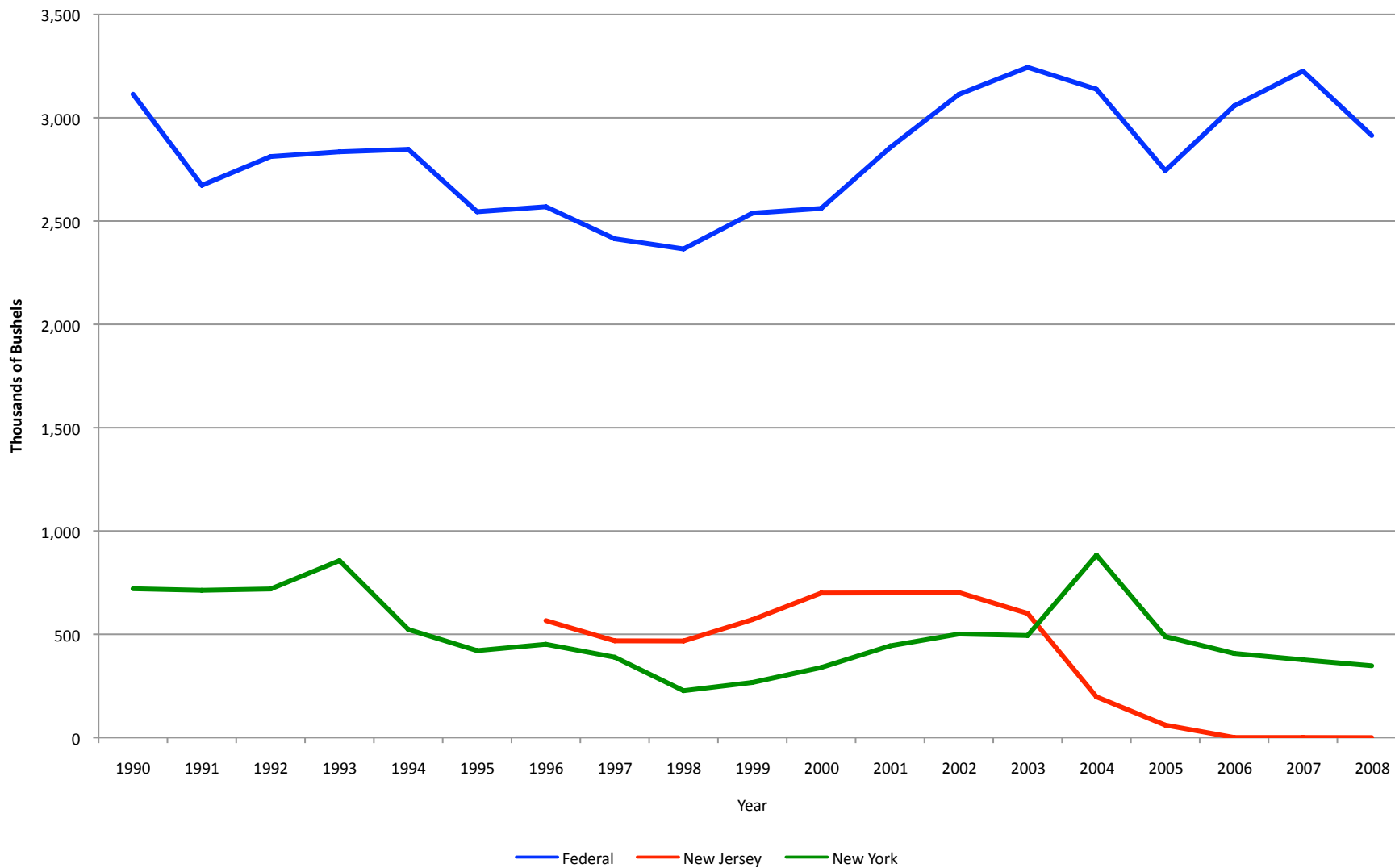


Figure 8
Federal Surfclam and Ocean Quahog Harvest v. U.S. Clam Imports and Exports
2008
(Thousands of pounds)

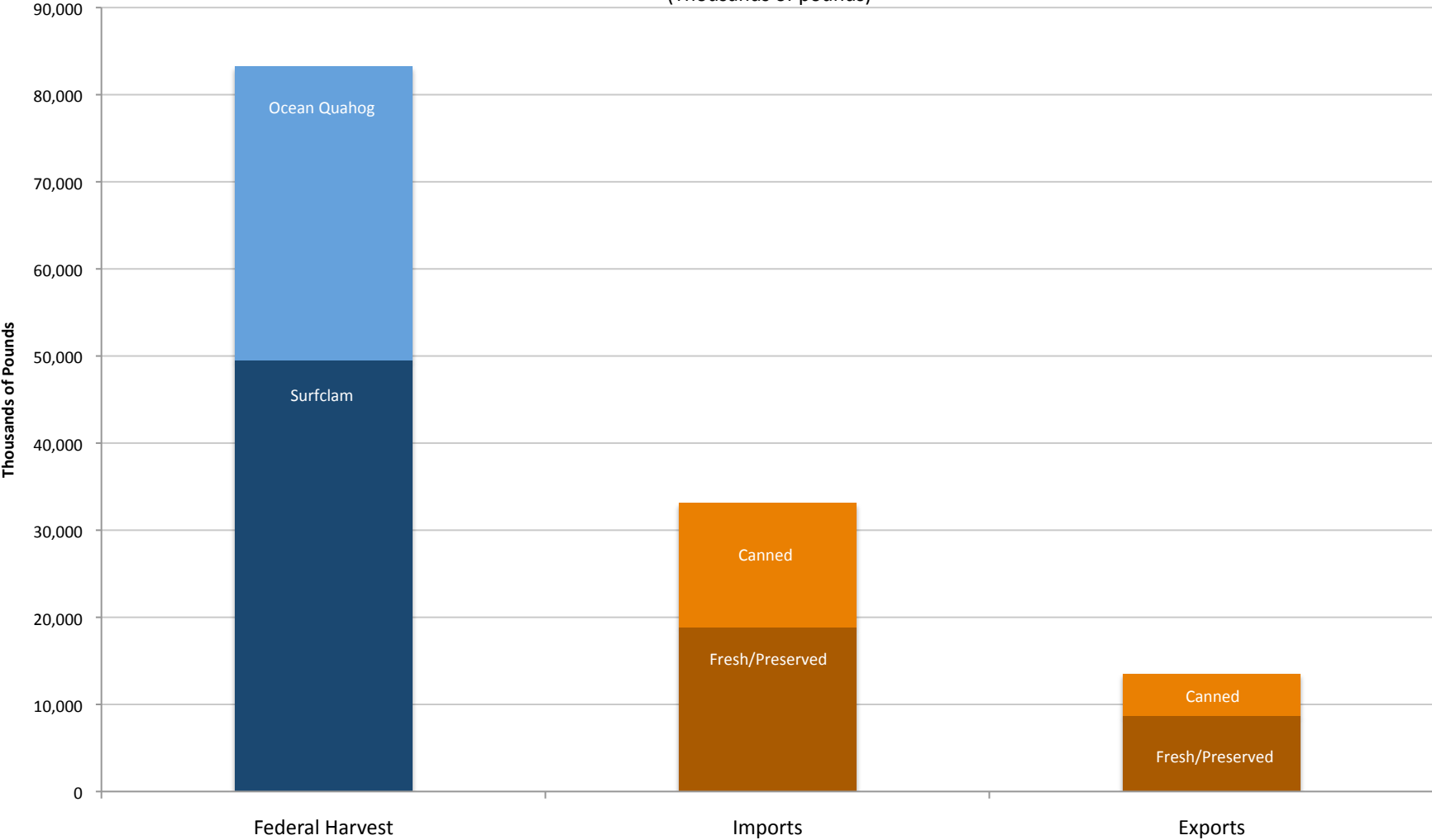


Figure 9

Surfclam Landings, Quota and Percent of Quota Landed

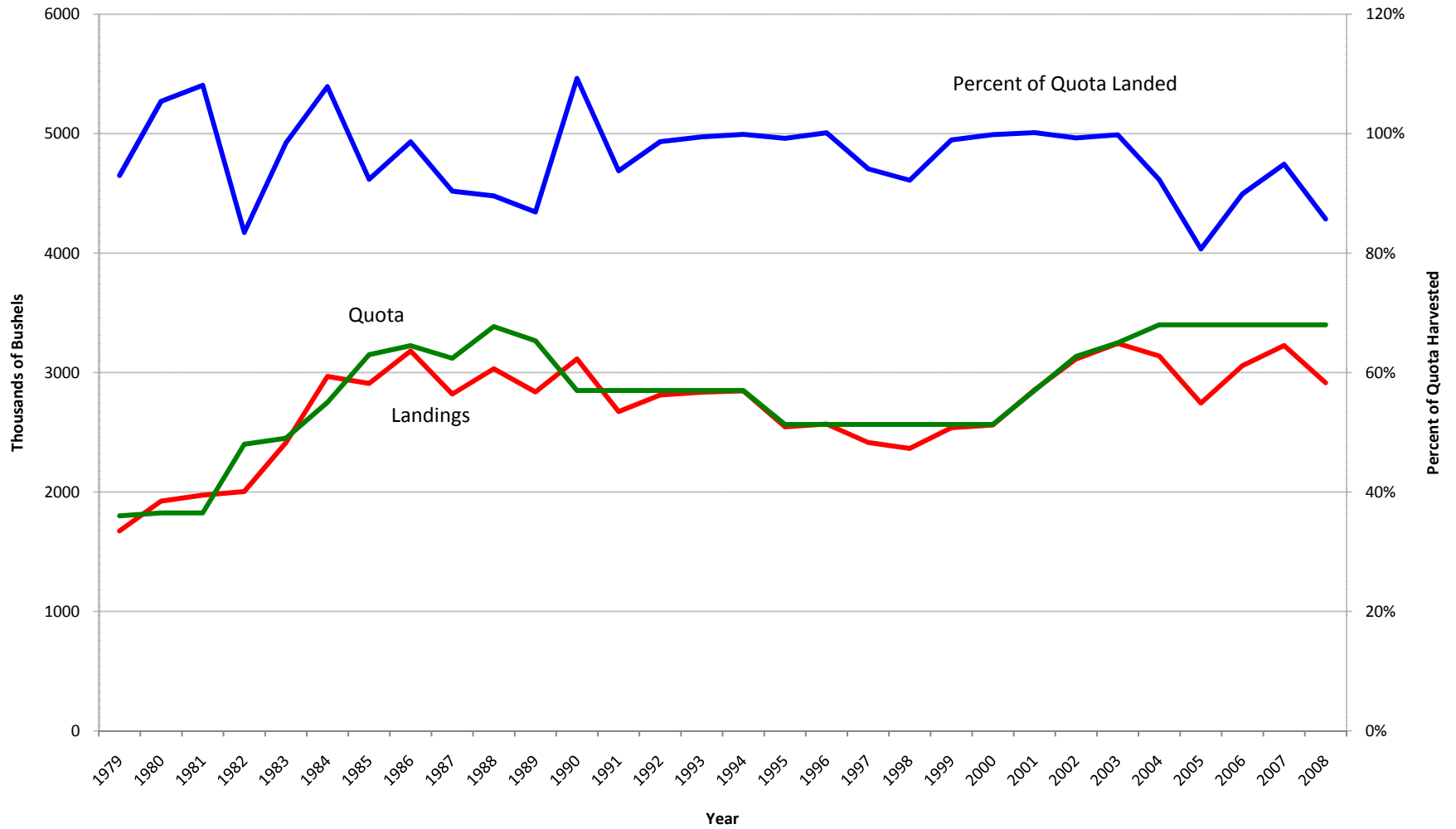


Figure 10

Ocean Quahog Quota, Landings, and Percent of Quota Landed

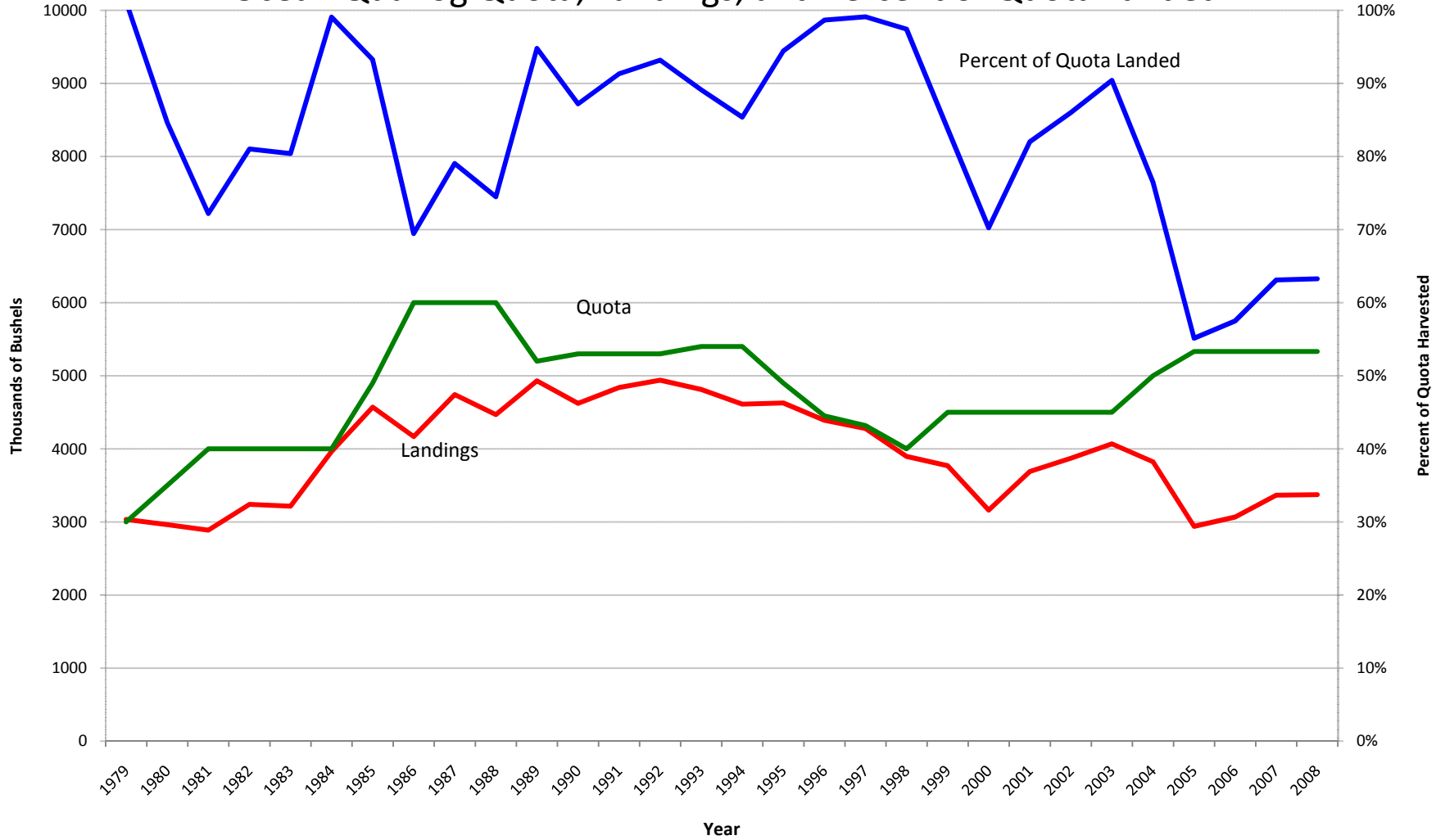


Figure 11
Surfclam and Ocean Quahog Landings per Unit Effort
(Bushels per Hour)

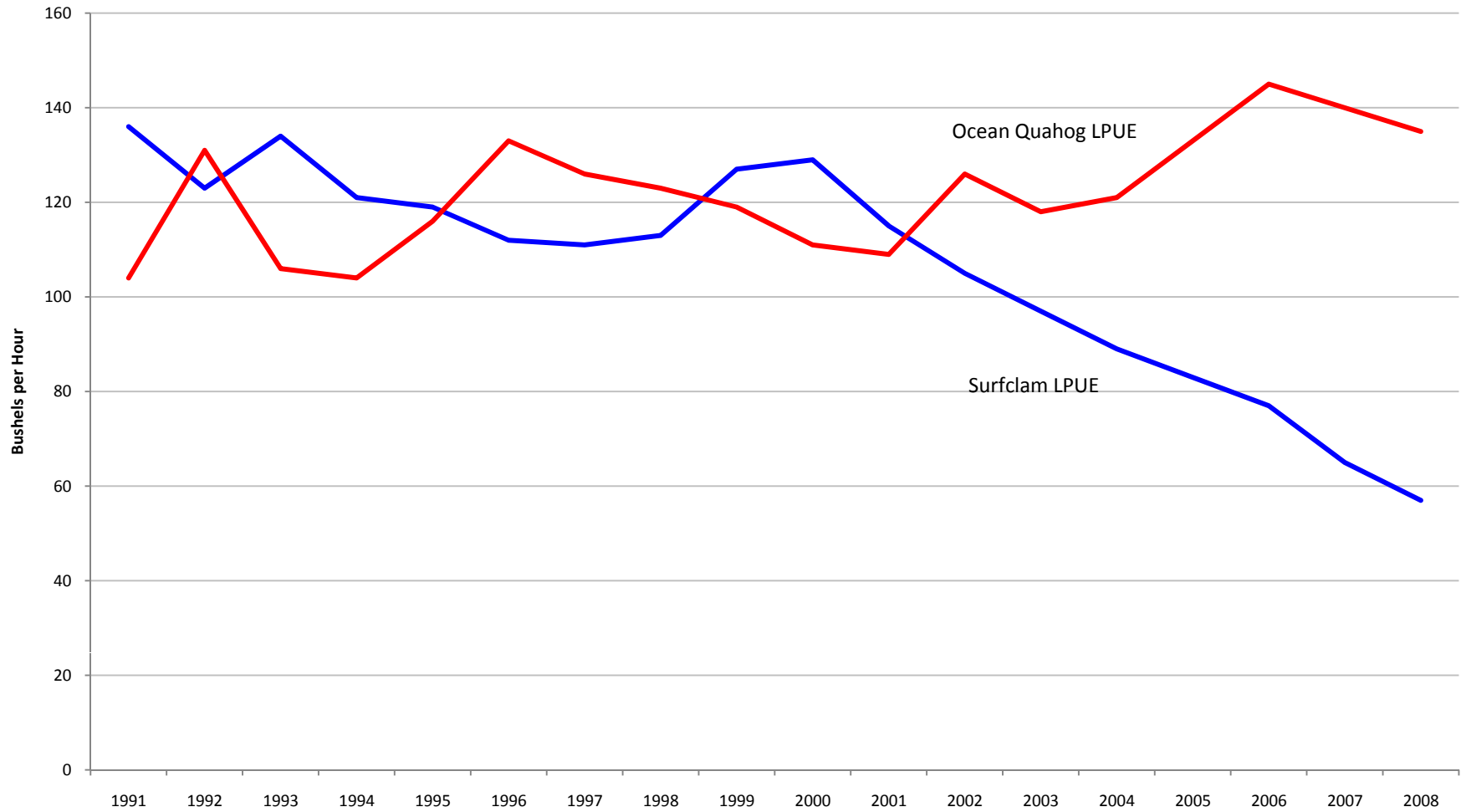
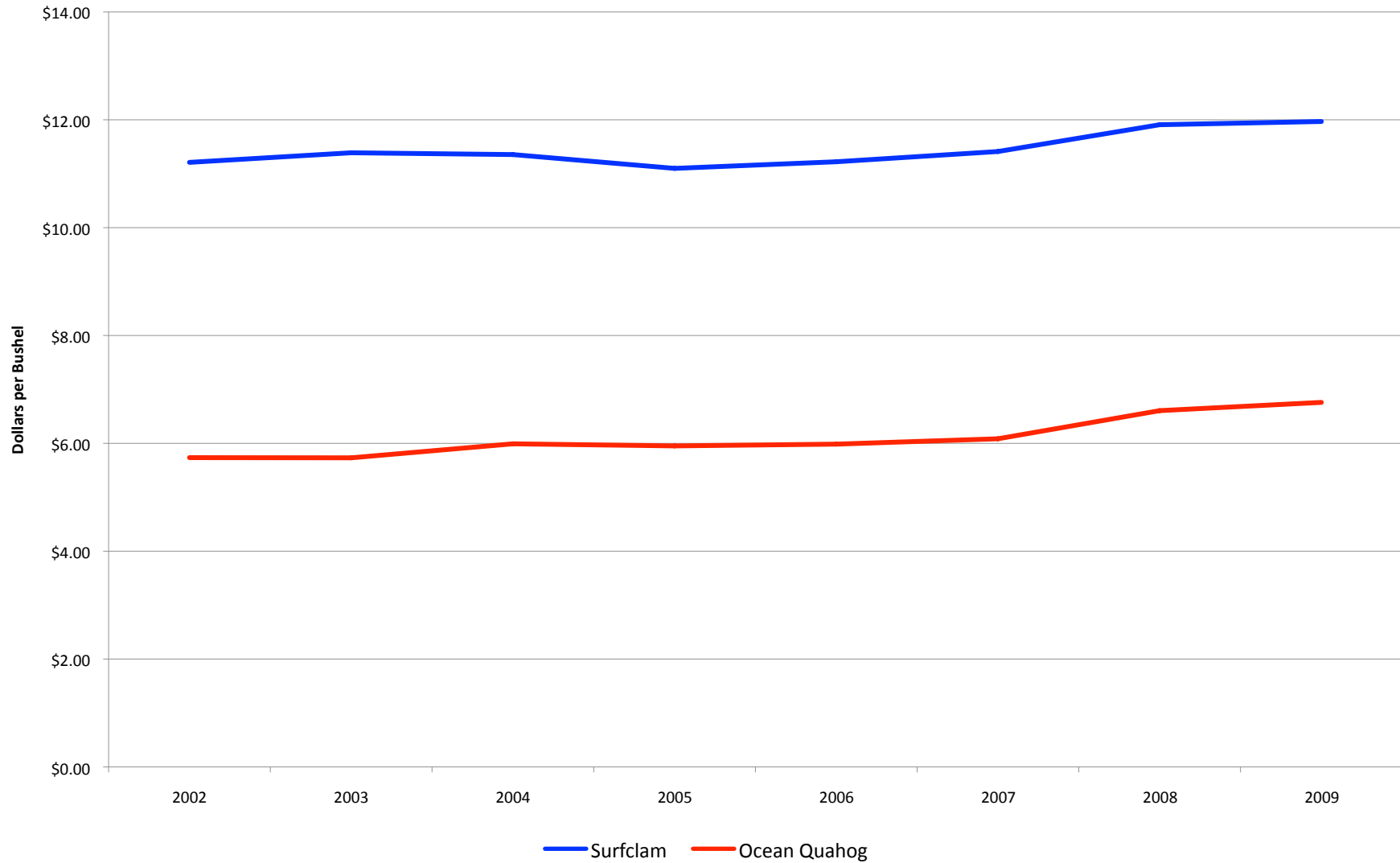


Figure 12

Surfclam and Ocean Quahog Prices Paid by Processors



2009 data through April 12, 2009.

Figure 13

Analysis of Effective Quota Concentration by Share Cap, Size of Competitive Fringe, and Competition from Non-SCOQ Clams

Scenario 1: Non-SCOQ Clams as Percent of TAC = 0%

Maximum HHI by Level of Share Cap and Aggregate Share Held By Fringe Quota Holders							
Share Cap	Percent Fringe						
	0%	5%	10%	15%	20%	25%	30%
20%	2000	1825	1700	1625	1600	1425	1300
25%	2500	2275	2100	1975	1900	1875	1650
30%	2800	2725	2700	2425	2200	2025	1900
35%	3350	3075	2850	2675	2550	2475	2450
40%	3600	3425	3300	3225	3200	2825	2500
45%	4150	4075	4050	3625	3250	2925	2650
50%	5000	4525	4100	3725	3400	3125	2900
55%	5050	4625	4250	3925	3650	3425	3250
60%	5200	4825	4500	4225	4000	3825	3700
65%	5450	5125	4850	4625	4450	4325	4250
70%	5800	5525	5300	5125	5000	4925	4900

Scenario 2: Non-SCOQ Clams as Percent of TAC = 10%

Maximum HHI by Level of Share Cap and Aggregate Share Held By Fringe Quota Holders							
Share Cap	Percent Fringe						
	0%	5%	10%	15%	20%	25%	30%
20%	1653	1508	1405	1343	1322	1178	1074
25%	2066	1880	1736	1632	1570	1550	1364
30%	2314	2252	2231	2004	1818	1674	1570
35%	2769	2541	2355	2211	2107	2045	2025
40%	2975	2831	2727	2665	2645	2335	2066
45%	3430	3368	3347	2996	2686	2417	2190
50%	4132	3740	3388	3079	2810	2583	2397
55%	4174	3822	3512	3244	3017	2831	2686
60%	4298	3988	3719	3492	3306	3161	3058
65%	4504	4236	4008	3822	3678	3574	3512
70%	4793	4566	4380	4236	4132	4070	4050

Figure 13

Analysis of Effective Quota Concentration by Share Cap, Size of Competitive Fringe, and Competition from Non-SCOQ Clams

Scenario 3: Non-SCOQ Clams as Percent of TAC = 20%

Maximum HHI by Level of Share Cap and Aggregate Share Held By Fringe Quota Holders							
Share Cap	Percent Fringe						
	0%	5%	10%	15%	20%	25%	30%
20%	1389	1267	1181	1128	1111	990	903
25%	1736	1580	1458	1372	1319	1302	1146
30%	1944	1892	1875	1684	1528	1406	1319
35%	2326	2135	1979	1858	1771	1719	1701
40%	2500	2378	2292	2240	2222	1962	1736
45%	2882	2830	2813	2517	2257	2031	1840
50%	3472	3142	2847	2587	2361	2170	2014
55%	3507	3212	2951	2726	2535	2378	2257
60%	3611	3351	3125	2934	2778	2656	2569
65%	3785	3559	3368	3212	3090	3003	2951
70%	4028	3837	3681	3559	3472	3420	3403

Scenario 4: Non-SCOQ Clams as Percent of TAC = 40%

Maximum HHI by Level of Share Cap and Aggregate Share Held By Fringe Quota Holders							
Share Cap	Percent Fringe						
	0%	5%	10%	15%	20%	25%	30%
20%	1020	931	867	829	816	727	663
25%	1276	1161	1071	1008	969	957	842
30%	1429	1390	1378	1237	1122	1033	969
35%	1709	1569	1454	1365	1301	1263	1250
40%	1837	1747	1684	1645	1633	1441	1276
45%	2117	2079	2066	1849	1658	1492	1352
50%	2551	2309	2092	1901	1735	1594	1480
55%	2577	2360	2168	2003	1862	1747	1658
60%	2653	2462	2296	2156	2041	1952	1888
65%	2781	2615	2474	2360	2270	2207	2168
70%	2959	2819	2704	2615	2551	2513	2500