Mid-Atlantic Fishery Management Council
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Michael P. Luisi, Chairman | G. Warren Elliott, Vice Chairman
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MEMORANDUM

Date: 21 May 2018

To: Surfclam and Ocean Quahog (SCOQ) Committee

From: José Montañez and Jessica Coakley, Staff

Subject: FMAT recommendations regarding excessive shares

The FMAT met on 14 May 2018 to develop draft recommendations on alternatives for the Excessive Shares Amendment for the SCOQ Committee and Council to consider. A summary of the FMAT meeting is attached. At this meeting, the Committee will review and approve a range of alternatives for further FMAT work and consideration by the Council.

Fishery Management Action Team (FMAT)

Meeting Summary - Excessive Shares Amendment

May 14, 2018

FMAT members in attendance: José Montañez (MAFMC), Jessica Coakley (MAFMC), Douglas Potts (GARFO), Marianne Ferguson (GARFO), Ted Hawes (GARFO), and John Walden (NEFSC).

Others in attendance: Peter DeFur (SCOQ Committee Chair), Peter Himckak (LaMonica Fine Foods), Dave Wallace (Wallace & Associates), Tom Alspach (Sea Watch International, Ltd.), Thomas Hoff (Wallace & Associates), and Katie Connelly (NEFSC).

Background

The Excessive Shares Amendment FMAT met in person on Monday, May 14 from 10:00 am to 4:00 pm in Boston, MA. The purpose of this meeting was to develop management alternatives to address excessive shares issues in the surfclam and ocean quahog fisheries. This was the first time the FMAT met on this issue.

The objective of the surfclam and ocean quahog (SCOQ) excessive shares amendment is to develop measures that ensure no individual, corporation, or entity acquires an excessive share of the surfclam and ocean quahog individual transferable quotas (ITQ) privileges.

National Standard 4 (NS4) of the Magnuson-Stevens Act (MSA) 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."* [1]

In 1990, Amendment 8 to the SCOQ FMP implemented an ITQ management program that did not include specific measures limiting the maximum amount of shares (e.g., percentage cap) that could be owned by a single entity. The Council is required to develop measures which specifically define what constitutes an excessive share in the SCOQ ITQ program to be consistent with NS4. This could be expressed as a percent cap or other measure.

The FMAT developed recommendations for the SCOQ Committee and Council regarding potential alternatives that they could consider regarding excessive shares.

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[1] http://www.fisheries.noaa.gov/sfa/laws_policies/national_standards/.

In addition, to making recommendations regarding excessive shares that could be considered, the FMAT discussed the timeline for amendment development and reviewed the action plan. The FMAT discussed ways to potentially increase competition in these fisheries which could be considered in conjunction with an excessive share definition (measures). Lastly, the FMAT was updated on other issues to be addressed under the Excessive Shares Amendment, i.e., the potential revisions of the FMP goals and objectives.

Amendment alternatives

The FMAT discussed what constitutes 'excessive shares' and noted that they may be socially determined and/or economically determined and defined in a manner consistent with the MSA. On the basis of economics, an excessive share would be a level of quota control that results in market power for a firm or entity. An outcome of obtaining market power could be pricing power in either output (product), or factor (input) markets, or the ability to disrupt other firms from participating in the market. In simple terms, not setting excessive shares measures could decrease competition in the market for quota share. From a social perspective, concentration of ownership and control affects the social and community structure and the sense of equity that may, in part, be grounded in the history of fishery management. The FMAT suggests that the Council first needs to define what they mean by excessive shares. The FMAT recommended that a summary of the excessive share cap provisions for existing catch share programs be added to this meeting summary (see Appendix A).

Table 1 summarizes draft amendment alternatives proposed by the FMAT. These alternatives require further discussion and refinement by the SCOQ Committee and Council.

Table 1: Draft amendment alternatives as discussed by the FMAT in May 2018.

- Alternative 1: No Action Alternative (*Status Quo*)
- Alternative 2: Single Cap – Ownership only with unlimited leasing
  - 2.1 - Maximum value based on ownership data, 2016-2018
  - 2.2 - Maximum value at 49%
- Alternative 3: Single Cap – Combined (ownership + lease)
  - 3.1 - Maximum value at 40%
  - 3.2 - Maximum value based on ownership data, 2016-2018
  - 3.3 - Maximum value at 49%
- Alternative 4: Two-Part Cap Approach. A cap on ownership and a cap on control throughout the year
  - 4.1 - Maximum of 30% ownership and a maximum of 60% combined (ownership + lease)
  - 4.2 - Maximum value based on ownership data, 2016-2018
  - 4.3 - Maximum value based on ownership data, 2016-2018 plus X% (for anticipated growth)
- Alternative 5: Cap of 3 entities plus Two-Tier Quota – Cap of 3 entities (the cap is 49% based on ownership) with no restriction on leasing. Plus, Quota A and B shares, where A = current 3-year landings level (to be defined; e.g., rolling average; largest last 3 years) and B shares is the difference between the ACT (or overall quota level) and A shares. B shares are not released until all A shares are used/exhausted.

Table 1 (continued): Draft amendment alternatives as discussed by the FMAT in May 2018.

- Alternative 6: Cap of 3 entities plus Two-Tier Quota – Cap of 3 entities (the cap is 40% based on ownership) with no restriction on leasing. Plus, Quota A and B shares, where A = current 3-year landings level (to be defined; e.g., rolling average; largest last 3 years) and B shares is the difference between the ACT (or overall quota level) and A shares. B shares are not released until all A shares are used/exhausted.

Under the draft no action alternative for excessive shares (alternative 1), the current management approach addressing excessive shares would continue. Therefore, no limit on accumulation of shares is specified within the management plan. The FMAT indicated that this alternative is required under NEPA. However, the no action alternative does not address the Council's requirement to define what constitutes an excessive share in the SCOQ ITQ program and is not consistent with NS4 requirements.

Under alternative 2, a single cap limit would be implemented for each surfclams and ocean quahogs (however, species specific levels could be developed). based on ownership with unlimited leasing Under alternative 2.1, the single cap would be based on the maximum value reported in the ownership data for the 2016-2018 period. Under alternative 2.2, the single cap would be based on a maximum value of 49%. This is based on the tilefish model which allows for a 49% IFQ (Individual Fishing Quota) share cap. In addition, a 49% cap would also result in a minimum of 3 entities participating in the fishery. This implies at least three firms holding quota, which may provide some constraint against predation or foreclosure of competitors. This alternative does not account for leasing or other transactions/business practices that are prevalent in the fishery.

Under alternative 3, a single cap limit would be implemented for each surfclams and ocean quahogs based on combined ownership and leasing; combined "control" in this context means the possession of tags, which is the power to decide if they will be used to harvest clams. Under alternative 3.1, the single cap on control would be based on a maximum value of 40%.[2] This is based on recommendations found in the Compass Lexicon report and corresponding CIE review. "In the business literature, there is a widely accepted notion that a Rule of Three structure is optimal because three big and efficient companies (e.g., with more than 10% market share) act as a tripod to ensure that neither destructive competition nor collusion prevails." And "An excessive-share cap of 40% assures that there would be at least three processors operating at reasonable output levels." Under alternative 3.2, the single cap on control would be based on the maximum value reported in the ownership data for the 2016-2018 period. Under alternative 3.3, the single cap on control would be based on a maximum value of 49%. This is based on the tilefish model which allows for a 49% IFQ (Individual Fishing Quota) share cap.

Under alternative 4, a two-part cap approach would be implemented for each surfclams and ocean quahogs, with a cap on ownership and a cap on combined control throughout the year. Alternative 4.1 would implement a maximum of 30% ownership and a maximum of 60% control (ownership + lease).[2] This is based on recommendations for a two-part cap approach found in the Compass Lexicon report. Under alternative 4.2, the two-part cap approach would be based on the maximum value reported in the ownership data for the 2016-2018 period. Under alternative 4.2, the two-part cap approach would be based on the maximum value reported in the ownership data for the 2016-2018 period, plus X% for

[2] However, species specific cap levels do not have to be the same for surfclam and ocean quahogs.

anticipated growth. The X% for anticipated growth is expected to provide flexibility for efficient firms in the SCOQ fisheries to growth if market conditions allow.

Under alternative 5, Cap of 3 entities plus Two-Tier Quota would be implemented for each surfclams and ocean quahogs (however, species specific levels could be developed). This alternative would implement a cap of 3 entities (the cap is 49% based on ownership) with no restriction on leasing. Plus, Quota A and B shares, where A = current 3-year landings level (to be defined; e.g., rolling average; largest last 3 years) and B shares is the difference between the ACT (or overall quota level) and A shares. B shares are not released until all A shares are used/exhausted. The 49% cap under this alternative is based on the tilefish model. This alternative would align supply in the fishery with market demand (a point made under the Compass Lexicon report and corresponding CIE review). The FMAT noted that the two-part cap would not be needed if the ACT was aligned each year with the anticipated market demand. Alternatively, an advantage of a two-part cap is that it allows additional flexibility for increasing harvests if there is a surge in demand for surfclams or quahogs midway through the fishing year.

Under alternative 6, Cap of 3 entities plus Two-Tier Quota would be implemented for each surfclams and ocean quahogs (however, species specific levels could be developed). This alternative would implement a cap of 3 entities (the cap is 40% based on ownership) with no restriction on leasing. Plus, Quota A and B shares, where A = current 3-year landings level (to be defined; e.g., rolling average; largest last 3 years) and B shares is the difference between the ACT (or overall quota level) and A shares. B shares are not released until all A shares are used/exhausted. The 40% cap under this alternative is based on recommendations found in the Compass Lexicon report and corresponding CIE review. This alternative would align supply in the fishery with market demand (a point made under the Compass Lexicon report and corresponding CIE review). The FMAT noted that the two-part cap would not be needed if the ACT was aligned each year with the anticipated market demand. Alternatively, an advantage of a two-part cap is that it allows additional flexibility for increasing harvests if there is a surge in demand for surfclams or quahogs midway through the fishing year.

In addition, the FMAT also discussed the possibility of using the Compass Lexicon excessive-share proposal which is laid out as a series of 7 steps. Which includes the use of the Herfindahl-Hirschman Index (HHI), assessment of the breadth of the market, 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 size of the fringe, and the sources of supply to processors. However, the FMAT indicated that this methodology requires a large amount of quantitative information that is not readily available and would also require frequent revision of caps due to changes in market dynamics.

Lastly, none of the alternatives would impact vessel that provide harvesting services only or services for hire. However, the Council could consider a separate vessel piece.

Industry members were provided with opportunities to make comments regarding the alternatives recommended by the FMAT. Below, a summary of the industry/stakeholder comments.

- Industry supports alternative 1.
- The current antitrust laws and DOJ take care of market power issues.
- The SCOQ industry cannot exert market power due to industry dynamics.

- The fishery is one of the best managed fisheries in the country if not the world, so why mess with something that is working well.
- The alternatives developed by the FMAT add a large degree of complexity to the management system (specially proposed alternatives 5 and 6). If a cap needed to be implemented, a cap would be better than the cap plus two-tier quota approach.
- When the Council last worked on this issue back in 2009, the scoping documents prepared by staff contained cap share levels ranging from 22% to 100% for each species. And during the scoping process, all industry members preferred the 100% cap level option.
    - 22% Cap Level - Represents the largest holding currently on record with NMFS.
    - 33% Cap Level - Would allow for a minimum of 3 entities holding up to 33% each to compete with one another.
    - 50% Cap Level - Would allow for a minimum of 2 entities holding up to 50% each to compete with one another.
    - 70% Cap Level - Corresponds to a market share level that is commonly cited in antitrust literature where market power concerns are an issue.
    - 100% Cap Level - Corresponds to cap level that was requested by a number of industry members.

Other Potential Alternatives

a. Revisit the cap (if implemented) at specific intervals. At least every 10 years or as needed.
b. Allow for Joint Ventures in these fisheries. The surfclam and ocean quahog harvest levels have been well below the quota levels established for those fisheries for many years. This alternative could allow for additional product to be sold and competition increased.
c. Set the cap at a specific level. But allow for opportunity for further consolidation upon review by NMFS, if specific data is provided by industry.

Action Plan and Timeline for Amendment Development

The FMAT reviewed the action plan and timeline for amendment development. The FMAT noted that the current draft timeline is probably feasible if staff have no other priorities during this time. The FMAT agreed that the action plan was well developed and recommended that additional information on subsequent meetings (e.g., FMAT, Advisory Panel) be added to the detailed timeline.

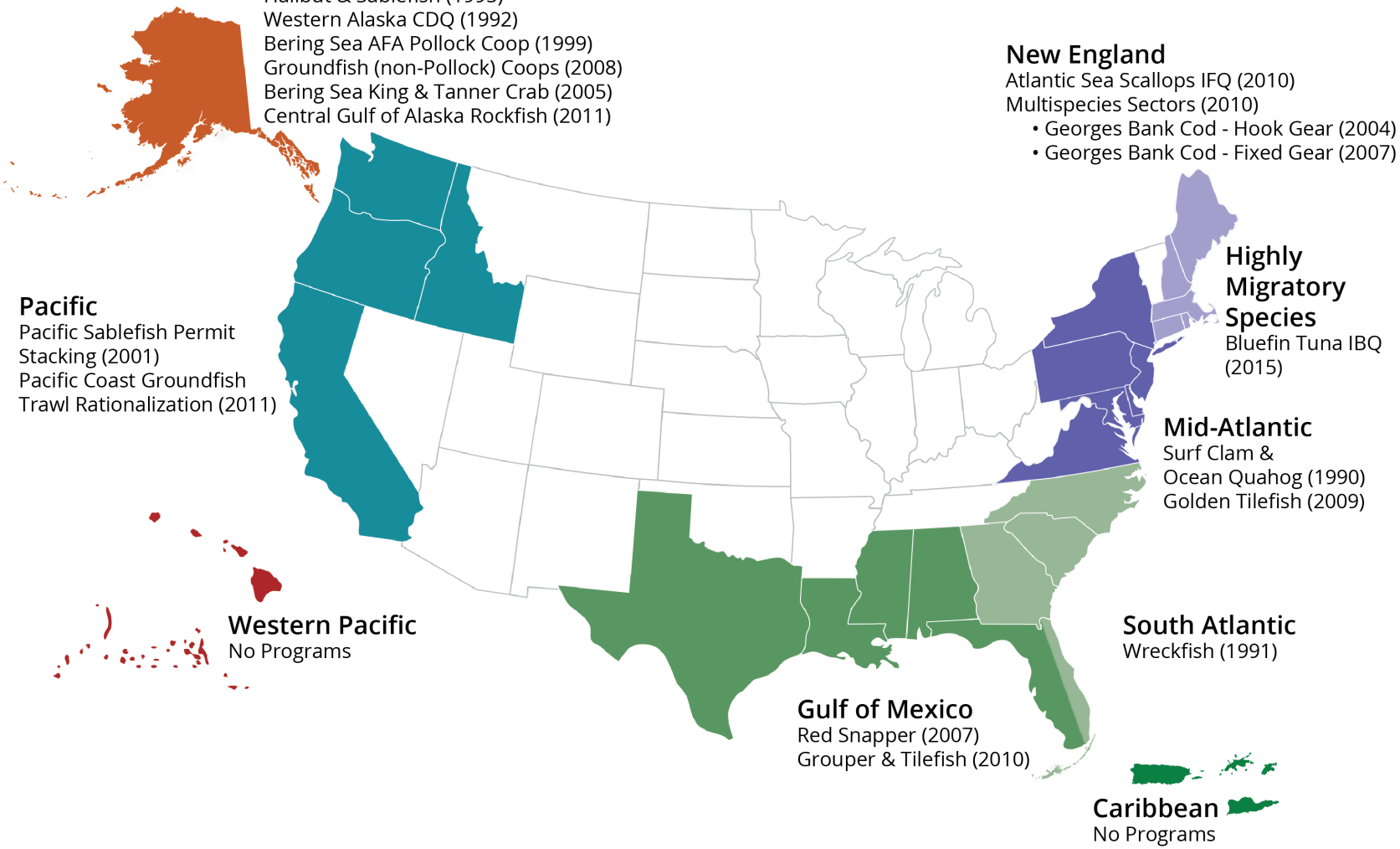
Industry members were provided with opportunities to make comments regarding the action plan discussed by the FMAT. Below, a summary of the industry/stakeholder comments.

- Why is this an EA (environmental assessment) and not an EIS (environmental impact statement)? Council staff consulted with GARFO and it was determined that this action would require an EA. It would be evaluated to an EIS if the FONSI (Finding of no Significant Impact) is not supportable.

APPENDIX A

This appendix presents information on the geographic distribution of the 16 catch share programs throughout the country and the excessive shares provision for each catch share program. The information presented in this section was provided by Lindsay Fullenkamp (NOAA) and Wendy Morrison (NOAA).

Current Catch Shares Programs



North Pacific
Halibut & Sablefish (1995)
Western Alaska CDQ (1992)
Bering Sea AFA Pollock Coop (1999)
Groundfish (non-Pollock) Coops (2008)
Bering Sea King & Tanner Crab (2005)
Central Gulf of Alaska Rockfish (2011)

New England
Atlantic Sea Scallops IFQ (2010)
Multispecies Sectors (2010)
- Georges Bank Cod - Hook Gear (2004)
- Georges Bank Cod - Fixed Gear (2007)

Pacific
Pacific Sablefish Permit Stacking (2001)
Pacific Coast Groundfish Trawl Rationalization (2011)

Highly Migratory Species
Bluefin Tuna IBQ (2015)

Mid-Atlantic
Surf Clam & Ocean Quahog (1990)
Golden Tilefish (2009)

Western Pacific
No Programs

South Atlantic
Wreckfish (1991)

Gulf of Mexico
Red Snapper (2007)
Grouper & Tilefish (2010)

Caribbean
No Programs

Program	Excessive Share Cap
Atlantic Sea Scallops IFQ	Yes. 2.5% of annual quota pounds[3]; 5% cap on quota share[4]
Multispecies Sectors	Yes. No individual or entity can hold more than 5% of all limited access groundfish permits. Additionally, there is a limit on the aggregated average of all allocated groundfish stocks of 15.5 Potential Sector Contribution (PSC). (Each permit has a history that brings a percentage of quota to the sector the permit enrolls with.) An entity can hold PSC for a single stock in excess of 15.5%, so long as the total holdings do not exceed 232.5 PSC for all 15 species. In other words, because there are 15 groundfish stocks currently allocated to the fishery, the total PSC across all stocks used by a permit holder cannot exceed 232.5 PSC (an average PSC of 15.5% per stock multiplied by 15 groundfish stocks).
Bluefin Tuna IBQ	No. The IBQ program is designed to account for bycatch in directed pelagic longline fisheries. There are various measures in place to curtail the excessive accumulation of share or allocation, such as no permanent sales and all leases contained within the calendar year.
Surf Clam & Ocean Quahog	No
Golden Tilefish	Yes, 49% of the tilefish IFQ total allowable landings
Wreckfish	Yes, 49% of quota share
Red Snapper	Yes, 6% of quota share
Grouper & Tilefish	Yes, quota share caps are: deep water grouper 14.7%, gag 2.3%, other shallow water grouper 7.3%, red grouper 4.3%, and tilefish 12.2%
Pacific Sablefish Permit Stacking	Yes, no individual can hold more than three permits unless meet requirements of grandfather clause.
Pacific Coast Groundfish Trawl Rationalization	Yes - For IFQ, quota share limits and quota pound vessel limits (annual and daily). Limits vary by species. The 30+ categories can be found here: http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/trawl_program/accumulation-limits.pdf. - For the mothership cooperative program, mothership permit usage limit (no more than 45% of sector allocation). Mothership catcher vessel endorsed permit ownership limit (no more than 20% of the sector allocation).

[3] Quota pounds is the annual amount of fish a participant is allowed to catch, usually defined in terms of total weight. It is often calculated as a percentage of the commercial quota based on a participant's quota shares. It varies according to changes in the commercial quota over time.

[4] Quota share is the percentage of the sector's catch limit to which the holder of quota shares has access to harvest. This percentage is used to calculate the annual allocation, and it is not affected by changes in the catch limit over time.

Halibut & Sablefish	Yes. No one can hold or control more than 0.5%-1.5% of the halibut or sablefish quota shares in various combinations of areas (Gulf of Alaska, Bering Sea, and Aleutians) unless grandfathered in based on original landings history. There are similar restrictions on the amounts of IFQ that can be used on any single vessel.
Western Alaska CDQ	No. The Bering Sea King and Tanner Crab and Halibut Sablefish IFQ have limits on CDQ holdings, but there are no specific excessive share limits in the CDQ Program itself because the allocations were specified by Congress. However, the percentage allocated is reviewed every 10 years.
Bering Sea AFA Pollock Coop	Yes. No entity can harvest more than 17.5% or process more than 30% of the pollock directed fishery allocation.
Groundfish (non-Pollock Coops)	Yes. No single person can hold or use more than 30% of the quota share, unless grandfathered; no single vessel may catch more than 20% of the initial TAC assigned to the non-AFA trawl catcher/processor sector in any given year.
Bering Sea King & Tanner Crab	Yes. No individual or entity may hold/use more than 1-20% of shares (varies by fishery) unless grandfathered. Processors may not possess or use more than 30% of the processor shares for each fishery unless grandfathered, with some limited exceptions for specific fisheries and entities.
Central Gulf of Alaska Rockfish	Yes. There are four types of use caps to limit the amount of rockfish quota share and cooperative fishing quota, unless grandfathered. The caps can be found in Table 1 here: https://alaskafisheries.noaa.gov/sites/default/files/rockfish-faq.pdf