Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment

Scoping Guide

http://www.mafmc.org/actions/scoq-excessive-shares-amendment

July 2017

Prepared by the
Mid-Atlantic Fishery Management Council (MAFMC or Council)

WHAT IS SCOPING?

Scoping is the process of identifying issues, potential impacts, and reasonable alternatives associated with the issue at hand. It provides the first and best opportunity for the public to make suggestions or to raise issues and concerns as development of an amendment begins.

This is the public’s opportunity to inform the Council about changes observed in the Atlantic Surfclam and Ocean Quahog fisheries, actions that the public believes should or should not be taken in terms of management and regulation, or any other concerns the public has about these fisheries.

Your comments early in the amendment development process will help us identify management issues and develop effective alternatives that address issues of public concern in a thorough and appropriate manner.

No management measures have yet been analyzed for their effectiveness or impacts. Please comment on which kinds of management measures may or may not be useful or practical, and explain your rationale. Please also comment on any other issues you believe should be addressed in the amendment. The list of relevant issues may be expanded as suggestions are offered during the scoping process.
INTRODUCTION

The Mid-Atlantic Fishery Management Council is seeking public input for the development of an “Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment” to the Atlantic Surfclam and Ocean Quahog (SCOQ) Fishery Management Plan (FMP). This amendment will consider two issues: 1) excessive shares and 2) FMP goals and objectives. As such, options to ensure that no individual, corporation, or other entity acquires an excessive share of the SCOQ Individual Transferable Quota (ITQ) privileges will be considered. In addition, in this action, the goals and objectives for the SCOQ FMP will be reviewed and the Council may consider revisions to those goals and objectives.

This excessive share action was identified as a priority in the Council’s 2017 Implementation Plan to ensure the FMP is consistent with National Standard Guidelines under the MSA, and the Council is now seeking public input to inform development of an amendment (http://www.mafmc.org/strategic-plan). The purpose of revisiting the goals and objectives in the SCOQ FMP is to support the Council’s 2014-2018 Strategic Plan and 2017 Implementation Plan (http://www.mafmc.org/strategic-plan).

The Council would like your comments on the range of issues and information that should be considered, including comments related to the excessive shares issue in the SCOQ ITQ fisheries and goals and objectives of the FMP, as well as any other issues that might be of concern to you regarding management of the SCOQ fisheries.

WHY IS THIS ACTION BEING PROPOSED?

Excessive Shares

National Standard 4 (NS4) 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.”

In 1990, 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. 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.

Goals and Objectives

The Council is undergoing a process to review and possibly revise goals and objectives for all their managed fisheries and FMPs. The Council initiated a process to consider revised goals and objectives for the SCOQ FMP in support of the 2014-2018 Strategic Plan and 2017 Implementation Plan (http://www.mafmc.org/strategic-plan). This initiative will allow the Council to revisit and possibly “refresh” FMP goals and objectives to ensure that they are consistent with today’s fishery and management issues. Feedback from scoping meetings will provide additional focus and a starting point for the Council’s discussion of revised goals and objectives at the October Council meeting. This

discussion is separate from the Excessive Shares Amendment discussion. The issue was included in the Excessive Shares Amendment to take advantage of efficiencies in timing and other resources.

Current FMP objectives

The current SCOQ FMP objectives were adopted in 1988 through Amendment 8 to the SCOQ FMP, which established an ITQ system for the SCOQ fisheries.

1. Conserve and rebuild Atlantic surf clam and ocean quahog resources by stabilizing annual harvest rates throughout the management unit in a way that minimizes short term economic dislocations.
2. Simplify to the maximum extent the regulatory requirements of clam and quahog management to minimize the government and private cost of administering and complying with regulatory, reporting, enforcement, and research requirements of clam and quahog management.
3. Provide the opportunity for industry to operate efficiently, consistent with the conservation of clam and quahog resources, which will bring harvesting capacity in balance with processing and biological capacity and allow industry participants to achieve economic efficiency including efficient utilization of capital resources by the industry.
4. Provide a management regime and regulatory framework which is flexible and adaptive to unanticipated short term events or circumstances and consistent with overall plan objectives and long term industry planning and investment needs.

WHAT APPROACHES MAY BE CONSIDERED?

The amendment is likely to consider a variety of approaches to ensure that no individual, corporation, or other entity acquires an excessive share of the SCOQ ITQ privileges.

These could include, but would not be limited to:

- A specific percent (%) cap on the amount of ITQ shares an individual, corporation, or other entity could acquire.
- Other approaches that could be used to provide a measurable definition of what constitutes an excessive share.

The amendment may also consider revisions to some or all of the current management objectives for the FMP (described above). Questions to consider when providing comments on the FMP Goals and Objectives are:

- Are the existing objectives appropriate for managing the surfclam and ocean quahog fisheries?
- Are there any objectives that appear outdated or do not reflect the way these fisheries are managed today? If so, how could they be updated?
- Is the intent of each objective clear? If not, how could they be reworded or clarified?
- Should any new goals and/or objectives be added?
- What else should the Council consider during the process of reviewing the objectives for the SCOQ FMP?
A draft Environmental Assessment will be developed for public comment and used by the Council to evaluate any proposed measures. The Council will consider the biological and socio-economic impacts of any management measure before making a final decision.

STAKEHOLDER INPUT

The Council would like your input on the range of issues and information that should be considered during development of this amendment, including the specific issues identified in this document, as well as any other issues that might be of concern to you regarding the SCOQ fisheries.

LEARN MORE
Find additional information and background documents about the amendment at:
GET INVOLVED

ATTEND A SCOPING HEARING
Public scoping hearings will be held on the following dates:

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<tr>
<th>Date and Time</th>
<th>Location</th>
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<tbody>
<tr>
<td>Monday July 10, 2017, 6:30 p.m.</td>
<td>Hilton Garden Inn Providence Airport</td>
</tr>
<tr>
<td></td>
<td>1 Thurber Street, Warwick, RI 02886. Telephone: (401) 734-9600.</td>
</tr>
<tr>
<td>Tuesday July 11, 2017, 6:30 p.m.</td>
<td>Webinar</td>
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<td>This meeting will be conducted via webinar accessible via the internet from the Council’s website, <a href="http://www.mafmc.org">http://www.mafmc.org</a>. Members of the public may also attend in-person at the Council office address (see below) for this webinar meeting, if they contact the Council by July 7, 2017.</td>
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<tr>
<td>Wednesday July 12, 2017, 6:30 p.m.</td>
<td>The Grand Hotel</td>
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<td></td>
<td>1045 Beach Avenue, Cape May, NJ 08204. Telephone: (609) 884-5611.</td>
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<tr>
<td>Monday July 17, 2017, 6:00 p.m.</td>
<td>Ocean Pines Branch Library</td>
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<td>11107 Cathell Road, Berlin, MD 21811. Telephone: (410) 208-4014.</td>
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SUBMIT WRITTEN COMMENTS:
In addition to providing comments at any of the scoping hearings, you may submit written comments by **11:59 PM, Eastern Standard Time, on July 21, 2017**. Written comments may be sent by any of the following methods:

1. ONLINE at [http://www.mafmc.org/comments/scoq-excessive-shares-amendment-scoping](http://www.mafmc.org/comments/scoq-excessive-shares-amendment-scoping)
2. EMAIL to jmontanez@mafmc.org
3. MAIL to Dr. Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, Delaware 19901
4. FAX to (302) 674-5399

*Please include “SQOQ Excessive Shares Amendment Scoping Comments” in the subject line if using email or fax or on the outside of the envelope if submitting written comments.*

All comments, regardless of submission method, will be compiled into a single document for review and consideration by the Council.
WHAT HAPPENS NEXT?

After the initial phase of information gathering and public comment, the Council will evaluate potential management alternatives for inclusion in the amendment.

The Council will then develop a draft amendment, incorporating the identified management alternatives, for public review. The Council will also prepare draft environmental analyses as required by the National Environmental Policy Act (NEPA) and subject those analyses to review and comment by the public as appropriate.

Finally, the Council will choose preferred management measures for submission with the appropriate environmental analyses to the Secretary of Commerce for publishing of a proposed and then final rule, both of which have additional comment periods. While there are many opportunities for public comment in the process, this scoping comment opportunity is particularly important for assisting the Council in establishing the overall focus and direction of the Amendment.
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 SCQ 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 SCQ 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