MEMORANDUM

Date: May 22, 2019

To: Council

From: José Montañez and Jessica Coakley, Staff

Subject: Atlantic Surfclam and Ocean Quahog (SCOQ) Excessive Shares Amendment – Draft Public Hearing Document

At the June Council meeting, the Council will review and approve the Draft Public Hearing Document for the SCOQ Excessive Shares Amendment. A description of the process and hearing locations is included behind this tab. The following documents are included for Council consideration on this subject:

1. SCOQ Committee memo dated May 10, 2019. This memo summarizes the changes made to the Draft Public Hearing Document for the SCOQ Excessive Shares Amendment requested by the Council at the April Council meeting.

2. Draft Public Hearing Document for the SCOQ Excessive Shares Amendment. This updated version of the public hearing document includes revisions noted in the Committee memo.

3. May 2019 Scientific and Statistical Committee (SSC) Report – See Committee Reports (Tab 15). This report contains information of the SSC’s discussion regarding alternatives 5 and 6 in the Draft Public Hearing Document for the SCOQ Excessive Shares Amendment.

4. Comment letters received by May 22 are found at the end of this tab. Additional comments received after May 22 will be posted at: http://www.mafmc.org/briefing/june-2019

The SCOQ Committee will meet on June 3 to review the Draft Public Hearing Document for the SCOQ Excessive Shares Amendment and develop recommendations for Council review and approval at the June 4-6 Council meeting.

Also, it is important to review the May 2019 SSC report. In that report, the SSC indicated that alternatives 5 and 6 in the Draft Public Hearing Document for the SCOQ Excessive Shares Amendment address market power issues in the fishery and should not be removed from this Draft Public Hearing Document so they can be subject to full public discussion.
ATLANTIC SURFCLAM AND OCEAN QUAHOG EXCESSIVE SHARES AMENDMENT

PUBLIC HEARING DOCUMENT
MAY 2019

Prepared by the
Mid-Atlantic Fishery Management Council
in cooperation with
the National Marine Fisheries Service
INSTRUCTIONS FOR PROVIDING PUBLIC COMMENTS

The Mid-Atlantic Fishery Management Council (MAFMC or Council) will collect public comments on the Atlantic Surfclam and Ocean Quahog Excessive Shares Issues Amendment during 4 public hearings to be held in XXX – XXX 2019, and during a 45-day written public comment period. Written comments may be sent by any of the following methods:

1. **Online** at [www.mafmc.org/comments/scoq-excessive-shares-amendment](http://www.mafmc.org/comments/scoq-excessive-shares-amendment)
2. **Email** to the following address: [TBD email address]
3. **Mail or Fax** to:
   Chris Moore, Ph.D., Executive Director
   Mid-Atlantic Fishery Management Council
   North State Street, Suite 201
   Dover, DE 19901
   FAX: 302.674.5399

If sending comments through the mail, please write “SCOQ Excessive Shares Amendment Comments” on the outside of the envelope. If sending comments through email or fax, please write “SCOQ Excessive Shares Amendment Comments” in the subject line.

All comments, regardless of submission method, will be compiled for review and consideration by the Council. **Please do not submit the same comments through multiple channels.**

Interested members of the public are encouraged to attend any of the following 4 public hearings and to provide oral or written comments at these hearings:

<table>
<thead>
<tr>
<th>Date and Time</th>
<th>Location (Tentative)</th>
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| [TBD]         | Hilton Garden Inn Providence Airport  
1 Thurber Street, Warwick, RI 02886. Telephone: (401) 734-9600. |
| [TBD]         | Webinar  
This meeting will be conducted via webinar accessible via the internet from the Council’s website, [http://www.mafmc.org](http://www.mafmc.org). 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. |
| [TBD]         | The Grand Hotel  
1045 Beach Avenue, Cape May, NJ 08204. Telephone: (609) 884-5611. |
| [TBD]         | Ocean Pines Branch Library  
11107 Cathell Road, Berlin, MD 21811. Telephone: (410) 208-4014. |

For additional information and updates, please visit: [http://www.mafmc.org/actions/scoq-excessive-shares-amendment](http://www.mafmc.org/actions/scoq-excessive-shares-amendment). If you have any questions, please contact either:

José Montañez, Ph.D., Fishery Management Specialist  
Mid-Atlantic Fishery Management Council  
302.526.5258
WHAT HAPPENS NEXT?

This document supports a series of public hearings and a public comment period scheduled to take place during May – July 2019. Following public hearings, written and oral comments will be compiled and provided to the Council and Board for review. These comments will be considered prior to taking final action on the amendment, which is tentatively scheduled for August 2019. The Council's recommendations are not final until they are approved or partially approved by the Secretary of Commerce through the National Marine Fisheries Service, so the timing of full implementation of this action will depend on the federal rulemaking timeline. This rulemaking process is expected to occur in 2020, with revised measures possibly effective during the 2020 fishing year.
Date: May 10, 2019
To: Atlantic Surfclam and Ocean Quahog Committee
From: José Montañez and Jessica Coakley, Staff
Subject: Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment Public Hearing Document

The following is available for Committee consideration on the above subject. Public hearing draft: http://www.mafmc.org/council-events/2019/scoq-committee-june-3

Committee Task

The Surfclam and Ocean Quahog Committee will meet on June 3, 2019 (from 1:00 p.m. until 4:30 p.m. at the Doubletree by Hilton New York Times Square West, 350 W. 40th St, New York, NY 10018; telephone (212) 607-8888) to review the Public Hearing Document for the Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment. The Committee is meeting to ensure this document is complete for Council review and approval. This memorandum summarizes the changes made to the public hearing draft of the Excessive Shares Amendment requested by the Council at the April Council meeting.

Additions to the Public Hearing Draft

Excessive Shares Definition (page 2)

For the surfclam and ocean quahog fisheries, the Council defines an excessive share as an ITQ share accumulation for an individual or business that is above the excessive share percentage cap selected by the Council for surfclam or ocean quahog (based on the affiliation and tracking model selected). In identifying this cap, the Council considered the intent of fisheries management as prescribed through the National Standards of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), including both social and economic concerns. The Council considered economic concerns and selected an excessive share cap that is intended to prevent a firm or entity from exerting market power.\(^1\) The Council also considered social concerns for fishing communities

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\(^1\) An outcome of obtaining market power could be pricing power in either output (product) or input (factor) markets or the ability to disrupt other firms or entities from participating in the market.
- as expressed in MSA National Standard 8 - which includes community participation, and a sense of equity and fairness that may, in part, be grounded in the history of fishery management in this country.

Court Case (page 40)

The final rule implementing the surfclam and ocean quahog ITQ program became effective on September 30, 1990. Almost immediately, lawsuits were filed by groups of harvesters and processors challenging various features of the program, most notably the formula for allocating fishing privileges among fishery participants. The case Sea Watch International v. Mosbacher [Secretary of Commerce], 762 F. Supp. 370 (D.D.C. 1991), illustrates the major legal challenges to the initial allocation. In general, the plaintiffs in the case argued that the initial allocation was not fair and equitable and therefore in violation of National Standard 4 of the MSA and,

“The plaintiffs claimed that the initial allocation allowed particular individuals, corporations, or other entities to acquire an excessive share of fishing privileges. Plaintiffs alleged that the allocation would concentrate 40 percent of the annual catch quota for the ocean quahog fishery in two fishermen, and that fragmentation of the remaining shares would result in further consolidation as holders of small shares sold their interests, creating an impermissible restraint on competition.”

The court noted the 40 percent number “does give pause” but found the MSA has no definition of the term “excessive shares” and that the judgment of NMFS of what is excessive “deserves weight.” Further, the court stated, “Even if the raw number measured a true economic market - which is by no means clear - a judgment of undue concentration could not be based on the mere existence of such a share possessed by the two largest participants.” With that, the court dismissed the plaintiffs’ argument.

Tracking Excessive Shares Concentration Following ITQ Plan Implementation (Page 41)

During the development of Amendment 8, the Council discussed in detail the requirements under National Standard 4. During those discussions, the Council was advised by NOAA General Counsel (GC) that in order to address part (C) of National Standard 4, there was no legal requirement to put a specific cap (numeric cap) into Amendment 8. GC indicated that a cap is simply a tool to address the National Standard 4 part (C) and that if the Council could come up with an equally effective mechanism to meet that requirement, they could use that mechanism. The Council’s intent under Amendment 8 was to have NMFS annually monitor the concentration of ITQ (as ITQ owners have to apply to NMFS to transfer ITQ) and if it seemed that excessive consolidation was occurring (i.e., an excessive share was being amassed), they would advise the U.S. Department of Justice (DOJ), which would then determine if antitrust laws were being violated.

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3 National Standard 4 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.”
As such, during the early period of the implementation of Amendment 8, the Council believed that NMFS could effectively monitor the concentration of ITQ ownership.

While the court case upheld Amendment 8 in 1991 - one year after the ITQ was implemented - it became clear over time to NMFS that this administrative process did not work.\(^4\) The creation of new business entities (e.g., LLC's, etc.) with ITQ ownership, and the lack of a regulatory mechanism (by NMFS) to identify corporate ownership or business partnerships across individuals or entities involved hampered the ability to determine whether there was a concentration of quota ownership, and whether competitive conditions were being eroded in the quota share market over time.\(^5\) Therefore, the review of industry concentration could not be conducted.

NMFS recognized they could no longer conclude that the ITQ program was carried out in such a manner to prevent someone from acquiring an excessive share of the fishing privileges and advised the Council of these concerns. GC indicated that the Council needed to put at least two regulatory components in place: one to identify the individuals behind the corporate entities listed as the owner of the ITQ, and an ownership cap or other control mechanism to keep individuals from acquiring the level of ITQ ownership that the Council deems to be "excessive." It is important to recognize that MSA did not address this issue by incorporating definitions from antitrust law or simply relying on enforcement of antitrust law. Rather, MSA used the term "excessive share" - a term left undefined in the statute. As noted in a 2007 NMFS\(^6\) guidance document on limited access privilege programs, while share levels exceeding antitrust standards would clearly represent an excessive share, factors such as other MSA requirements and National Standards can lead a Council to a more restrictive share limit than antitrust law may otherwise permit.

During the development of alternatives for the Excessive Shares Amendment, staff at the Council and GARFO (including GC) spoke with the Antitrust Division of the DOJ about the role that they might play in the monitoring of excessive shares in the surfclam and ocean quahog fisheries. The DOJ indicated that their Business Review Process does provide pre-enforcement review and advisory options for certain select transactions. However, the type of scenarios for which the Business Review Process\(^7\) has been used in the past have been for much larger, economically significant deals between companies than is envisioned by the Excessive Shares Amendment, making it an unfeasible vehicle for ongoing monitoring of quota share ownership.\(^8\)

For additional steps taken by the Council and NMFS regarding the excessive shares issue, see “History of this Action” below.

\(^4\) As noted in the Sea Watch International case, even though the initial ITQ program relied upon existing antitrust law to define excessive shares, NMFS and the Council retained the ability to modify the FMP and associated regulations, “without the permission of the ITQ holders.” 762 F. Supp. at 380.

\(^5\) For example, one person could form a couple of corporations and hold and acquire ITQ and it could not be determined whether or not this represented an excessive share since the ITQs would appear to be owned by legally separate entities.


\(^7\) For a detailed description of the Business Review process of the DOJ see: https://www.justice.gov/atr/business-reviews

\(^8\) Sarah Heil, letter to Chis Moore, PhD, June 1, 2018.
History of this Action (page 42)

This section presents in chronological order major steps taken by the Council and/or NMFS in addressing the excessive shares issue.

1990

- Surfclam and ocean quahog ITQ program is implemented.

2002

- Discussion of excessive shares in these fisheries began as early as December 2002 with a Government Accountability Office\(^9\) (GAO) report "Individual Fishing Quotas: Better Information Could Improve Program Management." The December 2002 GAO report stated:
  - Surfclam and ocean quahog quota consolidation is greater than NMFS data indicate. According to NMFS officials and others knowledgeable about the fishery, the quota holder of record (i.e., the individual or entity under whose name the quota is listed) is often not the entity that controls the use of the quota. Some families hold quota under the names of more than one family member; some parent corporations hold quota under the names of one or more subsidiaries; some entities hold quota under the name of one or more incorporated vessels; and some financial institutions serve as transfer agents and hold quota on behalf of others or in lieu of collateral for loans.
  - The governing rules of each program may have affected the extent of consolidation and the information collected. However, without clear and accurate data on quota holders and fishery-specific limits on quota holdings, it is difficult to determine whether any quota holdings in a particular fishery would be viewed as excessive, as prohibited by the MSA.
  - NMFS does not gather sufficient information or periodically analyze the data it does collect on surfclam/ocean quahog and Wreckfish quota holders to determine (1) who actually controls the use of the quota and (2) whether the holder is a foreign individual or entity. Furthermore, while each fishery is different, the regional councils have not defined the amount of quota that constitutes an excessive share in the surfclam/ocean quahog and wreckfish IFQ programs. Different program objectives and the political, economic, and social characteristics of each fishery make it difficult to define excessive share. However, without the information on who controls quota and defined limits on quota accumulation, NMFS cannot determine whether eligibility requirements are being met or raise questions as to whether any quota holdings are excessive.

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\(^9\) The U.S. Government Accountability Office (GAO; [https://www.gao.gov/](https://www.gao.gov/)) is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently.
2003

- In 2003, NMFS responded to several members of Congress about the GAO report. NMFS indicated that it would urge the Council to develop a plan amendment that limits the shares that an individual may hold.

2004

- A 2004 NMFS report (by Doug Christel) was written in response to the GAO report, and highlighted some of the additional information needs in these fisheries. “This report concludes that the degree of concentration in the ITQ program described by the GAO is due to the amount of information available. Current data collection by NOAA Fisheries is insufficient to assess ownership concentration to the extent necessary to monitor excessive shares within the ITQ program. This is because limited information is collected on corporate structure or related business entities.” In addition, “This report recommends that further information be collected regarding allocation ownership within the ITQ program.”

2004 - 2011

- During this time period, several FMAT [Fishery Management Action Team] meetings were held to discuss this issue. Periodically, the Council was updated on FMAT activities. But during this time period, no decisions were made to move this action forward to the Council.

2011

- Compass Lexecon Report concluded that, “The evidence we analyzed does not support a conclusion that market power is currently being exercised through withholding of quota in the SCOQ [surfclam and ocean quahog fisheries].” However, the report indicates that, “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.”

- The Compass Lexecon Report was reviewed by the Center for Independent Experts (CIE). [Summary of Findings by the Center for Independent Experts Regarding Setting Excessive Share Limits for ITQ Fisheries. Northeast Fisheries Science Center Reference Document 11-22]. The review noted that:

  - Measures of industrial concentration in the surfclam and ocean quahog fisheries (the Herfindahl-Hirschman index) suggests that marketing power may exist in these fisheries, particularly in its harvesting and processing sectors, but less so in quota holdings. These concentration measures are only indicative of the possibility of market power. They do not establish that it actually exists.
  - Implementation of the method proposed by the Technical Group requires at least the following data: quota ownership and control, processing volumes and capacity, size of the relevant market.
  - The method proposed by the Technical Group is based on the HHI, which means that evaluation of potential market power is consistent with what is done in other
industries. However, in order to apply the method, more data are needed along with a better understanding of the industry.

- The Technical Group should have paid more attention to the monopsony problem, which is the ability of processors to exert market power on the harvesting sector. This may be of greater concern than the monopoly problem.

**2012**

- The February 2012 Surfclam and Ocean Quahog Committee meeting discussed next steps for the then-numbered Amendment 15.
- At that meeting, GC Joel MacDonald advised that an information collection program could be implemented by NMFS without a Council FMP Amendment under authority granted in section 402(a) of the MSA.
- The Committee voted to split Amendment 15 into several parts: 1) move forward with cost recovery, essential fish habitat (EFH), and the ocean quahog biological reference point update in Amendment 15, 2) request that NMFS develop an information collection program, and 3) move development of an excessive shares cap to the next Amendment.

**2013**

- A “Data Collection Protocol” was developed for the Council to consider that would provide the data needed to understand ownership and control of the quota allocations in the surfclam and ocean quahog fisheries.
- The Council approved the “Data Collection Protocol.”

**2015**

- The data collection protocol was implemented.

**2016**

- Ownership data collection began in 2016.

**2017**

- An FMAT was reformed to work on the Excessive Shares Amendment.

**2018**

- June 2018: Range of alternatives developed and presented to the Surfclam and Ocean Quahog Committee and Council.

**2019**

- March 2019: Surfclam and Ocean Quahog Advisory Panel and Committee provided feedback on the public hearing document
- April 2019: Council reviewed public hearing document and instructed FMAT to make some modifications to the documents and bring it back to the Committee for review.
The term “HHI” means the Herfindahl–Hirschman Index, a commonly accepted measure of market concentration. The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

According to the DOJ, agencies generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated and consider markets in which the HHI is in excess of 2,500 points to be highly concentrated. According to the U.S. DOJ & Federal Trade Commission (FTC), Horizontal Merger Guidelines § 5.3 (2010), transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power.

The HHI of harvesting (2006-2008) and processing (2005-2008) in the surfclam and ocean quahog fisheries estimated by NMFS (NMFS 2009) would be considered highly concentrated by the DOJ. Updated HHI values for the harvesting and processing sectors (John Walden, Pers. Comm., NEFSC 2019) are presented in Figures 1 and 2. These figures indicate that the harvesting and processing sectors for the surfclam and ocean quahog fisheries continue to be highly concentrated (2016-2018). The processing sector HHI values for 2016-2018 were calculated using the same methods as were used through 2008. However, the harvesting sector HHI values for 2016-2018 were calculated using a different method than was used through 2009. More specifically, in order to identify ownership for the 2016-2018 period, vessel ownership data was used in conjunction with permit database to identify all the individuals who own one or more vessels by firm. In addition, online resources provided additional company and vessel information to identify vessel ownership.

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10 [https://www.justice.gov/atr/herfindahl-hirschman-index](https://www.justice.gov/atr/herfindahl-hirschman-index)
Figure 1. Herfindahl-Hirschman Index (HHI) of Market Concentration in Surfclam and Ocean Quahog Harvesting Sector, 1998-2008 (adapted from NMFS (2009)) and updated 2016-2018. Note: HHI values below the green line (1,500) shows Unconcentrated Markets; HHI values between the green line (1,500) and red line (2,500) shows Moderately Concentrated Markets; HHI values above the red line (2,500) shows Highly Concentrated Markets.
Figure 2. Herfindahl-Hirschman Index (HHI) of Market Concentration in Surfclam and Ocean Quahog Processing Sector (largely Vertically-Integrated), 2003-2008 (adapted from NMFS (2009)) and updated 2016-2018. Note: HHI values below the green line (1,500) shows Unconcentrated Markets; HHI values between the green line (1,500) and red line (2,500) shows Moderately Concentrated Markets; HHI values above the red line (2,500) shows Highly Concentrated Markets.

*Improvements to the Descriptions of Impacts (information already included in the public hearing document. This is stated here for clarification)*

The range of alternatives incorporated into the public hearing document was developed to provide the Council and the public with a suite of alternative that addresses various issues that have been raised in these fisheries. Six excessive shares alternatives were included in the document. However, the resulting excessive shares caps under each alternative may vary depending on the model, affiliation level, and/or time period used (2016 or 2017). The various models and affiliation levels included in the public hearing document are representative of various methods that have been used to set and/or monitor excessive shares in various fisheries.

When the Council selects a specific affiliate level (e.g., individual/business, family, or corporate officer) and model (cumulative 100% model or net actual percentage model) to monitor any particular excessive shares cap level they wish to implement, the associated cap level from that selection will become evident. In the interim, no cap level has been selected or recommended.

Lastly, all alternatives described in the document were compared to the current conditions in these fisheries as prescribed under NEPA. In general terms, measures that would curtail entities from exerting market power and therefore not decreasing competition would have positive socioeconomic impacts. In addition, measures that would result in community disruptions as a result of additional consolidation (e.g., decrease in the number of independent harvesters, decrease in employment) would have negative socioeconomic impacts.
Appendix A of the public hearing document lists all the catch shares programs in the U.S.A. There are currently 16 limited catch shares programs in the country. 13 of these programs have specific excessive shares cap limits. Two other programs do not specify an excessive shares cap limit, but they have other measures in place to avoid excessive accumulation of share or allocation. The surfclam and ocean quahog fisheries are the only federally-managed fisheries in the country that do not have measures to limit share accumulation. See Appendix A of the public hearing document for additional information for catch shares programs in the USA.

References


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11 Section 303A of the MSA has additional requirements for catch share programs adopted after January 12, 2007.
May 15, 2019

Dear Mid Atlantic Fishery Management Council Members;

Re: Excessive Shares Amendment

What is an excessive share? An amendment with a name like this should describe what it is. It is understood that whatever the answer, the number is completely arbitrary.

Is the council interested in fisheries management or social engineering? They are not the same.

Amendment 8 redistributed the clam resource from those who caught most of the clams to all of the participants. Is it the council’s intent to redistribute clam resource from those who bought the quota they needed to those who held their quota but do not participate in the fishery? If that is the objective then there will never be another Individual Transferable Quota system because no one in their right mind would buy out any part of an overcapitalizes fishery to then have part of what the paid money for taken away in another redistribution.

If you look at a number of these proposed alternatives, they may redistribute the clam resources and the two alternatives that openly advocate redistribution are five and six.

What happens if by chance an entity finds that they are over whatever arberturty percentage imposed? What if that quota is technically owned by a bank? How does the council propose to handle that issue?

The current objectives of the clam ITQ system comply with the MSA and have worked well for 30 years. If the objective of the council is to undermine the best-managed fishery in the U.S. then the council must change the objectives. If that is the case, what does the new clam fishery look like?

In the past, the SCOQ AP was highly involved in meaningful amendments to the FMP. The AP was not involved in the development of this amendment except to have it presented to us in a webinar.

There are statements in this amendment that are simply not true. That is outrageous. This is a highly biased document.

The industry suggest that you send the document back to the staff and AP and have the leadership work on the objectives of the fishery, if major changes are planned. Otherwise, if not changes are plan then leave the current objectives in place. If the council wants plan changes then the council needs to write new objectives and then justify what the new FMP is going to do and how.

Foot Note. The AP members that are involved in the fishery have stated that they want to meet in person and are willing to pay their travel expense. The industry must be involved in creating new amendments. There has been no transparency in the development of this amendment (none).
Detailed Comments

Wallace & Associates (W&A) represent a number of Surfclam and Ocean Quahog (SCOQ) Individual Transferable Quota (ITQ) owners. The ITQ owners that W&A represent are concerned that the proposed excessive share amendment that the council will consider in early June is misguided. The SCOQ ITQ Fishery Management Plan (FMP) was implemented on January 1, 1990 and has been in effect ever since. Over the almost 30 years the plan has worked well and the clam FMP is considered by many in NMFS to be one of, if not the best FMP in the country. The Mid Atlantic Council should be proud of having such an honor as the clam management plan.

The SCOQ FMP was the first FMP in the federal fishery management system with limited entry, fixed quotas, time based effort control system and other controls that set a very high standard for federal fishery management plans from the start. As the fishery recovered from being overfished before the MSA was implemented, the time based system could not keep up with the changes that the fishery was going through. Over the next 10 years the ITQ system took shape and in 1990 the clam ITQ FMP when into effect. The clam ITQ was the first in the U.S. The ITQ system was designed to resolve the gross overcapitalization of the clam fishery and to get the council and NMFS out of the day-to-day operations of the fishery. The plan is driven by very clear objectives and accomplished the goals. It is highly successful in allowing the clam fishery to adjust to many changes that have taken place over the last 30 years without council or NMFS intervention. It should be pointed out that the numerous amendment of the clam FMP had nothing to do with its operation but were required by Congress.

The clam fishery is a large boat, off shore industrial fishery. There is no open fresh market and the unit of measure is about 3,200 pounds per unite. The vessels supply shucking plants only when the plant request the product. Therefore, the clam business in unlike the finfish or scallop fisheries where a product can be sold off the boat for consumption at that point, but not for SCRs or OQs. Clam are processed in large expensive manufacturing plants and the meats then go to a secondary processor in which the meat is mostly an ingredient in another product.

In the proposed excessive shares amendment there are two alternatives that would completely destroy the clam ITQ system if they were implemented. If implemented either would send the message to every fishermen and council in the U.S. to never implement another ITQ system because the first thing the SCOQ, ITQ amendment did was to solve the overcapitalization situation with an industry funded buy out of the surplus production that wanted to leave the fishery. Alternatives five and six would be a second redistribution of the ITQ holders which undermined the very people that were needed to buy out the folks that wanted to get out of the industry. Those that did not sell or did not buy but wanted to rent their quota for the highest price and were not interested in long term leases could have a problem. Today, some of them are in that situation, no renters for their ITQs and it was their choice. Alternatives five or six would reduce the quota to the average demand of the last few years. That would take away quota which people purchased or have long termed leased so that they could operate their business. If alternatives five or six were implemented that would require the very people who bought out the surpluses production would then have to rent quota to cover their shortfall in supply. That is an unfair and decussating idea.

Alternative five and six should be removed from the document. If it were adopted it would be the worst-case of social engineering that has every come out of the Mid Atlantic Council ever.
For a number of years before the council approved amendment 8 and number of council members spent a great deal of time creating the current objectives of the FMP. Those objectives have served the council, NMFA and the industry well and have never been changed. There is no possible change that could happen for the next 30 years that the current objectives would need to be changes to address. Therefore, the clam industry strongly urge the council not to change the current objectives.

As stated above the council members back in the 1980s worked long and hard to have objectives that are flexible and could last throughout time. They were successful. Now there is a proposed new set of objectives written by the staff and FMAT. This is interesting because currently the New England skate fishery is working on limited entry and they need to change the current objectives to support what they are trying to do. The New England Council’s PDT was asked if they would write the new skate limited access objectives, they declined, saying that they do not make policy. Council members make management policies not the staff or PDT. Having the FMAT and staff writing the objectives instead of the council members needs to be corrected.

Thank you for considering my comments.

Sincerely,

[Signature]

David H. Wallace

Cc:

Mid Atlantic Council Members

Clam Industry Members
May 20, 2019

MAFM
800 North State Street
Dover SE 19901

Re: Excessive Shares Amendment

Dear Council members and Staff,

We are writing to express concerns for our company with regard to the excessive shares amendment. The presentations thus far have been based on a Northern Economics report. A report which oversimplifies operational aspects of the clam fishery and alludes to the clam industry being able to manipulate the marketplace in its current status. This could not be farther from the truth. The clam industry economics are driven by what the vendors will pay for the product. The demand is not at all from harvest or processing sectors. It is a product that is an ingredient, not center of the plate entrée. It therefore competes in the marketplace with many other ingredient proteins not to mention the increasing import of clam products from other countries.

A true excessive share definition has never been presented as it relates to the harvest and processing sector in the clam industry. The harvest sector does not have control of the market but yet the Alternatives being presented seek to control the amount of shares for quota holders that have little or no control in the marketplace.

Other Alternatives seek to take shares away from active participant in the fishery and to give opportunity to non-active quota holders. This shows the lack of research by Northern Economics. The purpose of Amendment 8 was to reduce capacity in the fleet. The reduction was completely voluntary and anyone that has not been active has zero barrier of entry back into the fishery. There is no cap on vessels or permits only bushels. These owners that still own quota can capitalize a vessel and get into the fishery. Any hindrance would be in lack of sales market. This is only because the market can only use so much product and does not always buy what is produced, hence the entire quota is not caught year over year. If there was high profitability in the sales sector the quota would be caught because every tag would be utilized if there was a robust market. To prove this point there is one owner of 200,000+ bushels of clams that does not own a clam vessel to harvest anymore. This same clam allocation owner owns 17 scallop vessels and oil supply vessels. If he desired, he would have the ability to capitalize a vessel and processing facility and proceed directly into the market. His barrier to entry is his own experience in the clam business and knowledge the difficulties in the
marketplace. The barrier is not that other members of the industry have excessive control to hold him back. Alternatives that take away from active participants to give opportunities to non-active participants already have, is nothing more that social engineering.

Alternatives 5 and 6 should be stricken from the document as this could have detrimental effects to the industry. The Alternatives claims that there could be a positive effect from having a quota split in such a way that it would force active participants to utilize non active participant’s quota. This could be devastating especially our company. It could create a situation wherein we would not be allocated enough to cover our business projections and forced to lease from non-active quota holders at unregulated pricing, thereby giving non-active participants excessive control and creating a negative economic impact to an already marginally profitable business. This is another example of oversimplifying of the clam industry from the Northern Economics report. This is also another example social engineering that could decrease the economic feasibility of the industry.

We ask the council and staff to seriously consider the negative impacts in what you are trying to accomplish in our industry by creating an excessive share definition and changing the goals and objectives from what they currently are. Everything that was approved within the current goals and objectives is the current status of the fishery and there is nothing in the conceivable future that would change, that couldn’t be addressed as they are.

Thank you for your time in considering these comments.

Sam Martin, Chief Operating Officer
Atlantic Capes Fisheries Inc.
Gallilean Seafood Inc.
Atlantic Harvester LLC (representing 6 clam vessels)
To: Mid-Atlantic Fishery Management Council
Atlantic Surfclam and Ocean Quahog Committee
800 North State Street, Suite 201
Dover, DE 19901

Re: Atlantic Surfclam and Ocean Quahog Excessive Share Amendment Public Hearing Document

Dear Committee Members:

The May 10, 2019 draft of the Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment is not complete for Council review and approval and has mischaracterizations of the definition of an excessive share, the excessive share alternatives and the alternative impacts described within the document. The document is written from the point of view that the continued accumulation of SC/OQ ITQ share would lead to an excessive share being accumulated, which has not been shown to be true. To present the document to the public, written from this, or any, specific point of view, does the fishery and the public a disservice. These mischaracterizations should be corrected before the document is released for public comment. Please move to advise the council to make these corrections.

The new definition of excessive shares in the May 10, 2019 draft, “the Council defines an excessive share as an ITQ share accumulation for an individual or business that is above the excessive share percentage cap selected by the Council for surfclam or ocean quahog”, suggests that there is no such thing as an excessive share until the Council sets an excessive share cap. This is not true. The definition in the draft as of 03/05/2019 stated, “Excessive Share: An amount (level of quota) of the Atlantic surfclam and ocean quahog Individual Transferrable Quota (ITQ) privileges that could result in market power for a firm or entity.” was accurate.

The Executive Summary is surprisingly short for such a lengthy document and at a minimum should also include:

- The definition of excessive share from the 03/05/2019 draft document. The Definitions and Terminology section wasn’t found until 26 pages into the 03/05/2019 draft document. It defines, “Excessive Share: An amount (level of quota) of the Atlantic surfclam and ocean quahog Individual Transferrable Quota (ITQ) privileges that could result in market power for a firm or entity.”
- A detailed description of the manner in which NMFS tracks ITQ ownership.
- A detailed description of the current management approach addressing excessive shares. “The current management approach” is mentioned within the document 8 times (pgs. 6, 7, 47, 121, 123, 124, 126 and 127 of the May 10, 2019 draft) yet the current approach is not explained anywhere in the document.
- The manner in which an excessive share is currently determined and enforced.
- The purpose of this action as detailed in the 03/05/2019 draft document.
The Public Hearing Document Summary of Alternatives beginning on pg. 3 and labeled Box ES-1 is vague and misleading. Beginning with Alternative 1: (No Action/Status Quo), it states, “No limit or definition of an excessive share is included in the FMP.” This is not true. The current excessive share limits are based on federal antitrust laws and have been in place since the SC/OQ ITQ system went into effect. This summary should include a statement that, under the No Action/Status Quo alternative, “an excessive share is an amount of share ownership that enables the owner/holder to exercise market power in violation of the US Antitrust Laws.” In the interest of accuracy and objectivity, the “summary” of alternative 1 additionally should state that: “The U.S. District Court for the District of Columbia has ruled that the status quo/no action alternative is compliant with NS4 of the MSA, and that ruling has not been overturned or appealed.” It is misleading to imply, as the draft does, that the status quo alternative is not compliant with the law, specifically NS4. This claim is repeated on pages 7, 47, 116 and 127 of the May 10, 2019 draft.

The Summary of Alternative 2 states, “Since the cap is based on ownership-only, it does not account for leasing or other transactions and complex business practices (e.g., combined ownership plus leasing) that are prevalent in the fisheries when setting the cap limit.” The portion of the statement “or other transactions and complex business practices that are prevalent in the fisheries” has no place in this document as the regulations have no method to recognize or account for other transactions besides a temporary or permanent transfer of ITQ shares. The ITQ program for surfclams and ocean quahogs allows allocation owners to permanently transfer the ITQ quota share (i.e., sale, permanent transfer) or lease ITQ out (i.e., cage tag leasing, temporary annual transfer). The term “or other transactions and complex business practices that are prevalent in the fisheries” should be removed from throughout the document.

The Summary of Sub-Alternative 2.1 is the first of several mentions of similarities to tilefish IFQ. It is unclear what the two stocks or fisheries have in common and what the purpose of this comparison is except to imply that what worked for the tilefish fishery could work for the SC/OQ fishery. This is misleading and all mentions of other ITQ programs should be removed unless appropriate similarities in the fisheries, markets or communities are identified and explained. One appropriate comparison that could be made but is not, is for the last 30 years, Clearwater Seafoods Ltd., based in Bedford, Nova Scotia, and a competitor to the US fishery, has held 100 percent of Canada’s Arctic surf clam licenses. I understand the Red Crab fishery quota is owned by a single company in the Northeast and the rendering business and bunker fishery in the U.S. was approved by DOJ to be controlled by a single company having almost 95% share, yet these examples are not given.

The Summary of Sub-Alternative 2.3: Quota share cap at 95%, does not accurately state the origin and purpose of this alternative. The summary should be edited to reflect that this alternative is included based upon a vote by the MAFMC. The intent of the alternative was to include a percentage cap to satisfy GARFO’s contention that an excessive shares limit must include a measurable number of shares, this should be noted within the summary.

While the Herfindahl-Hirschman Index (HHI) discussion of market concentration in the SC/OQ harvesting and processing sectors beginning on pg. 99 is interesting and detailed with colorful graphs, the document lacks an in-depth discussion of the index and concentration of ITQ, which is the only concentration to potentially be capped under the proposed amendment. Only one sentence describes the concentration of quota shares, “Lastly, the HHI of ownership (quota ownership) of surfclam quota in 2009 was 1,167, and the HHI of ownership ocean quahog quota was 993 (Mitchell et al. 2011).” (HHI values below 1,500 show Unconcentrated Markets.) The document failed to update the HHI of ownership (quota ownership) of surfclam and ocean quahog quota as it did update for the harvesting sector and processing sector and the HHI scale goes up to 10,000 yet it is only shown up to 5,000. These are other instances of the document prompting or encouraging a less than favorable opinion of this fishery and further consolidation.
The section header on page 41 of the May 10, 2019 draft, Tracking Excessive Shares
Concentration Following ITQ Plan Implementation, is a mischaracterization of the tracking of
quota share ownership concentrations following the ITQ Plan Implementation. There isn’t
any “Tracking Excessive Shares”, because excessive shares concentration levels have not been
shown to exist. Again, this is another example of obvious bias on the part of the authors of
this document that should be removed before its release to the public.

Beginning on page 127, section 7.4 Environmental Consequences of Alternatives /
Impacts to Communities (Socioeconomic Impacts), characterizes each alternative in general
terms as being more positive dependent upon it limiting further share consolidation. This is
biased toward less consolidation when there is absolutely no evidence that additional
consolidation will not lead to additional socioeconomic benefits. On page 134 under the
comparison of alternatives 2.1 to 2.3 the documents states, “An excessive-share cap of 28%
for surfclams and 22% for ocean quahogs could potentially ensure that there would be at
least four to five processors operating at reasonable output levels, respectively.” What a
reasonable output level is purely subjective and statements such as this have no place in this
Public Hearing Document. Furthermore, an excessive share cap of ITQ will not ensure there
will be any specific number of processors operating because operating as a processor does
not require ITQ shares in the SC/OQ industry.

The comparisons of Alternatives 5 and 6 under section 7.4 Environmental Consequences of
Alternatives / Impacts to Communities (Socioeconomic Impacts) and the statement that, “In
general terms, alternatives 5 and 6 would result in the largest positive impacts” (pg. 150) are
especially concerning. Alternatives 5 and 6 would work directly contrary to FMP Objective 3
which is to allow the “industry to operate efficiently,” and to allow “industry participants to
achieve economic efficiency including efficient utilization of capital resources by the industry.”

The non-participants whose leasehold rights would become necessary for continued
operation of the fishery would be in a position to extract unreasonable prices for their ITQs by
participating harvesters. This would create market power for industry non-participants to
whom harvesters would be required to turn to obtain fishing privileges necessary to sustain
their prior levels of harvest. Alternatives 5 and 6 are not “excessive share” control
mechanisms limiting those who participate in the industry, which was the intention of the
pending amendment, and these alternatives should be removed from the document entirely.
As participants who do not exceed and are well below any excessive share “cap”, we would
nevertheless lose the ability to utilize ITQs in which we have invested and would be
unnecessarily required to invest additional dollars in purchasing ITQs from non-participants
who have done nothing in or for the industry.

Alternatives 5 and 6 would introduce expensive and inefficient externalities into the operation
of the SC/OQ fishery, already one of the most capital-intensive fisheries, if not the most
capital-intensive fishery, the council manages. Surfside Foods has invested millions of dollars
and borrowed millions more in acquiring allocation rights to insure we can satisfy our
markets. We would likely be found to be in default of the terms of loans and have to
purchase additional shares at inflated prices to make up for this reduction. To have those
rights arbitrarily limited by the reduction of a “Class A” quota scheme, so as to require us to
lease or buy quota from non-participants in the industry, in order to maintain our overall level
of harvest would be devastating to the financial position of the company. The analysis of the
impacts from these alternatives must include these negative impacts that will result from the
artificial restricting of supply in the ITQ market for the document to be complete and accurate
if these alternatives are to remain in the document.

The comparisons of alternatives 5 and 6 also mention that the alternatives would also align
supply in the fisheries with market demand. This is nothing short of pure redistribution of
wealth from participants in the SC/OQ fishery that have invested in quota, vessels and the
infrastructure necessary for the fishery to operate and supply our markets to those that chose
to sit on the sidelines with absolutely no capital at risk.
As stated at the beginning of this letter, the May 10, 2019 draft of the Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment is not complete for Council review and approval. The use of reliable data and the reasoning is skewed by the manner in which the data is presented, the summaries are worded, and the environmental consequences of the alternatives are scaled positive or negative. Public hearing documents should go out of their way to present reliable data in as unbiased manner as possible, this document does not accomplish this, and it therefore should be revised and presented from a neutral position.

Thank you for consideration of our comments.

Regards,

Thomas Dameron
Surfside Foods LLC
Government Relations & Fisheries Science Liaison
May 21, 2019

Mid-Atlantic Fishery Management Council
800 North State Street
Dover, DE 19901

RE: Draft Excessive Shares Amendment for Public Hearings

Dear Council Members and Staff:

In anticipation that the Mid-Atlantic Fishery Management Council (MAFMC) will approve a Public Hearing Document on the Atlantic Surfclam and Ocean Quahog Excessive Shares Amendment when it meets June 4, 2019, LaMonica Fine Foods would like to have all MAFMC council members aware of our concerns and questions on the document going out for public hearings.

The MAFMC insists that a percentage cap has to be defined for the Surfclam and Ocean Quahog Individual Transferable Quota (SCQO ITQ) fishery in accordance with National Standard 4 of the Magnuson –Stevens Fishery Conservation and Management Act (MSA). The MAFMC further maintains that, while there is a definition of an excessive share, it is also considering social concerns for fishing communities, as expressed in MSA National Standard 8 – which includes community participation, and a sense of equity and fairness that may, in part, be grounded in the history of fishery management in this country.

LaMonica Fine Foods (LFF) would like the MAFMC to consider another part of the MSA, National Standard 5 – Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

Two of the alternatives in the Draft Public Hearing Document, Alternatives 5 and 6, in our estimation, appear to violate National Standard 5, wherein the alternatives are in essence a social engineering mechanism to facilitate entry into the fishery. Under the proposed Alternatives 5 and 6, unused/unfished allocations, would replace existing industry affiliated allocations (owned or leased), and in fact could very well allow these new or existing shareholders the economic upper hand in controlling a lease price for their use. This anticipated practice, should either Alternative 5 or 6 be adopted, would put market power in the hands of shareholders that historically have been non-participating in a financial, conservational, or physical manner. The new incoming shareholders would be unfairly rewarded, allowing them
the advantage of a government controlled false lease market, thereby giving the opportunity to allow treacherous behavior of price gouging in the request for lease pricing of their ITQ’s.

LaMonica Fine Foods sees these unintended consequences in both Alternatives 5 and 6 whereby those shareholders (owned or leased) that have invested in the SCOQ ITQ fishery since Amendment 8 was implemented could very well be replaced by unengaged shareholders who have not invested in the fishery. National Standard 5 does not allow for a conservation and management action to have as its sole purpose, the economic allocation that Alternatives 5 and 6 appear to create.

Defining an excessive share in the SCOQ ITQ fishery and demonstrating that a certain cap percentage is exerting market power, are difficult objectives in and of themselves. Considering Alternatives in the public hearing document that have nothing to do with defining excessive shares but rather serve as a redistributing/reallocation ITQ rights mechanism should not go out for public comment.

Since there is no clear understanding and explanation of the devastating effects that Alternatives 5 and 6 will have on the historically active participants in the SCOQ ITQ fishery, LaMonica Fine Foods requests that the MAFMC council members and staff, at the very least, remove Alternatives 5 and 6 from the public hearing document.

Sincerely,

Daniel P. LaVecchia, President
LaMonica Fine Foods
May 21, 2019

To: Mid-Atlantic Fishery Management Council
Atlantic Surfclam and Ocean Quahog Committee
800 North State Street, Suite 201
Dover, DE 19901

Re: Atlantic Surfclam and Ocean Quahog Excessive Share Amendment Public Hearing Document

Dear Committee Members:

Thank you for your request for comments on the Excessive Shares Amendment Public Comment document.

You are in receipt of a comment document submitted by Mr. Tom Alspach on behalf of Sea Watch International that details our concerns regarding the Excessive Shares Amendment Public Comment document. Mr. Alspach’ comments accurately reflect the concerns of ownership and management team here at Sea Watch International in a manner which I do not possess. I would like to take this opportunity to add a perspective to those concerns from a Sales and Marketing view which has been my primary function for the past 34 years over my 37 year career SC/OQ fisheries.

As you are aware consolidation has occurred in the SC/OQ fishery on both the harvest side as well as the processor side. I have personally worked for six different entities in the clam business over the past 37 years, three prior to Amendment 8 and three post Amendment 8. The consolidation became more prevalent post Amendment 8 as consolidation was a primary reason for the amendment being passed. The fishery was over capitalized with too many old, unsafe and inefficient vessels and the processing side was over capitalized with old inefficient and in some cases unsafe processing facilities. The consolidation on both sides of the equation allowed for investment in larger more efficient and safer vessels as well as more productive and safer processing facilities.

The improvements in harvesting vessels and processing facilities have made the SC/OQ fishery of today far more consumer friendly because of the ability to maintain quality and food safety standards that are required in today’s market place. These improvements have
come at great cost for those participants that decided to remain active in the industry by owning allocation, harvesting the resource, processing the resource, marketing the resource and supporting cooperative science. I hope that you are all aware of the industries continual participation and support of cooperative science to enhance and remove uncertainties that might exist in any fisheries management plan but if not I will offer a bit of context. Starting back in 1997 the National Fisheries Institute’s Clam Committee has funded cooperative science for the SC/OQ Fishery which is now carried on by SCeMFIS, the Science Center for Marine Fisheries. From 2007 through 2012 Truex Enterprise, part of Sea Watch’s ownership group funded the work on Georges Banks necessary for the FDA protocol which opened Georges Banks to the SC/OQ Fishery in 2013. Millions of dollars of industry money with direction from the NEFSC has supplemented government science to make “the best science available” for management of this fishery.

Having the position that I have had over all these years it has been my pleasure to tell the story of our FMP which enables the fishery to be managed sustainably which is the basis of MSA. In 2016 the SC/OQ fishery was certified sustainable by the Marine Stewardship Council in less than 9 months from start to finish. I believe that you are aware that this timeline was exceptionally fast compared to other fisheries. This was directly related to the successful management of the fishery over the last 29 years since the adoption of Amendment 8. I believe that the successful management of this fishery was also confirmed by the report given by Northern Economics at the April Council meeting in Avalon.

How should we define participation in the SC/OQ fishery? If I were to define it I would refer to the content in the paragraphs previously written. Investments in allocation, real dollars paid for allocation that others received from the government at no cost. Investment in larger, safer more efficient harvesting vessels that are more environmentally friendly. Investments in processing facilities that are safer, more efficient and more environmentally friendly. Investments in people, communities with good paying jobs and health benefits, the Sea Watch umbrella itself employs over 700 people in six states. Investments in cooperative science to ensure sustainability. Investments in market development at home and beyond the US border, Canada, Mexico, Hong Kong, Japan, Singapore. Investments since 2010 to try and get the FDA to remove processed shellfish from the EU Shellfish Ban so we can get our markets in Europe back. Investments to be made in Europe once the EU Shellfish Ban is lifted.

I painted this picture for you to substantiate my opposition to having Alternatives 5 and 6 in the public comment document that will be approved by the council at the upcoming June meeting. Two reasons for my opposition are fairness and confusion. I do not think it is fair to reward “Absentee” allocation owners when the market grows because of the investment made by “Active” participants. Do not be mistaken, there are no SMALL boats tied up out there waiting for someone to offload their catch. There are however “Absentee” allocation owners that received allocation from Amendment 8 that have not made any investments in the SC/OQ Fishery in the past 29. These “Absentee” allocation owners would be the only beneficiaries from Alternatives 5 and 6 at the expense of the harvesters, processors and ultimately the American consumer and our trading partners abroad. By developing a quota A & B based on historical catch from the previous year you are telling the real industry “participants” that all of the investment made over the past 29 years to grow the market are to benefit those who have made no investment.
If all allocation owners made the same decision years ago that the “Absentee” allocation owners made, we would not be sitting here having this discussion because there would be no fishery.

I think that Alternatives 5 and 6 would be confusing to people that do not understand the history of why Amendment 8 was approved, consolidation and management efficiencies. Alternatives 5 and 6 really do not address excessive shares but allow for “Absentee” allocation owners to benefit at the expense of active “participants” in the fishery who have made the substantial investments over time and ultimately burden the consumer with unnecessary cost increases. As our science tells us, there are plenty of clams in the SC/OQ Fishery to sustain the current quotas and when demand dictates it those currently unused allocation shares will be leased by someone or some entity.

Thank you for this opportunity to participate in the management process and I hope that you will share these comments through the briefing materials that will be distributed to the SC/OQ Committee and the full council.

Respectfully,
Guy B Simmons
Sea Watch International
Senior VP of Marketing and Product Development

Cc: Christopher Moore
Jessica Coakley
May 22, 2019

Mid-Atlantic Fishery Management Council
Atlantic Surfclam and Ocean Quahog Committee
800 North State Street, Suite 201
Dover, DE 19901

Re: Atlantic Surfclam and Ocean Quahog Excessive Share Amendment Public Hearing Document

Dear Committee Members:

Please consider the following proposed edits/revisions to the excessive shares public hearing document, in connection with the Committee meeting scheduled for June 3:

I. The Public Hearing Document Should Clarify the Existing Definition of “Excessive Share”

The draft of the public hearing document is confusing in its current form. At the outset, the draft fails to clarify that the definition of the term “excessive share” already exists and has been approved by NOAA/NMFS, as well as this Council’s predecessors.

NOAA recently recited the accepted definition of “excessive share” in connection with Amendment 18 to the Northeast Multi-Species FMP, stating that an “excessive share” of fishing privileges is an amount “that would allow an entity to influence the market to its advantage (i.e., exert market power).” This was the same standard that the independent economic experts who analyzed the SCOQ fishery adopted, in concluding that no entity currently holds market power that would enable it to raise prices or exclude competition. This is also the standard adopted by this Council’s predecessors as part of Amendment 8, when it was determined that, should an industry participant obtain and abuse market power, there would be a referral to the DOJ for enforcement procedures.

Instead of acknowledging this existing definition of an “excessive share,” the draft plan states that: “For the surfclam and ocean quahog fisheries, the Council defines an excessive share as an ITQ share accumulation for an individual or business that is above the excessive share percentage cap selected by the Council for surfclams or ocean quahogs.” In fact, “the Council” has never “defined” an excessive share in this fashion. The Council has not adopted any excessive share definition at all.
But more to the point, the supposed “definition” offered in the draft is nothing more than a tautology: An “excessive share” is a share that exceeds the cap on “excessive shares.” This makes no sense.

What the draft should state is that an excessive share is an amount of ITQs in excess of a percentage cap because an ITQ share in excess of that cap would yield market power—that is, the power to influence prices or exclude competition. It is likely that the drafters of the document do not want to define “excessive share” in this way, because that definition leads to an obvious question that is not answered anywhere in the draft: Where is the evidence for the claim that an amount of ITQs in excess of any of the proposed caps would yield market power and its effects? The draft provides no support at all for how/why a share of ITQs in excess of any of the caps would suddenly create “market power.” For example, one of the alternatives proposes a percentage cap of 49%—so that 50% ITQ ownership would exceed the cap and thereby become “an excessive share.” But why? Where is the support for the claim that an additional percentage of ownership beyond 49% bestows market power on the holder of those ITQ shares?

There is no factual or legal basis for defining “excessive share” as the draft document does; instead, analysis and factual support is needed for demonstrating that ITQ holdings in excess of a specific percentage amount would yield market power on behalf of the owner of those shares, and therefore those shares would be “excessive.” The hearing document should be amended accordingly before it goes out to the public.

II. Alternatives 5 and 6 Should be Deleted From the Public Hearing Draft

Alternatives 5 and 6 should be deleted because they are not “excessive share” control mechanisms, but instead are ITQ redistribution plans intended to create an artificial “market” for non-participants in the industry who still own ITQs. These alternatives would reduce current ITQ levels among industry participants by approximately 40%, compelling them to lease additional ITQ rights from industry non-participants, in order to maintain their previous levels of harvest. This would award market power to the ITQ owning non-participants, would penalize those non-participants who do not contribute to the industry in any way and who have no investment at risk, would reduce the ITQ collateral now relied upon by banks for loans to industry participants, and would increase the cost of producing clam products (because of leasing fees) which would unnecessarily increase prices to consumers—all for the sole purpose of creating new revenue for non-participating ITQ holders who add nothing to the industry.

For these reasons alternatives 5 and 6 should be eliminated from the public hearing draft, as they are market restructuring plans and not excessive share controls.

Here is an illustrative example of how alternative 5 would operate as social engineering/share reallocation rather than as an excessive share cap:
Under alternative 5 the share “cap” would be 40% of total ITQs

Assume an individual owns just 10% of ITQs, well under the cap.

With the 3.4m quota, that shareholder would be entitled to 340,000 bushels of surf ITQs.

But under alternative 5 the shareholder’s entitlement would be reduced to 10% of the annualized harvest, about 2.2m bushels, yielding that shareholder only 220,000 bushels of surf ITQs.

Before any class B shares would be made available, under alternative 5 all of the class A shares must be utilized. This would mean that, in order to make up the 120,000 bushels lost under the alternative 5 “quota,” the shareholder would be compelled to lease those ITQs from another absentee ITQ holder, not using his or its shares. Note that the price the absentee ITQ holder could extract for those additional shares is completely unregulated.

So simply in order to maintain the same harvest he had previously accomplished (340,000 bu), that shareholder would be compelled to pay – likely hundreds of thousands of dollars – for the lease of 120,000 bu of ITQs from an absentee ITQ holder not engaged in fishing or contributing to the fishery in any way.

The plan document supposedly offers an analysis of both positive and negative impacts from each alternative. Where is the discussion of negative impacts resulting from the scenario just described? The same scenario will play out throughout the industry if alternative 5 or 6 is adopted, but no analysis of its negative impact is included in the draft.

Instead, the draft rationalizes these alternatives as a means of “aligning market supply and demand.” By what authority does the Council have the right to do this? This is simply economic/social engineering – an effort by the Council to reallocate ITQs in a manner that ensures every ITQ holder is guaranteed a market for his/its shares – the “free market” in ITQs which was to be the bedrock of Amendment 8 is totally abandoned.

According to the draft, “aligning supply in the fisheries with market demand may result in more activity in the leasing market.” (Draft, p. 18). Alignment of market supply and demand is not a goal or objective of the FMP, nor is stimulating “more activity in the leasing market.” These are solely economic objectives, and fishery management may not be based solely upon economic manipulation of the market. In any event, “alignment of supply and demand” has nothing to do with containing excessive shares.

In fact, alternatives 5 and 6 would work directly contrary to FMP Objective 3 which is to allow the “industry to operate efficiently,” that is, to allow “industry participants to achieve economic efficiency including efficient utilization of capital resources by the industry.” Alternatives 5 and 6 would introduce expensive and inefficient externalities into the operation of the fishery:
actual industry participants, many of whom have invested millions of dollars in acquiring their allocation rights, would have those rights arbitrarily limited by the reduced “Class A” quota scheme, so as to require them to lease quota from non-participants in the industry, in order to maintain their overall level of harvest. The non-participants whose leasehold rights would become necessary for continued operation of the fishery would have participants over a barrel, and would be in a position to extract unreasonable ransoms for the lease of their ITQs by participating harvesters. Put another way, this would create market power – an excessive share – on the part of industry non-participants to whom harvesters would be required to turn to obtain fishing privileges necessary to sustain their prior levels of harvest.

This is not an “excessive share” control mechanism limiting those who participate in the industry, which is the purported intention of the pending amendment. Note that in the example above, participants who are well below the excessive share “cap” would nevertheless lose the ability to utilize ITQs in which they had invested, even though by definition they would not have an “excessive share.”

III. The Hearing Document Description of Alternatives Should be Corrected and Amended Before it is Approved

Box ES-1. “Summary of Alternatives” (page 3):

**Alternative 1:** The draft inaccurately states that “no limit” on share ownership is included in the FMP. This summary should include a statement that, under the No Action/Status Quo alternative, “an excessive share is an amount of share ownership that enables the owner/holder to exercise market power, as defined above, in violation of the US Antitrust Laws.” In the interest of accuracy and objectivity, the “summary” of alternative 1 additionally should state that: “The U.S. District Court for the District of Columbia has ruled that the status quo/no action alternative is compliant with NS4 of the MSA, and that ruling has not been overturned or appealed.” It is misleading to imply, as the draft does (see below), that the status quo alternative is not compliant with the law, specifically NS4.

**Alternative 2.2:** Draft misleadingly suggests this alternative would lead to two entities dominating the fishery (each with 49%); should add at the end of the last sentence: “or three large entities holding 30%, 30% and 40%”

**Alternative 2.3:** Draft does not accurately state origin and purpose of this alternative. The summary should be edited with language to the effect: “this alternative is included based upon a vote by the MAFMC SCOQ Committee. It is intended to function the same as the status quo alternative, but to include a percentage cap – 95% – to satisfy GARFO’s contention that an excessive shares limit must include a “quantifiable” or “measurable” amount of shares.”
Alternative 3.3: Add at the end of the last sentence: “or three larger entities holding 30%, 30% and 40%.”

Box ES-2. “Summary of Review Alternatives” (page 5)

Alternative 1: To make this statement accurate the following should be added: “But review by the DOJ is required if it is perceived that any shareholder has achieved market power and is acting in an anti-competitive fashion under the federal antitrust laws.”

Section 1.2 “Summary of Impacts” (page 6-8):

Alternative 1 (page 6): This section misrepresents/mischaracterizes the status quo alternative. It is not true that there is “no specific limit” in the current FMP “as required under NS 4 of the MSA.” To the extent a “specific limit” is intended to refer to a quantifiable or measurable standard, there is no such requirement under NS 4. And it is not true that there is no “limit” on excessive shares in the status quo FMP; instead, the limitation is that stated in the summary (revised) of Alternative 1 above.

This section misleadingly implies that under the status quo the DOJ would be required to assess every ITQ transaction, and all share ownership, and that the DOJ is not in a position to do this. But this is not the way the DOJ has functioned under the status quo alternative for the past 29 years. As noted above the status quo only requires that potential excessive shares be brought to the attention of the DOJ if it appears that a shareholder has acquired sufficient share ownership to exercise market power in an anti-competitive manner under the antitrust laws. The status quo imposes no significant burden on the DOJ at all.

Sub-alternative 2.3 (page 8): This section again misstates the origin and purpose of the 95% alternative, as noted above. This alternative was not included because of the argument “that industry participants cannot exert market power in the final product market (monopoly).” Instead, this alternative was added by the MAFMC SCOQ Committee because GARFO has insisted that there must be a “quantifiable” excessive shares standard, and 95% was selected to provide a “quantifiable” cap that actually functions in the same way as the current status quo.

It is never mentioned in the hearing draft, and should be, that whatever cap is under consideration, it does not trump the federal antitrust laws if implemented. So if the 95% cap is adopted, but in the future it could be demonstrated that an entity with only 60% or 70% of the ITQ shares was exercising market power in an anti-competitive manner, that would violate the antitrust laws and could require divestiture, even though the holder did not control 95% of the ITQs.
“Comparisons Across Sub-Alternatives 2.1 to 2.3" (page 9):

The bases offered for “comparisons” of these alternatives in the draft are entirely without substance or merit, and this language must be made credible, or should be deleted. The draft repeatedly purports to weigh “positive” and “negative” “socio-economic impacts” – but says nothing about what those “socio-economic impacts” supposedly are, or where the evidence for these bald statements in the draft may be found. The only “impact” alluded to is the concern of “protection against excessive consolidation.” What is “excessive consolidation”? And why does it constitute a “negative impact”?

The whole purpose of Amendment 8 was to effectively compel consolidation, and this is what has happened in this industry, and until now this has been considered a good thing – both for the industry participants who now operate more efficiently and for those who exited the industry by selling – often for very substantial dollars – the allocation rights they were given by the federal government.

This supposed weighing of “impacts” amounts to no more than gibberish, as terms are not defined, and there is no basis or evidence at all offered for the conclusionary statements included.

“Comparison Across Sub-Alternatives 3.1 to 3.3” (page 11):

As with the claimed “comparisons” of sub-Alternatives 2.1 to 2.3, the discussion of sub-Alternatives 3.1 to 3.3 again is based upon unidentified and undocumented “socio-economic impacts” with no description or evidence of what these might be – except for the claim that, again, the different sub-alternatives may provide “a larger degree of protection against excessive consolidation.” See the comments above regarding the total absence of a description of what “excessive consolidation” might be. Accordingly, these alleged “comparisons” are meaningless and this language should be deleted from the draft unless “socio-economic impacts” can be identified and described and quantified, and “excessive consolidation” can be identified and explained, including importantly a discussion of why such “consolidation” can be a “negative impact” inasmuch as Amendment 8 was precisely intended to bring about such consolidation.

“Comparisons Across all Excessive Share Alternatives” (pages 15-18):

This section begins by repeating the misleading and inaccurate characterization of Alternative 1, commented on above. It repeats the claim that the no action alternative creates “no limit” on the accumulation of shares, but this is false for the reasons already described above regarding the status quo procedure for invoking the antitrust laws in the event of market power and anti-competitive conduct resulting from share accumulation. But in this “comparison” section, this defective characterization of alternative 1 is amplified by adding the entirely unsupported claim that alternative
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1 will lead to “negative impacts in the long term” because it provides “no protection against excessive consolidation.”

As previously noted, nowhere is it explained what “excessive consolidation” might be, and what the basis and evidence is for the contention that “excessive consolidation” will result from the status quo alternative. Do we have “excessive consolidation” now? Presumably we should because the status quo already has been in effect for “the long term” — i.e., 29 years. So the draft should explain how there is excessive consolidation currently, since we have experienced the “long term,” and should explain why, and provide evidence for, the claim that “excessive consolidation” has resulted from this long term existence of alternative 1.

“Purpose and Need of the Action” (pages 33-34):

The draft states that the action proposed is necessary because “Amendment 8 did not include ... measures that limited the maximum amount of shares that could be owned by an individual, corporation or entity.” This is false. This language should be deleted or amended for the reasons already discussed. Amendment 8 most certainly did limit the “maximum amount of shares” to that amount that would not allow an individual/entity to exercise market power and engage in anti-competitive behavior. It was intended – with the Secretary’s approval – should the Council perceive market power was being exercised, there would be a referral to DOJ. As previously noted, this excessive shares control procedure has been explicitly approved by a federal court. The draft should candidly acknowledge these points, and should not misleadingly suggest there was “no limitation” on excessive shares following Amendment 8.

Section 5.1 “Excessive Share Alternatives” (page39):

The draft precedes the discussion of excessive share alternatives with the statement that “the Council is required to define measurable criteria for what constitutes an excessive share ... .”

This statement is false, and should be deleted from the draft. There is nothing in the Magnuson Act that “requires” an excessive share limitation to be based upon “measurable” (i.e., quantifiable) criteria” in fact, the status quo/no action standard for an “excessive share” has been in effect for 29 years, and does not include a specific “measurable” standard for “defining” an excessive share — e.g., number of bushels, etc. And without such a measurable, quantified standard the Secretary of Commerce and NOAA have approved the current “unquantified” standard, and that standard has been upheld by a federal court as explained above.

This is not to say that the Council is forbidden to adopt “measurable criteria” for how an excessive share is controlled; that remains their prerogative. But it is entirely misleading for the draft to state that such measurable criteria are “required” and this reference, for that reason, should be deleted.
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Section 5.1 next states that “at this point it is unclear whether any of the alternatives under consideration will result in the need for any individual, entity or corporation to divest.” Why should this be unclear? At considerable expense to industry, the agency has been collecting data on share ownership for three years now, and that data should be sufficient to determine whether divestiture will be necessary under any alternative.

Further, even if the need for divestiture is “unclear” the failure of the draft plan to address how divestiture would be implemented is a critical deficiency in the document that should be corrected before public hearings. If there is even a possibility that individuals or firms – many of whom have invested millions of dollars in ITQs – may be required to “divest” as a result of Council action, that action should include a procedure for how divestiture – actual loss of those investments – will occur. It is no answer to suggest that the Council/staff can simply kick this can down the road and let NMFS decide on divestiture at a later date. An excessive shares amendment that could require divestiture absolutely should include procedures for how such divestiture would work, if only out of fairness to the industry affected.

Past Councils, during the long history of excessive share consideration, have opined that upon enactment of an excessive share control rule all then owned or controlled shares would be “grandfathered” into place. At a minimum, this should be the rule and the plan and amendment should so state. Not only is this fair and equitable – in view of investments and contracts already made – but it also is logically defensible because the expert economic consultants retained by NMFS have concluded that, at current levels of ITQ control by individuals/entities, no one in industry in a position to exert market power and engage in anti-competitive conduct.

The draft plan document should not go out to public hearing until it fairly addresses the issue of divestiture and proposes how divestiture would occur should it be necessary.

Section 5.1.1 “Alternative 1: No Action/Status Quo” (page 40):

This short section repeats the inaccurate canard that no specific “definition” of an excessive share is included in the FMP “as required under NS4 of the MSA.” For the reasons stated at length above, this statement is inaccurate and should be deleted.

IV. Public Hearing Document includes no evidence or basis for how/why ITQ holdings in excess of the respective proposed percentage caps would be “excessive”

The theory behind alternatives 2 through 4 and their “sub-alternatives” is that ITQ holdings in excess of any of the proposed percentage caps would be deemed “excessive” and impermissible under the FMP. For example, Alternative 2.2 proposes a single cap of 49% for surfclams and quahogs. Therefore, ITQ ownership of 50%, or 55%, would be deemed “an excessive share.” Why? Where is the basis and what is the evidence for proposing that ownership of 49% of ITQs is acceptable, but ownership of 50% would be “excessive”? 
Similarly, alternatives 3.2 and 3.3 propose 40% and 49% caps, respectively, for combined ownership and leasing of ITQ shares. This means that, for example, if 3.2 were selected, combined ownership/leasing of 41% of ITQs would be “excessive” although ownership/leasing of 40% would not. Where is the evidence and what is the basis for this? How does the additional 1% – or any additional percentage – make that share “excessive”?

Nothing in the hearing draft, or in the discussion of any of the alternatives, explains how/why a 28% or 49% cap would be acceptable, but 29% or 50% would be “excessive.” The same is true of the 40% and 49% caps in 3.2 and 3.3. Put another way, the percentage caps are not based upon any evidence or analysis of economic or anti-competitive behavior; instead, they are simply arbitrary.

As a proposed administrative rule the pending amendment cannot be arbitrary and capricious if it is to have a legal basis. To keep the proposed amendment from the “arbitrary and capricious” category, the Council must identify a rational, evidentiary basis for why each of the proposed percentages represents acceptable ownership, but even an additional one percent in each instance would become an “excessive” share, that is, would yield market power. Nowhere does the public hearing draft attempt to explain what the basis for these arbitrary caps might be, and this document should not go out to public hearing until those bases are identified so that the public and industry fairly may comment upon them during the hearing process.

V. The Public Hearing Document Does Not Define or Address Permissible “Leasing”

Multiple alternatives proposed by the draft include limitations on the “leasing” of allocation/ITQ rights — but nowhere is it explained what is intended by the term “leasing.” This was a significant issue considered by the Compass Lexecon economists who concluded that there should be no constraints on leases of one year or less, because leases of such short duration could not really support the exercise of longer term market power.

At the very least, the same exclusion on leasing prohibitions should be included in the alternatives — that is, leases of one year or less should not be considered against any “percentage cap.” This has a practical purpose beyond the point made by Compass Lexecon. There are many short term lease arrangements made throughout every fishing year that result from market ups and downs, short term, during the course of each such year. These short term leases are intended only to address short terms needs for additional harvest rights, and have nothing to do with an effort to accumulate market power. Indeed, some ITQ rights are leased and released several times during the course of a year for this same purpose. So such short term leases should not be included against any percentage cap.

And on a related note, the draft document does not explain, but should, whether an entity will have additional harvesting/processing rights even if he/it reaches the percentage cap that is finally selected. Assume for example that the percentage cap is 49% for both ownership and leasing. But assume further that an entity reaches that cap, but, as has been true for the past decade, there are large
amounts of the quota unharvested (generally, 40% for each species). Why shouldn’t that individual or identity be able to lease further quota rights for the remainder of the year in order to continue to use that unharvested allocation? It should be clear that there are no constraints on continuing to harvest, or purchase/lease shellstock, even when a percentage cap is reached – provided that there is still ample quota available. This only makes sense as a means of achieving optimum yield, and the plan should address this.

For all of the reasons described above the draft public hearing document is not yet ready for public hearing, and the issues addressed herein should be given further consideration by the staff, the SCOQ Committee and the Industry Advisory Panel with a revised final draft to come before the Council when that work is finished.

Very truly yours,

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

TTA/tsd
SC/OQ Excessive Shares Amendment Comments

Mid Atlantic Fishery Management Council Members,

Truex Enterprises owns a number of surfclam and ocean quahog vessels, which operate from Atlantic City, NJ to New Bedford, MA. Truex Enterprises officer also owns a number of companies that have surfclam and ocean quahogs ITQs.

Before January 1, 1990, our collective fleet land a large percentage of surfclams and some ocean quahogs. Under amendment 8, our allocation of surfclams was going to be decreased by a substantial percentage because the ITQ system was structured to give the “have nots” more quota so they would support the amendment. Since the quota was being landed, the vessels landing the most were the ones that were going to be allocated much least than they were catching. For that reason, We, Truex Enterprises strongly opposed amendment 8.

It goes without saying that the “have nots” became supporters of amendment 8 when they were going to receive more than they caught. Therefore, there were enough companies supporting the amendment to have it pass and be implemented.

On January 1, 1990, we at Truex Enterprise had customers that had more demand than we had clams to supply because of the loss of access to the surfclam resource under the new ITQ system. However, there were a number of ITQ holders that had gotten out of the business and retired who were allocated ITQs and were willing to sell then to us. It did not make us happy to buy what the day before we were catching. However, we being the second-generation clam fishermen were in the business for the long term and had no choice but to go pay very high prices for the ITQ that we needed to continue in business. We also leased product from owners that did not want to sell but to lease their quota to the highest bidder.

Later, the large customers reduced their promotions on clam products because they had created more demand than there was supply, and ran the fishery out of product and we had to raise the price. That was a mistake for demanding higher prices. That infuriated the big retail clam chowder producers who then said that they would stop promoting clam products, which they did and continued to do so to this day.
We, at Truex Enterprises have invested heavily and now find ourselves in a possible situation like 1990, we could wake up to find that we do not have enough clams to fill the demand of our customers, if Alternatives 5 and 6 of the Excessive Shares amendment is implemented. We were badly hurt in 1990, and it appears that it could happen again, adding insult to injury by having to rent quota again after purchasing and renting large numbers of ITQs to operate our business. Moreover, the objective of the FMP was to get the surpluses capital out of the fishery, which we help, do. Alternatives 5 and 6 are simply unfair to the people who put up the money.

Thank you for considering out comments on the Excessive Shares Amendment.

Sincerely,

James Meyers, 
President.