



New England Fishery Management Council

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John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

March 14, 2011

Ms. Patricia Kurkul  
Regional Administrator  
NOAA/NMFS  
55 Great Republic Drive  
Gloucester, MA 01930

Dear Pat:

In accordance with provisions of the Magnuson-Stevens Act, the Council Chair has reviewed the revised draft regulatory text for Amendment 15 to the Atlantic Sea Scallop FMP in order to deem whether it is consistent with the amendment text and the Council's intent. The review is based on the draft regulatory text provided by email to Paul Howard on March 9, 2011. I have concluded that the proposed regulatory text implementing Amendment 15 measures is consistent with Council intent provided the attached modifications are made to the final text of the draft regulations. If these adjustments are made or identified in the draft proposed rule so the public can comment further, the Council deems these regulations consistent.

In addition, in a few instances, NMFS is using the opportunity of this rule to adjust management measures that were adopted in earlier actions. I again suggest our staffs discuss this practice in the future as it complicates the deeming process. Proposed changes may be consistent with the management plan but not directly authorized by the current action. I am unclear if the Council is being asked to deem all of the draft regulations consistent with this specific action or the FMP in general. I understand that it is more efficient to make other adjustments when the regulations are being revised for the current action, but it complicates our review and deeming process. Perhaps in the future the draft regulations can be separated out or sent separately so it is clear to the Council which revisions are related to Amendment 15 and which revisions are additional adjustments the Agency wants to make to clarify existing regulations.

Please feel free to call me with any concerns.

Sincerely,

John Pappalardo  
Chairman

attachment

## Attachment 1

### Summary of Issues Identified during Council Deeming of Amendment 15 Draft Regulations

1. In §648.4 section (a)(2)(ii)(A): Individual fishing quota LAGC permit: the regulations have been clarified so that a LAGC IFQ vessel can now be in possession of up to 600 pounds of shucked scallop meats, or land up to 50 bu. of in-shell scallops per trip, or possess up to 100 bu. of in-shell scallops seaward of the demarcation line. However, the intent of the Council was to not only increase the scallop meat weight possession limit to 600 pounds from 400 pounds, but also the in-shell landings limit, to go from 50 bu to 75 bu. While Framework 14 implemented that all vessels be restricted to 50 bu. of in-shell scallop within the VMS line to prevent vessels from shucking outside of fishing time, now that the LAGC IFQ possession limit has been increased, it should apply to all LAGC IFQ permits, not just vessels that land scallop meats. Therefore, the landings possession limit should be increased to 75 bu. of in-shell scallop for all LAGC IFQ permits.
2. In §648.53 section (b)(1) LPUE: there is reference to how LPUE estimates will be used to calculate DAS. It would be useful to define what LPUE actually is here in this section or in the definition section of the regulations.
3. In §648.53 section (b)(4) there is a sentence that specifies how DAS shall be determined. This is not exactly accurate in terms of how the model works and does not account for catch from access areas. It also does not seem necessary to have all the specific details of the method in the regulations. The Council suggests that the sentence, “*DAS allocations shall be determined by dividing the ACT specified in paragraph (a)(3)(ii) of this section by the LPUE specified in paragraph (b)(1) of this section, then dividing by the number of scallop vessels eligible for a full-time limited access scallop permit for the applicable fishing year*” be revised to read something like: “DAS allocations shall be determined by distributing the portion of ACT, as reduced by catch associated with access area catch, and dividing that amongst vessels in the form of DAS calculated by applying estimates of open area LPUE specified in paragraph (b)(1) of this section.”
4. In addition the next sentence should be clarified to reflect that occasional vessels are to receive the equivalent of 1/12 of a full-time permit allocation, so 8.33% and not 8%.
5. In §648.53 section (b)(ii) Accountability measures (AMs) the timing of the limited access AM is described. “*The AM shall take effect in the second fishing year following the fishing year in which the overage occurred. For example, landings in excess of the ACL in fishing year 2011 would result in DAS reduction AM in fishing year 2013.*” This is not completely consistent with final Council intent.

Alternative 3.2.3.9.1 Limited Access AMs in Amendment 15 specifies that AMs will be effective in the subsequent year. During development of Amendment 15 it was uncertain if subsequent year AMs were workable, but in the end the Council supported that if feasible, AMs are more effective if they can be implemented in the subsequent fishing year. So while there may be places in the document that suggest AMs may have to be two years out, the final intent of the

Council was to make all AMs effective the subsequent year: LA AMs, LAGC AMs, NGOM AM , as well as AMs related to the YT flounder sub-ACL.

Within the timing of ACL section of Amendment 15 it is explained that notification of DAS reductions will likely be after the start of that fishing year. Therefore, if a vessel exceeds the ultimate allocation for that year because they had already fished all their original DAS, their DAS the following year should be reduced by the same amount to account for the reduction caused by the AM. This is how DAS allocations currently work in this fishery if specifications are implemented after the start of the fishing year and a vessel already fished more than the final annual allocation.

This may complicate other regulations such as applying additional catch to the LAGC sub-ACL if the LA AM exception applies and LA AMs are not triggered, but that too can be addressed by allocating additional pounds to LAGC vessels mid-year or whenever that process is completed. By September of any fishing year the Agency will know if the previous ACL was exceeded and by how much, if the LA AM exception applies, DAS reduction needed if LA AM exception does not apply, additional total catch for LAGC sub-ACL if applicable, and individual increases in quota if LA AM exception is triggered and individual vessels are granted more catch based on a larger total LAGC sub-ACL.

6. In §648.53 section (b)(4)(iii) Limited access AM exception: it is explained that the AM will not be triggered if the updated estimate of fishing mortality rate is less than 0.24. The regulations do not explain the relevance of 0.24; it may be useful to compare this value to the threshold and associated F for ABC so it is clear what this value means.
7. In §648.53 section (b)(4)(iii)(B) and (b)(4)(iv) there is no reference to how the timing will work if an AM is triggered. A sentence similar to the following should be added; “the AM shall take effect in fishing year following the fishing year in which the overage occurred.” An example should be included as well for both sections.
8. In §648.53 section (b)(4)(iv) Limited access fleet AM and exception provision timing: a sentence has been included at the end that the Council and public should be made aware of. The Council may have concurred with this provision if it was raised during development, but it was not spelled out as such in Amendment 15. Specifically, a clause has been included that if NMFS does not concur with the Scallop PDT recommendations related to invoking the limited access AM exception, the AM shall be implemented regardless. While NMFS has the final authority related to all fishery regulations, the public should be aware of this specific addition in case in the future AMs are triggered even though the updated estimate of F is 0.24 or less.
9. In §648.53 section (d) End-of-year carry-over for open area DAS: there is reference to the fact that carry-over DAS are accounted for in setting the ACT for the limited access fleet, thus do not require any adjustment to account for additional catch. This sentence could imply that if DAS are carried forward and that additional catch causes the LA sub-ACL to be exceeded there will not be any adjustment to account for that additional catch. That is not the case. Amendment 15 identifies carry-over DAS as a source of management uncertainty and that is cited as one of the primary reasons for having a buffer between the LA sub-ACL and sub-ACT, but if carry-over DAS cause the LA sub-ACL to be exceeded, AMs will be triggered and DAS will be reduced in the future provided the LA AM exception does not apply. The language, “do not require any adjustment to account for additional catch” should be modified.

10. In §648.53 section (h)(2)(v)(B) the regulations explain how the accounting will work in terms of LAGC IFQ sub-ACL and carryover of IFQ. This was not specifically stated in an alternative in Amendment 15 and the Council concurs with how it is drafted in the regulations; it is consistent with Council intent that carryover IFQ should not invoke AMs for the LAGC IFQ fishery.
11. Similarly, in §648.53 section (h)(2)(vi) AM for the IFQ fleet: text has been added to allow a vessel that has a negative IFQ balance to lease or transfer IFQ to balance the IFQ. This was not specifically stated in an alternative in Amendment 15, but the Council concurs with how it is drafted in the regulations; it is consistent with Council intent.
12. In §648.55 section (c)(4) the deduction for observer set-aside should be 1%, not 2% as stated in the draft regulations.
13. In §648.55 section (d) and §648.64 section (a) there is reference to specifically how the YT sub-ACL will be allocated based on analyses by the PDT. All reference to how this will be done should be removed. The allocation decision is under the authority of the multispecies regulations, and while the allocation for 2010 was based on 90% of estimated bycatch of YT from scallop fishing, that is not fixed and was a different amount under Framework 45.
14. In §648.55 section (f)(37) an item has been added to the list of frameworkable items: increases or decreases in the LAGC IFQ possession limit. As the Council developed Amendment 15 the intent of that measure was related to the LAGC IFQ permit specifically. The way this is currently worded implies that any LAGC permit possession limit could be revised by framework (IFQ, NGOM or incidental catch). The Council does not disagree that those should be considered by framework, but the proposed rule may want to note that so the public can further comment on that directly.
15. In §648.56 section (c) there is reference to DAS set-aside for research. This should be removed here and anywhere else it appears in the final regulations. Amendment 15 replaced the DAS-set aside for research with a set poundage set-aside – equivalent to 1.25 million pounds, rather than a combination of pounds from access areas and DAS from open areas.
16. In §648.64 section (b)(2) Duration of closure: it should be noted for all YT AMs closures that the maximum duration is one fishing year so it is clear that AMs will not carry into a second fishing year. Also, the last row in each table related to the closure duration should have a value and “and higher” so that it is clear that any overage above that amount is equivalent to a full year closure.
17. In §648.56 section (f) AM for the 2011 fishing year: the Council notes that the agency clarified how the “reachback AM” will work in 2011 if Amendment 15 is implemented late. This was not specifically spelled out in the amendment because the hope was that the action would be implemented near or soon after the start of the 2011 fishing year. What the Agency has included in the draft regulations would be consistent with Council intent, but this should be noted in the preamble so the public is further aware of this clarification.