



## New England Fishery Management Council

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Mr. Michael Pentony  
Regional Administrator  
NMFS/GARFO  
55 Great Republic Drive  
Gloucester, MA 01930-2276

Dear Mike:

Thank you for providing the New England Fishery Management Council (Council; NEFMC) the January 15, 2021 letter submitted by the Scallopers Campaign to the Assistant Administrator for Fisheries. The letter requested that the Secretary of Commerce prepare an amendment to the Scallop FMP that would authorize leasing in the limited access scallop fishery. We carefully reviewed the petition and other correspondence submitted by the Scallopers Campaign. We do not agree that action is needed by the Secretary. The Scallopers Campaign has mischaracterized the Council process and history of the Council's discussion on leasing in the limited access fishery. As a result, we do not believe that the petition for rulemaking has merit and wish to clarify the administrative record on Council proceedings related to this matter.

The Atlantic Sea Scallop fishery is widely recognized as a success story. Close cooperation between the Council, the National Marine Fisheries Service, and the scallop industry has resulted in a highly profitable and sustainable industry. Innovative management practices – such as rotational access areas, a research set-aside program, and industry funded monitoring – were developed through the efforts of all three partners. Even with this fishery, because of limited resources, the Council is forced to make choices on which actions it will pursue each year. These choices are made through a structured and transparent process that reflects the judgment of the entire Council and provides numerous opportunities for public input, including from the Council's advisory panels. Ultimately, however, the decisions are made by the Council members. Often the Council does not choose to select management actions that are suggested by the public. This reflects the need to prioritize management actions and does not reflect a lack of compliance with the Magnuson-Stevens Act (MSA). At its most basic level, this request from the Scallopers Campaign for a secretarial amendment does not identify violations of the MSA, but reflects dissatisfaction with the Council's choice of management priorities.

With respect to the scallop leasing issue, it is worth first reviewing the actual record and correcting the errors in the letter from the Scallopers Campaign. Leasing for the limited access fleet was most recently considered by the Council in Amendment 15. After three and a half years developing the amendment, the leasing and stacking options were rejected by the Council in a close vote in September 2010. Attachment 1 details subsequent efforts to have the Council consider a leasing program. This summary highlights and corrects the numerous errors in the Scallopers Campaign letter.

With the correct record in mind, it is worth addressing the arguments made to justify the need for a Secretarial Amendment. These are:

- The FMP is not consistent with National Standards 5 and 10;
- The Council is ignoring the wishes of a "supermajority" of the industry and the Scallop Advisory Panel.

The Magnuson-Stevens Act requires that Councils prepare fishery management plans to be consistent with all ten national standards identified in Section 301 of 16 U.S.C. 1851. The NEFMC has done so in the Atlantic Sea Scallop FMP by working collaboratively with the fishery stakeholders and the National Marine Fisheries Service (NMFS). It is worth noting that the Secretary of Commerce has reviewed 4 amendments and 17 framework actions for the Scallop Fishery Management Plan since 2004 and concluded that all approved measures met the requirements of the MSA and applicable laws. Contrary to the claim in the letter, the determination has repeatedly been made that the FMP is consistent with the National Standards. The following section will rebut the argument in more detail.

The Scallopers Campaign argument that the Scallop FMP includes measures that are inconsistent with National Standard 5 is inaccurate. The Council has not imposed unnecessary burdens that increase costs and limit operational flexibility. The primary purpose of establishing the limited access program, including the one-permit-one-vessel criteria, was to reduce fleet capacity to better control fishing mortality on what was, at that time, an over exploited resource. Development of the limited access program was done in tandem with a suite of other measures that significantly changed how the scallop fishery was managed. The effort reduction through Amendment 4 established the foundation of a management framework still used today. Those changes were a necessary shift in how the fishery was administered in the hopes that the scallop resource and industry would thrive in the future. The one-permit-one-vessel approach was maintained during the establishment of rotational management and managing fishing mortality through annual catch limits. While management has evolved since 1994, the key measures enacted through Amendment 4 have remained, including the one-permit-one-vessel restriction, resulting in the scallop resource rebounding from an overfished status to record high biomass, landings, and revenue. The “unnecessary burdens that increase costs and limit operational flexibility” that the Scallopers Campaign believes the Council has imposed on the scallop fishery are, in fact, a key chapter in the story of the scallop fishery’s rise to becoming one most valuable and highly regarded fisheries in the world. As noted in the Campaign’s letter, the rebuilding success has resulted in a full-time scallop fleet of “multi-million-dollar” vessels generating hundreds of millions of dollars in revenue each year.

Other claims that the Scallop FMP is not consistent with National Standard 5 are simply not true. Working collaboratively with the fishing industry, the Council has increased flexibility and efficiency for the limited access component over the past several decades, including but not limited to measures such as (50 CFR §648.50 through 50 CFR §648.65): allowing additional crew on access area trips, allowing “broken trips”, allowing limited access vessels to obtain groundfish permits, creating the ability for limited access vessels to exchange partial trips to facilitate fishing opportunities in access areas of preference, establishing an expedited specification implementation process, facilitating access to groundfish and former habitat closures, modifying the southern boundary of the days-at-sea (DAS) demarcation line to allow vessels in the southern extent of the fishery to better utilize open area DAS allocations, establishing an open area DAS carryover provision, allowing access area allocations to be harvested in the first 60 days of the following fishing year, establishing standard default

measures, etc. All of the above are examples of measures that improve efficiency in the scallop fishery. While a leasing program is not included on this list, there is nothing in National Standard 5, or anywhere in the MSA for that matter, that states a leasing program must be established in order for a fishery to be considered efficient.

Perhaps in order to counter the argument that leasing may conflict with the National Standard 5 prohibition on measures whose sole purpose is economic allocation, the Campaign looks to National Standard 10 to argue that leasing will improve vessel safety. The Council remains committed to working with the scallop industry to promote safety at sea, as it does when considering any proposed change to the FMP, many of which are listed in the previous paragraph. The Campaign claims that safety hazards (National Standard 10) associated with vessel age, and one crew working multiple vessels in a year, could be reduced through the development of a leasing program. The theory is that older vessels would be retired or replaced with newer vessels that would be safer, and that new or existing vessels would fish more days, reducing the need for crews to transfer between multiple boats. This might occur, but this option would be most readily available only to owners of multiple permits and thus any fleet-wide benefits would be limited. The Council's direct experience with this theory is that adoption of leasing in the LAGC IFQ component did not result in a substantial amount of new vessel builds. The LAGC IFQ program review for 2010 to 2015 found that the introduction of a catch share program with leasing did not lead to immediate investment in building new vessels, even though a substantial number of active LAGC IFQ vessels were also built immediately after the implementation of the MSA and are over 40 years old.

The Scallopers Campaign has repeatedly claimed that development of a leasing program has been supported by a "supermajority" of limited access vessel owners. The term "supermajority" is not defined in the Magnuson-Stevens Act; however, we assume that the Scallopers Campaign means much more than half of all limited access vessel owners. This claim is difficult to corroborate, as the Campaign's summary of a 2020 survey states that responses were received from only 29 owners. Understanding ownership interest by entities in the scallop fishery is nuanced; what we know is that the spread of ownership interest in terms of the number of single or multiple vessel owners is diverse (see Table 1). We feel it is important to clearly state the range of ownership interest so that members of the public can make their own judgements around the number of limited access vessel owners in the fishery today.

Regardless of where ownership interests lie and aside from the specific topic of leasing, what is most important to the Council is ensuring that all interested parties have the opportunity to deliberate controversial issues in a public forum. This is where the Council process thrives, but where the secretarial action process falls short. Should you choose to respond positively to the Campaign's petition for secretarial action, you would be choosing to side-step the Council process, which is designed to address such controversial and complex allocation issues. This is not to say the Council will choose to prioritize this issue in the future, but rather to say that the Council is the most appropriate body to undertake such a large issue. The Council is also the appropriate body for determining the priority of management actions. You acknowledge this in the outset of your March 10, 2021 letter by stating that the Magnuson-Stevens Act specifically vests the Council with the authority to manage Atlantic sea scallops.

In your March 10, 2021 letter, you ask the Council to consider the current limited access program and compare the benefits and drawbacks of developing a leasing program. We do not

believe it is possible to make such a comparison until the details of the leasing program are known. A leasing program could be developed in any number of ways, and therefore there could be a wide range of drawbacks or benefits compared to how the scallop fishery is currently managed. That being said, it is worth noting that the Council did develop a range of consolidation alternatives in Amendment 15 (2011), including measures that considered allowing leasing in the limited access fishery. The fishery has evolved since that time, but the impacts of these measures were analyzed and could be used as an approximate reference in the place of the more ambiguous evaluation requested in your March 10, 2021 letter. What is clear from the Amendment 15 discussion is that the benefits and drawbacks are determined by the details of the leasing program. The open-area leasing program in Amendment 15, for example, was shown to increase or decrease scallop landings depending on the size of an adjustment to leased DAS. Amendment 15 also estimated that DAS allocations might need to be reduced for all permit holders if adjustments were not made for fishing power and increased efficiency. Operating costs were generally found to decline, but the analyses also highlighted negative impacts on regional jobs. These results may not be applicable to a future leasing program but do illustrate the difficulty in comparing a leasing program with an unknown design to the current program.

We recognize that the Campaign has outlined several aspects of what a leasing program might look like, including in a letter to the Council on May 4, 2021. While that is one option for a program, it is not the only one, nor is there any reason to expect the Council's final design would match this suggestion. Clearly, the Campaign's proposal will result in the distribution of the economic ownership benefits to fewer active ownership entities, and without carefully designed safeguards, would reduce the number of valuable active fishing opportunities that would be available to other individuals and entities in the U.S. in the future. To date, the leasing proposal has not even acknowledged this issue, which is very important and time-consuming to address.

We find no merit to the claim that the Council has sidelined its responsibility to be responsive to requests from the industry. The Council and the Scallop Committee have consistently made time on meeting agendas to entertain discussion on this topic, even when it was not identified as a work priority. For example, between February 2020 and January 2021, the Scallopers Campaign either took the opportunity to provide comment on the leasing proposal, or discussion related to the leasing proposal was held, at all Scallop Advisory Panel meetings (6 of 6), all Scallop Committee meetings (6 of 6), and 4 out of the 6 Council meetings that convened during this time. Also during that time, Mr. Pike and the Campaign corresponded with Council members and Council staff on a fairly regular basis, often times seeking guidance on how best to advocate for the leasing proposal through the Council's priority process. While the leasing proposal was given serious consideration at all levels throughout the 2021 priority process, the Council, weighing the overall management needs of the fishery, and after careful and thoughtful deliberation, has simply come to a different conclusion than the Campaign about what issues should be pursued. The Council is actively addressing key management questions that are directly related to the success of the Limited Access (LA) component, such as the evaluation of rotational management and an evaluation of scallop projection models in 2023. In our view the results of these efforts would enrich the discussion about a leasing program for the LA component.

The Council is poised to begin the 2022 priorities process in September. The initial list of possible work priorities will include two options for addressing leasing from last year's process:

a multi-year priority to “develop limited access vessel DAS and access area trip leasing suggested by the Scallopers Campaign” and an annual work priority to “conduct scoping or listening sessions on a LA DAS and AA trips leasing program to assess the need for a leasing program and whether to move forward with developing an amendment.” We encourage the Campaign to continue to work within the Council priority setting process to advocate for this issue, but we emphasize that the decision on what actions to pursue rests with the Council.

Sincerely,

*Table 1 – The number of people that own limited access scallop vessels by the number of vessels owned (source: GARFO APSD, 4/5/2021).*

Number of People	That Own This Many Vessels	% That Own This Many Vessels
118	1	<b>49%</b>
31	2	<b>13%</b>
13	3	<b>5%</b>
16	4	<b>7%</b>
5	5	<b>2%</b>
7	6	<b>3%</b>
3	7	<b>1%</b>
1	8	<b>0%</b>
31	11	<b>13%</b>
2	12	<b>1%</b>
4	14	<b>2%</b>
8	17	<b>3%</b>

## **Attachment 1 – Council Discussion Related to Leasing/Consolidation post-Amendment 15**

In August 2017, the East Coast Scallop Harvester Association (ECSHA) requested the Council consider leasing and consolidation in the scallop fishery. At that time, the request was that the Council initiate an amendment to establish a voluntary sector-style management system that would allow individuals who do not share common ownership of limited access vessels to receive scallop allocations in pounds (i.e., output control) as opposed to open area days at sea (i.e., input control), and to allow allocations to be transferred within and among sectors. Any and all requests for potential work priorities are added to a list for consideration by the Council's Advisory Panels, Oversight Committees, and the Council itself when discussing work priorities. This was the case in 2017 for the ECSHA request, which the Scallop Advisory Panel voted to not pursue as a work priority in 2018 on two separate occasions. The Scallop Committee also considered the request on two separate occasions in 2017 and unanimously recommended that the Council take up other important work priorities during 2018. The Council ranked the ECSHA request last on the list of priorities for 2018 and ultimately prioritized developing specifications, modifying access areas following changes to essential fish habitat (EFH) designations through Omnibus Habitat Amendment 2, and addressing persisting issues in the LAGC fishery (i.e., the Northern Gulf of Maine, LAGC IFQ possession limit) through Amendment 21.

Both the Scallop AP and Scallop Committee had initial discussions about 2019 priorities in September 2018 and neither group recommended adding the ECSHA request to the list for consideration. Instead, both groups recommended (by consensus) that "evaluation of the rotational management program" and "evaluate options for harvesting the slow growing scallops in the Nantucket Lightship South Deep" be added to the list for the Council's consideration. No correspondence was received prior to the September 2018 Council meeting related to the request, though a letter detailing private port meetings that were held to discuss problems and issues facing the scallop fishery was delivered to the Council at its September 2018 meeting. The letter essentially requested that the Council begin scoping the problems and issues facing the scallop fishery that were raised during privately held port meetings earlier that year. In October 2018, the AP recommended that "ECSHA – problems and challenges in fishery" be ranked 4<sup>th</sup> in the list of 2019 scallop priorities and the Committee ranked scoping on this issue last in its list of priorities (6<sup>th</sup> of 6) recommended to the Council. The Executive Committee considered the list in November 2018 and noted that Council members had ranked the request for scoping 80<sup>th</sup> out of 82 priorities overall. The Scallop AP and Committee met after the Executive Committee discussed 2019 priorities, and neither the AP or Committee agendas noticed that the priorities discussion that concluded in October 2018 would be revisited. The Committee chose not to revisit the priorities discussion because they had already made their recommendations to the Council, and because the public was not notified that the discussion would be reopened for debate. Prior to the December 2018 Council meeting, several letters were submitted asking the Council to prioritize scoping efforts that could lead to an amendment to address issues facing the scallop industry; however, similar to the year before, the Council considered the request along with other work items, accounted for staff resources available, and ultimately felt that other issues important to the scallop fishery were of higher priority for 2019, such as specifications, supporting the RSA process, evaluating the rotational management program, tracking bycatch inseason, mitigating impacts to Georges Bank yellowtail flounder, specifying allocation review triggers, and the multi-year work item that focused on the Northern Gulf of Maine Management area and the LAGC IFQ component of the fishery.

At the outset of work on 2019 priorities, the AP and Committee revisited priorities in light of an emerging issue that was impactful to the entire scallop fishery: developing ways to access the small, slow growing scallops in the Nantucket Lightship South Deep area. At the spoken support for this issue at the AP and Committee, the Council understood the need for work on this item

and decided to prioritize it and drop “evaluation of the rotational management program” as a priority given the limited staff resources available to make progress on the lengthy list of 2019 priorities. At that time, at least one Council member noted that while the Nantucket Lightship South Deep was a more pressing item to be addressed, evaluation of the rotational management program was important to revisit and should not be put on the shelf forever. Later that year, the Council considered a full list of work items that could be potentially worked on in 2020. This list included a variation of past requests from the ECSHA, different in that it requested the Council begin developing a pilot project for leasing in the limited access fishery. While the AP did recommend this as a #3 priority for 2020 at their October 2019 meeting, the Committee offered this item as a lower recommendation on the list because there were other items that were more important to address at the time, including but not limited to work on Amendment 21, a major action to the Scallop FMP that continues to take considerable staff resources to this day to complete. While many spoke in support of the AP’s recommendation at the October 2019 Committee meeting, many industry members (including owners of limited access scallop vessels) spoke against prioritizing the pilot leasing project. Furthermore, the Committee never specified which priorities were “above or below the line” in their October 2019 recommendation to the Council. Much like the year before, the AP reaffirmed their support for prioritizing the pilot leasing project at the November 2019 meeting; however, because revisiting priority recommendations was not noticed on the November 2019 Committee agenda, the Committee elected to not revisit the discussion. In December 2019, the Council again considered the lengthy list of potential work priorities for the following year, accounted for staff time and available resources, and decided that other work items were of higher priority to be worked on in 2020, including several items that were widely supported by all industry members such as developing specifications, supporting the RSA process, tracking bycatch in-season, and completing Amendment 21 to the Scallop FMP. The Council did consider the ECSHA request to develop a pilot leasing program (i.e., ranked 85<sup>th</sup> of 86 by the Council overall) through a motion to amend, but that motion failed 2/13/1.

Moving forward to 2020, Mr. Pike communicated to the Council through various forms of correspondence on what was then rebranded as the “Scallopers Campaign” and updated the Council on private outreach conducted throughout the course of the year. A July 24, 2020 letter requests that the Council initiate development of an amendment for leasing in the limited access fishery including a very high-level statement of purpose and need for such a program. In fall of 2020, the AP and Committee did move forward recommend that listening sessions for development of a leasing program be prioritized for 2021. In October 2020, the Executive Committee discussed the Scallop Committee’s recommendation to prioritize listening sessions and did not come to a consensus on which scallop priorities to recommend to the Council. Following discussion around several items, including listening sessions to assess the need for a leasing program, the Executive Committee did agree that their debate was a choice between two work items: 1) conduct scoping/listening sessions to assess the need for a leasing program, or 2) evaluate the rotational management program and do not conduct scoping/listening sessions on leasing. The Council held a special meeting in late October 2020 to address 2021 priorities. Consistent with the Executive Committee’s discussion early that month between two potential scallop priorities, a motion to substitute was put forward to prioritize evaluation of rotational management in place of listening sessions to assess the need for a leasing program in the limited access fishery. As is always the case in the Council’s public process, all interested parties had the opportunity to speak to the substitute motion before the Council ultimately decided to vote in favor of adding evaluation of rotational management over the leasing work item. This was done in consideration of the lengthy list of potential priorities, accounting for staff time and available resources, and seeing other work items that were of higher priority that were supported across the board by industry members and Council members alike. The final list of 2021 priorities included completing on-going actions that were delayed as a result of the pandemic (i.e., FW33, A21),

developing specifications, supporting the RSA process, tracking bycatch in-season, reviewing and implementing recommendations from the 2015 scallop survey review panel, and considering modifications to the methods used to count LAGC IFQ access area trips. The Council also moved forward a recommendation to start work on developing an action to revise habitat management areas on the Northern Edge of Georges Bank, a priority that has been widely supported by all scallop fishermen since the start of Omnibus Habitat Amendment 2.

DRAFT