

COMBINED FRAMEWORK ADJUSTMENT
Adjustment #7 to the Northeast Multispecies FMP
Adjustment #3 to the Scallop FMP, and
Adjustment #1 to the Lobster FMP

**To eliminate the requirement that permit applicants own title to a fishing vessel
at the time they initially apply for limited access/moratorium permits**

Prepared by
New England Fishery Management Council
in consultation with
National Marine Fisheries Service

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Combined Framework Adjustment

Adjustment #7 to the Northeast Multispecies FMP Adjustment #3 to the Scallop FMP, and Adjustment #1 to the Lobster FMP

To eliminate the requirement that permit applicants own title to a fishing vessel at the time they initially apply for limited access/moratorium permits

1.0 INTRODUCTION

In 1994 NMFS implemented major amendments developed by the New England Fishery Management Council to the fishery management plans (FMPs) for the Atlantic sea scallop, northeast multispecies (groundfish) and the American lobster fisheries. The amendments, intended to eliminate overfishing in these fisheries, employed moratorium and access controls as a first step to cap or reduce fishing effort.

NMFS partially implemented Amendment 4 to the scallop and Amendment #5 to the groundfish FMP on March 1, 1994. Most of the remaining measures and some framework adjustments were implemented on May 1 and in subsequent months. NMFS implemented the approved sections of Amendment #5 to the lobster FMP on June 21, 1994 except for the limited access permit system, which will be implemented on January 1, 1995.

2.0 PURPOSE AND NEED

2.1 Need for adjustment

Under current regulations for the Atlantic sea scallop, northeast multispecies (groundfish) and the American lobster fisheries, to be eligible for a limited access permit in 1994, an applicant must own a vessel that qualifies under the various moratorium criteria for each of these fisheries. In addition, applicants must obtain a permit in 1994 to be eligible for limited access permits in future years. This situation creates a potential problem for anyone who holds fishing rights under the various moratorium provisions but does not own a vessel. This includes anyone or who recently sold or transferred a vessel and retained the fishing rights, but has not bought a new vessel in time to apply for a permit during the 1994 calendar year.

The requirement that applicants must own a vessel at the time of their initial application for a limited access permit also conflicts with the requirements for permit renewals. Under the current regulations, once an applicant has received a limited access/moratorium permit, the applicant may sell the vessel and renew the permit in order to retain the fishing rights indefinitely.

In developing the amendments, the Council adopted the policy that vessel owners should not be required to fish their vessels to be eligible to get or to renew moratorium or limited access permits. The Council did not want to force vessels to remain in currently overfished fisheries in order to retain fishing rights for the future. Also it did not want to force an applicant to buy and fish a vessel only to preserve future fishing rights.

In making this decision the Council weighed the potential biological benefits of two alternatives. One alternative was to require vessels to fish in order to remain eligible for a permit and thereby attempt to get additional effort reduction through possible attrition from vessels that failed to fish within a defined time period. The other was to not require vessels to fish to retain future eligibility. The Council chose the latter approach because it believed that it had a greater probability of minimizing fishing effort in the early years of plan implementation when it is critical to get as much stock rebuilding as possible. It also believed that the first approach would not work because vessel owners would find a way to maintain potentially valuable fishing rights.

Additionally, the Council was concerned that as a practical matter some of the otherwise ineligible applicants could retain fishing rights by making "paper transactions" to acquire vessels in order to qualify for permits. For example an applicant could acquire a vessel with an agreement to sell it back to the original seller once the applicant obtained a limited access permit.

Although the Council did not explicitly address the issue of vessel ownership as a requirement for permit eligibility in the various FMP amendments, neither did it adopt a policy requiring applicants to own a vessel at the time of application. The idea that, to the extent possible, permits should be attached to vessels to prevent speculative buying and selling of fishing rights further added to the confusion.

Finally the regulations were written to minimize the change in the administration of the fisheries permit system. Federal permits have been issued to fishing vessels instead of to owners or operators. This practice was not a problem until the Council adopted limited access measures and potentially conflicting vessel replacement provisions. NMFS has not yet changed the permit system, partly because of the time the change would require, and partly because issuing permit numbers to vessels simplifies keeping track of vessels in the commercial fisheries data base. The proposed action will require NMFS to make minimal changes to the current permit system.

2.2 Publication of the action as a proposed rule and opportunity for public comment

The Council recommends that NMFS publish the adjustment as a proposed rule with an abbreviated comment period. This procedure will allow more public comment before the adjustment is implemented than is it were published as a final rule.

The Council has discussed and heard public comment on the this issue for several years during the development of the amendments to the Multispecies and Scallop FMPs. More recently, this problem has been discussed starting at the September Council meeting. Below is a list of recent meetings at which the issue has been discussed:

Date	Meeting	Location
9/21-22/94	Council	Southport, ME
10/4/94	Interspecies Committee	Peabody, MA
10/28-29/94	Council	Danvers, MA

The public is informed of Committee meetings by a letter to interested parties and advisors, including the press and industry associations. At the September 21-22, 1994 meeting, the Council initiated this framework action. The public is notified of all Council meetings by publication of a notice in the *Federal Register* and the agenda is mailed to approximately 1,500 interested parties including local and trade publications and industry associations.

3.0 PROPOSED ACTION AND ALTERNATIVES

3.1 Proposed action

The proposed action would allow an applicant with fishing rights but who does not currently own title to a vessel, to still qualify for a federal limited access/moratorium vessel permit for 1994 and subsequent years in the fisheries for Atlantic sea scallops, northeast multispecies (groundfish) and American lobster. The permit will specify the physical characteristics of the vessel for which the fishing rights were originally established, and only will be valid for vessels that fall within the plan-specified vessel replacement restrictions, if applicable.

For example, the vessel replacement restrictions would be based on the physical characteristics, the length, tonnage and horsepower, of the vessel that originally qualified under the limited access/moratorium criteria. At present this provision would apply only to the scallop and groundfish fisheries because there are no restrictions on the size or power of replacement vessels in the lobster fishery.

3.2 Alternatives to the proposed action - no action

Because of the nature of the problem, the only alternative to the proposed action is simply to not take any action. The current regulations prevent an applicant who does not own a vessel at the time of application from being issued a limited access/moratorium permit. Additionally, the current regulations would prevent such an applicant from qualifying for a limited access permit in the future (unless the applicant obtains the permit by acquiring another vessel that has qualified).

The no-action alternative causes several problems. First, the current regulations might be legally challenged on procedural grounds. Potential applicants were not informed of the vessel ownership requirement at the time of the public hearings for these FMP amendments and, therefore, did not have adequate opportunity to comment on this issue. In fact, if they had carefully followed the discussions of the Council and its species committees they may have been led to believe they would not be required to own a vessel when applying for a limited access/moratorium permit.

Second, taking no action would allow a restriction to remain in effect that the Council never intended to implement. This restriction could cause significant financial loss to applicants who might otherwise qualify for limited access/moratorium permits by forcing them to purchase and operate a vessel. Finally, the entry of any additional vessels would have a negative economic impact on other participants in these fisheries because the major fish stocks are either fully exploited or over-exploited.

4.0 ANALYSIS OF IMPACTS

4.1 Biological impacts

This proposed action affects only permit eligibility requirements and is not expected to have any biological impacts on the stocks managed under plans to which the adjustment would apply. The FMPs to which the measure applies will be monitored on the basis of whether they achieve their biological objectives and adjusted for any shortcomings. Consequently, the proposed action may affect the distribution of landings among vessels, but not the overall level of landings or fishing mortality.

4.2 Economic impacts

At present, information is not available about the number of vessel operations that might be affected, but the economic impacts of the proposed action are expected to be positive. The proposed action will not increase or decrease the overall level of fishing effort if current controls on effort are effective. It will, however, forestall investment in or the acquisition of additional vessels solely for the purpose of retaining fishing privileges. Under successful management these privileges could become very valuable as they have in other fisheries under limited access or rights-based management systems. Applicants who would qualify except for the fact that they do not own a vessel have a strong incentive to make a substantial investment in acquiring vessels to keep the fishing rights. Such expenditures would be counterproductive. First, they represent a needless expenditure of capital to maintain fishing rights and second, they could result in an increase in the number of active participants in fisheries that are severely overfished. Any increase in the number of active participants in the near future would have a negative impact on the ability of current participants to remain profitable during the next several years of rebuilding. The groundfish and scallop fisheries, in particular are barely sustaining today's harvesting industry.

4.3 Fisheries impacts

The proposed action will prevent possible negative impacts on other fisheries because it will forestall investment in or the acquisition of additional vessels solely for the purpose of retaining fishing privileges. Today, when most major commercial fisheries in the Northeast are either overfished or under restrictive management, additional investment in fish harvesting could increase fishing effort region-wide by increasing the competitive pressure for vessels to maintain or increase revenues to survive financially.

5.0 APPLICABLE LAW

5.1 Magnuson Act- Consistency with National Standards

Section 301 of the FCMA requires that any regulation promulgated to implement any FMP or amendment shall be consistent with the seven national standards listed below.

1. *Conservation and management measures shall prevent over-fishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.*

The proposed action will more effectively implement Council policy regarding eligibility requirements for limited access fisheries under its management. In so doing it will help the Council achieve its goals of eliminating overfishing and achieving optimum yields. The adjustment will not directly affect the fishing mortality rates of the species managed under the various plans.

2. *Conservation and management measures shall be based upon the best scientific information available.*

This consideration does not apply to the proposed measure which would change permit eligibility requirements and does not require scientific information.

3. *To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.*

The proposed action does not change the definition of the management unit or any geographical aspects of how permit eligibility requirements apply to the fishery.

4. *Conservation and management measures shall not discriminate between residents of different States. 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.*

The proposed action applies to residents of all states equally.

5. *Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.*

The proposed action will improve efficiency by eliminating the requirement for permit applicants to acquire vessels solely to maintain their eligibility for limited access permits in the future in fisheries that already are over-capitalized.

6. *Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.*

The proposed action would enable permit applicants to postpone investment in the fisheries until conditions improve thereby allowing them more flexibility in making investment decisions rather than forcing applicants to acquire a vessel before the end of 1994.

7. *Conservation and management measures shall, where practicable, minimize costs and avoid*

unnecessary duplication.

The proposed action minimizes costs by eliminating the requirement for permit applicants who otherwise would not qualify for limited access/moratorium permits to purchase and perhaps operate vessels in fisheries that are already severely over-exploited or fully exploited.

5.2 National Environmental Policy Act (NEPA)

The proposed action is very limited in scope and potentially affects a small but unknown number of permit applicants. The impacts of the proposed actions fall entirely within the scope of the impacts analyzed in the Supplemental Environmental Impact Statements submitted with Amendment #4 to the Scallop FMP, Amendment #5 to the Northeast Multispecies FMP, and Amendment #5 to the Lobster FMP.

5.2.1 Environmental Assessment

The proposed action only affects a small number of individuals and only it affects those who may be eligible for limited access permits but who do not currently own a fishing vessel. It is not expected to have any biological impacts and is expected to have positive economic impacts (see sections 4.1 and 4.2) Based on this analysis, the Council finds that the proposed action will not have any significant impact on the environment.

5.2.2 Finding of no significant environmental impact (FONSI)

NOAA Administrative Order 216-6 provides guidance for the determination of significance of the impacts of fishery management plans and amendments. The five criteria to be considered are addressed below:

- 1) *Can the proposed action be reasonably expected to jeopardize the long-term productive capability of any stocks that may be affected by the action?*

No. The proposed action will more effectively implement Council policy regarding eligibility requirements for limited access fisheries under its management. In so doing it will help the Council achieve its goals of eliminating overfishing and achieving optimum yields. The adjustment will not directly affect the fishing mortality rates of the species managed under the various plans.

- 2) *Can the proposed action be reasonably expected to allow substantial damage to the ocean and coastal habitats?*

The proposed action is not expected to impact coastal or ocean habitat.

- 3) *Can the proposed action be reasonably expected to have an adverse impact on public health or safety?*

The measure is not expected to have any impact on public health or safety.

- 4) *Can the proposed action be reasonably expected to have an adverse effect on endangered, threatened species or a marine mammal population?*

The proposed action does not change the way the FMPs affect endangered, threatened species or marine mammal populations. The NMFS biological opinions for Amendment #5 to the Northeast Multispecies FMP, Amendment #4 to the Scallop FMP and Amendment #5 to the Lobster FMP issued under authority of Section 7 (a) (2) of the Endangered Species Act, concurred that the fishing operations conducted under these amended FMPs are not likely to adversely impact endangered or threatened species under the jurisdiction of NMFS.

- 5) *Can the proposed action be reasonably expected to result in the cumulative adverse effects that could have a substantial effect on the target resource species or any related stocks that may be affected?*

The proposed action is intended to be a part of the management programs implemented through recent amendments to Scallop, Lobster and Northeast Multispecies FMPs. As such the cumulative effects are expected to be consistent with those of the respective plans. The proposed action is not expected to add to the effect of the FMP on other stocks.

The guidelines on the determination of significance also identify two other factors to be considered: degree of controversy and socio-economic effects. The Council expects no significant adverse socio-economic impacts (section 4.2). The Council also has determined that the proposal is not controversial since there has been no substantial dispute on the environmental effects of the proposed action. Based on this guidance and the evaluation of the preceding criteria, the Council proposes a finding of no significant impact.

FONSI statement: In view of the analysis presented in this document and in the DSEIS for Amendment #5 to the Northeast Multispecies FMP, Amendment #4 to the Atlantic Sea Scallop FMP and Amendment #5 to the American Lobster FMP, it is hereby determined that the proposed action would not significantly affect the quality of the human environment with specific reference to the criteria contained in NDM 02-10 implementing the National Environmental Policy Act. Accordingly, the preparation of a Supplemental Environmental Impact Statement for this proposed action is not necessary.

Assistant Administrator
for Fisheries, NOAA

Date

5.3 Regulatory Impact Review (Regulatory Flexibility Act and Executive Order 12866)

This section provides the information necessary for the Secretary of Commerce to address the requirements of Executive Order 12866 and the Regulatory Flexibility Act. The purpose and need for management (statement of the problem) is described in Section 2.0 of this document. The alternative management measures of the proposed regulatory action are described in Section 3.0. The economic impact analysis is in Section 4.2 and is summarized below under the discussion of how the proposed action is characterized under Executive Order 12866 and the Regulatory Flexibility Act..

5.3.1 Executive Order 12866

The proposed action does not constitute a significant regulatory action under Executive Order 12866. (1) As stated in section 4.2, the management proposals will not have any impact on the overall level of landings and revenues from the scallop, lobster and groundfish fisheries. Therefore, the proposed action will not have an annual effect on the economy of more than \$100 million. (2) The proposed action is expected to have a positive economic effect on the lobster, scallop and groundfish harvesting industries (section 4.2). For these reasons, the proposed actions will not adversely affect in a material way the economy, productivity, competition and jobs. (3) For the same reasons, it will not affect competition, jobs, the environment, public health or safety, or state, local or tribal governments and communities. (4) The proposed action will not create an inconsistency or otherwise interfere with an action taken or planned by another agency. No other agency has indicated that it plans an action that will affect these fisheries in federal waters. (5) The proposed action will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of their recipients. (6) The proposed action does not raise novel legal or policy issues. Permit qualification issues of this sort are common to limited access fisheries management systems.

5.3.2 Regulatory Flexibility Act

The lobster, groundfish and scallop harvesting industries are composed entirely of small business entities. This proposed action is expected to affect a very small but unknown number of applicants for limited access/moratorium permits in a positive way by ensuring that they are not denied permits because they did not meet the vessel ownership criterion at the time of their application or forced to acquire vessels to meet this criterion. The proposed action also is expected to have positive economic impacts by not forcing some applicants to participate in overfished fisheries in order to preserve future fishing rights. For the same reasons, the proposed action will not result in a reduction in annual gross revenues of more than 5 percent. Similarly, the proposed measures will not increase annual compliance costs for small entities by more than five percent and they will not increase compliance costs for small entities compared to large entities.

The proposed action, therefore, will not have a significant economic impact on a substantial number of small business entities and a Regulatory Flexibility Analysis is not required.

5.4 Endangered Species Act

The Council finds no cause to change its earlier findings with respect to the Endangered Species Act requirements as they apply to the scallop, lobster and groundfish fisheries.

5.5 Coastal Zone Management Act (CZMA)

Upon the submission of Amendment #5 to the Northeast Multispecies FMP, Amendment #4 to the Scallop FMP and Amendment #5 to the Lobster FMP, the Council conducted reviews of the FMPs for their consistency with the coastal zone management plans of the affected states. All the concerned states concurred with the Council's consistency determinations. The response letters from the states are on file at the Council office. The Council has determined that the proposed action is within the scope of measures already reviewed and that the consistency determinations done for these amendments are sufficient. The affected coastal states have been informed of this decision.

5.6 Paperwork Reduction Act (PRA)

Copies of the PRA analyses for Amendment #5 to the Northeast Multispecies FMP, Amendment #4 to the Scallop FMP and Amendment #5 to the Lobster FMP are available from NMFS Regional Office. The burden-hour estimates are detailed in the Classification section of the *Federal Register* notice of the final rules implementing the amendments. The proposed action requires no additional paperwork.

6.0 PUBLIC COMMENTS

No public comments on the proposed adjustment were received at the final Council meeting on October 28-29. Below are excerpts from the discussion of the proposed action at the September 21-22, 1994 Council meeting.

Mr. Allen: I think the intent of the Council was clear that somebody not have to replace a boat in any specific period of time. As I interpreted the situation I really didn't think about the fact that you said you had to renew your permit, but you didn't have to replace a boat within any certain period of time. We didn't think about the fact that you can't renew a permit unless you have a boat. I think what needs to happen as I see it, is that you would transform a permit into a certificate of fishing history or something like that which you could retain and replace the boat whenever you want and then you get the permit based on the fishing history that you hold. I guess it probably needs a framework measure to create the right things, but that would follow the intent of the Council.

Mr. Martin: It's not just a renewal problem, but a first year problem also. The regulations read that you have to get a permit the first year in order to be able to renew the rest of the period of the amendment as well. It is not just a renewal problem it's a problem for the first year that if you don't have a vessel can you get this sort of interim permit that holds your right to get a vessel at some future time.

Mr. Allen: My interpretation of what we tried to do is that everybody that qualified was qualified and on into the future. As to the existence of a boat either in the first year or in subsequent years we said we didn't want to force people to go out and get boats.

6.0 Public Comments (continued)

Mr. Brancaleone: That is my recollection also. Don't force a guy to get a boat and put more pressure on it.

Mr. Brennan: It is my collection as well. A system that would allow an individual to tender a permit would be the most direct and expeditious way to handle this problem.

Mr. Coates: I agree with Mr. Brennan.

Mr. Goodreau: We handed out today minutes from the May 13, 1993 Council meeting at which this was discussed. It is 50 pages, but the first seven pages deal with this issue. In fact, the result of that discussion is in the plan. There were two elements. The first one applies to this and it just says on page 176 in the plan, under Days at Sea Adjustment Due to Vessel Attrition says, "Vessel operators may tender their permit for an entire permit year in order to fish in other fisheries without being subject to scallop regulations. Since the number of scallop vessels that have active limited access permits will be known in advance, the Council may consider changes to days at sea allocations and to allow the remaining vessels to fish at higher levels without undermining the rebuilding schedule. This adjustment would be temporary and it would extend for the maximum of a year." This would make it possible for someone [who wanted] later on to actively use their permit.

If you recall, when we were developing this plan we went to three groups, twenty-two groups and had them placed in color categories of fleets. I think my sense of the whole development was that this was a new permit, this was a limited access permit, a separate entity from the current, and at that time, general permit. As it went through the implementation stage, NMFS quite logically used the general category permit because they did not have to go through the whole rigmarole of getting a new form approved and the cost of it, printing it and sending it out and all that. They just put another box on it [the general permit] to check off. The problem is that the number that is assigned to that permit is the number that is assigned to a boat. So when the boat disappears, the number goes with it, so there is no permit. I have a suggestion and if NMFS does it I hope that Mr. Brennan will not be mad at me, because I don't think this is a framework issue. It is an easy solution. There are 464 limited access permits. We simply need to make up a new number on the form that says "limited access number, 1-464. You can retain the permit with a limited access number even if there is no permit number for a boat on it. That way you can carry it forward year after year after year until you decided to replace the boat and then actively pursue your limited access permit.

Mr. Brancaleone: It can't be done. It's too simple.

Mr. Goodreau: Then I suggest we go to Framework #3.

Mr. Martin: What you just cited is not the same issue. That's a different issue. This thing about tendering a permit for a year to allow days at sea to be spread out among other fishermen has nothing to do with not having a vessel to replace during the first year.

Mr. Goodreau: That was part of the discussion. That was one of the two issues that were raised as a means or a purpose or reason for reallocating. But the first sentence was what the Council had intended which was "the vessel operators may tender their permit for an entire permit year in order to fish in other fisheries without being under the scallop regulations." It's written in other parts of the plan that someone had to get their permit for the first year.

6.0 Public Comments (continued)

Mr. Martin: But we are not talking about whether you have to fish. That's assuming he has a vessel. He can't fish in other fisheries unless he has a vessel. The issue that Mr. Starvish has raised is "if you don't have a vessel can you still preserve your right to get a permit in future years even though you don't get the permit this particular year." That is the problem with whether we can do this under a framework or whether we can do this as a technical amendment on the part of the Council. The more evidence that the Council intended that you can get the permit without having a vessel then the more likely we are going to agree that you can do it just as a technical amendment or a policy change.

Mr. Goodreau: You do have to renew the permit every year, but you can state that you do not intend to fish for the whole year.

Mr. Martin: That is not the issue. That is already in the regulations. The issue before us now is whether you have a vessel or not in order to get the permit.

Mr. Goodreau: That's right.

Mr. Allen: Can I ask a related question. We put some limits on upgrading vessels in the Scallop and Groundfish Plans. If you downgrade a vessel, can you down upgrade from the original vessel or can you only upgrade from the replacement?

Mr. Martin: You can upgrade from the original vessel.

Mr. Allen: If we don't make some simple accommodating adjustment to this problem we make people go out and buy little vessels to get their permits on and stick them in the yard instead of having a certificate in the strong box, they have to have a little vessel stored away somewhere.

Mr. Martin: If your first vessel that you get a permit on, that is the original vessel that I was talking about. If you start with a little vessel, then you are stuck with that upgrade restriction.

Mr. Allen: The one you have qualified with is your original vessel. Is that right?

Mr. Martin: If the horsepower and vessel size is different than what existed in August 1992 for the vessel that you are applying for your initial limited access permit on, then that becomes your baseline horsepower and vessel size. I thought you were asking if you start out with a big vessel with the original permit, then you downgrade, your base line is still the original big vessel that you got your permit on.

Mr. Starvish: So what you are now saying is the way I understand it, I have a permit now with no boat. I am going to go and buy a Boston whaler on the way home, apply the permit to the Boston whaler, park it behind my garage and everything is all right. Now, when I want to take this permit back out again, I can go back to my 850 horsepower.

Mr. Martin: No, you are stuck with the Boston whaler.

Mr. Starvish: But you just said the base line is the first permit.

Mr. Martin: You are getting your first permit on a Boston whaler.

6.0 Public Comments (continued)

Mr. Starvish: Then we will put 850 horsepower on the Boston whaler.

Mr. Martin: You can do that.

Mr. Starvish: I am not sitting down today until I get an answer because I have asked this question for the last six months. We have to make a decision here. I personally don't care how you go, because I have a lot of questions. For example, if a permit has to be attached to a boat how does it have to be attached to a boat, one day, one week. I can just start replacing all permits on another boat. This gets way out of proportion here.

Mr. Martin: I am not arguing against this permit thing, but the procedure may be

Mr. Starvish: Federal fish permits can be tendered indefinitely. The history remains. That's simple to me. I agree with Mr. Goodreau. Can we do it? How do we do it? I want my permits guaranteed for the foreseeable future. There is too much money at stake.

Mr. Peterson: If I understand correctly, if you don't have a boat and all you have is a permit, at the end of this year you have nothing. You have to have a boat and a permit whether it is a nineteen foot whaler with 850 horsepower or an 850 boat with nineteen horsepower, it makes no difference. I think that is the condition. Is that right, Mr. Martin. You have to have a boat to have a permit.

Mr. Martin: That is the rule right now.

Mr. Peterson: It has nothing to do with tendering. You have to have that [boat] to have that license.

Mr. Starvish: That is not what was voted on. The Council voted unanimously two years ago, that limited access permits could be tendered indefinitely and the history remain with the owner.

Mr. Peterson: All I can say is that what the Council votes at one time or another is as many contractions as there are meetings. It is what comes in the final plan and comes out in the rules and regulations. That is where the question is that you validly raise and that you are trying to get a clarification on. As I understand the regulations, and that is a big if, that in order to be able to carry that permit, you have to have a boat.

Mr. Starvish: So, if a guy's boat sinks the last day of the permit year, he has twenty-four hours to stick that permit on a boat or he loses it.

Mr. Peterson: No, if he can have a vessel history, and in fact I am going through all kinds of appeals now looking at why people couldn't meet the requirements and one thing or another, which are all subject to appeal. If your boat sunk on the last week then that is a condition that would have to get looked at in that vain. It doesn't exclude you. But, if you never had a boat and you got a permit and you don't intend to have a boat, that is different.

Mr. Starvish: I really don't understand you, but we will just have to do it through the permit office.

Mr. Martin: Under existing rules, Mr. Peterson described it correctly. I am not suggesting that you can't change it. The only thing I was concerned about was the procedure for changing whether it had

6.0 Public Comments (continued)

to be a framework or a technical amendment. I am uncomfortable with a technical amendment because the rule is so clear one way that it is very difficult to change a fairly clear rule unless you can show blatant disregard for what the amendment says. I don't think the amendment speaks to this.

Mr. Starvish: So you will send a message out to every permit holder that every one who owns a limited access scallop permit has to put a boat on it before the end of the year.

Mr. Martin: Yes, unless the Council changes the rule.

Mr. Allen: As I see where the technical difficulty arose is that the Council was quite clear, talked about it a lot, had a lot of rationale, went back and forth on the whole issue of whether somebody should have to use it or not use it – all of that was well discussed. There is no question what the intent of the Council was. The Council, as far as I know, I don't recall any discussion of the fact that you could not get a permit without a vessel. I don't know if the Council ever created that requirement to begin with or NMFS just decided that permits went on vessels. You could not go and apply for a permit without a vessel. The two never came together. That NMFS policy on issuing permits and the Council's intent on fishing histories and forcing people to go in, never came together to get resolved. It seems to me it is a technical issue that you can solve the Council's intent by turning people's qualification into some kind of certificate of qualification and accomplish what the amendment really said we wanted to accomplish. I would think the technical adjustment would be entirely appropriate.

Mr. Brancaleone: My recollection, for both scallops and groundfish, is that the permit is tied to the boat. The discussion of whether someone had to replace that vessel was that if the vessel was lost, that individual doesn't have to replace that boat, he can hold on to the permit. But you can't replace the boat with a boat that didn't exist prior to the implementation of the document.

Mr. Allen: No. Boats that qualify that were in existence during the qualifying period, qualified. The fact that they sank, burned, etc. after that, didn't remove their qualification.

Mr. Hill: If I understand the issue that Mr. Starvish that is raising, it is that permits of boats that are on the bottom.

Mr. Starvish: I have three boats on the bottom.

Mr. Hill: There are permits for vessels that no longer exist, whether they are on the bottom or whatever. Is that correct?

Mr. Marshall: There is a fishing history which qualifies them.

Mr. Hill: Do we know how many vessels this represents?

Mr. Starvish: The permitting office is permitting sunken vessels.

Mr. Brancaleone: Then, why are we discussing this?

Mr. Martin: It is vessels that have either been sold out of the fishery or sold any where or vessels that are destroyed and no longer exist in physical form.

6.0 Public Comments (continued)

Mr. Brancaleone: But, he just said they are issuing permits.

Mr. Martin: No, only for sunken vessels – a vessel that actually exists on the ocean floor.

Mr. Starvish: This gets very complicated.

Mr. Martin: This is a permit office issue. But the distinction is that the vessel still physically exists and theoretically could fish again.

Mr. Starvish: I was hoping not to bring what Mr. Martin said up because it makes it worse.

Mr. Hill: Does this add to the number of permits that we have in the plan, the 400 odd permits or does it include those permits.

Mr. Starvish: It includes those permits.

Mr. Hill: Those permits that are included – their fishing history is represented of the total fishing effort that involved in the drafting of the amendment. Based on that, I don't see why the Council would not then create a mechanism for those "permits" to be carried forward if we used that system and that fishing effort as part of the analysis for the plan and they are part of the permits that were counted as "active vessels in the fishery". Why would we not create a mechanism to accommodate that and how do we do that?

. . .

Ms. Stevenson: I wanted to ask Mr. Martin how we determine if these vessels exist right now.

Mr. Martin: I don't know.

Ms. Stevenson: As far as I can tell there is no way to tell.

Mr. Martin: This is far out of my expertise. Perhaps Ms. Kurkul can help.

Ms. Kurkul: The problem is not with people who still own a vessel in some capacity. In other words, if there is a sunken vessel out there you still own that vessel or the rights to that vessel. The problem is with those people who are holding fishing histories with no vessel. So, for example, you have someone who sold that vessel but has a piece of paper that says I retain the right to fish that went with that vessel. The distinction that the Council has to make is that if it was their intent to exclude the people who are just holding histories from the requirement to renew permits on an annual basis. You still have the first-year problem which is separate.

Ms. Stevenson: So if my boat sank and I never sold any rights to it, there is no problem and I can get my first year permit and I can go on. It is only the people who bought up permits from other people who have a problem.

Ms. Kurkul: Its like you sold the boat to Ben Rathbun who now owns the boat and gets the permit every year.

6.0 Public Comments (continued)

Ms. Stevenson: Then why can't I assign my fish history to a fictitious boat. How do you know it is a fictitious boat?

Ms. Kurkul: If you had a Coast Guard documentation then we wouldn't know, but you would have to have the information for the permit.

Mr. Allen: I would be willing to make the motion, but something Pat said gave me a little different approach that might be better. If we just inserted where it said "permit or fishing history" and create a certificate of fishing history then it might make it cleaner and you would not have to have a big new section. Every place it says renew permit or obtain a permit for, you would say "permit or fishing history."

Mr. Hill: Then, could I suggest that the motion needs to be generic and let NMFS figure out how to technically implement the change.

Mr. Brancaleone: Do we have a motion yet?

Mr. Coates: I was asking Mr. Peterson if this would trigger paperwork reduction or something. There is another problem, that is, taking a boat history which I think we could address this and having that history transferrable to a permit and the question has arisen as to what kind of vessel does that tie back to. That history is related to a vessel that had characteristics. It would seem to me that everything that goes back in terms of the constraints of that permit, since we have now implemented the plan, whether that was a 150 horsepower boat etc. Even if the vessel was sold and the person is left holding the rights, you can trace that back to a vessel that at one time existed.

Mr. Martin: That is not what the rules say now. You are changing the rules. The rules say now that you are stuck with whatever your permit was, I think it was August 1992 or 1993, whatever it said on your permit as of August 1992, that is the horsepower and vessel length that you are going to get as your baseline data unless you have different horsepower and vessel length for the vessel you are actually applying for a permit for the first time you get a permit on that vessel. If you change vessels or upgraded since August of 1992 you are allowed for the first permit to get whatever horsepower you had on that vessel that you are applying for. You are restricted to the horsepower of the actual vessel that you are getting a permit on for the first year. Is that correct, Ms. Kurkul.

Ms. Kurkul: Right, you lost me for a minute there, but you are restricted to the horsepower in your initial application for the first permit that you get.

Mr. Martin: It might be different than your qualifying vessel.

Mr. Coates: The vessel for which you have the history of that you want to transfer into a permit.

Mr. Martin: You are suggesting something that's slightly different.

Mr. Coates: I think it is more consistent with the other upgrades. I know it predates the implementation of the plan, but does create more

Mr. Martin: You are saying for this special category of people that are going to have whatever permit certificates, that don't have vessel, you are going to say that if you want to get into that category for

6.0 Public Comments (continued)

this first year, you're going to be stuck with your qualifying vessel's history. Again, you can do that, but that is going to require some additional regulatory language.

Mr. Coates: But it isn't inappropriate or inconsistent with the limitations imposed on current upgrades.

Mr. Martin: It is inconsistent with the way that I have just explained it. You can have a different horsepower and vessel size if you do have a vessel now, or the initial vessel that you permit different than the qualifying vessel that gets you into the fishery. There is a reason why you might be suggesting this change for the special category.

Mr. Coates: You have to have something as a base. Now, I understand that somebody might have said that I took that sunken 150 horsepower job and now I have my 900 horsepower vessel and that is the one that I blocked in here in this eligibility thing. I don't know if there is a way of evaluating of how much of that there is.

. . .

[There was a discussion of procedural issues which resulted in the following action:]

Mr. Coates further perfected the motion:

that the respective jurisdictions implement immediately framework measures to accommodate the problem of people with fishing histories and not permits before the deadlines as specified in the various plans.

Mr. Brancaleone: So, you are suggesting this for groundfish, lobsters...

Mr. Coates: For groundfish, lobsters and scallops.

Mr. Peterson: I know I sat yesterday going over a bunch of appeals for permits. People were arguing why they should be issued a permit and why they didn't have a vessel at a certain time. Some got approved and some didn't. I used my judicial judgement of saying what was the Council intent. The Council intent was not to keep legitimate fishermen out of the fishery, it was to stop speculation. The way I see us going is that we are going to foster speculation to buy up sunken boats, buy a bunch of things and hope that consolidation comes along. I have real problems. We have taken a hard hit on the permitting processes. If I told you how many man hours and effort has gone into trying to issue permits and understand all the complications of this thing, you wouldn't believe it. It's all the way up to my level. I have a great concern if we just start tinkering with these things at this point in time. The regulations say what they say and from my point of view that is the way we ought to live with it until we are really sure that we made a mistake. We made final agency decisions on those permits and some of those permits that have been declined under this new thinking would be approved. God only knows what kind of mess we could get into then where we have made decisions under one set of rules but under a new set of rules, they are eligible. This is not the way to do business.

Mr. Coates: Mr. Chairman, is the regional director saying that he can handle this problem administratively?

Mr. Peterson: No. I am saying that a rule is a rule, if you don't qualify, you don't qualify. You

6.0 Public Comments (continued)

appeal and we give you a value judgement after hearing your appeals and you get it or you don't. That's final. If we go with this, some of those decisions would not stand [up] anymore under the type of thing. I do see that this presents a new, different set of circumstances than what we have been operating with at this point in time. I don't know if our reflections on what we have been doing here is at all consistent with the initial discussions that we had. My perception is that the Council did not want to keep somebody out of the fishery who was a legitimate fishermen because they had some kind of complications that came in. They did not want speculation. This opens up the avenue for speculation.

Mr. Coates: On the other hand, this addresses an issue that apparently is a problem with regard to some possible legitimate fishermen that want to basically continue their ability to hold a fishing right without having to make the commitment of purchasing a vessel that cannot be addressed administratively under the current system. Is there a problem here for people that may have legitimate histories and not a vessel that, as a result of the deadline, lose their access to the fishery? If that is going to happen and you can't address it, then we need to take an action. If not, then I'll withdraw the motion.

Mr. Peterson: I don't know if that will happen and I wouldn't make a statement because it would make it subject to appeal. Looking at the circumstances and the conditions, each one of them is a separate, individual case. Otherwise they wouldn't be appealed up to my level as a final agency decision. They could be handled by people who could just interpret the law and say that's it.

Mr. Coates: Could the Council make a recommendation or empower the regional director, recognizing that you already have the power in this area, to handle this issue for us. Could we request that the regional director handle this problem through a technical amendment or whatever power that has to be done to deal with this.

Mr. Martin: If it came up through an appeal, he doesn't have the authority to make wholesale decisions.

Mr. Coates: Everybody in this situation has the right to appeal? Is that correct?

Mr. Martin: If they have applied for a permit and are denied, they would have the right to appeal.

Mr. Coates: But, now their deadline is looming and the rule is that you have to have a vessel in order to get a permit. They are approaching this deadline and they have filed something that says, "I have a history, have fished, etc., but I won't get a permit because the rule says that I have to have a vessel. I really don't want to go out and buy a sixteen foot Boston whaler." What would happen?

Mr. Martin: He may deny everyone of those appeals or he may grant them. He can't tell you that in advance.

Mr. Coates: I am not expecting him to tell me in advance. If he has the authority to deal with it then we don't have to deal with it.

Mr. Peterson: The context of the person who is in that situation would be that he would apply for his new permit and he would be denied. Then he would appeal that and there are two different levels of appeal. The first appeal we would say, give us the documentation, etc. Then he would say he didn't

6.0 Public Comments (continued)

have a vessel because I didn't want a vessel. So he probably would still be denied. Then he asks for a hearing and goes before one of the lawyers that act as my hearing officer and establishes all the facts and figures and they build up the case file. It is then given to me with all the documentation and then I render a final agency decision. The process starts when he is denied the permit. All cases are different. If a person comes in and says that he has bought up a bunch of permits because I want to have those boats, chances are he will have a hard time making an argument why he didn't get boats in time.

Mr. Brancaleone: It couldn't be that he is waiting for consolidation?

Mr. Starvish: I have been listening very closely. Mr. Martin said that if you owned the boat, now whether the boat is floating or sunk, you still own it so you will get permitted. The only people that are in contention here and I personally don't know anyone, but there could be someone, would be someone who sold their boat to Alaska or somewhere else, and retained the fishing rights, and haven't put those rights on another boat. Help the guy out.

Mr. Brancaleone: Why don't you just come out and say, hurry up with consolidation. We are not saying they can't buy a boat.

Mr. Allen: Tape inaudible at this point.

Ms. Stevenson: Is it correct that you have until the end of the year to get your permit? So if you don't have a boat you have until the end of the year to get a boat. Now could that person who has this history and no vessel sell the history to me?

The answer was no.

Ms. Stevenson: I could sell my boat with my groundfish history to him and then buy back my boat with its groundfish history and his scallop history.

Mr. Brancaleone: No, you can't do that. You can't have those two permits.

Ms. Stevenson: So it would have to be like a mid-Atlantic squid boat.

Mr. Martin: Answer inaudible.

Ms. Stevenson: The point that I am getting at is that the people who we really wouldn't want to have them, are the people who can think enough to get around it. Why not go ahead and not make people have boats.

Mr. Coates: I am going to try another tack. Is it possible that there is an administrative procedure that the regional director could implement that would basically say that this deadline is extended for a certain period of time and the Council can confer with the regional director and get this squared away in a rationale way. I tend to go with Mr. Peterson and let him use his judgmental authority.

Mr. Martin: If you are asking about the deadline, we could probably agree on policy grounds. If you are saying that in order for a framework to go through, that's different.

6.0 Public Comments (continued)

Mr. Coates: Whatever. I want to get this resolved. If there is an appeal process that brings all these people to an appeal.....

Mr. Martin: An appeal process is no guarantee one way or the other. There is no way to prejudge that. I would advise you not to put your stock in an appeals process.

Mr. Coates: The question that I am asking is can it be postponed for either of those reasons until we can sort it out. It seems to me that people losing their permits is an administrative process.

Mr. Martin: Legally I think we could postpone the deadline date for the initial application. I can't make the policy decision whether we do that or not.

Mr. Coates: Can we make that request.

Mr. Brennan: A further question along this line. Is it possible to review the 400 permits and find out how many may be in this situation to try to narrow down the scope of this particular situation.

Mr. Brancaleone: Mr. Kellogg is saying no.

Mr. Kellogg: You could review it, but the whole point is that you have 1500 possible groundfish permits that are in the same situation. It is the same with lobster. I agree with Mr. Goodreau. The reason this thing came up this way in the regulations is because the way that NMFS permit system worked, not because of Council intent. So the regulations were written that you have to have a vessel to renew a permit. As Mr. Allen pointed out, there was a disconnect between the Council intent and the way the regulations were written. I can see no reason for putting people through all these problems. If NMFS had just issued a limited access permit to a person and not attached it to a boat, the problem would have been resolved.

Mr. McCauley: I want to make one comment. I think that when we went into limited access we had maybe 450 permits in scallops and so many in groundfish and I say years from now, we are still going to have exactly that number unless you have consolidation. They are not going to go away under limited access because they have value. These vessels will always just be upgraded into something else unless we allow consolidation and they will end up with two boats going into one boat, but now we can't split permits so you can't make one boat into two. My feeling is that we have to recognize that situation and go with the appeal process. So far I think the appeals have been processed fairly. Right now we are talking about consolidation and the right to hold onto permits.

Mr. Martin: May I make a suggestion that you consider this motion here to at least initiate the framework and let either the Scallop Committee or any of the committees that want to do this for all the plans initiate it for procedural purposes. If we can find a way of bypassing a framework requirement or doing it administratively, no promises, but if we can find a way to foreshorten this somehow, through a simple change or if we are convinced that it was clearly the Council's intent and you are not adding bells and whistles that nobody had ever discussed before, then we could do it in a relatively short time. If we can't find a short fashion to do this then we will have at least initiated the procedure for making the change through the proper procedural channels and perhaps delay the application deadline.

Mr. Brancaleone: I will call the question. There will be ample time to discuss this at committee

6.0 Public Comments (continued)

meetings,

The motion carried on a voice vote with one abstention.

Mrs. Didricksen: Though you have already voted, it is speculative. There are licenses that have gone from 500 horsepower to 1,600 horsepower. There have been permits given to vessels that are not existing. Mr. Allen said you cannot get a permit if you do not have an existing license. These things are happening. I have looked at the license lists. They say there have been sales. There have been no sales. Anybody who has a vessel and a permit you are fishing your boat because you have to make a living. These are speculative, they were floating around. We mentioned in Connecticut that there were a couple of graveyards of speculation to start. If that's what you want to do and take the fishery away from fishing people and consolidate in a way that you could give people fishing a few more days so they could make a living -- you want to turn it over to speculation, that basically is what you are laying the groundwork for.