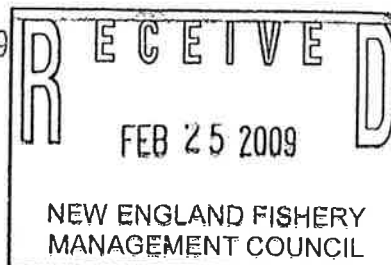


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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

FEB 24 2009



Stephen Ouellette
127 Eastern Avenue
Suite 1
Gloucester, MA 01930

Dear Stephen:

Thank you for your letter regarding various scenarios involving the ownership cap provisions for owners of limited access scallop vessel and confirmations of permit history (CPH) in the Atlantic Sea Scallop Fishery Management Plan (FMP).

The ownership cap provision was established by Amendment 4 to the FMP in 1994 to prevent an individual from having an ownership interest in more than 5 percent of scallop vessels (i.e., permitted vessels or CPH). We administer this based on varied levels of ownership interest, from an individual with 100 percent ownership of a vessel, to an individual with the lowest possible legal involvement in a corporate-owned vessel. Generally, individuals listed in multiple corporations that own multiple vessels are considered to have an ownership interest in each corporate-owned vessel. We see this commonly in our permit files. Each vessel and its ownership structure receives close review relative to the ownership cap.

Many of the scenarios you offer do not allow for general application of the ownership cap provisions and would require close review of the specifics in an actual application to determine if the ownership cap would be violated. Without a real case to review with specific information, it is not possible to determine whether certain interests in vessels or CPHs would constitute an ownership interest.

We rely on the information submitted by the vessel owner, or authorized agent, as part of a limited access scallop permit application, to establish the list of individuals with an ownership interest in each vessel. The submission of true and accurate records and information is a legal requirement which, if violated, would bring about investigation and potential penalty. We therefore expect that all individuals with an ownership interest in a vessel are being truly and accurately presented by the applicant. We will investigate specific allegations of fraudulent information if credible evidence is brought to our attention.

Some of your questions pertain to market or supply interest in the scallop fishery overall. The New England Fishery Management Council (Council) did not develop measures under the ownership cap provision to extend to market or supply relationships between vessel owner and dealer. Therefore, the current ownership cap provision does not prevent an individual from having market agreements involving several other vessels while also having the maximum 5 percent ownership interest. During the recent Council discussions of excess capacity, permit

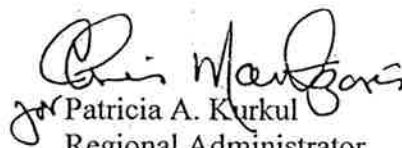


cc: Council, DB (2/27)

stacking, and scallop days-at-sea and access area trip leasing as part of Amendment 15 to FMP, scallop industry members have raised new questions about the level of individual interest in, and control of the scallop fishery. Since the Council would have to recommend revisions to the current ownership cap provisions, I urge you and industry members to continue to present your concerns to the Council. Any consideration of revisions should include specific recommendations for the documentation my staff would rely on to administer new provisions.

If you have any additional questions, please call the Sustainable Fisheries Division at (978) 281-9315.

Sincerely,


Patricia A. Kurkul
Regional Administrator

Cc: Paul Howard, Executive Director, New England Fishery Management Council

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January 28, 2009
VIA EMAIL
and
REGULAR MAIL

Patricia Kurkul, Regional Administrator
NMFS/NOAA
55 Great Republic Way
Gloucester, MA 01930

Re: Limited Access Scallop Ownership Limitations

Dear Pat:

The recent discussions before the New England Fishery Management Council has raised concerns regarding the potential for excessive consolidation in the Northeast Region Limited Access scallop fishery. During a recent conversation with Gene Martin, he indicated that the Agency might have further guidance for or interpretations of the current 5% cap on permit ownership and its effect on the fishery. I had sent him a letter, via email on December 5, 2008, and he has recently advised me that this letter must be addressed to you, so I am posing the questions to you. I would like to see any NOAA/NMFS policies or interpretations of the ownership limitation, and better understand whether the potential exists for further consolidation. To the extent that there are any further guidelines, interpretations or policies, I would appreciate it if you could forward copies of them to me. Additionally, I would like to pose some typical situations that have raised concern.

The regulation at issue, 50 CFR 648.4 provides, in pertinent part:

(M) *Percentage ownership restrictions.* (1) For any vessel acquired after March 1, 1994, a vessel owner is not eligible to be issued a limited access scallop permit for the vessel, and/or a confirmation of permit history, if, as a result of the issuance of the permit and/or confirmation of permit history, the vessel owner, or any other person who is a shareholder or partner of the vessel owner, will have an ownership interest in a total number of limited access scallop vessels and limited access scallop confirmations of permit history in excess of 5 percent of the number of all limited access scallop vessels and confirmations of permit history at the time of permit application.

(3) Having an ownership interest includes, but is not limited to, persons who are shareholders in a vessel owned by a corporation, who are partners (general or limited) to a vessel owner, or who, in any way, partly own a vessel.

OUELLETTE & SMITH

Patricia Kurkui, Regional Administrator
January 28, 2009

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The question arises as to what constitutes an "ownership interest" given various scenarios. The following are commonly posed examples:

1. A vessel owner transfers vessels to his spouse, sibling or child without consideration, as a gift or accepting back debt obligations. Does the transferor divest himself of that ownership interest by the transfer for purposes of the "ownership interest" limitation? Does this depend on whether the transferee is materially involved in operation of the business/vessel?
2. Is a bona-fide lender, or any lender, considered to have an "ownership interest" for purposes of the ownership limits?
3. Does a dealer with a firm marketing/supply contract, or right of first refusal to a vessel's landed product, have an "ownership interest" for purposes of the ownership limitation?
4. A corporate vessel owner owning 5% of the permits decides to split into two entities, dividing the fleet between the two, and maintaining a separate set of shareholders for each. Each company then acquires additional permits so that each of the entities now controls 5% of the permits. Does this violate the "ownership interest" limitation?
5. What if the two corporations or more companies, with separate shareholders, owning in the aggregate more than 5% of the scallop permits (5% each), have common officers and/or directors. Does this violate the "ownership interest" limitations?
6. Assuming a vessel owner owns 5% of the scallop permits, directly or indirectly, may he enter into exclusive marketing agreements or supply contracts with owners of other vessels, or does this constitute an "ownership interest." For example, the two corporations in the prior example are engaged in a joint venture, such as dealing in scallops.
7. If an owner sells a vessel to a third party, with a provision allowing him the right to re-acquire the permit, or a right of first refusal, is this considered an "ownership interest" for purposes of the ownership interest limitation?
8. If a dealer, owning no scallop permits, enters into exclusive marketing agreements with limited access scallop vessels, does he have an "ownership interest" and in turn any limit on how many vessels he may enter into contracts with.

OUELLETTE & SMITH

Patricia Kurkul, Regional Administrator
January 28, 2009

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These issues have come up a number of times, and we have gotten conflicting responses from NMFS/NOAA and participants in the industry. This is of particular concern when we are told that one group of owners now claims to have over \$500,000,000.00 invested in the fishery. This type of concentrated capital appears to be what the 5% limit was intended to prevent. It would be very helpful to get the Agency's response on these issues in light of concerns regarding ongoing discussions around potential consolidation in this fishery and concern that some entities, or groups of entities, are acquiring excessive control over the scallop fishery. In short, we are trying to determine to what extent, if any, NMFS contends the term "ownership interest" extends to situations other than record vessel title or share ownership, such as control.

Thank you for your attention to and cooperation in this regard. If you have any questions about this request, please do not hesitate to call me directly.

Very truly yours,


/s/ Stephen M. Ouellette
Stephen M. Ouellette, Esq.

cc. Gene Martin, Esquire

