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Public Comments Received by
NERO/NMFS on Amendment 17 to the
NE Multispecies FMP

Subject: Groundfish Amendment 17 Public Review Comments
From: "Gehan, Shaun M." <SGehan@KelleyDrye.com>
Date: Fri, 13 May 2011 16:03:36 -0400
To: "GFAMendment17@noaa.gov" <GFAMendment17@noaa.gov>

Attached please find the comments we are submitting on behalf of the Associated Fisheries of Maine with respect to Groundfish Amendment 17. Thank you very much for your attention to these materials.

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May 13, 2011

VIA ELECTRONIC MAIL

Patricia Kurkul
Regional Administrator
National Marine Fisheries Service - Northeast Regional Office
55 Great Republic Drive
Gloucester, MA 01930

Re: Groundfish Amendment 17 Public Review Comments

Dear Ms. Kurkul:

We submit these comments with respect to the Public Review Draft of Amendment 17 to the Northeast Multispecies Fishery Management Plan (April 2011) ("Draft Am. 17") on behalf of the Associated Fisheries of Maine ("AFM"). Attached hereto are comments submitted to the New England Fishery Management Council ("Council") on January 24, 2011, on the Draft Amendment 17 document. We respectfully request this letter and attachment be entered into the record and considered by the National Fisheries Service ("NMFS") in conjunction with development of Amendment 17.

In brief, we stand by the comments appended hereto, reaffirming the concerns about NMFS's non-transparent decisionmaking with respect to state-operated permit banks and the inadequate analyses under a variety of applicable laws. These laws include the National Environmental Policy Act ("NEPA"), the Regulatory Flexibility Act ("RFA"), and the Magnuson-Stevens Act's requirement for preparation of a fishery impact statement analyzing the effects of this proposed rulemaking on participants in the New England multispecies fishery.

To date, the only changes that have been made to the document have been the addition of perfunctory statements that this rulemaking is subject to a categorical exclusion under NEPA because the rulemaking has been summarily declared "administrative" in nature. Draft Am. 17 at 30. The document goes on to assert that "NOAA-sponsored, state-operated permit banks . . . would not affect fishing vessel effort, operations, species targeted, or areas fished, there would be no direct or indirect impacts, individually or cumulatively, of the proposed action on any

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Patricia Kurkul
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Page Two

fishery resources, protected resources, or the habitat, including essential fish habitat, of any such resource.” *Id.* The analysis, however, fails to recognize that by facilitating the development and operation of state permit banks, Amendment 17 will have significant impacts on the market, availability, and distribution of multispecies permits and associated fishing rights. Moreover, the statement that the measure will have no impact on “fishing vessel effort, operations, species targeted, or areas fished” is incorrect, as AFM discusses in detail in the attached letter. The whole purpose of these banks is to divert fishing privileges and effort to particular areas and vessel types.

In short, the final NEPA analysis must take into account all these factors and reasonably discuss the actual impacts of this rulemaking.

Similarly, the Public Hearing Draft defers RFA compliance until a final amendment is prepared. *Id.* at 31. While that approach may have an arguable basis in the law, it does not excuse NMFS or the Council from the preparation of a fisheries impact statement, which covers much of the same ground. *See* 16 U.S.C. § 1853(a)(9). The full range of impacts, including potential benefits and consistency with Council policy, should be developed for public review before the Council takes final action.

We also note that in terms of “significant economic impacts” on small businesses, a thorough RFA analysis must include assessment of positive economic impacts. Given that one objective of the state-operated permit banks is to provide increased opportunities for small entities, those benefits must be discussed in the initial and final regulatory flexibility analyses, as well as the fisheries impact statement. In no event do we see certification of this rule under RFA section 605(b) that the rule does not have a “significant economic impact on a substantial number of small entities,” 5 U.S.C. §605(b), as being appropriate.

Thank you for considering these comments. We look forward to working with NMFS and the Council as it completes its work on Amendment 17.

Sincerely,

/s/ David E. Frulla

David E. Frulla
Shaun M. Gehan
Andrew E. Minkiewicz

ATTACHMENT

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January 24, 2011

VIA ELECTRONIC MAIL

Mr. John Pappalardo, Chairman
New England Fishery Management Council
50 Water Street
Newburyport, MA 01950

**Re: Legally Required Analysis of the Proposed Amendment 17 to the
Northeast Multispecies Fishery Management Plan Measures**

Dear Chairman Pappalardo:

We represent the Associated Fisheries of Maine ("AFM") with respect to proposed Amendment 17 to the Northeast Multispecies Fishery Management Plan. Many of AFM's members participate in the New England groundfish fishery and will be affected by this action. We are writing to urge the Council and the Multispecies Committee to reverse its decision not to require a thorough analysis of this measure to streamline and facilitate the operation of the National Oceanic and Atmospheric Administration ("NOAA") sponsored, state-operated permit banks. As shown below, such analysis is required by the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and other applicable law. More importantly, such analysis is necessary to inform the public about the costs and benefits of NOAA's decision to establish such permit banks, as well as its own judgment about whether the proposed action meets the purpose and needs the amendment and the permit banks seek to address.

AFM's members have long been concerned about the nontransparent decision by the NOAA to fund state-operated permit banks and, especially, the lack of public decisionmaking with respect to the conditions under which they are to operate. Of course, these were decisions made by the agency and the subject of negotiations and agreements between the federal government and sovereign states. As such, the Council had no role in the permit banks' formation, the conditions to which they are subject, or the manner in which decisions were made.

The present rulemaking, however, presents a chance to bring these issues to light. As a matter of policy, it would be wrong to give up this opportunity to explore the impacts the operation of these governmental permit banks will have on things such as the overall market for permits, the distribution of fishing effort, the impacts on fishing communities both with and

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without vessels qualifying under the terms of the Memoranda of Agreements (“MOA”), as well as those in states without permit banks, and like issues.

Perhaps more importantly, as a matter of law, such analysis is required. The National Marine Fisheries Service’s (“NMFS”) contention that the impacts of this Amendment are “wholly administrative in nature” and thus do not require analysis under NEPA, the MSA, or other law is simply in error. As the Draft Amendment 17 document makes clear, “at the time Amendment 16 was developed and approved by the Council, the establishment of any NOAA-sponsored, state-operated permit bank had not been contemplated, and no such permit banks existed.” Draft Am. 17 at 20. This statement confirms what is obvious—no analysis of the impacts of the operation of these entities has ever been conducted. As a result, the Council cannot now rely on the analysis in Amendment 16 to support the current rulemaking.

Below we briefly discuss the legal authorities applicable to Amendment 17 and how they apply to the issues in the current rulemaking.

I. Legal Authorities

A. The Magnuson-Stevens Act

The MSA, which created the regional fishery management council system, governs all actions taken by such councils. In particular, “[*a*]ny fishery management plan which is prepared by *any* Council . . . with respect to *any* fishery, shall . . . include a fishery impact statement for the plan or amendment.” 16 U.S.C. § 1853(a)(9) (emphasis added). Among other things, the fishery impact statement must

assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and mitigation measures for—

(A) participants in the fisheries and fishing communities affected by the plan or amendment; [and]

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants[.]

Id. As an amendment to the federal groundfish fishery management plan, this section’s requirements clearly apply to Amendment 17.

There can be no reasonable argument that, despite its rather unusual nature, Amendment 17 does not contain “conservation and management measures” as that phrase is used in the law.

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Administrative process provisions detailing how fishing rights may be held or transferred are the very essence of a “management measure.”

Nor does the argument that “[a]bsent this amendment, such permit banks are free to form . . . and operate to transfer [annual catch entitlements (“ACE”)] and or [days-at-sea (“DAS”)] to sectors,” Draft Am. 17 at 11, justify exempting the proposed administrative provisions from the fishery impact statement requirement. In particular, this statement does not reflect the reality that such banks cannot effectuate such transactions under current groundfish rules until or unless such banks become part of a sector and that sector and/or its operating plans are approved by the Council. The unusual restrictions placed on the state-operated permit banks by NOAA, which, to say the very least, fit uncomfortably with the MSA’s substantive requirements, are particularly deserving of analysis and consideration in any such approval process.

In sum, the requirement to provide a fishery impact statement, including all required analysis, applies to Amendment 17.

B. The National Environmental Policy Act (“NEPA”)

NEPA, established in 1968, requires “all agencies of the Federal Government” to

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment; [and] . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and]
- (iii) alternatives to the proposed action,

42 U.S.C. § 4332. In short, “major federal actions” implemented through regulatory decisionmaking are generally accompanied by an “environmental impact statement” or “EIS” that contains the required analyses.

The definition of a “major federal action” is one “with effects that *may* be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18 (emphasis added). In the present case, the proper tool for assessing whether Amendment 17 is a major action that significantly affects the environment is an “environmental assessment” (“EA”). An EA is a more abbreviated means than an EIS designed to “provide sufficient evidence and

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analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” *Id.* § 1508.9(a)(1).

There is no alternative to this process, absent a categorical exclusion, *see id.* § 1508.4, for which there is none for amendments promulgated under the MSA.

C. The Regulatory Flexibility Act/National Standard 8

The Regulatory Flexibility Act (“RFA”) requires federal agencies to consider the impact of regulations on small entities in developing the proposed and final regulations, such as those necessary to implement Amendment 17. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. In many respects, the RFA is a mirror of NEPA, except that its procedural and analytical requirements apply to adverse and disproportionate regulatory burdens on small entities. Courts look at NMFS compliance with the RFA in conjunction with review of the agency’s compliance with National Standard 8, 16 U.S.C. § 1851(a)(8), mandating the minimization of adverse economic impacts on fishing communities.¹

The RFA provides:

Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.

5 U.S.C. § 603. In addition to any “significant alternatives” considered that achieve the same goal with less burden on small entities, the initial flexibility analysis must contain “(1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; [and] (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply,” among other things. *Id.* § (b),(c). The final rule must be accompanied by a final regulatory flexibility analysis. *Id.* § 604.

The only exception to this requirement that could apply with respect to Amendment 17 is “if the head of the agency certifies that the rule will not, if promulgated, have a significant

¹ *See, e.g., North Carolina Fisheries Ass’n v. Gutierrez*, 518 F. Supp. 2d 62, 95 (D.D.C. 2007) (“It is not surprising that plaintiffs would intermingle their arguments as to the RFA and National Standard 8, since courts have frequently done just that.”) (citing cases).

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economic impact on a substantial number of small entities.” *Id.* § 605(b). While the RFA general applies to entities that are directly regulated, the National Standard 8 inquiry is broader.

Given the purported purpose and benefits of the state-operated permit banks, *see* Draft Am. 17 at 2-3, it may well turn out that a certification under RFA section 605(b) may ultimately be appropriate. But it is worth noting that while the state-operated permit bank transfers of ACE to particular entities are credited with, among other things, “[m]aintaining small-boat enterprises,” “[p]roviding options to fishermen with little access to capital” and “continu[ing] access to fishery resources for local, small-scale fishermen,” *id.*, virtually all fishing operations covered by the Multispecies FMP, including those not eligible for these benefits, are “small entities” within the meaning of the RFA.

This universe includes vessels in Maine, New Hampshire, Massachusetts, and Rhode Island that are larger than the minimum size eligible under the states’ MOAs with NOAA, as well as vessels of the same or smaller size outside of the designated fishing communities or in states that have not benefited from this federal largesse. No groundfish-permitted vessels within the Mid-Atlantic Fishery Management Council’s jurisdiction are eligible, though their communities have been hard hit by new multispecies and other regulations. All these small entities are equally the concern of the RFA and deserve consideration in terms of the potential impacts that this action could have. Those impacts are the subject of the next section.

II. Discussion

NMFS is proposing Amendment 17 in order to authorize NOAA-sponsored, state-operated permit banks to be entities eligible to “transfer ACE and DAS to sectors for the purpose of achieving the goals and objectives of the permit banks.” Draft Am. 17 at 2. NMFS asserts that Amendment 17 is necessary to combat consolidation and movement of permits away from traditional fishing communities that have resulted from the implementation of Amendment 16, less than one year ago. The draft amendment itself states that a primary purpose is to “streamline the administrative and procedural requirements of the Northeast Multispecies FMP so that NOAA-sponsored, state-operated permit banks can operate effectively and efficiently to the benefit of the states’ fishing industry and communities.” *Id.* at 15.

The amendment also denies that the administrative measures proposed have any effect: “This action does not propose to authorize any activity to occur that could not already occur through another, albeit more cumbersome, process.” *Id.* As a result, NMFS and the Council have preliminarily disclaimed any duty to prepare the types of analysis called for by the authorities described above. The draft document provides the following explanation:

[A]s the focus of this amendment is on defining a second type of entity that is authorized to provide ACE and/or DAS to approved groundfish sectors, the impacts of the preferred alternative are wholly administrative in nature, and

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the only entities *directly* affected are the state fishery management agencies operating NOAA-funded permit banks. Therefore, a detailed description of the environmental components including the biological resources, physical environment, and socio-economic structure that could be affected by the alternatives under consideration is not necessary. Rather, this amendment builds on, but does not alter, the analysis of impacts developed for Amendment 16 to the Northeast Multispecies FMP.

Id. at 19 (emphasis added). But, of course, as noted above, Draft Amendment 17 states what is obvious—that is, that no such permit banks existed when Amendment 16 was adopted. *Supra* at 2 (quoting Draft Am. 17 at 20). Therefore, effects, both direct and indirect, the existence and operation these permit banks will have on the resource, the physical environment, and social and economic conditions have never been analyzed.

It is simply not true that this measure has no effects. Nor would these impacts be impossible to analyze.

As to the former, but for Amendment 17, federally funded, state-operated permit banks could not operate in the fishery. While it is accurate to note that Amendment 16 did provide a means by which a permit bank could join a sector, the fact is none have yet done so. If one did, such as through Framework 45, the Council must give its approval, and the duty to analyze impacts would arise at that time. It makes no legal difference that the Council chose to take the approach set forth in Amendment 17 to deal with these entities rather than waiting to consider their impacts in the context of a new sector. MSA, NEPA, and RFA analysis must be conducted.

As to the latter, this is not the same type of situation as described in the draft document with respect to the impossibility of “comprehensively evaluat[ing],” in Amendment 16, “the impacts of the sector program as it is implemented each fishing year.” Draft Am. 17 at 21. Here, the conditions attached to the NOAA grants are known. The MOAs contain limits on the types of vessels that can receive privileges under the banks’ permits, the geographic locations of the eligible communities, and other salient characteristics. We know that the banks will not operate as for-profit entities, but rather as public entities with a mission. Thus, they could very well lease fishing privileges at below-market rates, and purchase permits at above market prices. The only unknowns are the precise number of permits, the number of DAS or ACE that might attach to them, and the ultimate number of participants that might lease these rights.

These uncertainties are no more insurmountable than the typical challenges faced when analyzing new conservation and management approaches. What is both known and inferable provides a sufficient basis from which to predict and analyze the likely impacts of these proposed new entities. More importantly, this analysis is required by law.

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In terms of likely impacts, there is the potential for market distortions resulting from the influx of substantial amounts of money chasing a limited universe of available permits that could have both positive and negative social and economic consequences for participants in the fishery. NMFS states in the proposed Amendment 17 document that the NOAA sponsored, state-operated permit banks will be subject to the Department of Commerce rules which only allow profits to recoup expenses, as well as in some cases state law that expressly prohibits the receipt of any profits. Draft Am. 17 at 12.

With those restrictions in place, the state-operated permit banks will necessarily have an impact on the marketplace for permits and leasing. An individual who purchases a multi-species permit must price it according to what profit he/she can reasonably expect to receive from the purchased permit. Due to the aforementioned regulatory restrictions, state-operated permit banks will not purchase permits to make a profit, therefore likely inflating the market price for permits, making entry into the fishery more expensive, and raising costs for existing participants.

The opposite will be true for the leasing market, where individuals lease ACE/DAS at a price that will maximize their return on investment. A state-operated permit bank is prohibited from maximizing its return; therefore it will lease ACE/DAS at a lower than the market rate for private lessees and distort the market. NMFS needs to analyze these potential impacts and determine whether the mitigation it is trying to achieve through this action outweighs the negative effects on the marketplace.

Furthermore, the limitation on vessels receiving ACE or DAS from these banks to forty-five feet or less, and only in certain geographic locations could have environmental consequences. For instance, more effort may be focused in near-shore areas compared with the status quo, perhaps leading to different impacts on essential fish habitat or bycatch composition. Finally, there are questions of distributional impacts on similarly-situated small entities between those that qualify and those that do not. These are but a few matters to analyze and discuss.

Review of these issues is also important to determining whether the preferred alternative is likely to meet the stated objectives. Without impacts assessment, the Council would merely be guessing whether the amendment it is considering is lawful, rational, and effective. Will these banks protect small fishing communities? Without analysis, the answer is unknowable.

During the legally required analysis, AFM respectfully suggests several matters concerning the proposed state-operated permit banks ought to be addressed. The MOA between the states and NMFS allows only vessels forty-five feet or less to lease ACE from the permit banks. Why was forty-five feet chosen as the cutoff point? What other restrictions will there be on these permit banks? Are these permit banks, with restrictions in place, reasonably expected to mitigate the problems they are supposed to address? As it stands now, NMFS is asking for blind acceptance of the premise that the state-operated permits will be effective in mitigating the presumed negative effects of Amendment 16.

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All these questions fall within the ambit of alternatives that each source of law requires be explored during the rulemaking process. AFM understands that the Council is not in a position to dictate the terms of the MOAs between the states and NOAA. It is, however, fully in control of the rules governing all participants in the New England groundfish fishery, including the permit banks. In setting these rules, the Council should assure itself that its economic, social, and conservation objectives are being met.

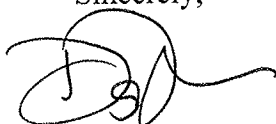
If, after this analysis, the Council is convinced that better or more refined options exist for achieving the stated goals of Amendment 17, and the Multispecies FMP more generally, than those set forth in the MOAs, it has choices. The Council could either use its rule recommending power to effectuate change or it could enter into a dialogue with NOAA and the states – each with a seat of the Council table – to best meet the mutual goals.

III. CONCLUSION

AFM understands NOAA and the states are eager to implement the state-operated permit banks and put the \$6 million of federal funds to immediate use. However, the fishery management regime is governed by substantive and procedural legal requirements that do not necessarily apply to the grantee/grantor relationship between the states and NOAA. Any urgency that may exist among the contracting parties regarding these permit banks can not supplant these legal mandates.

The analytical requirements of the MSA, NEPA and RFA are fully applicable to Amendment 17. These laws exist to foster informed public input, reasoned decisionmaking, and reasonable and rational regulations. In the current atmosphere surrounding Amendment 16 and its implementation, a more open process can only benefit the Council, NMFS, and the public. AFM looks forward to working with the Council as it continues to fulfill its duties under the law.

Sincerely,



David E. Frulla
Shaun M. Gehan
Andrew E. Minkiewicz

cc: Mr. Rip Cunningham, Chair, NEFMC Groundfish Committee
Capt. Paul Howard, Executive Director, NEFMC
Ms. Patricia Kurkul, Regional Administrator, NMFS

Subject: Groundfish Amendment 17 Public Review Comments
From: John Crawford <JCrawford@pewtrusts.org>
Date: Tue, 17 May 2011 13:18:26 -0400
To: "GFAmendment17@noaa.gov" <GFAmendment17@noaa.gov>

Please accept the attached pdf document containing comments on Amendment 17.
Thanks very much,

John D. Crawford, PhD
Pew Environment Group - New England | The Pew Charitable Trusts
p: 781-771-7026 | e: jrcrawford@pewtrusts.org | <http://www.pewtrusts.org/>

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Patricia Kurkul, Regional Administrator
National Marine Fisheries Service
Northeast Regional Office
55 Great Republic Drive
Gloucester, MA 01930

May 10, 2011

Subject: "Groundfish Amendment 17 Public Review Comments"
by email: GFAmendment17@noaa.gov

Dear Ms. Kurkul:

We are writing to provide public review comments on Amendment 17 (April 2011) to the multispecies fishery management plan, which addresses NOAA-sponsored, state-operated permit banks. We provide our unqualified support for Alternative 2: NOAA-Sponsored, State-Operated Permit Banks Authorized to Provide ACE and/or DAS to Sectors.

Through Alternative 2, Amendment 17 will allow NOAA-funded state permit banks to contribute to an important goal identified for the New England groundfish fishery with Amendment 16: "to minimize, to the extent practicable, adverse impacts on fishing communities and shore-side infrastructure."¹

A substantially expanded system for quota management through fishing cooperatives, known as sectors, was established in the Northeast multispecies fishery with Amendment 16.² The sector system provides fishermen with annual quotas, opportunities to lease quota, increased flexibility, incentives to reduce discarding of fish and increased accountability. The sector system is reducing overfishing, helping to allow depleted stocks to rebuild and improving economic conditions for many fishermen. The system is giving fish and fishing communities in New England a new lease on life.

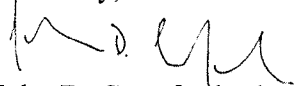
The state operated permit banks offer an important mechanism to help preserve access to the groundfish fishery for local, small-scale fishermen and will therefore protect smaller fishing communities. The permit banks will supplement existing access privileges held by fishermen in small communities and generally help to limit consolidation in the fishery. The funding offered through permit banks will be used to reduce economic barriers to entry into the fishery.

¹ Goal 4, section 3.4, Northeast Multispecies FMP Amendment 16, dated October 16, 2009

² Federal Register / Vol. 75, No. 68 / Friday, April 9, 2010 / Rules and Regulations

With Alternative 2 as preferred, Amendment 17 will allow the permit banks to function in a more streamlined fashion, eliminating the need to meet technical requirements that were developed for sectors, not permit banks, under Amendment 16. The Amendment will recognize NOAA-sponsored, state-operated, permit banks under Northeast Multispecies FMP as entities allocated, and authorized to transfer, annual catch entitlement (ACE) to sectors. These permit banks will no longer be required to join a sector, or function as a sector. This administrative change makes sense, will benefit New England communities and the nation and will help to preserve a diverse fishing fleet in the region.

Sincerely,



John D. Crawford, PhD

Science and Policy Manager – Northeast Region

Subject: Groundfish Amendment 17 Public Review Comments
From: Brett Tolley <brett@namanet.org>
Date: Tue, 17 May 2011 09:11:27 -0400
To: GFAMendment17@noaa.gov
CC: Niaz Dorry <niaz@namanet.org>, Boyce Thorne Thorne Miller <boyce@namanet.org>

Please see the attached comments on behalf of the Northwest Atlantic Marine Alliance.

Thank you,
Brett Tolley

This body part will be downloaded on demand.

NAMA A17 Comments.pdf **Content-Type:** application/pdf
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Part 1.3 **Content-Type:** text/plain
Content-Encoding: 7bit



May 17, 2011

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

RE: Groundfish Amendment 17 Public Review Comments

On behalf of the Northwest Atlantic Marine Alliance we support the Amendment 17 (A17) to the Multispecies Fisheries Management Plan, which seeks to create an administrative exemption for State Permit banks to provide affordable access to local community-based fishermen.

BOARD OF TRUSTEES

Bill Adler
*Massachusetts Lobstermen's
Association*

Niaz Dorry
NAMA Coordinating Director

Madeleine Hall-Arber, Ph.D.
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MIT Center for Marine Social Sciences

Ted Hoskins
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Brett Tolley
Community Organizer

Sean Sullivan
*Marketing, Development and Outreach
Associate*

We recognize permit banking as one of several critical tools to ensure coastal communities and smaller-scale fishermen maintain access to the rights to fish in New England.

Permit banks cannot get the job done alone. The implied goals for A17, as articulated in the A17 document, are listed below:

- Provide options to fishermen with little access to capital.
- Help fishermen to improve cooperation and operating efficiencies.
- Maintain small-boat enterprises through the combination of a variety of permit attributes to meet the needs of fishermen and fishing communities for access to fishery resources.
- Help fishing communities preserve stable access to local fishery resources for local fishermen.
- Preserve continued access to fishery resources for local, small-scale fishermen from small fishing communities throughout the states of Maine, New Hampshire, Massachusetts, and Rhode Island.
- Supplement existing access privileges held by fishermen in small communities.
- Mitigate the effects of fishing effort consolidation on small-scale fishermen and fishing communities in these four states.

In order to achieve the implied A17 goals as well as the stated goals of the NEFMC related to fleet diversity and excessive accumulation there must be additional policy tools that compliment the intent of permit banking. We recommend that NOAA support the use of additional tools in the multispecies fishery such as:

- Quota set-aside programs that secure community access to fishing rights.
- Leasing policies that foster affordability and fleet diversity.
- Policies that address the disproportionate impact of rules on small-scale businesses.
- Incentives for owner-operators and low-carbon footprint

- fishermen
- Limitations on the accumulation of fishing rights.

We support permit-banking programs that provide affordable access to community-based fishermen. We also urge NOAA to consider successful models within the affordable housing communities and apply those best practices to Permit Banks during the early stages of development. One common aspect of modern State or community-based affordable housing models is a provision that allows for property to transition back into the ownership of families (rent-to-own model). Current Permit Bank MOUs between NOAA and the States are void of this type of provision and we recommend it be put in place.

Thank you,



Brett Tolley
Community Organizer

Subject: Groundfish Amendment 17 Public Review Comments

From: Erik OBrien <eobrien@swamc.org>

Date: Wed, 18 May 2011 11:36:28 -0800

To: GFAMendment17@noaa.gov

Patricia Kurkul,
Regional Administrator NMFS
Northeast Regional Office
55 Great Republic Drive
Gloucester, MA 01930

A storm is gathering over access to fisheries resources in Alaska. While the details of addressing such conflict will likely vary considerably from plans to address similar problems in the Northeast Fisheries Management Council region, it is comforting to know that this important issue is being addressed. Our organization, the Southwest Alaska Municipal Conference (SWAMC), has compiled empirical data outlining the relative decline in access to fisheries allocations from various stakeholders from our region: [Southwest Alaska Fisheries Resource Allocation: A 30 Year Analysis](#).

We will continue to compile stakeholder complaints and conduct further analysis of the issues affecting our fishermen and communities; there is a need for revisions to the current market design if either can be expected to survive in the long run. Strengthening the link between communities and resource allocations, such as permit banks may be a very important step in the right direction. We support NOAA's efforts to incorporate policy to protect fishing communities, such as Amendment 17.

Thank you,

Erik OBrien
SouthWest Alaska Municipal Conference
P: 907-562-7380
www.swamc.org

Subject: Fw: Groundfish Amendment 17 Public Review Comments
From: jackie odell <jackie_odell@yahoo.com>
Date: Wed, 18 May 2011 13:58:19 -0700 (PDT)
To: GFAMendment17@noaa.gov
CC: Doug Christel <Douglas.Christel@noaa.gov>, Susan Murphy <Susan.A.Murphy@noaa.gov>

Hi Doug and Sue, Just ccing you on this email to make sure it goes through. Been having problems with my email today - I am worried about the email address shown below. Thanks ~ Jackie

----- Forwarded Message -----

From: jackie odell <jackie_odell@yahoo.com>
To: GFAMendment <17@noaa.gov>
Cc: Glenn Delaney <grdelaney@aol.com>; Vito Giacalone <vitofish@earthlink.net>; jackie_odell@yahoo.com
Sent: Wed, May 18, 2011 4:55:39 PM
Subject: Groundfish Amendment 17 Public Review Comments

Please find the NSC public comments per Amendment 17 attached.

Sincerely,

Jackie Odell
Executive Director
Northeast Seafood Coalition

NSC Final Comments PR Amendment 17 May 18 2011.doc.pdf

Content-Type: application/pdf
Content-Encoding: base64

NORTHEAST SEAFOOD COALITION

May 18, 2011

Patricia Kurkul,
Regional Administrator
National Marine Fisheries Service
Northeast Regional Office
55 Great Republic Drive
Gloucester, MA 01930

RE: Groundfish Amendment 17 Public Review Comments

NSC has serious reservations regarding Amendment 17 as proposed by the Council.

The Council suggests that the purposes and objectives of Amendment 17 are limited to streamlining and expediting a process to enable the state-operated permit banks to operate as sectors.

The Council further asserts it does not have the responsibility to conduct its normal deliberate process to analyze, evaluate or discuss the purposes and objectives of the state-operated permit banks themselves, or more importantly, the impacts thereof.

This might have been the case if no state-operated permit banks were in existence and the Council was merely providing in advance a process for state-sponsored permit banks to follow in their establishment. However, the banks do exist, and so the proposed action will trigger the impacts the existing banks will have. But for this proposed action, these banks would not be able to operate as sectors and participate in the private-sector permit market and thus would have no impacts thereon. Implementation of this proposed action will cause impacts to occur that would not occur in its absence. They must be analyzed.

Failure to fully analyze these impacts appears to be a deliberate attempt to circumvent the very core of Magnuson-Stevens Act policy and process. Why?

From the affected public's perspective, the purposes and objectives of these banks have been shrouded in mystery-- having first been asked to provide input on the subject when the Agency took the unilateral action to unveil this new concept for first time in its proposed rule to implement sectors under Amendment 16. This was done absent any discussion, consideration or recommendation by the Council.

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This unprecedented lack of transparency, together with the fact that representatives of these same states have voted to approve this Amendment is troubling. The fact that these same state representatives will continue to vote on future actions that their banks may have a fundamental financial interest in is disturbing. The fact that they will also continue to vote on future actions that directly affect the financial business interests of fishermen that will be forced to compete with these banks in the private-sector permit market is downright alarming.

With this in mind, will the states, as voting members of the Council, continue to be exempt from the section 302(j) provisions of Magnuson-Stevens Act governing financial disclosure and conflicts of interest once they are enjoying a direct financial interest in actions over which the Council has jurisdiction?

Even a rudimentary understanding of the groundfish fishery and the complexities of the sector system would suggest that the state-operated permit banks will certainly have some significant impacts. In reality, these banks may go so far as to completely restructure the fundamentals of the business side of the sector system -- and with that the socio-economics of fishing communities throughout the region. Yet, the Council has proposed to deny itself, its staff, the Agency, the sectors, common-pool participants, all other interested parties and even the states themselves from having the analyses necessary to understand the true nature and scope of such impacts.

NSC feels very strongly that the usual robust process of analysis and deliberation by the Council, Agency, states, industry and affected public must apply to this proposal just like it does for all other actions of this magnitude pursuant to the MSA and other relevant statutes including NEPA and the Regulatory Flexibility Act. In our view this is bad government even in the absence of such clear statutory mandates.

If state-operated permit banks are to operate on par and in direct competition with real sectors, then they must be held to the same standards applied by Amendment 16. At a minimum, the banks must be subject to the same rigorous level of transparency needed to evaluate their operations and performance in meeting the objectives of the applicable statutes and the NE Multispecies Fishery Management Plan—not simply the objectives of the states and their permit banks over which there is no Council control.

Under normal circumstances, because this proposal has strayed so far off base, we would assume that it is simply not approvable by the Agency. However, given the Agency's unusual and as yet not fully explained advocacy for the state-operated permit banks and this proposed action, it must also be assumed it will devise some rationale for giving its approval. This will likely lead to the intervention of a federal judge to evaluate the legality of the proposed action.

In addition to the preceding commentary, NSC would like to highlight and reiterate the following specific concerns:

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- The affect of this proposal is to allow state governments to use federal taxpayer dollars, including those taxes paid by affected fishermen in the groundfish fishery, to compete directly with those fishermen in what was originally intended to be a private sector marketplace in transactions that are fundamental to the financial survival of those fishermen. This is not an appropriate use of public funds and raises serious legal concerns.
- The amount of these taxpayer funds and, therefore, the amount of competition the states may exercise is unlimited and cannot be predicted or adequately analyzed because it is at the discretion of the current 112th Congress and all future Congress's. Amendment 17 provides blanket Council approval for the future operation of state-operated permit banks with an unknown level of funding and permit acquisition capacity and, therefore, an unknown impact on the permit market and fishing industry.
- Because potential future funding is unlimited, and because these funds are being disbursed by public entities that do not operate within the realities of a free marketplace, there is no upper limit on the amount state-operated permit banks can pay for permits and no lower limit on what they can chose to sell permits for. In fact, laws governing such activities in some states expressly prohibit profit making. Thus, by definition, state-operated permit banks will distort the otherwise free market for groundfish permits in order to comply with state law to the direct detriment of fishermen that must compete with the state-operated permit banks.
- The negotiations and criteria established and agreed upon within the Memoranda of Agreements between the various states and NOAA have been and will continue to be conducted behind closed doors with no public engagement or information sharing. Once again, the Council is proposing to provide a blanket approval to the unknown results of these future negotiations. This is simply bad government.
- Such Memoranda of Agreement may also be changed at the sole discretion of the respective states and the Agency in a process that is beyond the reach of the Council and the public. For example, changes could be made to the current criteria for vessel or community size—or even gear type. Such future changes could vastly expand or alter the scope and impacts of this program on the private sector marketplace and the fishery itself. Again, none of this can be predicted or analyzed, and all of this is beyond the reach of the Council and public.
- The proposed amendment appears to have as it sole purpose to facilitate the reallocation of permits from a large portion of the fishery to a far smaller and very specific segment of the fishery. This is in direct violation of National Standard 5 which prohibits an amendment from having “economic allocation as its sole purpose”.
- The Council did not consider or include provisions for state-operated permit banks in its lengthy deliberations and development of Amendment 16. Provisions were added to

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Amendment 16 by the Agency unilaterally in its implementing rulemaking subsequent to the Council's final action. Consequently, many critical details and considerations were simply omitted if not circumvented by the Agency. NSC submitted comments on that proposed rule which included comments on the state-operated permit banks. NSC requests that the Agency reconsider those comments in the context of this proposal.

- There is no legitimate justification for the Council to exempt the state-operated permit banks from transparency and a rigorous analysis of their impacts on small business fishermen with which they compete and the overall fishery and fishing communities. Such exemptions are in direct contravention to sound public policy and more specifically to the broadly expressed intent of Congress in the Magnuson-Stevens Act.
- The New England Council has 17 voting members, 4 of which are designated officials of the state governments that have already negotiated MOAs with the Agency to operate state-operated permit banks. Additional states may take the same action. These banks will operate in direct competition with the sectors and private-sector fishermen that these same states regulate through their participation in the Council process. This represents a profound and unacceptable conflict of interest for the states. As raised above, will the states, as voting members of the Council, continue to be exempt from the section 302(j) provisions of Magnuson-Stevens Act provisions governing financial disclosure and conflicts of interest once they are enjoying a direct financial interest in actions over which the Council has jurisdiction?

With such serious concerns in mind, NSC requests that Amendment 17 be withdrawn as currently proposed. NSC further requests the Council, Agency and states to ensure that the state-sponsored permit banks will follow the requirements applicable to sectors pursuant to Amendment 16 until such time as an adequate public process of analysis and deliberation produces an alternative mechanism for achieving a well-articulated and justified set of objectives.

Subject: Groundfish Amendment 17 Public Review Comments

From: meri ratzel <meritree@gmail.com>

Date: Mon, 16 May 2011 22:59:15 -0400

To: GFAMendment17@noaa.gov

This letter is written in support of the further establishment of state controlled permit banks to assure that permits will be affordable and made available to fishermen within our communities. I believe the state controlled permit banks will continue to offer our fishermen some access to our coastal waters. Access to the sea is not only important to the fishermen who fish these waters, but to those of us who wish to continue building healthy vibrant local economies based on a low carbon footprint for sale of fish within our region.

The establishment of these banks within the state will somewhat guarantee our fishermen will not feel pressured to seek third party investors outside the boundaries of the local economy. If fishermen are not given access to the capital to fish our waters ~ our communities will suffer the loss of jobs from disenfranchised crew members, and fisheries dependant businesses. The burden of swelling unemployment will exacerbate what is already a precarious economy in Cape Cod's seasonal communities.

Please do what you can to further this process with equitable assurances for today's fishermen as well as their children's children. Doing so will help to minimize the consolidation that has been occurring throughout the Northeast due to the leasing costs of the first year of catch share policy.

Sincerely,

Meri Ratzel
Harwich, MA
Fishing Locally Collaborative member

