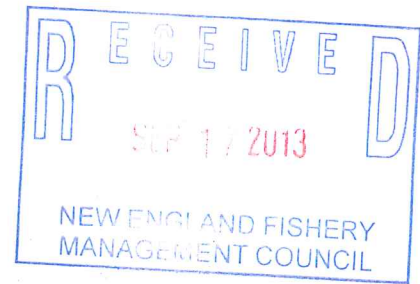


#6A

# PRIORITIES DISCUSSION CORRESPONDENCE

Email with attachment received 9/17/13:

**From:** [john@mosessmithmarkey.com](mailto:john@mosessmithmarkey.com)  
**To:** [mbtooley@live.com](mailto:mbtooley@live.com)  
**Subject:** Re: Single Dredge - Scallop Issue



Ms. Tooley -

I am writing to you on behalf of a number of small business people interested in the above referenced issue. I apologize for the late filing of the attached letter / petition. But, we had been under the impression that the issue of the "priority" to be assigned to the single dredge permit issue was not going to be discussed at your committee meeting this week. We had expected that it would be raised (if at all) at the November Meeting.

In anticipation of the November meeting, the attached letter / petition was prepared and signed by hundreds of people interested in preserving the integrity and the traditions of the small boat owners in Northeast Fishing ports from Maine to New Jersey.

If this issue is discussed at your committee meeting tomorrow, please accept this submission and share it with your group as input from the community members sharing the concerns of the fishing communities in the Northeast. If you require additional testimony (beyond this letter / petition), please call me at any time and I will make arrangements to have a representative present at the meeting this week. My cell number is (508) 525-0071.

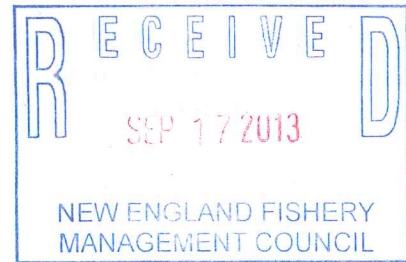
Thanks very much for your anticipated cooperation.

John A. Markey, Jr.  
Moses Smith and Markey, LLC  
50 Homers Wharf  
New Bedford, MA 02740  
(508) 993-9711 - phone  
(508) 993-0469 - fax

attachment

September 11, 2013

New England Fishery Management Council  
50 Water Street  
Newburyport, MA 01950  
Attn: Thomas A. Nies



RE: Atlantic Sea Scallop Small Dredge Program

Dear Mr. Nies:

Once again, the New England Fishery Management Council has been asked to eliminate or amend the Full Time Small Dredge Program. We the undersigned do not believe that there is any credible rationale or justification for further review of this request. Accordingly, we ask that the Council immediately reject the proposal. Furthermore, the below signers want to stress to the Council that the elimination of the Full Time Small Dredge Program would have dire financial consequences for hundreds of New England and Mid-Atlantic Families. In addition, it appears that only a few individuals out of the hundreds of Limited Access scallop permit holders supports the elimination of the small dredge fleet, desiring to undo a policy which has been in place for nearly twenty years.

The sole purpose of this push to eliminate full time small dredge vessels from the Atlantic Sea Scallop Fishery appears to be personal gain. Those opposed to the full time small dredge fleet have stated consistently that the full time small dredge vessels should be eliminated and that the scallops that the small dredge vessels would have caught should be allocated to the full time large dredge fleet. This argument violates two basic requirements of the Magnuson-Stevens Fishery Conservation and Management Act which stipulates that any changes in fishing regulations must consider: (a) conservation of the resource; and (b) the associated economic impact of the proposed change. The taking of allocation from one group of permit holders and transferring that allocation to another group of permit holders does not promote conservation. Moreover, the proposed change would unequivocally harm small dredge permit holders; the fishing crews that they employ; and the hundreds of shore-side businesses serving this segment of the industry. In addition, the loss of the associated tax revenue from the small dredge fleet, fishermen and support businesses would harm the fishing communities and the states in which they operate.

Full time small dredge vessels employ a maximum 10.5' dredge and they are limited to the use of five crew members. In contrast, a full time large dredge vessel can carry two dredges with a combined total of 30' of dredge and they can use seven men, allowing them to be more efficient in harvesting the resource. The increase in harvesting capability by transferring allocation from the small dredge fleet to the large dredge fleet would actually have a negative effect on conservation management.

Amendment Four, which created the Full Time Small Dredge Program, was passed in 1994 – nearly twenty years ago. Since that time nine amendments have been passed without any objections from the industry to curtail the full time small dredge operators.

Precedent has been established and reasonable investment backed expectations have been made by scores of fishing families. For the past nineteen years, the owners of full time small dredge vessels have based their business decisions on the long-term continued support from the industry and Council. The Council should not revisit its decision twenty years after the fact.

Since the inception of Amendment Four, full time small dredge vessels have fished exclusively for scallops and as a result are unable, due to changes in other fishery management programs, to fish for other species. Eliminating the full time small dredge program would essentially put these owners out of business; bankrupting them and forcing their crews into unemployment. The elimination of these boats from the fleet will result in an estimated 300 newly unemployed commercial fishermen. Job killing actions by the Council are (and should be) extremely unpopular. The elimination of the small dredge rights will lead to a long and costly political and legal fight. The boats of the small dredge fleet have earned the right through hard work and sacrifice to remain a part of the fishery.

The financial losses would not end with the boat owners and their crews, but would extend to the hundreds of shore support businesses serving the scallop industry, such as: fish houses, ice plants, welders, painters, supply houses, electricians and trucking companies. Recently, the Council was forced to issue severe restrictions on the groundfish industry and to reduce the allowable catch for the scallop industry. Because of those restrictions, shore support businesses are less profitable today than they were last year. Eliminating another sixty small vessels from a sustainable fishery would have a significant negative ripple effect throughout the industry and may force already struggling businesses to make further cuts or to close completely.

In addition to losses by shore support businesses, commercial banks along the coast of the Eastern United States would suffer significant losses from the elimination of the small dredge fleet. The majority of small dredge owners carry a mortgage on their vessels. Eliminating the small dredge fleet would render these boats (the banks' collateral) worthless. The majority of owners would not be able to satisfy their bank loans and would be forced to declare personal bankruptcy. These owners and their families would be wiped out and local banks throughout New England and the Mid-Atlantic would be forced to write-off \$50 million - \$100 million of bad commercial fishing loans.

Furthermore, as an industry, fishermen, scientists and regulators need to focus on high priority issues, such as: (i) further reductions to bycatch through rotational management and gear modifications; (ii) additional funding for research; (iii) more collaboration amongst fishermen, scientist and regulators; and (iv) improved closed area management. It is these issues that will allow the Atlantic Sea Scallop biomass to flourish. In terms of the health and sustainability of the fishery, the elimination of the Small Dredge Program is an issue of zero impact and therefore does not warrant the Council's time and attention.

It is our belief that the Council would be ill advised to consider eliminating the small dredge fleet and we request that the Council reject this discussion outright. In addition, we ask the Council to send a strong message that future requests to revisit this issue will be met with similar opposition.

Name: PAUL LEMIEUX

Company: BLUE FLEET WELDING

Name: Shelton HARVELL

Company: F/V JEAN MARIE

Name: Scott Dwyer

Company: Ontario Fisheries INC.

Name: GLENN M OLIVEIRA

Company: F/V HUNTER

Name: Paul Dubs  
Truistrot

Company: \_\_\_\_\_

Name: Manuel Marinero

Company: Whaling City SED

Name: Travis E Young

Company: F/V Sassy Girl

Name: TRAVIS E YARRINGTON

Company: \_\_\_\_\_

Name: George Bragdon

Company: F/V Resident

Name: Mark B

Company: Berry

Name: Antoine Amarel

Company: N.B. Ship Supply

Name: Cliff Bigness

Company: Bergie's SEAFOOD

Name: Joe Lopez

Company: L.W.S. INC.

Name: NORVAL A STANLEY III

Company: Bergies SED. Inc.

Name: Joe Lopez

Company: L.W.S.

Name: MARC LORCAU

Company: LET IT RIDE CLAP

Name: Ronald Suzman

Company: LWS

Name: Pete C Inden

Company: Whaling City Arch

Name: Stephen Mattson

Company: Session

Name: Dil Sultun

Company: DIVIOLA SHIPPING

Name: Brent Fulcher

Company: Fulcher Trawling

Name: Rft Le Bell

Company: LABOELLE SHORE ENT

Name: Andrew F. Walsh

Company: Mad J

Name: Codi J. Hynd

Company: Madi J

Name: Steve Wall

Company: Mad J

Name: Paul Adams

Company: Mad J

Name: Kai Kure

Company: R.W. Jones

Name: Paul McNeill

Company: RW Jones

Name: Bobb Mason

Company:

Name: Ronnie C. Willis

Company: Fisherman

Name: DAVID MOSHER

Company: R.W. Jones

Name: John Palmieri

Company: White Fisheries

Name: Jeff White

Company: CMW FISHERYS

Name: Bill Arabian

Company: CMW fisheries

Name: Daryl Arabian

Company: CMW fisheries

Name: CHANDLER PALMIERI

Company: CMW FISHERIES

Name: Alex Oliveira Name: Wendell Lorton  
Company: Oliveira Paintings Sons Company: Mrs. Stone

Name: Alvaro Santiago Name: Chris Stone  
Company: Oliveira Painting Sons Company: Mrs Stone

Name: Russell J. Pavia Name: [Signature]  
Company: T & R Fisheries Inc. Company: Mrs Stone

Name: CITE MARIQUÉS Name: Wendell Lorton  
Company: Independencia Company: JENI LORON

Name: Robert Demerco Name: Pascual Cruz  
Company: Independencia Company: OSCAR LAOY

Name: [Signature] Name: Smith Holcomb Jr.  
Company: Independencia Company: JESSICA

Name: Richard Marques Name: Juan Cervantes  
Company: INDEPENDENCIA Company: JESSICA

Name: Louie Licio Name: [Signature]  
Company: INDEPENDENCIA Company: [Signature]

Name: Albert L Name: [Signature]  
Company: INDEPENDENCIA Company: [Signature]

Name: WARREN ALEXANDER

Company: ATLANTIC SHELLFISH

Name: TOM BECICA

Company: SOUTHERN CLAM CO.

Name: ROBERT NADAN

Company: BOB'S MARINE

Name: LESLIE HOPKINS

Company: BOB'S MARINE

Name: JANET NADAN

Company: BOB'S MARINE

Name: NADIA CROZ

Company: ATLANTIC SHELLFISH

Name: ROBERT EARHART

Company: ATLANTIC SHELLFISH

Name: JAMES CROZ

Company: ATLANTIC SHELLFISH

Name: COLLIN DAY

Company: ATLANTIC SHELLFISH

Name: PAUL CASTELS

Company: F.V. NADIA LEE

Name: KAREN SMITH

Company: ATLANTIC SHELLFISH

Name: FRANK MATOS

Company: F.V. NADIA LEE

Name: MICHAEL SMITH

Company: ATLANTIC SHELLFISH

Name: CARLOS CRUZ

Company: F.V. NADIA LEE

Name: STAN ALEXANDER

Company: ATLANTIC SHELLFISH

Name: RICARDO GARZA

Company: F.V. NADIA LEE

Name: HOLLIS NEWELL

Company: ATLANTIC SHELLFISH

Name: MARCO SILVA

Company: F.V. NADIA LEE



Name: Esteban Perez  
Company: Nadia Lee

Name: [Signature]  
Company: Ocean Prowler

Name: Manuel Alonso  
Company: NADIA LEE

Name: Earl Chrysler  
Company: OCEAN PROWLER

Name: Diane Natale  
Company: Stacy Lee

Name: Richard Lynch  
Company: Leader

Name: Frank Boh  
Company: Stacy Lee

Name: Thomas Saunders  
Company: header

Name: Melvin D Cordo's  
Company: Stacy Lee

Name: Raes Garica  
Company: Ocean Prowler

Name: FRANCESCO RITKY  
Company: Stacy LEE

Name: Robert Borges  
Company: Leader

Name: Nolan Nilsen  
Company: Stacy Lee

Name: Todd Lenlin  
Company: Ocean Prowler

Name: Peter T. Benson  
Company: Stacy Lee

Name: JOAN CRAVO  
Company: Ocean Prowler

Name: Robert Searin  
Company: Stacy LEE

Name: Rob Staker  
Company: RAW BAR INC.

Name: JOE GIMS

Company: F/V Golden Nugget

Name: Britnee P. Walker

Company: F/V Golden Nugget

Name: RODNEY MOORE

Company: F/V GOLDEN NUGGET

Name: Maria Alvernal

Company: F/V Kathryn Marie

Name: Lo Van Nguyen

Company: \_\_\_\_\_

Name: F/V HUNTER

Company: \_\_\_\_\_

Name: Vincent Loran

Company: F/V Deep Voyager

Name: Colonial Fernandez

Company: dock worker

Name: Robert J Baptist

Company: KATHRYN MARIE  
LUMPER

Name: Miguel Corrett

Company: CRISTA ICA

Name: Debbie Gautreau

Company: Hunter + Kathryn Marie  
(Cleaner)

Name: Dezomair

Company: Temper

Name: Mamuel Sykes

Company: DOCK WORK

Name: [Signature]

Company: Lumper

Name: James Isaac

Company: KATHY MARIE

Name: James M. King, Jr.

Company: FORMER B.A. Lumpers UNION

Name: [Signature]

Company: dock worker

Name: Jose Venissimo

Company: dock work, Bergie's Scooter

Name: [Signature]  
Company: BASE TONS.

Name: Alfred J. Marley  
Company: SEVERIGN STAR

Name: Richard Amador  
Company: BASE NE.

Name: [Signature]  
Company: DOCK WORKER

Name: Frank Pater  
Company: FV Hunter Inc

Name: Kathy Marie  
Company: Kathryn Marie & Hunter

Name: Albert Banton  
Company: FV/HUNTER INC

Name: Jim Schindler  
Company: WCB

Name: WALTER BOTKIN  
Company: FV HUNTER

Name: \_\_\_\_\_  
Company: \_\_\_\_\_

Name: John P. Alvence  
Company: Hunter

Name: \_\_\_\_\_  
Company: \_\_\_\_\_

Name: KEVIN HART  
Company: B W WATER SERVICE

Name: \_\_\_\_\_  
Company: \_\_\_\_\_

Name: Teddy Lopez  
Company: Bergie's Seafood

Name: \_\_\_\_\_  
Company: \_\_\_\_\_

Name: Roberto Roehna  
Company: Bergie's Seafood

Name: \_\_\_\_\_  
Company: \_\_\_\_\_

Name: Lewis A DeMello *Luis A DeMello* Name: Donald Hughes

Company: FLV SANTA BARBARA Company: White Fisheries

Name: ERIC HANSEN *Eric Hansen* Name: *KS*

Company: Hansen Seafaring Inc. Company: Kathryn Marie Hunter

Name: DAVID LARSON *D Larson* Name: \_\_\_\_\_

Company: \_\_\_\_\_ Company: \_\_\_\_\_

Name: Tommy Ahern Name: \_\_\_\_\_

Company: HUNTER  
KATHRYN MARIE Company: \_\_\_\_\_

Name: GLENN M OLIVEIRA Name: \_\_\_\_\_

Company: HUNTER  
KATHRYN MARIE Company: \_\_\_\_\_

Name: Diane Natale Name: \_\_\_\_\_

Company: Karen Nicole Company: \_\_\_\_\_

Name: Kenneth Bran Name: \_\_\_\_\_

Company: Ocean Boy Company: \_\_\_\_\_

Name: THOMAS SAUNDERS Name: \_\_\_\_\_

Company: Ocean Prowler Company: \_\_\_\_\_

Name: Arliudo Dos Santos Name: \_\_\_\_\_

Company: Sovereign STAR Company: \_\_\_\_\_

Name: Richard Dubowik Name: Alan Dan  
Company: FIV C+K Inc. Company: Fisherman

Name: Kenney Brown Name: \_\_\_\_\_  
Company: ATLANTIC SHELLFISH Company: \_\_\_\_\_

Name: James E. Bess Name: \_\_\_\_\_  
Company: Atlantic Shellfish Company: \_\_\_\_\_

Name: Mai J. Name: \_\_\_\_\_  
Company: Fly JUST FORSPITE Company: \_\_\_\_\_

Name: David H. H. H. Name: \_\_\_\_\_  
Company: Fish Company: \_\_\_\_\_

Name: Orly Meyer Name: \_\_\_\_\_  
Company: Fisherman Company: \_\_\_\_\_

Name: John W. Richardson Name: \_\_\_\_\_  
Company: Atlantic Shellfish Company: \_\_\_\_\_

Name: PETER BARBERD Name: \_\_\_\_\_  
Company: F&S FISHERIES Company: \_\_\_\_\_

Name: Andrew F. Walsh Name: \_\_\_\_\_  
Company: CMW Fisheries Company: \_\_\_\_\_

Name: HENRY OLIVEIRA Name: \_\_\_\_\_

Company: MIRAGE Company: \_\_\_\_\_

Name: FERNANDO HOMEA Name: \_\_\_\_\_

Company: MS LESLIE Company: \_\_\_\_\_

Name: [Signature] Name: \_\_\_\_\_

Company: Total Welding Supp Company: \_\_\_\_\_

Name: JAY ELSNER Name: \_\_\_\_\_

Company: FIN'S MIRAGE/MISTRESS Company: \_\_\_\_\_

Name: Charles Maguire Name: \_\_\_\_\_

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Name: [Signature] Name: \_\_\_\_\_

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Name: James Hardy Name: \_\_\_\_\_

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Company: Independent Contractor Company: \_\_\_\_\_

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Name: Donald Harris

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Name: Steve Wall

Name: \_\_\_\_\_

Company: White Fisheries

Company: \_\_\_\_\_

Name: Rick J. Dawn O'Brien

Name: \_\_\_\_\_

Company: F/V Madison III

Company: \_\_\_\_\_

Name: Michael J. O'Hara Jr

Name: \_\_\_\_\_

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Name: Editha Buis Name: \_\_\_\_\_

Company: Edie + Marie Boat Settlement Company: \_\_\_\_\_

Name: [Signature] Name: \_\_\_\_\_

Company: Moses Smith & Maly, LLC Company: \_\_\_\_\_

Name: Timothy P. Wall Name: \_\_\_\_\_

Company: Moses Smith & Maly, LLC Company: \_\_\_\_\_

Name: [Signature] Name: \_\_\_\_\_

Company: Moses Smith & Maly, LLC Company: \_\_\_\_\_

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Name: Radon Palmieri

Company: CMW FISHERIES

Name: Radon Palmieri

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Company: \_\_\_\_\_



WASHINGTON, D.C. OFFICE  
fifth floor  
flour mill building  
1000 potomac street nw  
washington, d.c. 20007-3501  
TEL 202 965 7880 FAX 202 965 1729

OTHER OFFICES  
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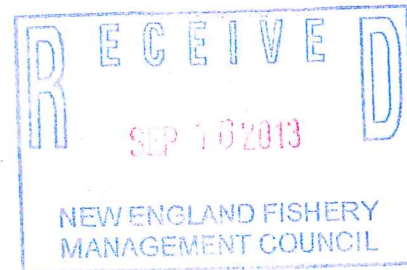
GARVEY SCHUBERT BARER

Please reply to ELDON V.C. GREENBERG  
egreenberg@gsblaw.com TEL EXT 1789

September 12, 2013

**VIA REGULAR MAIL**

Hon. Penny Pritzker  
Secretary of Commerce  
United States Department of Commerce  
14<sup>th</sup> Street and Constitution Avenue, NW  
Washington, D.C. 20230



**Petition for Rulemaking to Repeal the Atlantic Sea Scallop Small Dredge Exemption**

Dear Madam Secretary:

Please find enclosed herewith a petition for rulemaking under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.*, to repeal the small dredge exemption under the Atlantic sea scallop fishery management plan.

Please don't hesitate to contact me if you have any questions.

Sincerely,

Eldon V.C. Greenberg

Enclosure

cc: Samuel D. Rauch III  
John Bullard  
Lois Schiffer  
Ernest F. Stockwell III  
Raymond Starvish

*cc: PB, Cornil (9/11)*

---

**Petition for Rulemaking to Repeal the Small Dredge Program  
Under the Atlantic Sea Scallop Fishery Management Plan**

---

Submitted to Secretary of Commerce Penny Pritzker  
Office of the Secretary  
United States Department of Commerce  
14th Street and Constitution Avenue, NW  
Washington, D.C. 20230

September 12, 2013

Please Address Correspondence to:

Eldon V.C. Greenberg  
Jeffrey C. Young  
GARVEY SCHUBERT BARER  
1000 Potomac Street, NW  
Washington, D.C. 20007  
Phone: (202) 965-7880  
Fax: (202) 965-1729  
[egreenberg@gsblaw.com](mailto:egreenberg@gsblaw.com)  
[jyoung@gsblaw.com](mailto:jyoung@gsblaw.com)

Attorneys for Petitioner Compass Fishing Corp.

## **I. INTRODUCTION**

Compass Fishing Corp. (“Petitioner” or “Compass”) hereby petitions the Secretary of Commerce (the “Secretary”) for a rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (the “APA”), and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884 (the “Magnuson-Stevens Act”), to repeal the outdated and ineffective “Small Dredge Program” currently set forth in 50 C.F.R. § 648.51(e) (the “Exemption” or the “Program”).<sup>1</sup> As discussed below, the Exemption was specifically designed for the effort control days-at-sea (only) management program instituted in 1994 in the Atlantic sea scallop fishery under the Atlantic Sea Scallop Fishery Management Plan (the “FMP”). In light of subsequent regulatory changes in the fishery, the Exemption no longer serves the function for which it was originally intended. Worse yet, it has provided a loophole that has significantly increased fishing mortality and fishing capacity for Atlantic scallops in contravention of the Program’s original purpose. It has also inequitably reallocated large portions of the catch—estimated to be approximately five million pounds worth over \$50 million annually—to vessels not otherwise qualified as “full-time” or “part-time” fleet vessels. The solution to these problems is a simple one—repeal of the Exemption—that would still allow current Program participants to fish, but at the classification level for which they actually qualify.

## **II. BACKGROUND**

### **A. Interest of the Petitioner**

The New England origins of Petitioner date back to the late 1970s. Compass is a family business, owned and operated for the past 35 years by Ray Starvish Sr., who has recently been joined in the business by his son, Ray Jr. Today, Compass owns two boats, K.A.T.E. and K.A.T.E. II, which operate out of the Port of Fairhaven, New Bedford, Massachusetts. Both

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<sup>1</sup> The rule is set forth in its entirety in Appendix A to this Petition.

vessels are western-rigged<sup>2</sup> scallop fishing boats that carry the same seven-person crew. They fish on Georges Bank to the north and the Delmarva<sup>3</sup> to the south.

Ray Starvish Sr. has been in frequent attendance at New England Fishery Management Council (the "Council" or the "NEFMC") meetings since the mid-1980s, and participated in the proceedings in which the Exemption was adopted in 1993-94. As a qualified full-time scalloper operating in the fishery, Compass has grown increasingly concerned about the deleterious effect of the Exemption, both on its own economic livelihood and on the fishery itself. In recent years, Mr. Starvish has been in frequent correspondence with the Council and with the National Marine Fisheries Service ("NMFS"), advocating for repeal or reconsideration of the Exemption.<sup>4</sup>

#### **B. The Exemption Was a Creature of a Previous Management Regime Focused on Effort Control**

The Exemption was created in 1994 as a last-minute insertion to Amendment 4 of the FMP. *See 59 Fed. Reg. 2757* (Jan. 19, 1994). Amendment 4 introduced a significant change to how the fishery was managed, as it shifted the primary management strategy from a meat count (*i.e.*, size) control management system, to an effort control program for all resource areas. To that end, it established a limited entry program, under which three categories of limited-access permits were created: "Full-time" fleet vessels, "Part-time" fleet vessels, and "Occasional" fleet

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<sup>2</sup> A "western-rigged" fishing boat is a boat that has the pilot house forward of mid-ship, and tows over the stern.

<sup>3</sup> "Delmarva" refers to the southern-most portion of the scallop fishery, comprising areas off the coasts of Delaware, Maryland, and Virginia.

<sup>4</sup> Of relevance to the present Petition, Mr. Starvish has corresponded on previous occasions with NMFS Regional Administrator Patricia A. Kurkul about repealing the Exemption. Responding to an August 11, 2010 letter from Mr. Starvish, Ms. Kurkul, by letter dated August 26, 2010, advised that she was forwarding Mr. Starvish's informal request for repeal to the Council for consideration in subsequent amendments to the FMP. Later, in response to an October 8, 2010 follow-up letter from Mr. Starvish, Ms. Kurkul responded by letter dated January 24, 2011, advising Mr. Starvish that she had forwarded his letter to the Council for consideration at its November 2010 meeting, but that the Council decided not to take action on the issue at that time. She also indicated that the issue was brought to the Executive Committee for discussion, but was not identified as a management priority for the year. Ms. Kurkul agreed to forward Mr. Starvish's most recent letter to the Council so that they could "consider addressing [his] concerns through a future action."

vessels. The expectation under this system was that vessels with Part-time and Occasional permits would receive only 40 and 8.3 percent, respectively, of a full-time allocation. The Council's primary objective with this new framework in Amendment 4 was "to reduce the fishing mortality rate to eliminate the overfished condition of Atlantic sea scallops." *See 59 Fed. Reg. at 2757.*

The Exemption was added to Amendment 4 at the eleventh hour, without any study or analysis of its expected impact. In essence, the Exemption offers scallop vessels the option of more days-at-sea if they agree to employ less intensive harvesting practices. Specifically, vessels classified as "Part-time" and "Occasional" have the annual option to fish under the next higher classification (*i.e.*, "Full-time" for "Part-time" vessels, and "Part-time" for "Occasional" vessels)—thereby having more days-at-sea—if they are willing to use and carry no more than a single dredge not to exceed 10.5 feet (3.2 m) in width, and have no more than five people on board, including the operator. *See id.* at 2758. The Council expressly envisioned that these gear and crew size limitations would reduce the efficiency of Program participants. *See id.* ("The specific management measures that will be used **to achieve the necessary reduction in fishing effort** include . . . an annual option for vessels in the Part-time or Occasional category to fish in the next higher vessel group if they use only one dredge no more than 10.5 feet (3.2 m) in width and their crew complement (including the operator) is five or less.") (emphasis added).

At the time the Exemption was enacted, its proponents urged that it was necessary to assist Maine small boat (*i.e.*, single dredge) scallop fishermen, thereby "allow[ing] for a continuation of a traditional fishery." NEFMC Minutes of Meeting on May 12-13, 1993 ("NEFMC Meeting Minutes"). Council Member Bill Brennan from Maine, at the Council meeting held in Mystic, Connecticut on May 12-13, 1993, offered a motion for a small dredge

exemption on behalf of 32-34 small dredge Maine scallop vessels. In announcing approval of the motion, Council Chairman Brancalone summarized the issue as follows:

[The next issue] is at the request of the so-called small scale fishermen, primarily from Maine. A class of vessels that basically has fished at varying levels but have been largely unrecorded in terms of their performance and landings. And largely confined their activities to the Gulf of Maine. We approve, the committee approved, a special authorization – a consideration that would allow them to use a single ten and one-half foot [dredge] which I believe is the present maximum size dredge allowed in Maine. These individuals would be allowed to move from part-time, if they're so classified, or occasional, to move up one step provided they use this single dredge, only one dredge.

*Id.*<sup>5</sup> As indicated by the Chairman, proponents of the Exemption claimed it was necessary to aid small-scale fishermen, primarily from Maine, who would otherwise have difficulty documenting their appropriate classification under the FMP:

Gulf of Maine fishermen commented that their historical practice of scalloping in state waters and occasionally at Fippennies Ledge and Georges Bank with small dredge was not taken into account. Furthermore, they argued that incomplete data collection and difficulty in documenting their complete scalloping history would result in mis-classification. The Council responded by modifying the group assignment rules, the gear size restrictions, and the crew limits.

NMFS, Final Amendment 4 and Supplemental Environmental Impact Statement to the Atlantic Sea Scallop Fishery Management Plan, at p. 6 (1993).

In addressing this concern, however, the Council could not undermine the primary objective of Amendment 4 “to reduce the fishing mortality rate to eliminate the overfished condition of Atlantic sea scallops.” 59 *Fed. Reg.* at 2757. Thus, supporters of the Exemption assured the Council that the gear and crew size restrictions would counterbalance the greater number of days-at-sea for Program participants, making for a conservation-neutral policy. The meeting minutes show that the Council was ultimately persuaded by this argument, believing that

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<sup>5</sup> At the request of Council member Dick Allen, the Council subsequently adopted the additional qualification requiring that vessels participating in the Program carry no more than a five-person crew in order to limit shucking power. See NEFMC Meeting Minutes.



the fishing efforts per day of Program participants would be less than half of that for larger vessels. *See* NEFMC Meeting Minutes. The Council further estimated that a full-time small dredge vessel with a five-person crew would have a shucking capacity of approximately 700-800 pounds per day, as compared to a full-time large dredge vessel that would have a daily shucking capacity of 1,500-2,000 pounds. This projected to approximately 40% catch/production/landings of a full-time large dredge vessel. *Id.* And when a concern was raised about vessels capable of large dredge operations utilizing the Exemption, its supporters claimed the large disparity in efficiency between large and small dredges would eliminate any economic incentive for gaming the system. Thus, the Council was told, and ultimately believed, that by reducing drag size and crew, it could grant more days-at-sea for small-scale fishermen, thereby preserving a traditional fishery without compromising Amendment 4's ultimate objective of restoring stocks of Atlantic sea scallops. The Exemption, in other words, was specifically designed for an effort control system of management, offering a particular trade-off based on the relevant metrics for that particular system.

### **C. The Undermining of the Exemption by the Shift to a Spatial Management Strategy for the Fishery**

Despite serious concerns with the hasty process and lack of adequate analysis and review in 1994, the Exemption was adopted and has been part of the FMP ever since. Regrettably, it is now clear that the Exemption has become merely a regulatory loophole through which (mostly non-Maine) fishing interests can operate at a higher classification level without the concomitant trade-offs originally intended with the gear and crew size limitations of the Exemption. The cause of this shift has been the evolving regulatory framework for the fishery, in which the days-at-sea/effort control approach has been de-emphasized, while the Exemption has remained the same.

The key factor that has undermined the Exemption as it was originally conceived has been the shift toward a spatial management strategy for the fishery. As discussed above, Amendment 4 regulated scallop fishing under a “days-at-sea” approach focused upon effort control, whereby vessels were allocated a certain number of days-at-sea based upon their classification in the fishery (*i.e.*, Full-time, Part-time, Occasional). Those Part-time and Occasional vessels wishing to have more days-at-sea than they could otherwise qualify for, had the option of obtaining a higher classification under the Exemption, in exchange for the associated gear and crew size limitations. This presented the Council with what it believed to be a conservation-neutral trade-off, the advantages of which were left up to individual fishing interests to weigh: less efficient fishing for more time (under the Exemption), or more efficient fishing for less time (without the Exemption).

In 1999, however, the Council adopted the Access Area Program, which granted access to previously closed areas for scallop fishing. Georges Bank closed areas were opened to scallop fishing starting in 1999 pursuant to Framework 11 and later Framework 13. *See* Proposed Framework 24 SAFE Report, Appendix I, distributed at the NEFMC Scallop Plan Development Team (the “PDT”) Meeting on Aug. 20-21, 2012. Frameworks 14 and 15 provided controlled access to Hudson Canyon and Virginia/North Carolina areas. *Id.* Then, in 2004, the Council adopted Amendment 10 to the FMP, which fundamentally changed the way the scallop fishery had been managed: “The primary intent of Amendment 10 is to introduce spatial management of adult scallops, taking advantage of resource heterogeneity to improve yield and minimize collateral adverse impacts on other fisheries and the marine environment.” NMFS, Final Amendment 10 to the Atlantic Sea Scallop FMP with a Supplemental Environmental Impact Statement, Regulatory Impact Review, and Regulatory Flexibility Analysis, p. 3-2 (Dec. 2003).

This new spatial management strategy emphasized high landings per unit effort (“LPUE”) to minimize dredge bottom time, reduce fishing time and reduce expenses such as fuel.

The shift to a spatial management strategy focused on LPUE under Amendment 10 has left the benefits of the Exemption in place (*i.e.*, the ability to step up to a higher classification), while largely eliminating its disincentives. This is because under the new regime, small dredge vessels receive the same number of access trips, pounds, and crew size, as compared to full-time large dredge vessels. *See, e.g.*, 50 C.F.R. § 648.51(e)(3)(i) (“There is no restriction on the number of people on board for vessels participating in the Sea Scallop Area Access Program as specified in § 648.60[.]”). Vessels fishing in closed areas are now limited only by total allowable catch, not the number of days-at-sea, and thus small dredge vessels can fish in access areas with a full crew for as long as necessary in order to catch their allocated pounds. And the high LPUE in access areas means that even with a single, small dredge, vessels can harvest significantly more scallops than they could in the open areas. Thus, the only disadvantage of having a smaller dredge on Access Area trips is the marginal additional trip expenses, such as food and fuel.

#### **D. The Surge in Vessels Utilizing the Exemption and Re-allocation of the Scallop Harvest to those Vessels**

With these changes, the Exemption has become, in essence, an attractive loophole, offering a “carrot” (higher classification) without the “stick” (lower yields) that existed under previous iterations of the FMP. Accordingly, Part-time and Occasional vessels have flocked to avail themselves of the Exemption. Between 1994 and 2000 when scallop management relied entirely on “days-at-sea,” there were never more than five Full-time small dredge permits. Since then, the number of Full-time small dredge permits has increased tenfold, reaching a high of 63 in 2007. *See* Table 1 below.

Table 1.

Permit Category	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Full-time small dredge	3	13	25	39	48	57	59	63	56	55	54	53

In 2010, in addition to the 54 Part-time scallop vessels that upgraded to Full-time small dredge vessels, 35 Occasional scallop vessels upgraded to Part-time small dredge vessels. See Proposed Framework 24 SAFE Report, Appendix I, distributed at the NEFMC Scallop PDT Meeting on Aug. 20-21, 2012.

This trend did not go unnoticed by the PDT. In a September 1, 2004 Scallop Management Advice Memorandum to the Scallop Oversight Committee, the PDT included the following recommendation on the Exemption:

Another issue related to the changing characteristics of the fishing fleet and capacity is the increasing number of small dredge permits, which have increased from 7 permits in 2000 to 63 permits in 2004 (with a corresponding decrease in part-time and occasional full-size dredge and trawl permits from 55 to 13). More analysis is needed to determine how this change in permits has affected DAS allocations to limited access vessels and fishing mortality, which may be a suitable focal point for the 2005 SAFE Report. **More important to this potential re-evaluation would be a determination of the past and present objective of the small dredge permit, so that [it] can be determined whether the present system is achieving this objective.**

PDT, Memorandum on Scallop Management Advice, Sept. 1, 2004 (emphasis added). No such re-evaluation ever occurred.

Along with the increasing number of vessels utilizing the Exemption, there has been a corresponding sharp increase in the allocation of the resource to small dredge vessels.

Framework Adjustment 18 observed that:

Another important trend was that vessels with part-time and occasional permits were converted into fulltime or part-time small dredge permits as the resource conditions improved **and the daily catches for a vessel with a small dredge**

**permit became closer to the daily catches of a vessel with a large dredge permit.**

NMFS, Framework Adjustment 18 to the Atlantic Sea Scallop FMP, Including an Environmental Assessment, Regulatory Impact Review, Regulatory Flexibility Analysis and SAFE Report, p. 4-18 (Dec. 2007) (emphasis added). Framework Adjustment 18 also explained:

The striking increase in the scallop revenue per full-time vessel according to the gear categories is evident from Table 40. While the vessels in all categories have more than doubled their annual scallop revenue during 1999-2004, **annual scallop revenue per full-time small dredge vessel almost tripled explaining the incentive to transfer part-time permits to full-time small-dredge permit during recent years.**

*Id.* at 4-23 (emphasis added). Again, this tripling of revenues by full-time small dredge vessels was primarily caused by the increase in catch by this group resulting from rotational area management, where full-time small dredge vessels received the same number of access trips and pounds as bona fide full-time vessels. In sum, it is now clear that the premise upon which the Exemption was founded—that a small dredge significantly reduces a vessel’s take—is simply not true.

#### **E. Unfairness to Properly Categorized Vessels**

The foregoing dynamic has resulted in an unfair and unintended reallocation of the scallop resource to those vessels that did not originally qualify for an upgraded category. In August 2011, H. Kite-Powell, a Research Specialist at the Marine Policy Center of the Woods Hole Oceanographic Institution, produced an economic study entitled “Estimated Effect of the Small Dredge Exemption on Scallop Landings.”<sup>6</sup> It sought to quantify the per vessel gains conferred upon users of the Exemption. The following table (here labeled Table 2), set forth in the Kite-Powell report as Table 3, summarized those gains from 2008 and 2009:

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<sup>6</sup> A copy of the report is attached as Appendix B to this Petition.

**Table 2.**

	Landings per vessel per year (lbs)	
	2008	2009
<b>Part time vessel upgrading to full time small dredge</b>		
Fishing part time as two-dredge scallop vessel	71,360	69,330
Fishing full time small dredge	120,350	138,950
Gain from upgrade	<b>48,990</b>	<b>69,620</b>
<b>Occasional vessel upgrading to part time small dredge</b>		
Fishing occasionally as two-dredge scallop vessel	14,570	14,170
Fishing part time small dredge	50,620	51,450
Gain from upgrade	<b>36,050</b>	<b>37,280</b>

Based on these trends, the report estimated the effective transfer of the allocation from Full-time permits to Part-time and Occasional boats operating under the Exemption to be between 14,900 and 19,500 lbs/year for each Full-time permit, with 50-75% of the total coming from Access Area landings. For 2010, the report estimated (conservatively) that vessels utilizing the Exemption would accrue between 3.9 to 5.1 million pounds in additional scallop landings. Under these calculations, the cost to each Full-time vessel was expected to be more than \$200,000, with the potential for even greater losses if additional access areas were to be created.

### **III. STATUTORY AND REGULATORY AUTHORITY FOR THIS PETITION**

This Petition invokes the authority of the Secretary pursuant to the APA and the Magnuson-Stevens Act.

#### **A. Administrative Procedure Act**

The APA states that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). If such a petition is denied the agency must provide “a brief statement of the grounds for denial.” *Id.*, § 555(e); *Nat’l Mining Ass’n v. U.S. Dep’t of the Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995). This right “entitles the petitioning party to a response on the merits of the petition.” *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-16 (D.D.C. 1995). Agencies must respond to petitions “within a

reasonable time,” to “proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b).

Accordingly, the Secretary must “fully and promptly consider” all petitions presented to her.

*WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981).<sup>7</sup>

### **B. Magnuson-Stevens Act**

Under the Magnuson-Stevens Act, the Secretary plays an integral role in the realization of the Act’s goals by providing guidance to the fishery Councils with respect to their operations and exercising rulemaking authority to guide and implement Council actions. This includes “assist[ing] in the development of fishery management plans” by establishing advisory guidelines based on national standards, *see* 16 U.S.C. § 1851(b) and 50 C.F.R. Part 600, Subpart D, and issuing general regulations governing Council operations. *See generally* 50 C.F.R. Part 600. The Secretary also ensures that regulations proposed by the Councils “are consistent with the fishery management plan [and any] plan amendment[,]” *id.*, § 1854(b)(1), publishes both proposed and final rules under the Act and generally carries out rulemaking responsibilities for fishery management measures. *Id.*, 16 U.S.C. §§ 1854(b)(2),(3). In the event of any inconsistency, the Act empowers the Secretary to “notify the Council in writing of the inconsistenc[y] and provide recommendations on revisions.” *Id.*, 16 U.S.C. § 1854(b)(1)(B). The Secretary further has a “responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of [the Magnuson-Stevens Act].” *Id.*, § 1855(d). Finally, the Magnuson-Stevens Act provides, “The Secretary may promulgate such regulations, in accordance with section 553 of title 5, United States Code, as

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<sup>7</sup> NMFS has developed Operational Guidelines, pursuant to the Magnuson-Stevens Act, for the development, review, approval, and implementation of FMPs, amendments, and other related fishery management actions. Included within the Guidelines are “Procedures for Development of Regulations,” Paragraph 14 of which specifically addresses petitions to undertake rulemaking. This Petition is consistent with such Procedures.

may be necessary to discharge such responsibility or to carry out any other provisions of this Act.” *Id.*

#### **IV. THE SECRETARY SHOULD DIRECT THE COUNCIL TO TAKE ACTION LEADING TO REPEAL OF THE ANACHRONISTIC EXEMPTION IN SERVICE OF THE REQUIREMENTS OF THE MAGNUSON-STEVENSONS ACT**

The Magnuson-Stevens Act was enacted to prevent overfishing, rebuild overfished stocks, and establish a comprehensive fishery conservation and management scheme. *See* 16 U.S.C. §1801(a)-(b). Pursuant to these goals, Congress intended that fishery management programs “utilize[] . . . the best scientific information available.” *Id.*, §§ 1801(c)(3), 1851(a)(2). It is now manifestly clear from the best scientific information available that the Exemption is being used as a loophole to harvest significantly greater quantities of Atlantic sea scallops. It is also clear why this has occurred—because the regulatory underpinnings for the Exemption have changed, while the Exemption itself has not. Under the current management approach, there is no reason for providing a stepped-up classification for Part-time and Occasional vessels, and doing so threatens the resource and results in an inequitable reallocation to unqualified vessels, contrary to Section 301(a)(4) of the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(4). The Secretary can and should close this loophole by directing the Council to take action leading to repeal of the Exemption. Doing so would require no great expenditure of effort, as no new rule is needed to take its place, and would not deprive any current Program participants of the right to fish. It would simply require that all participants fish under the classification for which they truly qualify, thereby promoting the sustainability and fair allocation of the scallop resource.

#### **V. CONCLUSION**

For the foregoing reasons, Petitioner respectfully submits that the Secretary should direct the Council to undertake action leading to a rulemaking to repeal the Exemption.



Date: September 12, 2013

Respectfully submitted,



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Eldon V.C. Greenberg  
Jeffrey C. Young  
GARVEY SCHUBERT BARER  
1000 Potomac Street, NW  
Washington, D.C. 20007  
Phone: (202) 965-7880  
Fax: (202) 965-1729  
[egreenberg@gsblaw.com](mailto:egreenberg@gsblaw.com)  
[jyoung@gsblaw.com](mailto:jyoung@gsblaw.com)

Attorneys for Petitioner Compass  
Fishing Corp.

# Appendix A

(C) Vessels subject to the requirements in paragraph (b)(5)(ii) of this section transiting waters west of 71° W long., from the shoreline to the outer boundary of the Exclusive Economic Zone, are exempted from the requirement to only possess and use TDDs, provided the dredge gear is stowed in accordance with § 648.23(b) and not available for immediate use.

(D) *TDD-related definitions.* (1) The cutting bar refers to the lowermost horizontal bar connecting the outer bails at the dredge frame.

(2) The depressor plate, also known as the pressure plate, is the angled piece of steel welded along the length of the top of the dredge frame.

(3) The top of the dredge frame refers to the posterior point of the depressor plate.

(4) The struts are the metal bars connecting the cutting bar and the depressor plate.

(c) *Crew restrictions.* Limited access vessels participating in or subject to the scallop DAS allocation program may have no more than seven people aboard, including the operator, when not docked or moored in port, except as follows:

(1) There is no restriction on the number of people on board for vessels participating in the Sea Scallop Area Access Program as specified in § 648.60;

(2) Vessels participating in the small dredge program are restricted as specified in paragraph (e) of this section;

(3) The Regional Administrator may authorize additional people to be on board through issuance of a letter of authorization.

(4) A certified at-sea observer is on board, as required by § 648.11(g).

(d) *Sorting and shucking machines.* (1) Shucking machines are prohibited on all limited access vessels fishing under the scallop DAS program, or any vessel in possession of more than 600 lb (272.2 kg) of scallops, unless the vessel has not been issued a limited access scallop permit and fishes exclusively in state waters.

(2) Sorting machines are prohibited on limited access vessels fishing under the scallop DAS program.

(e) *Small dredge program restrictions.* Any vessel owner whose vessel is assigned to either the part-time or Occa-

sional category may request, in the application for the vessel's annual permit, to be placed in one category higher. Vessel owners making such request may be placed in the appropriate higher category for the entire year, if they agree to comply with the following restrictions, in addition to, and notwithstanding other restrictions of this part, when fishing under the DAS program described in § 648.53:

(1) The vessel must fish exclusively with one dredge no more than 10.5 ft (3.2 m) in width.

(2) The vessel may not use or have more than one dredge on board.

(3) The vessel may have no more than five people, including the operator, on board, except as follows:

(i) There is no restriction on the number of people on board for vessels participating in the Sea Scallop Area Access Program as specified in § 648.60;

(ii) The Regional Administrator may authorize additional people to be on board through issuance of a letter of authorization.

(iii) A certified at-sea observer is on board, as required by § 648.11(g).

(f) *Restrictions on the use of trawl nets.*

(1) A vessel issued a limited access scallop permit fishing for scallops under the scallop DAS allocation program may not fish with, possess on board, or land scallops while in possession of a trawl net, unless such vessel has been issued a limited access trawl vessel permit that endorses the vessel to fish for scallops with a trawl net. A limited access scallop vessel issued a trawl vessel permit that endorses the vessel to fish for scallops with a trawl net and general category scallop vessels enrolled in the Area Access Program as specified in § 648.60, may not fish with a trawl net in the Access Areas specified in § 648.59(b) through (d).

(2) *Replacement vessels.* A vessel that is replacing a vessel authorized to use trawl nets to fish for scallops under scallop DAS may also be authorized to use trawl nets to fish for scallops under scallop DAS if it meets the following criteria:

(i) Has not fished for scallops with a scallop dredge after December 31, 1987; or

# Appendix B

## Estimated Effect of the Small Dredge Exemption on Scallop Landings

H. Kite-Powell  
Research Specialist  
Marine Policy Center  
Woods Hole Oceanographic Institution  
August 2011

Under the small dredge exemption (SDE) created in 1994 as part of Amendment 4 to the Atlantic Sea Scallop Fisheries Management Plan, “part-time” and “occasional” scallop fishing vessels are allowed to increase their fishing activity in exchange for restrictions on gear and crew. Specifically, scallop vessels originally categorized as “part-time” (more than 37 but fewer than 150 days at sea (DAS), on average, in 1985-1990) can upgrade to full-time status, and vessels originally categorized as “occasional” (averaging fewer than 38 DAS in 1985-1990) can upgrade to part-time status, in exchange for restricting fishing gear to a single 10.5 ft dredge and limiting crew to no more than five. Following the advent of Amendment 10 to the Atlantic Sea Scallop Fishery Management Plan in 2004, the number of scallop vessels taking advantage of the SDE increased significantly. In 2010, 54 part-time scallop vessels upgraded to full-time small dredge permits and 35 occasional scallop vessels upgraded to part-time small dredge permits under the SDE. Here, we estimate the increase in annual scallop landings, under recent conditions, for vessels that take advantage of the SDE.

The tradeoff for a scallop vessel considering the SDE upgrade is a greater number of DAS for fishing in Open Areas and, possibly, a greater number of fishing trips to Access Areas, in exchange for a lower landings per unit effort (LPUE) during Open Area fishing due to the dredge and crew restriction. Table 1 shows LPUE for different categories of scallop vessels in Open Areas in 2008 and 2009.

	Landings per unit effort (LPUE)	
	2008	2009
<b>Full time scallop vessel</b>	1,768 lbs	2,222 lbs
<b>Full time small dredge</b>	948 lbs	1,323 lbs
<b>Part time small dredge</b>	731 lbs	1,030 lbs

**Table 1:** Open Area landings per unit effort, 2008 and 2009.  
Source: NMFS/PDT.

Table 2 shows DAS and trip allocations by vessel category for 2008 and 2009.

Effort Allocation				
	2008		2009	
	Open Area DAS	Access Area Trips	Open Area DAS	Access Area Trips
<b>Full time scallop vessel</b>	51	4 @ 18k lbs	37	5 @ 18k lbs
<b>Part time scallop vessel</b>	20	2 @ 18k lbs	15	2 @ 18k lbs
<b>Occasional scallop vessel</b>	4	1 @ 7.5k lbs	3	1 @ 7.5k lbs

**Table 2:** Effort allocation to different categories of scallop vessels, 2008 and 2009. Access Area trips are limited to 18,000 lbs landings for full time and part time, and 7,500 lbs landings for occasional vessels. Source: Amendment 15, Atlantic Sea Scallop Fishery Management Plan.

Table 3 summarizes the gains from upgrading under the SDE for 2008 and 2009.

Landings per vessel per year (lbs)		
	2008	2009
<b>Part time vessel upgrading to full time small dredge</b>		
Fishing part time as two-dredge scallop vessel	71,360	69,330
Fishing full time small dredge	120,350	138,950
<b>Gain from upgrade</b>	<b>48,990</b>	<b>69,620</b>
<b>Occasional vessel upgrading to part time small dredge</b>		
Fishing occasionally as two-dredge scallop vessel	14,570	14,170
Fishing part time small dredge	50,620	51,450
<b>Gain from upgrade</b>	<b>36,050</b>	<b>37,280</b>

**Table 3:** Estimated gains per vessel from upgrading under the SDE, 2008 and 2009. Landings for regular scallop vessels are based on LPUE for full-time vessels.

As Table 3 shows, the estimated gain from upgrading a part-time two-dredge scallop vessel to full-time under the SDE was about 49,000 lbs in 2008 and nearly 70,000 lbs in 2009. The gains for upgrading an occasional two-dredge scallop vessel were 36-37,000 lbs. These estimates may understate the actual gains because the estimated landings fishing part-time or occasionally as a two-dredge vessel assume the LPUE for full-time two-dredge scallop vessels – and these may well be larger than those achieved by part-time and occasional vessels, if the data for SDE fishing are any indication (see Table 1).

In 2010, there were 54 full-time and 35 part-time scallop vessels operating under SDE upgrades. Assuming per-vessel gains similar to those estimated for 2008 and 2009, this suggests (conservatively)

additional scallop landings accruing to these vessels as a result of the SDE of 3.9 to 5.1 million lbs in 2010.

About 2.9 million lbs of these additional landings for the SDE vessels come from Access Area trips. Under a fixed total landing amount from Access Area fishing, and without the SDE upgrades, these 2.9 million lbs would in principle be allocated to the full-time fleet. Table 4 estimates the effective “transfer” of Access Area allocation from the full time (mainly two-dredge) fleet to the SDE fleet as a result of SDE upgrades. This assumes total landings from Access Area trips fixed at 23.7 million lbs, and part-time vessels receiving 40% and occasional vessels receiving 8.33% of the Access Area allocation given to a full-time permit.

	FT	FT SDE	PT 2D	PT SDE	Occ 2D
<b>With SDE upgrades</b>					
Permits	261*	54		35	
Access Area trips/permit	4	4		2	
Allocation per permit (lbs)	72,000	72,000		14,400	
Trip limit (lbs)	18,000	18,000		14,400	
Fleet landings/year (lbs)	18,792,000	3,888,000		1,008,000	
<b>Without SDE upgrades</b>					
Permits	261*		54		35
Access Area trips/permit	4		2		1
Allocation per permit (lbs)	82,966		33,186		6,911
Trip limit (lbs)	20,741		16,593		6,911
Fleet landings/year (lbs)	21,654,054		1,792,060		241,887
<b>Gain (loss) from SDE</b>					
Fleet (lbs/year)	(2,862,054)	2,095,940		766,113	
Per vessel (lbs/year)	(10,966)	38,814		21,889	

\*NOTE: FT fleet includes 250 full-time two-dredge vessels and 11 net boats.

**Table 4:** Estimated effective transfer of Access Area allocation from full-time (FT) fleet to part-time (PT) and occasional (Occ) vessels that upgrade under the SDE. This assumes a constant annual total landing from Access Area trips of 23,688,000 lbs, and that part-time vessels receive 40% and occasional vessels 8.33%, respectively, of the full-time vessel Access Area allocation.

**Summary:** If total annual landings from Open and Access Area trips are held constant, based on data from 2008 and 2009, the estimated effective transfer of allocation from full-time permits to part-time and occasional boats operating under SDE is between 14,900 and 19,500 lbs/year for each full-time permit. Under the assumptions described in Table 4, about 11,000 lbs/year of this transfer (50 to 75% of the total) comes from Access Area landings.

**Email received September 3, 2013**

-----Original Message-----

From: Jon Williams [<mailto:jwilliams@atlanticredcrab.com>]

Sent: Tuesday, September 03, 2013 3:19 PM

To: Tom Nies

Subject: deep sea red crab



Dear Mr. Nies,

With the upcoming Executive Committee meeting this fall, I would like to request that the red crab fishery be put on the priorities list for 2014 in order to potentially set an ABC for female red crab. A brief look at the history of the fishery reveals that the prohibition of females does not have significant biological merit regarding the red crab stock. In fact, it was not biologists who imposed the male-only approach-rather; it was the industry itself that requested the council to only allow a male ABC. With a new demand in the marketplace for female red crab, we now urge the council to reassess the ABC of female red crabs which currently is set at zero.

The origins of the female probation emerged during the implementation of the FMP in 2001. During this time, there were two groups that stood deeply divided regarding the future of the fishery. On the one hand, a number of historic participants followed the recommendation of the 1973 stock assessment and supported a 5.8 million lb. TAC. On the other hand, a second group argued that the '73 assessment was flawed and that resource could support a TAC in excess of 20 million lbs. As we could not predict the decision of the council, we lobbied for a prohibition on females as a safeguard in the event the council recommended the higher TAC.

In the end, however, the council both adopted the 5.8 million lb. TAC and banned the retention of female crabs. While this imposed a significant limitation to the fishery, it was not a pressing issue at the time as there was no significant market for female crabs.

Yet much has changed since the implementation of the male-only ABC. A second stock assessment conducted by Dr. Rick Wahle in 2003 found that the female biomass was 260% greater than that of males and in recent years we have had more and more opportunities to sell female crab into the Asian market.

In 2009, in response to red crab being placed on the data poor list, the council voted to set the ABC of male red crab at 3.95 million. While poor market conditions beginning in 2007 resulted in landings less than the ABC, this still was a significant setback to the fishery's future potential.

With such promising current conditions and a red crab stock that is more stable than ever, it is apparent that now is the time to reassess the prohibition on female crabs. The ban on females was only ever put in place due to unstable times within the fishery and a lack of demand in the marketplace. In addition, I would like to emphasize the ease at which this change could take place. With the implementation of Amendment 3 in September of 2011, the current language in the red crab FMP holds an ABC of females at zero rather than "retention prohibited." This should allow the council and the SSC to change the ABC to a number greater than zero without a great deal of work.

Thank you for your consideration and feel free to contact me with any questions, I look forward to hearing back from you.

Best regards,

Jon Williams



# NORTHEAST SEAFOOD COALITION

August 30, 2013

Terry Stockwell, Chairman  
Groundfish Oversight Committee  
New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950



Re: New England Fishery Management Council Priorities

Dear Terry:

On behalf of our members whose businesses rely upon a sustainable and stable groundfish fishery, the NSC strongly requests that the Groundfish Oversight Committee recommend to the New England Fishery Management Council for inclusion in the Council's future priorities that alternative management approaches for setting catch advice be explored, analyzed and considered for stocks managed under the groundfish fishery management plan. Such strategies should be considered as an alternative for managers who have relied solely upon the existing stock assessment models which, for many stocks, have proven over the past ten years to yield wildly fluctuating if not unreliable results. This has rendered both the business and management of the groundfish fishery virtually impossible.

- NSC strongly believes that the time for exploring alternative management approaches is now. The groundfish fishery, which is now only four months away from the original 2014 rebuilding targets, is already in a state of disaster.

NSC looks forward to working with your Committee and the Council on this important endeavor to achieve sustainability and stability in the groundfish fishery.

Thank you in advance for your consideration.

Sincerely,

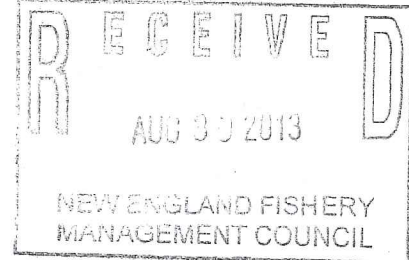
Jackie Odell  
Executive Director

Cc: Tom Nies, Executive Director, New England Fishery Management Council  
Jamie Courane, Groundfish Plan Coordinator, New England Fishery Management Council



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

AUG 29 2013



Ernest F. Stockwell, III, Acting Chairman  
New England Fishery Management Council  
50 Water Street  
Newburyport, MA 01950

Dear Terry:

I am writing to follow up on my August 31, 2012, letter regarding the District Court's August 2, 2012, remedial order in *Flaherty v. Locke*, No. 11-660 (D.D.C.), a case challenging Amendment 4 to the Atlantic Herring Fishery Management Plan (FMP).

In that letter, I described the District Court's March 2012 opinion finding that the National Marine Fisheries Service (NMFS) had not complied with: Magnuson-Stevens Fishery Conservation and Management Act (MSA) provisions concerning stocks in the fishery and minimizing bycatch; and the National Environmental Policy Act (NEPA) requirement to consider a reasonable range of alternatives for Amendment 4's accountability measures (AMs), acceptable biological catch (ABC) control rule, and measures to minimize bycatch. I further described the remedial actions the District Court ordered NMFS to take.

NMFS has completed all but two of the actions ordered by the District Court. The two remaining actions are:

- (1) Filing with the District Court a report of all remedial actions taken, including a completed NEPA analysis for the 2013-15 herring specifications and management measures for the Atlantic herring fishery analyzing a range of alternatives to the current AMs and the ABC control rule for herring, including consideration of control rules for other forage fish; and
- (2) Filing with the District Court a supplemental explanation setting forth NMFS's consideration of whether the Atlantic Herring FMP minimizes bycatch to the extent practicable in compliance with the MSA.

On July 26, 2013, the District Court granted NMFS an extension until October 23, 2013, to complete these two remaining actions. NMFS expects the District Court to scrutinize the agency's compliance with the August 2, 2012, remedial order closely.

Additionally, during this lawsuit and development of Amendment 5, stakeholders have raised concerns that the Council can address. Although not required by the District Court's August 2, 2012, order, the Council can take steps to improve management of the herring fishery through: Development of an amendment to consider river herring and shad as stocks in the herring



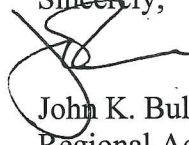
@: CBR, LS (9/6)

fishery; development of an amendment to further consider alternative ABC control rules for herring, including consideration of control rules for other forage fish; and completion of Framework 3 considering catch caps for river herring and shad. I strongly urge the Council to take the following actions as soon as possible:

- (1) Develop an amendment to consider river herring and shad as stocks in the herring fishery, consistent with the recommendation in my August 31, 2012, letter, and with the Council's 2013 priority list.
- (2) Further consider alternative ABC control rules for herring, including control rules for other forage fish, based on the best available science. This is consistent with the recommendations of the Scientific and Statistical Committee and Herring Plan Development Team calling for comprehensive consideration of managing herring as a forage fish as part of the long-term management strategy for herring. I recommend that the Council begin considering this issue in an amendment prior to development of the 2016-18 herring specifications. This action could be combined with the amendment to consider river herring and shad as stocks in the herring fishery.
- (3) Complete the Council's consideration of the river herring/shad catch cap action in Framework 3.

I appreciate the hard work that you and your staff have put into improving management of the herring fishery, and I look forward to continuing these efforts together. Please contact me if you have any questions.

Sincerely,

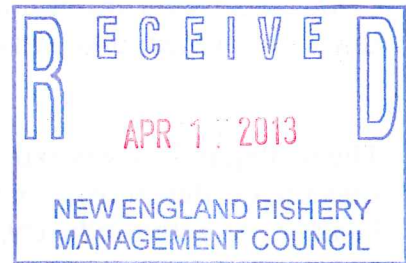


John K. Bullard  
Regional Administrator

cc: Thomas A. Nies, Executive Director, New England Fishery Management Council

April 17, 2013

New England Fisheries Management Council  
Attn: C.M. "Rip" Cunningham, Jr.  
50 Water Street, Mill 2  
Newburyport, MA 01950



Dear Chairman,

I am asking for The Council to consider a change in the way observer coverage is financed in the scallop fishery.

Please consider the following:

The scallop fishery is unique in that the vessel makes direct payments to the observer service provider. The vessel then needs to fish additional pounds or fractions of D.A.S. to recoup or offset the financial burden incurred by carrying the observer.

The reason for carrying observers is to accumulate data that is then used in the science to best manage the fishery.

In the past a vessel taking a late season closed area trip would find itself carrying an observer after the scallop observer set aside was exhausted with the vessel bearing the entire financial burden with no offset or compensation.

Presently we have access areas with very low catch rates. When a vessel is assigned an observer for one of these access areas, it becomes very stressful and burdensome to prolong the trip to catch the allocation and the observer compensation pounds. A trip limit of 13,000 lbs could take a single dredge vessel averaging 500 lbs a day a full 26 days or more to achieve its goal. As more vessels extract their trips, catch rates will drop further. A vessel must mobilize twice and perhaps three times as catch rates drop. An observer assignment to a trip that lasts 13 days will add four or more fishing days for the vessel to harvest its compensation pounds.

We typically limit our trips to eleven days for product quality reasons. For a vessel to harvest 13,000 lbs at a catch rate below 500 lbs a day presents fishing strategy logistic and financial problems.

Assume two 13 day trips at hopefully 500 lbs a day, then add four or more days to recoup observer costs and it becomes near impossible to successfully harvest and overcome costs associated with fishing an access area with low catch rates. Fuel costs, gear expenses, fixed overhead, wear and tear, all dictate that vessels must operate with maximum efficiency in today's economy. The condition of certain

*cc: Council; DB (4/19)*

access areas, combined with the vessels responsibility to the observer creates great inefficiencies and uncertainties for the vessel. If an observer is assigned to more than one segment of the trip the formula for success becomes even more impossible.

The scallop industry is experiencing severe cut backs in 2013 and 2014. In order to ease the burden of reduced fishing opportunities and maintain the viability of a healthy pro-active industry, I request a dialogue to address funding of the observer program.

The open area observer program may function well at the moment; however, the access area program doesn't and deserves a long-term solution to remove variables and uncertainties that affect the fleet.

The direction I would suggest is that in order to facilitate the gathering of data by observers for scientific inputs to fisheries management, the funding source needs to change. Let the fleet's set aside pounds be redistributed in annual fishing year specifications and have the funding for science (observers) be allocated from other sources intended for that purpose, such as S-K money.

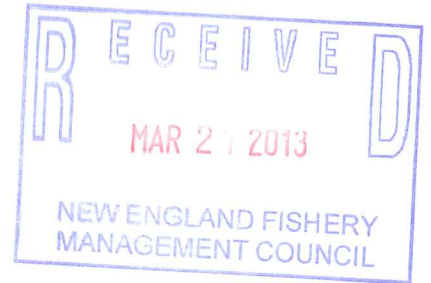
I feel this is a consequence arising from unforeseen circumstances that have developed in our fishery. The scallop fishery and the scientific and regulatory communities all benefit from observer data but this data now comes at too high a cost. The scallop fleet has always been a willing partner in science and accumulation of data; however, carrying an observer can be viewed as a penalty in some access areas and before an aversion to willing participation develops, this could and deserves to be addressed.

Respectfully submitted,

Joseph J. Gilbert  
F/V Regulus & F/V Furious  
322 New Haven Ave.  
Milford, CT 06460

203-876-8923

EMPIRE FISHERIES, LLC  
322 NEW HAVEN AVENUE  
MILFORD, CONNECTICUT 06460



March 19, 2013

Ms. Mary Beth Tooley  
Chairperson Scallop Committee  
New England Fishery Management Council  
50 Water Street  
Newburyport, Massachusetts 01950

Dear Chairperson Tooley and Committee Members:

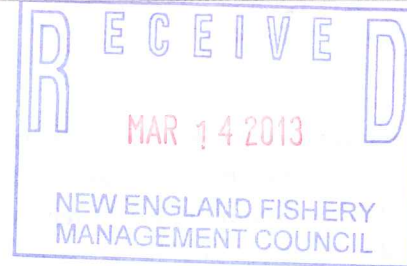
It seems that one segment of the scallop fleet desires to eliminate or cut back in some way another smaller segment of the scallop fleet.

I request the Committee NOT consider any revisiting of where and how the small dredge fleet was established in Amendment 4.

Respectfully,

Joseph Gilbert  
F/V Regulus  
F/V Furious

*u. Council, SC Cte, CBK, DB (3/25)*



**Email received March 14, 2013**

**From:** Cameron S. Miele [<mailto:cmiele@scallopfishing.net>]

**Sent:** Thursday, March 14, 2013 1:56 PM

**To:** Mary Beth Tooley; Mark Alexander; Tom Dempsey; David Pierce; David Preble; John Quinn; Laura Ramsden; Peter Christopher

**Cc:** John Bullard; Rip Cunningham; Tom Nies; David Frulla; Drew Minkiewicz

**Subject:** Small Dredge Scallop Fleet

Council Members,

I understand that certain members of the scallop fishery are once again pushing for the elimination (or significant modification) of the small dredge fleet. It is unfortunate that they continue to push for more personal gains at a time when we all need to be focused on priority issues such as bycatch reduction. Since I know that this issue has been raised once again and will be raised at future Council meetings, I wanted to provide the attached brief commentary on the repercussions from the elimination of the small dredge scallop fleet.

Thank you,

Cameron Miele  
F/V Kathryn Marie  
F/V Hunter

#### **SMALL DREDGE EXEMPTION REMARKS**

The repercussions from eliminating the Small Dredge Exemption would be devastating to hundreds of families across New England and the Mid-Atlantic. It would mean a loss of jobs and tax revenue at a time when this country cannot afford to lose either. The Magnuson-Stevens Fishery Conservation and Management Act requires that economic factors be considered when making management decisions. And from an economic standpoint the elimination of the small dredge fleet would be a net economic loss. The only benefit from eliminating the exemption would be to already highly successful boat owners as they would capture additional share of the fishery. In addition, the elimination of the small dredge exemption would not lead to additional conservation of the sea scallop resource.

- 1. Jobs:** Unemployment is the number one issue facing this country. The President, Congress, State and Local Leaders, and the American People are all concerned with the high rate of unemployment. The elimination of the Small Dredge Exemption will put full-time and part-time small dredge operators out of business as the full-time boats will not remain economical as part-time boats and the part-time boats will not remain economical as occasional boats. Total employment loss from the elimination of these boats from the fleet will generate an estimated 300 – 400 newly unemployed commercial fishermen. These boats also support hundreds of shore side support jobs. Job Killing actions by the Council will be extremely unpopular and will face a long and costly political and legal fight.
- 2. Priority Issues:** Fishermen, scientists and regulators need to focus on high priority issues such as: (i) improving safety; (ii) further reductions to bycatch; (iii) better funding for research; (iv) more collaboration amongst fishermen, scientist and regulators; and (v) improved closed area management. In terms of the health and sustainability of the fishery the elimination of the Small Dredge Exemption is an issue of zero importance and therefore does not warrant the Council's attention.

*cc: CSA, MB (3/14)*

3. **Significant Bank Write-offs and Bankruptcies:** While accurate figures are not available, anecdotal evidence suggests that the vast majority of small dredge owners carry a mortgage on their vessel. Eliminating the Small Dredge Exemption would render these boats and permits near worthless. The majority of owners would not be able to satisfy their bank loans and would therefore be forced to declare personal bankruptcy. These owners and their families would be essentially wiped out and local banks throughout New England and the Mid-Atlantic would be forced to write-off in the neighborhood of \$50 million - \$100 million of bad commercial fishing loans.
4. **Loss of Tax Revenue:** The vessels comprising the small dredge fleet contribute significant tax revenue to the Federal, State and Local governments. The remaining full-time boats that would pick up the incremental poundage would not contribute associated tax revenue sufficient to cover the lost revenue from the small dredge fleet. The elimination of the Small Dredge Exemption is a net loss in tax revenue.
5. **17-Year Precedent:** The Small Dredge Exemption has been in place for approximately 17 years and has been continually re-authorized. The boats of the small dredge fleet have earned the right through hard work and sacrifice to remain in the fishery. Precedence has been established.
6. **Backdoor Consolidation:** The Atlantic Sea Scallop fishery is sustainable. Since the fishery is not overfished there is no reason to eliminate boats from the fleet. This is not a health of the biomass issue, this is a money issue. The only motive of those that support the elimination of the Small Dredge Exemption is to garner additional pounds and force competition out of the fishery.
7. **Abandoned Vessels:** If these small dredge boats become essentially worthless their owners will have no reason to maintain the vessels and/or pay for their dockage. Those who can sell their boats will and those who cannot will leave them tied to the dock and neglected. The ports that formerly housed these working boats will now have to deal with the rusting hulks abandoned and tying up productive dock space.



Feb. 7, 2013

Hi Paul,  
on the tapes you heard Richard  
Roe (R.A.) at the time, say the staff  
would have to write for the Secretary's  
review of the justification, rationalization  
analysis of the Small Dredge program.

My request is a copy of this  
justification, rationalization, analysis  
the staff submitted to the Secretary,  
also I would like a copy of the  
analysis of the economic effects  
the Small Dredge program would  
have on the fishery.

Regards,  
Ray Starvish

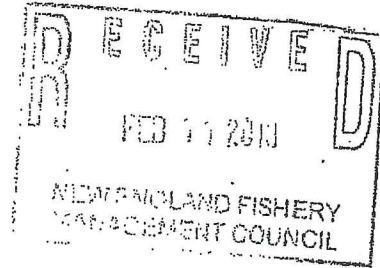
P.S.  
E mail Ray STARVISH e

FAIRHAVEN-MA-02719

w:DB(2/12)

# RAYMOND STARVISH

P.O. BOX 231  
FAIRHAVEN, MA 02719



New England Fishery Management Council  
50 Water Street, Mill 2  
Newburyport, MA 01950

Attention: Council Members

Re: **SMALL DREDGE EXEMPTION PROGRAM**  
**Scallop FMP Amendment 4**  
**50 CFR § 648.51(e) Adopted 1994**

Dear Council Members:

I refer your attention to the Small Dredge Exemption Program and enclose an analysis of the *Program* as implemented in *Amendment 4*.

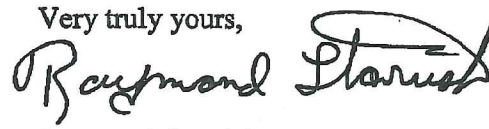
Since the implantation of the Access Area Program in 1999 and the adoption of area based quota management in 2004, the Small Dredge Exemption Program has become a loophole through which scallop vessels that would not qualify as full-time or part-time vessels are permitted to significantly increase their total landings. This is unfair and prejudicial to those vessels that qualify as full-time or part-time access permit vessels.

The Access Area Program assigns small dredge vessels the same total landings as large dredge vessels and places no limit on crew size in violation of New England Fishery Management Council's intention and objective in creating the Small Dredge Exemption Program. Accordingly and for the reasons outlined in the enclosed analysis, small dredge permit holders should be precluded from participating in access area trips because the smaller dredge size does not effectively limit their total landings.

In the alternative, I request that the Council reevaluate the Scallop Dredge Exemption Program pursuant to the Scallop Plan Development Team's recommendation, as described in further detail in the enclosed analysis.

I appreciate your time and attention to this matter. I would like to discuss this matter with you further during an upcoming New England Fishery Management Council Meeting.

P.S.  
Please Listen  
To The C.D.

Very truly yours,  
  
Raymond Starvish

cc: DB (2/12)

# CLINTON & MUZYKA, P.C.

ATTORNEYS AT LAW  
88 BLACK FALCON AVENUE, SUITE 200  
BOSTON, MASSACHUSETTS 02210

THOMAS E. CLINTON  
THOMAS J. MUZYKA  
ROBERT E. COLLINS\*  
TERENCE G. KENNEALLY  
OLAF APRANS\*\*\*  
KIRBY L. AARSHEIM\*

TELEPHONE  
(617) 723-9165

FACSIMILE  
(617) 720-3489

ARTHUR P. SKARMEAS\*\*  
Of Counsel

October 30, 2012

E-MAIL:  
[tmuzyka@clintmuzyka.com](mailto:tmuzyka@clintmuzyka.com)

\*Also admitted in RI  
\*\*Also admitted in NH  
\*\*\*Also admitted in WA

Mr. Raymond Starvish  
P.O. Box 231  
Fairhaven, MA 02719

Attention: Mr. Raymond Starvish

Re: **SMALL DREDGE EXEMPTION PROGRAM**  
**Scallop FMP Amendment 4**  
**50 CFR § 648.51(e) Adopted 1994**

Dear Mr. Starvish:

We refer to your request that our office investigate, evaluate, and present you with our analysis of the efficacy of the *Small Dredge Exemption Program* as implemented in *Amendment 4*.

Please take the following as our report on your request.

The Small Dredge Exemption Program was created as part of Amendment 4 to the Scallop Fishery Management Plan in order to assist Maine small boat [single dredge] scallop fishermen in continuing a traditional fishery. Since access to closed areas were opened to scallop fishing in 1999 and the subsequent adoption of area based quota management in 2004, the Small Dredge Exemption Program has become a loophole through which scallop vessels that would not qualify as full-time or part-time vessels are permitted to significantly increase their catch/production/landings. This is unfair and prejudicial to those vessels that qualify as full-time or part-time access permit vessels. Accordingly and for the reasons outlined below, the small dredge permit holders should be limited in their total allowable catch/production/landings as was the original intent in implementing the Small Dredge Exemption Program.

**I. The Objectives of the Small Dredge Exemption Program are No Longer Being Achieved.**

The NEFM Council's intention in including the Small Dredge Exemption Program into

Amendment 4 was to "allow for a continuation of a traditional fishery."<sup>1</sup> During the Council meeting in Mystic, CT on May 12 and 13, 1993, Council Member Bill Brennan from Maine offered a Motion on behalf of thirty-two to thirty-four [32-34] small dredge Maine scallop vessels to alter Amendment 4 to assist these fishermen. Council Chairman Brancalone described the issue as follows:

*[The next issue] is at the request of the so-called small scale fishermen, primarily from Maine. A class of vessels that basically has fished at varying levels but have been largely unrecorded in terms of their performance and landings. And largely confined their activities to the Gulf of Maine. We approve, the committee approved, a special authorization – a consideration that would allow them to use a single ten and one-half foot which I believe is the present maximum size dredge allowed in Maine. These individuals would be allowed to move from part-time, if they're so classified, or occasional, to move up one step provided they use this single dredge, only one dredge.*<sup>2</sup>

Upon the request of Council Member Dick Allen, a third qualification was added that the vessels carry no more than a five [5] man crew.<sup>3</sup> Amendment 4 includes the following:

*"Gulf of Maine fishermen commented that their historical practice of scalloping in state waters and occasionally at Fippennies Ledge and Georges Bank with smaller dredge was not taken into account. Furthermore, they argued that incomplete data collection and difficulty in documenting their complete scalloping history would result in mis-classification. The Council responded by modifying the group assignment rules, the gear size restrictions, and the crew limits. Vessels would be allowed to qualify for a single category increase in days at sea allocation if they continue to use the smaller, 10.5 feet dredges throughout the year and carry a crew of no more than five while scalloping."*<sup>4</sup>

The Small Dredge Exemption Program was instituted to allow thirty-two to thirty-four [32-34] small dredge vessels to continue a traditional fishery in the Gulf of Maine. To date, only one [1] of fifty-three [53] full-time small dredge vessels remains in the Gulf of Maine.

Furthermore, the Council believed that by reducing drag size and crew, the small dredge vessel's fishing efforts per day will be less than half of the larger vessels.<sup>5</sup> The Council estimated that a small dredge vessel with a five [5] man crew will have a shucking capacity of approximately seven hundred to eight hundred pounds per day [700-800lb] as compared to a full-

<sup>1</sup> New England Fishery Management Council, Minutes of Meeting on May 12-13, 1993.

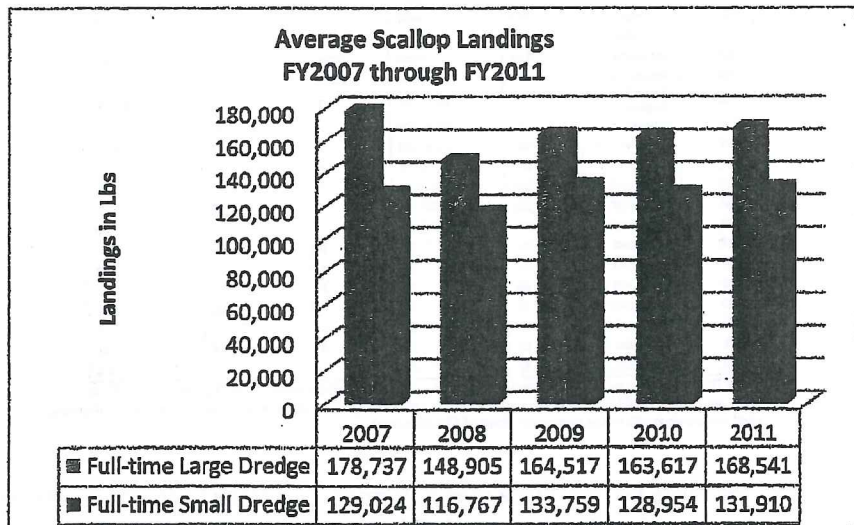
<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> National Marine Fisheries Service, *Final Amendment 4 and Supplemental Environmental Impact Statement to the Sea Scallop Fishery Management Plan*, pg. 6, 1993.

<sup>5</sup> NEFMC Meeting Minutes, *supra* at 1.

time large dredge vessel that has a fifteen hundred to twenty five hundred pound [1500-2500lb] shucking capacity. This projected to approximately forty percent [40%] catch/production/landings of a full-time large dredge vessel. However and as confirmed in the chart below, drag size and crew limitations did not have the intended effect on the small dredge vessel's fishing catch/production/landings. Small dredge vessels are now landing greater than seventy percent [70%] of the average landings for a full-time large dredge vessel, a far greater percentage of landings than was originally intended in implementing Amendment 4. See Chart below.



National Marine Fisheries Service, Northeast Region, NOAA, Summary of total and average scallop landings by Full-time Large and Small Dredge vessels, FY2007-FY2011, October 9, 2012

**II. The Small Dredge Exemption Program did not Account for the Access Area Program.**

The Small Dredge Exemption Program has been codified in 50 C.F.R. § 648.51. As defined below, small dredge permit holders must comply with the regulation when fishing under the DAS program. When the Small Dredge Exemption Program was created in 1994, the scallop access area program, which limits access to closed areas by number of trips and catch totals, was not established.<sup>7</sup>

<sup>6</sup> National Marine Fisheries Service, Northeast Region, NOAA, Summary of total and average scallop landings by Full-time Large and Small Dredge vessels, FY2007-FY2011, October 9, 2012:

Summary of total and average scallop landings (lb) by full-time large (category 2) and small (category 6) vessels, FY 2007 - FY2011					
	FY2007	FY2008	FY2009	FY2010	FY2011
Total scallop landings for full-time large dredge vessels from access area trips	27,172,168	21,533,665	19,700,668	16,249,145	18,485,441
Total scallop landings for full-time large dredge vessels from open area trips	16,220,928	15,523,843	21,428,413	24,893,119	23,818,405
Total scallop landings for full-time small dredge vessels from access area trips	5,453,786	4,796,829	4,353,279	3,211,844	3,574,685
Total scallop landings for full-time small dredge vessels from open area trips	1,513,521	1,452,705	2,654,952	3,493,766	3,284,433
Average scallop landings per full-time large dredge vessel from access area trips	107,826	86,561	78,809	64,491	73,647
Average scallop landings per full-time large dredge vessel from open area trips	70,911	62,344	85,714	99,136	94,894
Average scallop landings per full-time small dredge vessel from access area trips	100,996	88,830	82,708	61,788	68,748
Average scallop landings per full-time small dredge vessel from open area trips	28,029	27,937	51,056	67,186	63,162

Report run on October 2, 2012  
Source: Data Matching and Imputation System, Northeast Regional Office

<sup>7</sup> 50 C.F.R. § 648.60.

(e) Small dredge program restrictions. Any vessel owner whose vessel is assigned to either the part-time or

Georges Bank closed areas were opened to scallop fishing commencing in 1999 by Framework 11 (CAII) and later by Framework 13 (CAII, CAI, NLS).<sup>8</sup> Frameworks 14 and 15 provided controlled access to Hudson Canyon and VA/NC areas.<sup>9</sup> The following chart outlines the number of Access Area trips allotted to full-time vessels and part-time permit holders that opted to become full-time small dredge vessels. *See Chart below.*

Table 2. DAS and trip allocations per full-time vessel

Year	Allocations based on the Management Action	Total DAS Allocation (1)	Estimated Open area DAS allocations (2)	Access area trip allocations (3)	DAS charge per access area trip (4)	DAS allocation estimate for access areas (5)
1994	Amendment 4	204	None	None		None
1995	Amendment 4	182	None	None		None
1996	Amendment 4	182	None	None		None
1997	Amendment 4	184	None	None		None
1998	Amendment 4	142	None	None		None
1999	Amendment 7					
2000	Framework 11	120	90 to 120	3	10	0 to 30
2000	Framework 13	120	60 to 120	8	10	0 to 60
2001	Framework 14	120	90 to 120	3	10	0 to 30
2002	Framework 14	120	90 to 120	3	10	0 to 30
2003	Framework 15	120	90 to 120	3	10	0 to 30
2004	Framework 16	120	43 (MAX. 63)	7	12	84
2005	Framework 16	100	40 (MAX. 117)	5	12	60
2006	Framework 16	112	52	5	12	60
2007	Framework 16	111	51	5	12	60
2008	Framework 19	95	35	5	12	60
2009	Framework 19	97	37	5	12	60
2010	Framework 21	86	38	4	12	48
2011	Framework 22	86	32	4	12	48
2012	Framework 22	82	34	4	12	48

Total DAS allocation per full-time vessel represents a rough estimate for years 2004-12 since DAS is allocated for open areas only. DAS allocation for access areas is estimated by assuming an equivalent 12 days-at-sea charge for each access area trip with a possession limit of 18,000 pounds.

As noted in the table below, there was a dramatic increase in the numbers of full-time and part-time small dredge vessels after the year 2000. This increase in small dredge permit holders corresponds with the introduction of the Access Area Program, where small dredge vessels received the same number of access trips, pounds, *and crew size*, as full-time large dredge vessels. By the year 2010, fifty-four [54] part-time scallop vessels upgraded to full-time small dredge vessels and thirty-five [35] occasional scallop vessels upgraded to part-time small dredge vessels.<sup>10</sup> *See Chart below.*

Occasional category may request, in the application for the vessel's annual permit, to be placed in one category higher. Vessel owners making such request may be placed in the appropriate higher category for the entire year, if they agree to comply with the following restrictions, in addition to, and notwithstanding other restrictions of this part, *when fishing under the DAS program described in § 648.53*:

- (1) The vessel must fish exclusively with one dredge no more than 10.5 ft (3.2 m) in width.
- (2) The vessel may not use or have more than one dredge on board.
- (3) The vessel may have no more than five people, including the operator, on board, except as follows:
  - (i) There is no restriction on the number of people on board for vessels participating in the Sea Scallop Area Access Program as specified in § 648.60;
  - (ii) The Regional Administrator may authorize additional people to be on board through issuance of a letter of authorization.
  - (iii) A certified at-sea observer is on board, as required by § 648.11(g).<sup>7</sup>

<sup>8</sup> Proposed Framework 24 SAFE Report, Appendix I, distributed at the NEFMC Scallop PDT Meeting on August 20-21, 2012.

<sup>9</sup> *Id.*

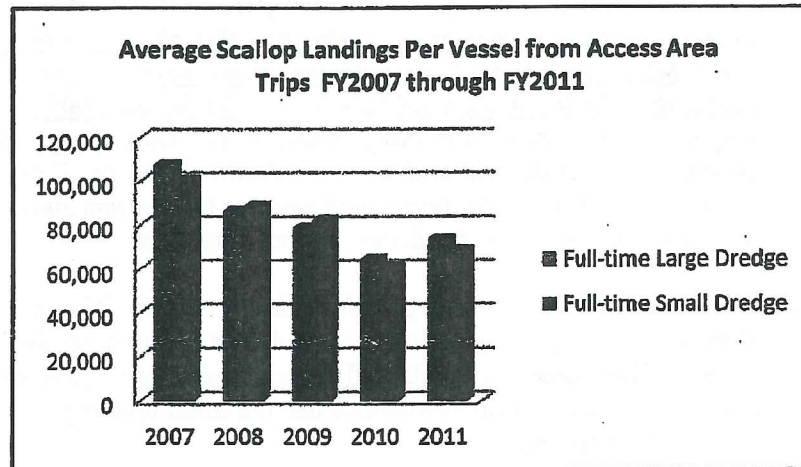
<sup>10</sup> *Id.*

**Table 11. Number of limited access vessels by permit category and gear**

Permit category	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Full-time	220	224	234	238	242	248	255	258	254	259	252	253
Full-time small dredge	3	13	25	39	48	57	59	63	56	55	54	53
Full-time net boat	17	16	18	18	19	19	14	12	11	11	11	11
Total full-time	240	253	275	293	305	324	328	331	321	325	317	315
Part-time	16	14	14	10	4	3	3	2	2	2	2	2
Part-time small dredge	4	6	8	19	25	30	34	35	32	34	34	32
Part-time trawl	20	18	10	8	3	-	-	-	-	-	-	-
Total part-time	40	38	32	37	33	33	37	37	34	37	36	34
Occasional	4	5	4	3	3	1	2	1	1	-	-	-
Occasional trawl	16	19	15	8	5	5	-	-	-	-	-	-
Total occasional	20	24	19	11	8	6	2	1	1	0	0	0
Total limited access	300	315	326	342	346	363	367	369	356	361	353	351

*Note: The permit numbers above include duplicate entries because replacement vessels receive new permit numbers and when a vessel is sold, the new owner would get a new permit number.*

After 2000, part-time and occasional permit holders began taking advantage of the Small Dredge Exemption Program because the reduction in gear size had little effect/impact during Access Area trips. Vessels fishing in closed areas are limited in total allowable catch, not days at sea. Small dredge vessels can fish in access areas *with a full crew* for as long as necessary in order to catch their allocated pounds. Therefore, the only disadvantages to having a smaller dredge during access area trips are the additional trip expenses, such as food and fuel. As indicated on the chart below, the average landings for full-time large dredge and full-time small dredge vessels remains almost the same, and in some cases the average landings per small dredge vessels exceeds those by large dredge vessels. *See Chart below.*



*Summary of total and average scallop landings by Full-time Large and Small Dredge vessels, FY2007-FY2011*

The intended plan for the Small Dredge Exemption Program was that by restricting the dredge and crew size, vessels would automatically catch less than the full-time large dredge vessels. Therefore the limit in dredge and crew size would counteract the increase in days at sea and there would not be a significant impact to the scallop fishery. However, the limitation of having a small dredge has very little impact on the total landings of small dredge vessels during

<sup>11</sup> National Marine Fisheries Service, Northeast Region, NOAA, Summary of total and average scallop landings by Full-time Large and Small Dredge vessels, FY2007-FY2011, October 9, 2012.

access area trips. The Access Area Program has created a substantial loophole for all part-time and occasional permit holders to increase their days at sea and total landings, despite the fact that the current small dredge fishermen are not the Maine fishermen that the Small Dredge Exemption Program was created to protect.

### III. No environmental impact statement was completed for the Small Dredge Exemption Program implemented in Amendment 4

Among each Council's primary tasks is the development and maintenance of a fishery management plan (FMP) for each fishery under its control. The MSA imposes content requirements on these FMPs, which must ultimately be approved by the National Marine Fisheries Service (NMFS), acting on behalf of the U.S. Secretary of Commerce.<sup>12</sup> Under NEPA, an agency is required to evaluate and make public the environmental consequences of its proposed action.<sup>13</sup> However, the Council failed to evaluate the potential impact that the Small Dredge Exemption Program will have on the scallop fishery.

In 2004, the Scallop Plan Development Team acknowledged the increasing number of small dredge permit holders in a "Scallop management advice" memorandum to the Scallop Oversight Committee:

*Another issue related to the changing characteristics of the fishing fleet and capacity is the increasing number of small dredge permits, which have increased from 7 permits in 2000 to 63 permits in 2004 (with a corresponding decrease in part-time and occasional full-size dredge and trawl permits from 55 to 13). More analysis is needed to determine how this change in permits has affected DAS allocations to limited access vessels and fishing mortality, which may be a suitable focal point for the 2005 SAFE Report. More important to this potential re-evaluation would be a determination of the past and present objective of the small dredge permit, so that it can be determined whether the present system is achieving this objective. (underscoring our emphasis).<sup>14</sup>*

As the total number of small dredge permit holders increased, it became clear that part time permit holders were opting to engage in the small dredge program solely for the greater number of days at sea. The increase in small dredge permits and landings was never reviewed, despite the Development Team's recommendations that the small dredge program be evaluated for its impact on the scallop fishery.

### IV. Conclusion

The objective of the Small Dredge Exemption Program was to protect and encourage a traditional fishery in the Gulf of Maine. However, only one [1] of fifty-three [53] full-time small dredge vessels remain in the Gulf of Maine. Furthermore, the objective that a smaller dredge and crew size will reduce the small dredge vessel's catch/production/landings is no longer valid.

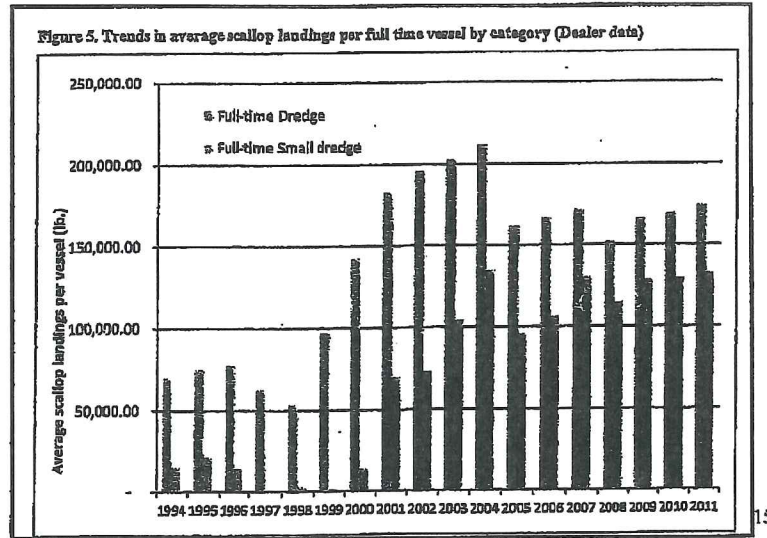
<sup>12</sup> 16 U.S.C. §§ 1852, 1853(a)(15), and 1854.

<sup>13</sup> *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 124 (D.D.C. 2011) citing 40 C.F.R. § 1502.14.

<sup>14</sup> Scallop Plan Development Team Memorandum to Scallop Oversight Committee, dated September 1, 2004.



Full-time small dredge vessels catch approximately seventy percent [70%] or more of their full-time large dredge counterparts. The increase in small dredge vessel landings illustrated in the table below is a result of the implementation of the Access Area Program and subsequent increase in small dredge permit holders. See Chart below.




Proposed Framework 24 SAFE Report

In view of the foregoing and to comply with the intent and objectives of the Small Dredge Exemption Program, we recommend that the small dredge permit holders be exempted from participating in access area trips because the smaller dredge size does not effectively limit their total catch/production/landings. When the Small Dredge Exemption Program was created, the Council envisioned that the small dredge and limited crew will result in less than half of the landings of a large dredge and fully crewed vessel. Clearly the subsequently implemented Access Area Program, which allots small dredge vessels the same total landings as large dredge vessels and places no limit on crew size, violates the NEMF Council's intention and objective in creating the Small Dredge Exemption Program.

In the alternative, we recommend that the New England Fishery Management Council honor the Scallop Plan Development Team's recommendation and reevaluate the Scallop Dredge Exemption Program to determine whether the present system is achieving its original and intended objectives.

We trust the foregoing sufficiently responds to your request to our office. We look forward to the opportunity to discuss this matter with you further upon your return.

If we can provide you with any further evaluation or explanation, please do not hesitate to advise.

Very truly yours,  
  
 Thomas J. Muzyka

<sup>15</sup> Proposed Framework 24 SAFE Report, *supra* at 8.



New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116  
C.M. "Rip" Cunningham, Jr., *Chairman* | Paul J. Howard, *Executive Director*

February 25, 2013

Mr. Ray Starvish  
PO Box 231  
Fairhaven, MA 02719

Dear Ray:

Thank you for your letter of February 11, 2013 with enclosures. I have forwarded them on to the full Council for review and consideration. As you know, the Council has discussed this specific issue several times in the past when identifying annual Council work priorities every November. I recall one Council member raising this as an issue that merits further evaluation based on previous correspondence from you to the Council. However, each year your request for consideration falls "below the line" when compared to other more important priority issues facing the scallop management program and fishery.

I will hold on to this letter for the fall and include it with meeting materials for the Council priorities discussion and vote next November 2014. I encourage you to attend that meeting and express your concerns again to the Council directly. The last few years have been very busy for the scallop management program with implementation of mandated annual catch limits and accountability measures, actions to reduce Groundfish bycatch and sea turtles, and adjustments to the recently implemented general category IFQ program.

I thank you for your continued interest in fisheries management.

Sincerely,

Paul J. Howard  
Executive Director