

NORTHEAST SEAFOOD COALITION

May 18, 2011

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RE: Groundfish Amendment 17 Public Review Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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