

November 12, 2004

Northeast Seafood Coalition
Comments on Proposed Interim Rule
Solicitation: October 28, 2004, at 69 FR 62844

Comment 1: General

The Northeast Seafood Coalition (NSC) was deeply involved in the development of Amendment 13 to the Northeast Multispecies Fishery Management Plan, and this experience provides the organization with a valuable perspective for commenting on the proposed action. Having developed Capacity Option 9, on which much of the Amendment 13 Final Supplemental Environmental Impact Statement (FSEIS) and Final Rule are based, NSC is in a unique position to state unequivocally that the intent of Capacity Option 9 was to cap a vessel's used Days At Sea (DAS) baseline at the vessel's annual DAS allocation for Fishing Year 2001 (which remained in effect up until the August 1, 2002, implementation of the Interim Final Rule).

NSC confirms that the information and explanation presented in the "Background" and "Classification" sections set forth in the Federal Register notice are correct and accurately reflect NSC's understanding of both the Amendment 13 development process and the intent of the New England Fishery Management Council's (NEFMC). NSC also confirms that it was fully aware that all of the many analyses underlying Amendment 13 and its FSEIS were based on the understanding that a vessel's used DAS baseline was to be capped at the Fishing Year 2001 allocation, and that these analyses were widely reviewed and discussed by the Council and public.

NSC strongly supports the purpose of this action to clarify the Amendment 13 Final Rule by making explicit that a vessel's used DAS baseline may not exceed the vessel's annual DAS allocation received for Fishing Year 2001. It is also critical for the NEFMC to follow suit and adopt a permanent clarification to Amendment 13 that is consistent with this action.

NSC strongly opposes any efforts to change even seemingly minor aspects of the basic formula of Capacity Option 9 by removing this cap or by other means, such as by including large mesh and/or carry-over DAS in the calculation of a vessel's annual baseline allocation.

Both the essential conservation objectives and the delicate balance of social and economic costs/benefits achieved by the NEFMC through Amendment 13 would be seriously undermined if a vessel's annual allocation were to be calculated and implemented without this cap, or if such other changes were made. **Virtually any change in the Capacity Option 9 formula is likely to have such a profound effect on the core management and allocation aspects of A13 that it would demand a complete reevaluation of Amendment 13 altogether.** Given the far-reaching conservation and socio-economic implications, such a reevaluation would warrant a full-blown plan amendment process.

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Background: At its October 21, 2003, meeting the NEFMC added a fifth alternative to their Amendment 13 document for analysis and consideration. This “Alternative 5” was a proposal submitted to the NEFMC by the NSC (see attached document “Proposed Alternative Regarding Amendment 13”). Alternative 5 was subsequently adopted by the NEFMC at its November 2003 meeting to be the basic foundation of the Amendment 13 FSEIS that was ultimately implemented by the National Marine Fisheries Service (NMFS) in its Final Rule on April 27, 2004.

The NSC Amendment 13 Proposal included 14 options intended to modify and/or implement specific options included in Alternative 1 of the “Alternatives to Address Rebuilding Requirements” set forth in Section 3.6 of the Amendment 13 document (DSEIS). The first option recommended in the NSC Proposal was to implement Capacity Option 9 for the Effective DAS Calculation section of the DSEIS. Capacity Option 9 was also a proposal developed by NSC and included by the NEFMC in the DSEIS at an earlier stage in the development of Amendment 13.

NSC’s purpose and intent in first developing and later including Capacity Option 9 in the NSC Amendment 13 Proposal (Alternative 5) was to address several problems associated with the Court-Ordered Capacity Option 8. NSC used Capacity Option 8 as the template for developing Capacity Option 9; modifying it in three specific ways by: (1) adding fishing year 2001 to the qualifying period from which a vessel’s individual baseline DAS allocation was calculated, in order to address an inherent inequity in Capacity Option 8; (2) limiting the qualifying years to those in which a vessel harvested at least 5,000 pounds of regulated groundfish, in order to reduce both “Paper DAS” (DAS called into the system without conducting fishing activity) and the overall fishery’s DAS baseline allocation; and 3) eliminating the 10-day minimum allocations in Capacity Option 8, also in order to reduce the fishery’s overall DAS baseline allocation that would result in higher DAS allocations to past and currently active fishermen.

The relevant provision of Capacity Option 8 stated: “*Freeze Days at Sea (DAS) using the period of May 1, 1996 – April 30, 2001 at the maximum DAS used by a permit in any single year, **not to exceed the current allocation.***” (see *CLF v Evans Settlement Agreement*). The clause “*not to exceed the current allocation*” had the unambiguous effect of capping a vessel’s used DAS baseline at the vessel’s annual allocation in Fishing Year 2001. The only change to this provision proposed by NSC was to extend the qualifying period for one year (i.e. through April 30, 2002). NSC did not propose to alter the baseline cap.

It should be noted that the purpose of NSC’s proposal to change the qualifying period was to correct an inequity inherent to the Settlement Agreement that rendered fishing year 2001 the only relevant fishing year not included in the qualifying period. In fact, it was inequities such as these that served as the basis for NSC’s decision to refuse to accept the Settlement Agreement and proposed Capacity Option 9.

To reiterate, Capacity Option 9 was developed using Capacity Option 8 as its template. The intent was for the Fishing Year 2001 allocation cap set forth in Capacity Option 8 to also apply

to Capacity Option 9. This reality was well recognized by the Plan Development Team (PDT), NMFS and NEFMC staff in all of the analyses done on Capacity Option 9 and the many other fundamental aspects of Amendment 13 that are affected by the DAS baseline calculations. Moreover, it was well understood to be the case by members of the industry. The public had extensive opportunity to discuss and understand this reality.

Comment 2: Section 648.82 (c)(1)

NSC is concerned that the proposed language to amend 50 CFR 648.82(c)(1) might present an unintended ambiguity given the apparent potential for deliberate misinterpretation and litigation.

Specifically, the clause “..., *not to exceed the vessel’s annual allocation prior to August 1, 2002.*” might again be ‘misinterpreted’ to mean that a vessel’s used DAS baseline would be capped by its annual DAS allocation in any year during the qualifying period (1996 – 2001), including 1996 when higher allocations were made.

NSC understands that the intent of this provision is for a vessel’s used DAS baseline to be specifically capped at the vessel’s annual DAS allocation received for Fishing Year 2001 and not in any other prior fishing year.

Therefore, NSC recommends that this language be revised and further clarified. NSC suggests the following alternative language as one possible option to redress this issue: “..., *not to exceed the vessel’s annual allocation received for Fishing Year 2001.*”

Background: The evaluation of Capacity Option 8 and the development of Capacity Option 9 during the Amendment 13 development process included months of extensive discussion and deliberation by the Groundfish Advisory Panel (GAP), the Groundfish Oversight Committee (GOC), the NEFMC, and the PDT.

In addition, many stakeholders in all sectors of the industry, conservation community and public domain took the almost unlimited opportunity to review, consider and comment on these options. This public review and input included the many analyses performed to determine the quantitative effect of such options on the used DAS baselines for individual vessels and the overall fishery as these quantities directly related to the overall fishing mortality objectives of Amendment 13. This process was extensive, deliberate and highly transparent. NSC participated in virtually all aspects of this process.

NSC is unaware of any discussion or comment on or off the record by any participant in this process that would suggest that Capacity Option 9 did not include the Fishing Year 2001 DAS allocation cap on a vessel’s used DAS baseline, until after the Amendment 13 Final Rule was published. To the contrary, each and every analysis of Capacity Option 9 on which discussions and decisions by the GAP, GOC, NEFMC and PDT were clearly predicated on this cap.

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In Fishing Year 1996 all individual and fleet DAS permit holders had substantially higher DAS allocations than in the period of fishing years 1997 through 2001—a period when identical DAS allocations were made. While NSC supports including Fishing Year 1996 in the qualifying period, **applying the Fishing Year 2001 cap was the only way that all six of the qualifying years could be equitably included.**

Any interpretation that did not include the cap would have produced a very different quantitative result in terms of the used DAS baseline (effective effort) for the overall fishery that would have been inconsistent with the fishing mortality objectives of Amendment 13. As has been explained above and in detail in this Proposed Interim Rule, individual vessel DAS allocations would also have been dramatically and disparately altered.

Given these profound implications, there should be an extensive record documenting an intensive discussion and debate among all of the participants in the Amendment 13 development process regarding this issue. To NSC's knowledge, no such record exists during the post Capacity Committee period when the "Settlement Agreement baseline" (Capacity Option 8) and, later, Capacity Option 9, (crafted as an alternative improvement to Capacity Option 8), were included along with the 7 options generated during the earlier period the Capacity Committee was meeting.

The Background section of the Proposed Interim Rule refers to the fact that some stakeholders have called into question the validity of including the Fishing Year 2001 cap in the Amendment 13 Final Rule. NSC notes that those industry stakeholders who now argue for an interpretation of Capacity Option 9 that does not include the cap are the very same stakeholders who commented profusely to reject Capacity Option 9 at every step in the Amendment 13 development process. Instead, these stakeholders advocated use of the "Settlement Agreement" Capacity Option 8. Ironically, Capacity Option 8 also included the Fishing Year 2001 cap. Had Capacity Option 8 been adopted by the NEFMC as these stakeholder wanted, it would have denied them the very result they now seek in litigation—ie. the ability to apply the additional DAS included in the higher 1996 allocations, and/or used carryover DAS, to their used DAS baseline.

The rationale provided for rejecting Capacity Option 9 by these stakeholders was limited to keeping the used DAS allocation (effective effort) for the overall fishery down from what they thought would be an increase in this overall allocation caused by adding the 2001 Fishing Year to the qualifying period. NSC is not aware of any record in the post Capacity Committee Amendment 13 development process documenting any argument for or against retaining the cap or forfeiting the additional DAS included in their 1996 allocation by these or any other stakeholders.

NSC reiterates its strong recommendation in "Comment 2" to revise the language proposed to amend 50 CFR 648.82(c)(1) to ensure that no ambiguity remains.