

Sector Operating Agreements Workshop

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Glossary of Terms and Acronyms

Access rights: cover territorial use rights in fishing (TURFs) and limited-entry access rights.

Advisory Panel: Subcommittee of the New England Fishery Management Council (NEFMC). Made up of members from the fishing industry (from both commercial and recreational sectors), scientists, environmental advocates, and others with knowledge and experience related to fisheries issues. They meet separately or jointly with the relevant oversight committee and provide input and assistance in developing management plan measures. Advisors are appointed every three years following a solicitation for candidates. After reviewing applications, the respective committee chairman selects new or returning advisors. The Council's Executive Committee provides the final approval of advisory panel members.

APA: Administrative Procedure Act

Biomass: The total mass of living matter in a given unit area or the weight of a fish stock or portion thereof.

Buy-Back Program: A program, usually government sponsored, for buying vessels from producers and removing the vessels from the fishery.

Bycatch: (v.) The capture of nontarget species in directed fisheries which occurs because fishing gear and methods are not selective enough to catch only target species; (n.) fish which are harvested in a fishery but are not sold or kept for personal use, including economic discards and regulatory discards but not fish released alive under a recreational catch and release fishery management program.

Capper-Volstead Act (C-V Act): 7 U.S.C. § 291. Exempts qualified agricultural producers from antitrust liability for collective production, etc.

Capital stuffing: The tendency to invest excessively in productive inputs (hull, engine, gear).

Catch: The sum total of fish killed in a fishery in a given period. Catch is given in either weight or number of fish and may include landings, unreported landings, discards, and incidental deaths.

CCCHFA: Cape Cod Commercial Hook Fishermen's Association

Days-at-sea (DAS): The total days, including steaming time, that a boat spends at sea to fish. Amendment 13 categorized DAS for the multispecies fishery into three categories, based on each individual vessel's fishing history during the period fishing year 1996 through 2001. The three categories are:
Category A: can be used to target any groundfish stock;

Category B: can only be used to target healthy stocks;

Category C: cannot be used until some point in the future. Category B DAS are further divided equally into Category B (regular) and Category B (reserve).

DAS “flip”: A practice in the Multispecies Fishery Management Plan (FMP) that occurs when a vessel fishing on a Category B (regular) DAS must change (“flip”) its DAS to a Category A DAS because it has exceeded a catch limit for a stock of concern.

Demersal species: Most often refers to fish that live on or near the ocean bottom. They are often called benthic fish, groundfish, or bottom fish.

Discards: Fish that are disposed, usually at sea, after being caught.

DMR: Department of Marine Resources

Environmental Assessment (EA): Required under National Environmental Protection Act (NEPA) as an initial step to determine whether there will be significant environmental harm because of a project. It analyzes the proposed action, alternatives that were considered, and the environmental impacts of both the proposed action and proposed alternatives. An Environmental Assessment is prepared when there is no anticipation of significant environmental harm. A finding of no significant harm (FONSI) is included at the end of the EA.

Environmental Impact Statement (EIS): This is an assessment of the environmental impacts of a particular project. This is required under NEPA if there will be significant harm to the environment. **DEIS**: Draft EIS. **FEIS**: Final EIS. **SEIS**: Supplemental EIS.

ESA: Endangered Species Act of 1973.

Essential Fish Habitat (EFH): Those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. The EFH designation for most managed species in this region is based on a legal text definition and geographical area that are described in the Habitat Omnibus Amendment (1998).

Exclusive Economic Zone (EEZ): A zone in which the inner boundary is a line coterminous with the seaward boundary of each of the coastal States and the outer boundary is line 200 miles away and parallel to the inner boundary.

Exploitable biomass: The biomass of fish in the portion of the population that is vulnerable to fishing.

Finding of No Significant Impact (FONSI): During the preparation of an EA, if no significant environmental harm will come of the federal action, a FONSI is issued and an EIS is not required under NEPA.

Fishermen’s Collective Marketing Act (FCMA): 15 U.S.C. § 521. The FCMA extends an antitrust exemption to “persons engaged in the fishing industry...collectively catching, producing, preparing for market, processing, handling, and marketing their fish.” FCMA was patterned after Capper-Volstead Act (7 U.S.C. § 291). C-V case law is applicable precedent for analyzing FCMA cases.

Fishery: The term "fishery" means—

- (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
- (B) any fishing for such stocks.

Fishing: The term "fishing" means—

- (A) the catching, taking, or harvesting of fish;
- (B) the attempted catching, taking, or harvesting of fish;
- (C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or
- (D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

Fishery Management Plans (FMPs): The Regional Councils draw up fishery management plans (FMPs) that are reviewed and approved by the Secretary of Commerce. FMPs provide for regulation of foreign fishing in the management zone under governing international fishing agreements (GIFAs) and vessel fishing permits. They also provide a mechanism for preemption of State law by the Secretary of Commerce.

Framework adjustments (FW): Adjustments within a range of measures previously specified in a fishery management plan (FMP). A change usually can be made more quickly and easily by a framework adjustment than through an amendment. For plans developed by the New England Council, the procedure requires at least two Council meetings including at least one public hearing and an evaluation of environmental impacts not already analyzed as part of the FMP.

GB: Georges Bank (e.g. GB Cod)

GOM: Gulf of Maine

Horizontal integration: A fishery or industry is horizontally integrated when firms in the fishery operate and manage multiple units at the same level of the supply chain. For example, a firm that operates several processing plants, across several regions or for different species, is considered horizontally integrated.

Individual Fishing Quota (IFQ): Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by an individual person or entity.

Individual Transferable Quota (ITQ): IFQ that is transferable.

Input rights: Numerical rights pertaining to use of a certain amount of fishing time or gear, a certain boat size, etc. May provide cost-effective management, minimizing waste.

IUF: Illegal, Unreported, or Unregulated Fishing

Limited Access Privilege:

The term 'limited access privilege'—

(A) means a Federal permit, issued as part of a limited access system under section 303A to harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable catch of the fishery that may be received or held for exclusive use by a person; and

(B) includes an individual fishing quota; but

(C) does not include community development quotas.

LAPP: Limited Access Privilege Program.

Limited entry rights: those assigned through licensing to limited participation in fishing. Can generate economic benefits by slowing expansion of capacity.

Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA):

Established regional fishery management councils comprised of federal and state officials, including the Fish and Wildlife Service. (See the Brief History of the Groundfish Fishery handout for more specific information).

Market gluts: A situation in which the market is supplied with an unusually large amount of product, which strains the capacity of primary buyers, processors and wholesalers and causes prices to drop to low levels.

MMPA: Marine Mammal Protection Act of 1972.

MPA: Marine Protected Area

MSRA: Magnuson Stevens Reauthorization Act of 2006. The goals of this reauthorization were: End overfishing; promote market-based management approaches; Improve science; larger role in decision-making; enhance international cooperation. MSRA set a firm deadline of 2010 for measures to be in place that end overfishing in the United States.

Multispecies: Multispecies: the group of species managed under the Northeast Multispecies Fishery Management Plan. This group includes whiting, red hake and ocean pout plus the regulated species (cod, haddock, pollock, yellowtail flounder, winter flounder, witch flounder, American plaice, windowpane flounder, white hake, halibut, and redfish).

NEFMC: New England Fishery Management Council

NEPA: National Environmental Policy Act of 1969. Analyzes the environmental impacts of proposed major Federal Actions.

NERO: Northeast Regional Office

NMFS: National Marine Fisheries Service

NOAA: National Oceanic and Atmospheric Administration

Observer: The term "observer" means any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under the Magnuson-Stevens Act.

Office of Law Enforcement (OLE): NOAA Fisheries Office for Law Enforcement is dedicated primarily to the enforcement of laws that protect and regulate our nation's living marine resources and their natural habitat.

Open access: describes a fishery or permit for which there is no qualification criteria to participate. Open-access permits may be issued with restrictions on fishing (for example, the type of gear that may be used or the amount of fish that may be caught).

Output rights: Numerical rights to catch a piece of TAC-can be ITQs, community quotas etc. may reduce race to fish, reducing overcapitalization.

Overfishing/Overfished: The terms "overfishing" and "overfished" mean a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.

Oversight Committees: Another subcommittee of NEFMC. They meet regularly to review and discuss individual fishery management plans (FMPs) and develop specific measures that will form the basis of the plan, plan amendment or framework adjustment to an FMP. Oversight committee recommendations are forwarded to the full Council for their approval before inclusion in any draft or final version of an FMP.

PDT: Plan Development Team: Subcommittee of NEFMC made up of scientists, managers and other experts with knowledge and experience related to the biology and/or management of a particular species. Individuals serve as an extension of the Council staff. PDTs meet regularly to respond to any direction provided by the oversight

committee or Council, to provide analysis of species-related information and to develop issue papers, alternatives, and other documents as appropriate. A member of the Council staff generally chairs each PDT and the team members are from state, federal, academic or other institutions.

Race to fish: Pattern of fishing characterized by an increasing number of highly efficient vessels fishing at an increasing pace, with season length becoming shorter to shorter.

Regulatory discards: The term "regulatory discards" means fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell.

Resource rent: The value of the resource *in situ* (i.e. in the water).

Special Access Program (SAP): A SAP represents a narrowly defined fishery that is prosecuted in such a way as to avoid or minimize impacts on groundfish stocks of concern, as well as minimize bycatch and impact on EFH. Amendment 13 implements two SAPs that allow fishing for regulated groundfish without compromising efforts to rebuild overfished stocks or end overfishing of regulated multispecies.

Stock: A grouping of fish usually based on genetic relationship, geographic distribution and movement patterns. A region may have more than one stock of a species (for example, Gulf of Maine cod and Georges Bank cod). A species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

Stock assessment: Determining the number (abundance/biomass) and status (life-history characteristics, including age distribution, natural mortality rate, age at maturity, fecundity as a function of age) of individuals in a stock

Sustainable Fisheries Act (SFA): Amendment to the Magnuson-Stevens Act in 1996. Among other things: Modifies the operations of the Fishery Management Councils; mandates that the Secretary of Commerce take steps to end overfishing and rebuild stocks; mandates the Secretary of Commerce to establish guidelines for identification of essential fish habitat (EFH) by Fishery Management Councils (other federal agencies are required to consult with the Secretary of Commerce when their action may affect EFH); mandates research on fishery management and conservation.

Total Allowable Catch (TAC): This value is calculated by applying a target fishing mortality rate to exploitable biomass. The amount (in metric tons) of a stock that is permitted to be caught during a fishing year. In the Multispecies FMP, TACs can either be "hard" (fishing ceases when the TAC is caught) or a "target" (the TAC is merely used as an indicator to monitor effectiveness of management measures, but does not trigger a closure of the fishery).

TURFs: Rights to specified fishing locations, such as informal rights for lobster fishing.

Use rights: These concern how access to the fishery is restricted, amount of fishing effort each participant is allowed, or the catch each can take.

Vertical integration: A fishery or industry is vertically integrated when firms in the fishery engage in multiple levels of the supply chain. For example, a firm that operates and manages fishing vessels, processing plants and a wholesale distribution operation is vertically integrated. This becomes important for the anti-trust issues facing the fishing industry.

Vessel Monitoring System (VMS): VMS allows the OLE to monitor and survey vessels over vast expanses of open-water while maintaining the confidentiality of fishing positions. VMS allows the OLE to use 21st century technologies to monitor compliance, track violators and provide substantial evidence for prosecution while maintaining the integrity of the individual fisherman's effort.

Withdrawal rights: Input rights (effort limits) and output rights (catch quotas).

Brief Regulatory History of the Northeast Multispecies Groundfish Fishery

- Species include cod, haddock, yellowtail flounder, Pollock, redfish, white hake, witch flounder, American plaice, winter flounder, windowpane flounder, and other unregulated species.
- Largest ports are Portland, ME, Gloucester, New Bedford, MA; however, there are many others in RI, and NJ that are also important to the fishery.
- Before 1977, the fishery was largely unregulated, and international fleets fished in the same offshore waters as US vessels.

The Magnuson-Stevens Fisheries Conservation and Management Act of 1976, also known as the Magnuson Fishery Conservation and Management Act

- Established regional fishery management councils comprised of federal and state officials, including the Fish and Wildlife Service. The Act also established a 200 mile fishery conservation zone, but that was later dropped by an amendment and changed to the Exclusive Economic Zone (EEZ).
- The management councils had several missions, including, protecting the EEZ from encroachment, protecting domestic fisheries laws, and maintaining international fisheries agreements.
- The Regional Councils draw up fishery management plans (FMPs) that are reviewed and approved by the Secretary of Commerce. It provides for regulation of foreign fishing in the management zone under GIFA's (governing international fishing agreements) and vessel fishing permits. It also provides a mechanism for preemption of State law by the Secretary of Commerce.
- 1977 there were quarterly species quotas and trip limits. Quotas increased in 1980 and 1981. This resulted in a short season, market gluts and price depreciation.
- 1979-1982, fishing morality rose, fishing stocks declined, there were shorter seasons, more vessels, and number of trips increased. Consumer demand increased and processors were forced to import from Canada to meet the demand. There was cheating on quotas, cheating etc.
- Other regulatory regimes were implemented in 1982-1989.
- The Northeast Multispecies FMP was implemented in 1986 to reduce fishing mortality of heavily fished groundfish stocks and to promote rebuilding to sustainable biomass levels. The groundfish complex has been managed by seasonal and year-round area closures (no fishing in certain areas), gear restrictions (specified mesh size, number of nets/hooks, etc.), minimum fish size limits, trip limits (limiting

fishermen to a certain poundage of fish per trip), limited access (limiting the number of participants in the fishery) and restrictions on the number of days a vessel is allowed to fish for groundfish each year (days-at-sea).

Amendment 5-1994

- Called for reduction in fishing mortality by 50% over five years by using direct controls on the effort expended by fishermen. This included allocating days at sea (DAS) to individual vessels. This did not work as expected.

Sustainable Fisheries Act

- In 1996, there were amendments to the Magnuson-Stevens Act, known popularly as the Sustainable Fisheries Act. Among its major provisions were, modifying the operations of the Fishery Management Councils, mandates that the Secretary of Commerce take steps to end overfishing and rebuild stocks, mandates the Secretary of Commerce to establish guidelines for identification of essential fish habitat (EFH) by Fishery Management Councils (other federal agencies are required to consult with the Secretary of Commerce when their action may affect EFH), mandates research on fishery management and conservation.

Amendment 7-1996

- Accelerated the DAS, eliminated significant exemptions from the effort controls, provided incentives to fish with a bigger mesh size to minimize incidental catches, broadened area closures (to protect juveniles, and spawning fish), and increased haddock possession limit to 1,000 lbs.
- DOC in 1996 began a buy back program that expended 23 million. It had an immediate effect on reducing active fishing capacity, but individuals who sold their vessels, subsequently bought other vessels and created high production vessels.

Amendment 9

- Established new overfishing definitions and set the optimum yield for 12 groundfish species.

Lawsuits/Effects thereof

- In 2000, the American Oceans Campaign sued the Secretary of Commerce, alleging that NOAA and NMFS violated the Fishery Conservation and Management Act (FCMA) by approving essential fish habitat (EFH) amendments promulgated by regional fishery management councils, and the National Environmental Policy Act (NEPA) by performing environmental assessments (EA), rather than environmental impact statements (EIS), for amendments. The court found that the Secretary's actions were subject to judicial review, and that the EFH did not violate the FCMA, but that the EAs were inadequate. *American Oceans Campaign v. Daley*, 183 F.Supp.2d 1 (D.D.C. 2000).
- In 2001, NMFS initiated another buy back program with \$10 million. The program purchased 245 permits, only a few of which were active vessels.

- In late 2001, CLF filed suit against NMFS alleging that the rebuilding plans NMFS implemented were not consistent with the overfishing definitions set forth in Amendment 9. CLF charged that the management plans failed to adequately address bycatch reporting, and minimize bycatch and bycatch mortality. *Conservation Law Foundation v. Evans*, 209 F.Supp.2d 1 (D.D.C. 2001). The case settled and interim measures were adopted.
- The court ordered that by 2003 the Secretary come up with a Fishery Management Plan Amendment and calculate the TAC for all species governed by Amendment 9; that for all gear sectors, NMFS is to provide 5% observer coverage, or higher if necessary, and to provide statistically reliable data; and that as of May 1, 2003, NMFS is to increase the observer coverage to 10% for all gear sectors, unless it can establish by the most reliable and current scientific information available that such increase is not necessary. NMFS ultimately came out with Amendment 13 which addresses stock rebuilding and habitat protection, and reduces fishing effort and capacity.

Amendment 13

- The goals of Amendment 13 include managing the northeast multispecies fisheries at a sustainable level consistent with the National Standards and other provisions of the MSA; creating a management system that creates diversity within the fishery and achieves economic efficiency and biological conservation; maintaining commercial and recreational fisheries for northeast multispecies; minimizing adverse effects on fishing communities and shoreside infrastructure to the extent possible; and promoting stewardship within the fishery.
- Amendment 13 creates categories of DAS, creates a leasing program and permanent transfer program of the DAS, and allows groups of fishermen to form sectors.

Sector program of Amendment 13

- A sector may develop a plan that is based on an allocation of allowable catch or effort (DAS) in which only members of the sector may participate. The Fishery Management Plan, the Magnuson-Stevens Act, and NEPA are legal requirements to which the sector must adhere. Participation in the sector is voluntary.
- In order to form a sector, the sector applicants must submit to the Council, at least one year prior to the date that it plans to begin operation, a proposal requesting that the Council initiate a framework adjustment to authorize an allocation of catch or effort, subject to compliance with general requirements described below and any analytical documents necessary to comply with NEPA.
- Once the operations plan is deemed complete, NMFS will solicit public comment. Each sector may set its own rules with regard to movement between sectors. Once the vessel signs a binding contract to participate in a sector, the vessel is required to remain in the sector for the remainder of the fishing year.

- Allocation of fishery resources to a sector is based on documented accumulated landings for the 5-year period prior to submission of a sector allocation proposal to the Council, of each participant in the sector.

Magnuson Stevens Reauthorization Act of 2006

- The goals of this reauthorization were: End overfishing; promote market-based management approaches; improve scientific research and the role of science in decision-making; enhance international cooperation (address IUU fishing and bycatch of protected living marine resources).
- MSRA set a firm deadline of 2010 for measures to be in place that end overfishing in the United States.

Cape Cod Hook Sector

- The Hook Sector was implemented in Amendment 13 to the Groundfish FMP in response to predictions that the new regulations would have high impacts on hook fishermen from Chatham and Harwichport.
- Membership is voluntary, but each member once part of the sector must remain in the sector for three years.
- Leasing the DAS during the fishing year may occur among sector participants only, and it is only for that fishing year.
- Allocated a maximum of 20% of the GB cod TAC (total allowable catch) for each fishing year for which an operations plan is approved.
- The sector Manager can monitor members, ensure compliance; enforce the agreement subject to the Board or committee, Sector's bylaws, including penalties. They are also the liaison between NMFS and the sector.
- If, in a particular fishing year, the sector exceeds its TAC, the sector's allocation will be reduced by the amount of the overage in the following fishing year.
- If a member exceeds the quota, he or she is subject to penalties, including attorneys' fees and costs. The other sector members are jointly and severally liable for the actions of another member.
- When the GB TAC is reached, participants in the sector will be prohibited from using any fishing gear that is capable of harvesting groundfish for the remainder of the fishing year.
- Members are required to submit daily catch amounts to the manager of the sector, who in turn provides NMFS with a report of catch landings. In addition, each member is responsible for ensuring their dealers provide the manager with timely catch

reports. Member and Manager must ensure the manager compares and validates catch records with the dealer reports.

- CCHS also has a 5% reserve allocation, which the sector uses to enforce its provisions.
- Amendment 13 only allocated NMFS with the authority to allocate GB Cod. This means for both the Cape Cod Hook Sector and the Fixed Gear sector, they still need to use the DAS system to manage fishing mortality of non-cod species. CCHFA has expressed concern over this dual system and its seeming diminishment of the effectiveness of sectors (in terms of conservation, and sustainability).
- The CCHFA requested that Amendment 16 include an authorization for NMFS to allocate a minimum amount (1,000 lbs or some other appropriate level) of TAC (of any groundfish species) to sectors where fishing history is less than the minimum allocation level.
- CCHFA also requested that the universal baseline for allocation of catch should be 1996-2001.

Problems in Marine Fisheries

- Overfishing, resulting in substantially diminished stocks of some species
- Overcapitalization, i.e. excessive investments in national fishing fleets
- Water pollution that threatens spawning areas vital to health of many marine species
- International conflicts over fishing rights.

Individual Transferable Quotas (ITOs)

- Each fisherman is allocated a percentage (or quota) of the TAC for a given species. This quota is usually based on his average catch in past years, which can take into account a fisherman's failure to participate in the fishery in a given year.
- Chief advantages: the race to fish is eliminated; the over-investment and capital stuffing are greatly reduced.
- Problems: (1) Determining who should get quotas, how large should they be and at what price, and (2) enforcement.

Possible Legal issues with sector formation (see legal issues memo below)

- Corporate form
- Jurisdiction (federal, state, preemption?)
- Enforcement (arbitration?)—another issue with this is whether we can prevent a sector from dissolving or a member from leaving a sector to escape liability if the sector exceeds its TAC.
- Liability (joint and several liability?)
- Antitrust issues with cooperatives

Latest Developments

- New MSA Requirements: Amendment should set cost recovery standards to identify what costs should be paid for by the sectors. The Committee has yet to address this item because they are awaiting development of NMFS' Guidelines. It will be interesting to see what NMFS comes out with, especially since this was a concern of ours (cost of sector creation and management).
- MOTION: Each FMP should define a **minimum** sector size by specifying a minimum number of participants expressed as a number of individuals or % of permits, in order to ensure accountability among sector members, and not complicate administration or enforcement, **passed** unanimously.
- MOTION: Each FMP must identify a single, fixed and permanent baseline for the purpose of sector allocation. This motion **passed** 3-1. The committee then recognized that there may be reasons for exceptions to this motion.
- MOTION: Each FMP may allow transfers of quota **among sectors** contingent on evaluation of proposals. Motion **passed** unanimously.
- If the EA is prepared for a multi-year operations plan, and the range of possible changes during that period is fully analyzed in the EA, then no additional analysis should be required. MOTION: Each FMP may allow proposals that request authorization for multi-year operations. Motion **passed** unanimously. This would make it much less expensive for the sector to engage in the repeated required NEPA analysis.
- Committee discussed the monitoring, reporting and review requirements of sectors, but declined to recommend a policy or alternative on this.
- NMFS Regional Office commented that the definition of a geographic area (assigned to each sector) would enhance their enforcement if the geographic area were smaller than the area in the FMP. Committee agreed that the geographic area limitation on sectors is a matter to be taken up by the individual species committees when they develop their sector programs.

Summary of Major Legal Issues in Sector Operating Agreements

Introduction

Under Amendment 13 to the Northeast Multispecies Fishery Management Plan (FMP) (69 CFR 22906, April 27, 2004) any person may submit a Sector allocation proposal for a group of limited access Northeast multispecies vessels to the New England Fishery Management Council (NEFMC). A sector proposal must be submitted at least one year in advance of the start of a sector. The council decides whether to initiate a framework. Each sector must submit an Operations Plan and Sector Contract to the Regional Administrator at least three months prior to the beginning of each fishing year. Some of the many legal issues to be considered are: corporate status of each individual fishermen and the sector as a whole; start-up money; NEPA compliance; joint and several liability; enforcement; choice of law; and antitrust. Each of these issues will be considered in turn.

Corporate Status

Should each member be incorporated? Each member in the Cape Cod Hook Sector is duly organized, and validly existing. Each member in the Pollock cooperative is incorporated, and the sector is a non-profit pursuant to 501(c). An issue that arises is whether (or how) we can prevent a member from leaving the sector or prevent the sector from dissolving to escape liability.

NEPA Compliance

Each sector is responsible for ensuring their operations plan and contract complies with NEPA, and undergoes the appropriate NEPA analysis (EA, EIS etc). This requires start-up equity to hire a group to do the NEPA analysis (e.g. Gulf of Maine Research Institute, or a private firm).

Joint and Several Liability

Under the National Oceanographic and Atmospheric Administration's statutes, the members of the cooperative are subject to joint and several liability. 15 C.F.R. § 904.107.

Enforcement

Members are required to submit daily catch amounts to the sector's manager who provides NMFS with a report of catch landings. In addition, each member is responsible for ensuring their dealers provide the manager with timely catch reports. Member and Manager must ensure the manager compares and validates catch records with the dealer reports.

Amendment 13 allocates NMFS authority to allocate GB Cod. This means for both the Cape Cod Hook Sector and the Fixed Gear sector, they still need to use the DAS system to manage fishing mortality of non cod species. CCHFA has expressed concern over this dual system and its seeming diminishment of the effectiveness of sectors (in terms of conservation, and sustainability). This also raises an issue of enforcement. If there are different TAC for different species caught by the same vessel, will enforcement change?

Under the Cape Cod Hook sector agreement, if any member exceeds his or her TAC, member(s) can enforce on behalf of the sector and/or members. Members agree to take all action, documents, necessary to give effect to enforcement procedures. This clause is the same in the Pollock cooperative contract.

Penalties on the schedule, plus costs of enforcement are the sole remedy, and they are to be born by the non-prevailing party. Any costs imposed on a member by the sector are in addition to any state or federal penalties. A stop fishing order can be issued if a member of the sector exceeds the sector's total allowable catch. The sector can obtain an injunction if the stop fishing order is ignored.

An issue expressed at the May 30, 2007, New England Fishery Council Meeting is whether we can prevent a sector from dissolving or a member from leaving a sector to escape liability if the sector exceeds its TAC.

Jurisdiction/Choice of Law

In the Cape Cod Hook sector agreement, federal fisheries laws apply and to the extent they don't apply, laws of MA. When would the federal fisheries laws not apply? Enforcement? Penalties?

Antitrust

The Fishermen's Collective Marketing Act (15 U.S.C. § 521-FCMA) extends an antitrust exemption to "persons engaged in the fishing industry...collectively catching, producing, preparing for market, processing, handling, and marketing their fish." FCMA was patterned after Capper-Volstead Act (7 U.S.C. § 291) which exempts qualified agricultural producers from antitrust liability for collective production etc. C-V case law is applicable precedent for analyzing FCMA cases.

Harvesting agreements may be pro-competitive. Limited research suggests that processor ownership of catcher vessels was not uncommon when FCMA was adopted, so harvesting agreements among vertically integrated fishermen may not be inconsistent w/ congressional intent concerning the exemption. Under circumstances present in many US fisheries, harvesting co-ops may operate legally without the FCMA exemption.

Because the fishermen present in the New England fisheries are not vertically integrated, there is even less of an antitrust issue. These fishing cooperative agreements are pro-competitive, and the fishermen are harvesters, not catcher/processors. The Pollock cooperative consists of catcher/processors and they received a favorable decision from the U.S. Department of Justice regarding antitrust implications.