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AMENDMENT 14 (PERMIT STACKING) IMPLEMENTATION ISSUES FOR 2003 AND BEYOND

On August 7, 2001, NMFS published a final rule implementing Amendment 14 to the groundfish fishery management plan. The final rule established the basic "permit stacking" program for sablefish-endorsed limited entry permits (66 FR 41152). Under this program, up to 3 limited entry permits with sablefish endorsements may be registered for use with a single vessel during the primary sablefish season; permits may only be owned by one individual human person; and no person may have an ownership interest in, or hold (i.e. lease), more than 3 permits. An exception to the individual ownership requirement and the limitation to 3 permits is made for entities (corporations, partnerships, and individuals) that owned sablefish-endorsed permits on November 1, 2000. These entities are "grandfathered," and are not subject to the individual ownership requirement, the "no more than 3 permits" rule, or to the "owner-on-board" requirement described below. To minimize confusion in this document, permit owners who owned permits on November 1, 2000 will be referred to as "first generation" (or "grandfathered") permit owners, while a permit owner that did not own a sablefish-endorsed permit on November 1, 2000 will be referred to as a "second generation" permit owner. Requirements discussed here apply to all sablefish-endorsed permits, even if they are not stacked.

In the *Federal Register* notice announcing the final rule, NMFS indicated that the agency would implement the more complex provisions of Amendment 14 through a second set of regulations for the start of the 2002 primary sablefish season. However, the agency has not yet implemented these provisions due to the workload resulting from recent groundfish litigation, and to the need for clarification of the Council's intent regarding some of the more complicated Amendment 14 provisions. To date, only the April 1 through October 31 primary sablefish season has been implemented for 2002.

Following consultation with the Council and its advisory bodies at the April 2002 Council meeting, NMFS expects to implement the following provisions as regulations for 2003 and beyond, consistent with Amendment 14:

- 1) An owner on-board requirement for permit owners who did not own sablefish endorsed permits on November 1, 2000;
- 2) A requirement that corporations and partnerships provide documentation listing all individuals with ownership interest in the entity (i.e., shareholders, partners, etc.) as of Nov. 1, 2000, in order to determine the number of permits owned by an individual and in order to document the ownership structure of the owning entity for determining when grandfather rights terminate;
- 3) A determination of which sablefish-endorsed vessels have sufficient frozen sablefish landings to qualify for the exemption from a prohibition on the at-sea processing of sablefish.

In preparing to implement these provisions, NMFS has received many questions from the affected fishers about ownership structure and limitations. Many fishermen have expressed surprise and dismay at the effects of the new requirements. NMFS wants to bring these issues to the Council's attention. In some cases NMFS would like clarification on how things should be implemented. In other cases NMFS wants to ensure that the affected public fully understands the effect of these provisions on their fishing operations and business arrangements. The provisions will generally impact most existing permit owners' business and family arrangements related to their fishing operations, as well as the fishing operations themselves. Examples of specific issues that have caused concern are: 1) the requirement that the owner of a permit be physically aboard the vessel when the permit is being fished (e.g., if a vessel operator will land fish caught under two leased permits, the owners of those two permits must be aboard the vessel); 2) how the owner-on-board requirement will affect vessel operators as they age and become physically less able to cope with the demands of fishing; 3) what happens with the surviving spouse if the permit owner dies and the owner-on-board requirement applies; and 4) effect on desired family business arrangements of any or all of the requirements.

Of the three numbered items listed above, the latter two are reasonably straightforward to implement, although their implementation requires Paperwork Reduction Act clearance from the Office of

Management and Budget. NMFS could benefit from Council guidance regarding the owner-on-board requirement, and issues stemming from this.

Background. The intent of the owner-on-board and individual-owner provisions is to keep the fishery as an owner-operated fishery, preventing permits from being purchased by absentee owners who then lease permits to the fishermen. Thus, the permit stacking program requires the permit owner to be physically aboard the vessel when it takes its sablefish under a permit (referred to as the "owner-on-board" requirement). This requirement is applied only to second generation owners in order to avoid unnecessary disruption to current business arrangements. Second generation owners are also required to be individuals rather than business entities. In order to determine when the first generation ownership changes (which triggers the owner-on-board and individual ownership requirements), NMFS needs to know exactly what the ownership entity was, and what individuals had ownership interests in the entity, as of November 1, 2000. NMFS records show that ownership entities (permit owners of record) as of November 1, 2000 included corporations, partnerships, trusts, joint tenancies, tenancies in common, marital communities, and individuals. It is also necessary to define what events cause changes in an ownership entity such that it is no longer grandfathered, and the second generation requirements come into play.

Under the Council's regulatory recommendations for implementing Amendment 14, "the permit owner would be required to be onboard the vessel during fishing operations, with the exception of those falling under the following grandfather provision: Corporations, partnerships, and individuals who hold sablefish endorsed permits as of November 1, 2000 will not be required to be onboard the vessel on which the permit will be used. Grandfathered absentee owners may acquire additional permits to stack with the permits they own, subject to accumulation caps, and still maintain their exemption from the owner on board provision. This exemption will cease if there is any change in the identity of a corporation or partnership owning the stacked permits."

Amendment 14 regulatory recommendations further defined a "change in the identity" as the addition of a new member to the grandfathered corporation or partnership (subtraction of a member would not cause a change in the identity of the ownership entity). For purposes of determining what ownership entity is grandfathered, NMFS will not investigate permit ownership outside of what was listed in its permit records as of November 1, 2000. Therefore, for purposes of implementing this system, the permit owner of record in NMFS records as of November 1, 2000 is the grandfathered ownership entity.

In June 2001, the Council provided NMFS with guidance for the owner-on-board provision, clarifying that permit owners who are subject to the owner-on-board requirement must be on board the vessel whenever sablefish is taken, starting from April 1 through whenever the vessel has harvested the primary sablefish limits associated with the permits registered for use with that vessel. Only persons, partnerships or corporations that, as of November 1, 2000, owned the sablefish-endorsed permits registered for use with the vessel would be exempt from this requirement.

Owner-on-Board Points of Clarification

Issue 1. What is the duration of the owner-on-board exemption for first generation owners? Three possible options are presented below.

(A) A first generation owner is exempt from the owner-on-board provision for as long as he/she is alive, or for business entities, as long as the ownership entity does not change.

(B) A first generation owner is exempt from the owner-on-board provision for as long as the entity owns at least one sablefish endorsed limited entry permit.

(C) A first generation owner is exempt from the owner-on-board provision for as long as the entity owns at least one sablefish endorsed limited entry permit, and has not had a break in the ownership of such permits of longer than 6 months (a year, duration?). In other words, a first generation owner could sell its permit, buy another permit within the specified time frame, and retain its exemption from the owner-on-board requirement.

Issue 2. If a partnership or a corporation is a first generation owner, how are the individual persons with ownership interest in that partnership or corporation affected by the owner-on-board provision?

(A) A person who has ownership interest in a partnership or corporation that is a first generation owner is exempt from the owner-on-board provision if he/she wishes to own a permit under his/her own name, even if he/she did not own a permit under his/her own name as of November 1, 2000. That is, the *individuals* with ownership interest would be exempt.

[This interpretation would raise additional questions. For example, if a new owner is added to the grandfathered ownership entity, that entity loses its grandfathered status and must become a second generation owner. Would the individuals with ownership interest in this entity still individually be considered first generation owners and exempt from the owner on board? Or would their grandfathered status also expire?]

(B) A person who has ownership interest in a partnership or corporation that is a first generation owner is *not* exempt from the owner-on-board provision for permits owned under his/her own name unless he/she owned a permit under his/her own name as of November 1, 2000. That is, the *ownership entity* is what is exempt.

Issue 3. How is the owner-on-board requirement applied when a first generation individual permit owner dies?

(A) The next owner of the permit is a second generation owner, and must be an individual that must be aboard the vessel when it is fishing against its tiered sablefish limits. During the period that the permit is owned by the estate and has not been transferred to an individual it cannot be used.

(B) The estate of the deceased permit owner has a period of time in which to transfer the permit to an individual. This period allows the estate to hire a skipper to fish the permit while the estate is being settled. Once the permit is transferred, the new owner must be on board the vessel. The grace period could be 1 year, 2 years, 3 years. NMFS Alaska Region allows a grace period under their regulations. NMFS strongly recommends the grace period.

[Under this interpretation, if a spouse inherits a permit, the permit could be fished by anyone while the estate is being settled, up to the end of the grace period. However, once the estate is settled and the permit has passed to the spouse, then the spouse is the second generation owner and must be on the vessel when the tier limit is being taken.]

Issue 4. Under the Council's regulatory recommendations for implementing Amendment 14, a partnership or corporation that adds a new member would lose its exemption from both the owner-on-board provision and from the provision that allows only individual persons to be permit owners. Many partnerships or corporations that own sablefish endorsed permits are family-owned entities.

(A) Continue this provision, which would abolish a partnership or corporation's exemptions in the event that the partnership or corporation adds a new member. [Under this option, a husband and wife that own a permit could not add a son or daughter to the permit without losing first generation status. Similarly, a fisherman who wants to take on new a partner because an existing partner is retiring could not add that new partner without losing first generation status.]

(B) Remove this provision, allowing partnerships or corporations to add new members without losing their exemptions. [This option could allow a partnership or corporation to remain exempt from the owner-on-board provision and the individual owner provision for as long as the corporation exists (i.e., forever).]

Issue 5. Under the current structure, an individual who is a first generation permit owner could not add another person as a permit owner, because as described under Issue 4, that person would lose his/her first generation status. [Therefore, if a permit owner gets married or has a child, he/she could not add the new spouse or child as an owner. In addition, since second generation owners must be individuals, a

husband and wife will not be able to be listed as second generation permit owners. Only one person may be listed, and that permit owner must always be on the vessel. Additionally, two business partners could not own a permit together and fish that permit at separate times, as only one person could be listed as the permit owner.]

Issue 6. One issue that has come up is that in some states, a husband and wife may both own the permit under community property law. However, some permits may be listed in the NMFS records with both spouses being the permit owner, and for other permits, only one spouse may be listed as the permit owner. It would not be appropriate or practical for NMFS to attempt to discern whether permits are community property or not. As part of implementing this rule, NMFS believes that the agency should allow first generation permit owners that were married on the control date to correct permit ownership records as of that control date if they wish. Permit owners could then add a not-listed spouse as a co-owner without losing the grandfather status.

Issue 7. If an owner must be on board when a permit is being fished, in the case where permits of different owners are being used on one vessel, there must be some way to record what permit is being used, and who is on board. Currently, permit numbers are not recorded on fish tickets in each state, and there is no set way to determine who is on board when those permits are being fished. One way to enforce this to develop a method to record on fish tickets the permit number of the permit being fished (in addition to the "base" permit number, if that is already recorded), and the signature of the permit owner. NMFS and the Council must work with the states to develop a workable tracking system.

Limitations on Permit Ownership and Permit Holdership

Under the Council's initial regulatory recommendations for implementing Amendment 14, no more than three sablefish endorsed permits may be owned by a person, partnership or corporation, unless that person, partnership, or corporation held more than three permits as of November 1, 2000. In June 2001, the Council clarified this recommendation, saying that it had intended to restrict each person, partnership, or corporation to holding (owning or leasing) no more than three permits. The Council further clarified that the grandfathered exception to the 3 permits restriction allowed only those persons, partnerships, or corporations that had owned more than 3 permits as of November 1, 2000 to continue to own those without acquiring additional permits.

Under the current groundfish regulations, at 50 CFR 660.302, "permit owner" and "permit holder" are defined as follows:

"*Permit holder* means a permit owner or a permit lessee."

"*Permit owner* means a person who owns a limited entry permit."

The current regulations also provide at 50 CFR 660.333(a) that:

"In order for a vessel to participate in the limited entry fishery, the vessel owner must hold (by ownership or lease) a limited entry permit and, through [NMFS] must register that permit for use with his/her vessel."

This is the basic structure of the entire limited entry scheme - a permit must be registered to the vessel with which it is being used, and the owner of the vessel is the "holder" of the permit.

NMFS codified the Council's recommendations on ownership and holdership limits at 50 CFR 660.334(d)(3) as follows:

"(3) Ownership Requirements and Limitations [for sablefish endorsed limited entry permits]."

(i) No partnership or corporation may own a limited entry permit with a sablefish endorsement unless that partnership or corporation owned a limited entry permit with a sablefish endorsement on November 1, 2000. Otherwise, only individual human persons may own limited entry permits with sablefish endorsements.

(ii) No person, partnership, or corporation may have ownership interest in or hold more than three permits with sablefish endorsements, except for persons, partnerships, or corporations that had ownership interest in more than 3 permits with sablefish endorsements as of November 1, 2000. The

exemption from the maximum ownership level of 3 permits only applies to ownership of the particular permits that were owned on November 1, 2000. Persons, partnerships or corporations that had ownership interest 3 or more permits with sablefish endorsements as of November 1, 2000 may not acquire additional permits beyond those particular permits owned on November 1, 2000 until they own fewer than 3 permits; at that time they may not exceed the ownership cap of 3 permits. . .”

In more plain English, this means that no one may have control over or ownership interest in more than three permits, unless he/she owned more than three permits as of November 1, 2000. It also means that anyone who owned more than three permits as of November 1, 2000 may not have control over additional permits beyond those owned as of November 1, 2000.

The Council and NMFS have received a request from a limited entry permit owner that the Council recommend revising these limited entry permit program regulations so that vessel owners would no longer have to “hold” limited entry permits to participate in the limited entry fishery. This would completely change the limited entry program structure. The real issue here is not the definition of “hold”. Rather the issue is whether the three permit per person restriction should include permits that an entity “owns”, or also ones the entity leases to use on his or her vessels. Two possible scenarios under different ownership/holdership rules:

(A) Under the current regulations, a person could own three permits and two (or more) vessels. The person could not stack an additional permit beyond the original three permits on his vessels. Or a first generation owner could own five permits and three vessels. He would not be able to stack any additional permits on the vessels beyond the original five permits.

(B) If there is no restriction on “leasing” permits, the first owner could lease any number of permits. He could stack his 3 permits on vessel 1, and lease three additional permits for his second vessel. If he leased from first generation owners, neither he nor the other owners would need to be on the vessel. If he leased from second generation owners, the second generation owners would have to be on the vessels. For the second person, he could use the 5 permits, and lease an additional 4 permits. Again, if the permits were leased from a first generation owner, neither owner would need to be on the vessel. If they were leased from a second generation owner, the permit owner would need to be on the vessel when the permit is being fished.

