

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 94-135, adopted May 3, 1995, and released May 9, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, located at 1919 M Street, NW, Room 246, or 2100 M Street, NW, Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by adding Atkins, Channel 257A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 652

[Docket No. 950126030-5131-02; I.D. 111794A]

Atlantic Surf Clam and Ocean Quahog Fisheries; 1995 Final Fishing Quotas

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final 1995 fishing quotas for surf clams and ocean quahogs.

SUMMARY: NMFS issues these final quotas for the Atlantic surf clam and ocean quahog fisheries for 1995. These quotas were selected from a range defined as optimum yield (OY) for each fishery. The intent of this action is to establish allowable harvests of surf

clams and ocean quahogs from the exclusive economic zone in 1995.

EFFECTIVE DATE: January 1, 1995 to December 31, 1995.

ADDRESSES: Copies of the Mid-Atlantic Fishery Management Council's analysis and recommendations are available from David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901-6790. Copies of the Report of the 19th Northeast Regional Stock Assessment Workshop (19th SAW Report) are available from Helen Mustafa, NMFS, Woods Hole Laboratory, 166 Water Street, Woods Hole, MA 02543-1097.

FOR FURTHER INFORMATION CONTACT: Myles Raizin (Resource Policy Analyst) 508-281-9104.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries (FMP) directs NMFS, in consultation with the Mid-Atlantic Fishery Management Council (Council), to specify quotas for surf clams and ocean quahogs on an annual basis from an established range of values to represent the OY for each fishery. It is the policy of the Council that the levels selected will allow fishing to continue at that level for at least 10 years for surf clams and 30 years for ocean quahogs. In addition to this constraint, the quotas are set at a level that meets the estimated annual demand.

For surf clams, the quota must fall within the OY range of 1.85 million bushels (652 thousand hectoliters (hL)) and 3.4 million bushels (1.2 million hL). For ocean quahogs, the quota must fall within the OY range of 4 million bushels (1.4 million hL) to 6 million bushels (2.1 million hL). These ranges are specified in 50 CFR 652.21 (a) and (b) of the regulations.

Final fishing quotas for the 1995 fishing year are: Surf clams—2.565 million bushels (90.4 thousand kiloliters (kL)); ocean quahogs—4.9 million bushels (172.7 thousand kL). NMFS has considered all comments and has determined that these are the appropriate quotas, in accordance with § 652.21(a)(3) of the regulations. These quotas are identical to those recommended by the Council and published as proposed on February 6, 1995 (60 FR 6977). The public comment period ended on March 6, 1995.

The 19th Stock Assessment Workshop (SAW) Report was not available to the Council when the Council voted on the proposed quotas for surf clams and ocean quahogs. That report declared that both the surf clam and ocean

quahog fisheries were fully exploited and at medium levels of biomass. The report also suggested that the surf clam quota be reduced by 16 percent and the ocean quahog quota be reduced by approximately 18 percent from quota levels set for 1994. This reduction was necessary to accomplish a 50-percent probability of achieving the Council's supply-year goals. However, despite the updated management advice, the Council did not revise its earlier recommendation of a 10-percent reduction in the surf clam quota and a 12.5-percent reduction in the ocean quahog quota.

The quota-setting process for these fisheries relies upon a high degree of public participation. Early in the process, the industry was invited to attend meetings and discussions where NMFS scientists presented survey results and other data on the status of the fishery. The industry was given many opportunities to testify or comment on the Council's proposals, and written comments were submitted during the open comment period provided after proposed quotas were published in the **Federal Register**.

The 1995 surf clam and ocean quahog specifications are based on the 1992 surf clam abundance survey, as reported in the 1993 stock assessment report. Reliance on the 1992 survey is based on two factors. First, the 19th SAW report and the 1994 abundance survey it contains were not available for the Council to analyze before the Council voted initially on proposed specifications for surf clams and ocean quahogs for 1995. Second, the NMFS scientists reported that the 1994 surf clam abundance survey was a statistical anomaly and raised serious biological questions when compared with the survey data from prior years. The Director, Northeast Region, NMFS (Regional Director) agreed and decided that utilization of the 1994 survey information was not prudent at this time. NMFS has accepted comments based on the 1994 survey, however, and will consider these comments when the 1994 survey data is reexamined. In determining the final quota amounts, NMFS considered the recommendations of the Council, the findings of the 19th SAW Report, and concerns regarding the impact on the public and the resource. The 19th SAW Report recommended that the 1995 quota be set even lower than the Council's proposed specifications. However, the Council's specifications remain within the range of estimated supply years. Therefore, NMFS has concluded that the Council's recommendation remains sufficiently

prudent and further reductions are not warranted at this time.

Comments and Responses

Eight sets of comments, which altogether made nine separate points, were received on the proposed 1995 quotas of 2.565 million bushels (904 thousand hL) for surf clams and 4.9 million bushels (1.7 million hL) for ocean quahogs. One commenter favored the proposed quotas, while eight commenters were in opposition.

Comment: The refusal of NMFS and the Council to use results of the 1994 abundance survey to measure the biomass of surf clams and ocean quahogs was not consistent with basing the specifications on the best scientific information available.

Response: The Stock Assessment Review Committee (SARC) for the 19th SAW, comprised of scientists from NMFS, academia, state facilities, and staffs of the New England and Mid-Atlantic Fishery Management Councils, made the determination not to include the 1994 abundance survey results in the stock assessment. Those results were markedly and scientifically incompatible with the rest of the time-series developed from the 19 previous survey cruises. The 1994 abundance survey results could not have been attributable to a major recruitment event. Since the size-structure of the clams caught in the 1994 survey was similar to the size-structure detected in the previous surveys, evidence of increased recruitment for at least some age-classes should have been detected in the previous surveys. The only conclusion that can be drawn is that the capture efficiency of the clam dredge used in the 1994 survey was higher than it was in previous years.

Furthermore, the 1994 abundance survey results alone do not constitute the best scientific information available. They represent an anomaly in a very long time-series of survey results. It would not be scientifically sound to accept the 1994 survey results by assuming that there is a sudden and dramatic increase for almost every year-class for both species. These results need to be scientifically vetted before they can be used to modify existing data. The results have not been discarded. If future survey results replicate the 1994 survey results, then a sounder scientific basis would exist for making an adjustment to the annual quota.

A number of scientific questions have been asked regarding the validity of the 1994 dredge survey data. As a result, NMFS and the Council believe that use of the 1992 surf clam abundance survey,

as reported in the 1993 stock assessment report, as the basis for its recommendations for the annual quotas for surf clams and ocean quahogs represents the best scientific information available at the time.

Comment: Based on the 1992 abundance survey, the Council chose to assume 9 years of surf clams available for harvest, when they could have chosen up to 12 years. The correct approach would have been to assume the mean number of years—10.5.

Response: In 1994, in a written report containing their analyses and recommendations (see ADDRESSES), the Council chose to recommend a conservative approach to protect the stocks by assuming 9 years of availability at current harvest levels. NMFS has accepted this conservative approach in specifying the 1995 surf clam quota. The recruitment to this fishery is at low levels and does not offset annual removals from the fishery. Consequently, a high probability exists that this fishery will be severely depleted at the end of 10 years. This means that fishing will be dramatically curtailed. Concomitantly, the value of individual transferable quotas may be severely affected.

The most sound approach is to take no action that could accelerate the severe depletion of the fishery. This necessitates a reasonably conservative approach to management. If, in the future, the results of the 1994 survey are invested with some scientific validity, or a major recruitment event occurs, then the Council would have a basis on which to adopt less conservative quotas.

The 1995 quota specifications do not even represent the most conservative quota recommendations for these fisheries. At present levels of harvest, the SARC estimates a 50-percent probability that only a 7-year supply of surf clams remains in northern New Jersey and in Delaware, Maryland, and Virginia (Delmarva). These areas jointly account for approximately 90 percent of the harvest. If NMFS were to base the final quota on this most conservative estimate, a 16-percent reduction from the 1994 surf clam quota would be required for 1995, as opposed to the 10-percent reduction recommended by the Council and adopted by NMFS. One reason for not using the most conservative estimate is that NMFS believes that harvest patterns show the fishery to be moving northward; the percentage harvested from the Delmarva and northern New Jersey area may not comprise 90 percent of the harvest over the 10-year period. Also, a decrease of this magnitude may cause severe disruptions in the markets for surf clams

and surf clam products and adversely affect the individual transferable quota market.

In fact, NMFS remains so concerned for the long-term sustainability of this resource that the agency may advise the Council that it should revise these definitions prior to setting the 1996 quotas. The overfishing definitions for both surf clams and ocean quahogs, as contained in the FMP, may be inadequate to protect the long-term productivity of these resources.

Comment: The Council ignored empirical information provided by fishermen on increased levels of recruitment and continues to assume a low level of recruitment in both the surf clam and ocean quahog fisheries.

Response: There has been conflicting testimony from fishermen regarding the level of recruitment in both fisheries. The fact that the Council did not adopt the more conservative SARC estimate of a remaining 7-year surf clam supply, or the more conservative ocean quahog quota recommended by the Council staff (i.e., 4.6 million bushels (1.6 million hL)), reflects that the Council did take into account the industry's testimony regarding increased recruitment.

Comment: The 1994 survey showed increases in surf clam recruits per tow from 13.5 in 1992 to 27.2 in 1994 for northern New Jersey and from 7.5 in 1992 to 39.2 in 1994 for Delmarva. This shows significant increases in recruitment and would constitute the best scientific information available. The survey also showed large increases in recruitment to the ocean quahog fishery.

Response: The Council and NMFS did not use the results from the 1994 abundance survey for the reasons mentioned above. However, if the 1994 survey data were used, the 19th SAW report calculated that the number of surf clam recruits relative to all sizes would comprise 20.9 percent of each tow for 1994, as compared to 20.4 percent in 1992.

For the reasons outlined above, the 1994 survey results for ocean quahog were also discounted. Annual recruitment per unit area for ocean quahogs is very low, as would be expected for a long-lived bivalve. In the 1994 and previous surveys, there is no evidence of substantial recruitment in any region other than the Gulf of Maine. (From the Advisory Report and Summary report (p. 182).)

Comment: The report containing the Council's analysis and recommendations concluded that no significant recruitment occurred in the surf clam or ocean quahog fisheries. When the Council and scientists were

asked to define "significant recruitment," they could not answer.

Response: The answer to the question "What is significant recruitment?" was not as clear as it might have been.

Basically, two kinds of recruitment events occur for surf clams—a continual low level of recruitment and a substantial recruitment event. The latter type of event can be characterized as "significant" and last occurred for surf clams in 1976 and 1977 off the New Jersey and Delmarva coasts, respectively. Since then, only a low level of recruitment has occurred in this fishery. Current harvest rates in these areas exceed current stock replenishment rates due to this steady low recruitment.

Comment: One commenter offered a table drawn from the northern New Jersey DeLury model found in the 19th SAW report to show that estimated total biomass of surf clams for the years 1991 through 1994 had not declined at all, even though estimated recruitment was approximately 12 percent of the biomass for each year.

Response: The table provided by the commenter shows estimated total biomass decreasing from 91.8 thousand metric tons (mt) in 1992 to 88.8 thousand mt tons in 1994. Although the 1994 estimate is slightly above the 1991 estimate of 88.5 thousand mt, the current trend shows estimated total biomass to be in decline.

Comment: The Council's analysis cited in the **Federal Register** (60 FR 6979, February 6, 1995) states that the alleged rapid decline in catch per unit of effort (CPUE) requires the "conservative selection of a 9-year remaining surf clam supply." However, the Council's Chairman claimed that declining CPUE was not used neither in the decision to set 1995 quotas at current levels nor in taking a

conservative approach to selecting the remaining surf clam supply. These statements appear to contradict each other.

Response: The Council's report (1995 Surf Clam and Ocean Quahog Quota Recommendations), containing analysis and recommendations, states that the declining CPUE "suggests" a conservative approach. The report does not state that the declining CPUE requires a conservative approach. However, the Council's Chairman may have misspoken in his attempt to convey the fact that declining CPUE was only one of many factors considered. In any event, the record is clear that declining CPUE was not the sole basis for the Council's recommendation.

Comment: One commenter claimed that the Council's "10-year supply" formula constitutes a rule that is null and void, because it was not adopted through the rulemaking process and constitutes an unadopted, and therefore inapplicable, administrative rule.

Response: The Council process gives interested persons an opportunity to participate in all aspects of the rule making process. Through the Council's process, the surf clam and ocean quahog industry had adequate opportunity to participate in the establishment of the supply policies. In June 1993, the Surf Clam and Ocean Quahog Committee and the Scientific and Statistical Committee discussed and voted on the surf clam 10-year supply policy, as well as the ocean quahog 30-year supply policy, in formally noticed public meetings and accepted written comments. In the Council meeting of June 1-3, 1993, the Council discussed and voted to adopt the policy. The Council used this policy as an underlying rationale in setting the 1994 and 1995 quota amounts. These quota amounts were published pursuant to Administrative Procedures Act

procedures with advance notice and opportunity to comment.

Comment: One commenter supported the proposed specifications, because the process of specifying quotas has worked for 18 years and is consistent with the structure designed by the Magnuson Act. Historically, the Council and the industry have worked together to manage the fishery. The Council has always carefully weighed all information on economic, social, and ecological factors before making quota recommendations. That strategy rebuilt our surf clam stocks and has promoted a healthy industry for many years.

Response: NMFS agrees with the commenter that a careful weighing of all information by both the Council and industry is an important component of the surf clam and ocean quahog fishery management strategy.

The final quotas for the 1995 Atlantic surf clam and ocean quahog fisheries are as follows:

FINAL 1995 SURF CLAM/OCEAN
QUAHOG QUOTAS

Fishery	1995 final quotas (bu)	1995 final quotas (kL)
Surf clam	2,565,000	90,390
Ocean quahog	4,900,000	172,700

Classification

This action is authorized by 50 CFR part 652 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 9, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

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