November 9, 2006

Mr. Robert Lohn, Regional Administrator  
National Marine Fisheries Service, Northwest Region  
7600 Sand Point Way NE, BIN C15700  
Seattle, WA  98115-0070

Re: Pacific Fishery Management Council rationale and justification for an emergency rule for the 2007 Pacific whiting fishery.

Dear Mr. Lohn:

On October 17, 2006, you received a letter conveying the September 2006 recommendation of the Pacific Fishery Management Council (Council) for an emergency rule for the 2007 Pacific whiting fishery to protect the fishery from harm caused by vessels qualified under the American Fisheries Act (AFA). The Council motion passed on September 13, 2006 was to (1) move forward expeditiously to complete Council action on a simplified Amendment 15 to the Pacific Coast Groundfish Fishery Management Plan for implementation in 2008 and (2) recommend National Marine Fisheries Service (NMFS) approve an emergency rule to be implemented for the 2007 season to prohibit participation of AFA-qualified vessels with no sector specific catch history in the fishery prior to 2006 (effectively December 31, 2005) in the shore-based, mothership, or catcher-processor sectors of the 2007 Pacific whiting fishery. In taking this action, the Council recognized that completion of Amendment 15 represents the best mechanism for achieving long-term protective measures for West Coast fisheries. Because completing Amendment 15 cannot occur prior to 2008, the Council also recognizes the need for an interim rulemaking process to prevent imminent harm to fisheries in 2007. The purpose of this letter is to provide additional background, justification, and rationale in support of this recommendation.

BACKGROUND

When Congress passed the AFA in 1998, Congress designated the Council to develop conservation and management measures to protect West Coast groundfish fisheries from potential harm caused by the AFA. In September 1999, the Council initiated Amendment 15 to address this concern and requested NMFS publish notice of the rules under consideration and a control date of September 16, 1999. This control date applies to participation by catcher vessels in mothership and shore-based Pacific whiting fisheries, and in the inshore groundfish fishery for non-whiting species. The Council also set a control date of June 29, 2000 as notice to the public and potential purchasers of limited entry permits held by AFA entities. This control date provides advance notice that, based on future Council action, groundfish limited entry permits held by an AFA entity may be revoked or restricted to a specific fishery sector.
The Council addressed Amendment 15 again at its September 2001 meeting when the Council reviewed a range of alternatives and initial analyses and adopted a preferred alternative. The preferred alternative covered many issues and included provisions to limit catcher vessel participation in West Coast groundfish fisheries (at-sea whiting, shore-based whiting, non-whiting) by sector to those vessels with qualifying landings during the period of January 1, 1994 to September 16, 1999. The Council directed Council staff to complete public review drafts of the analysis and proposed management measures but, because of competing workload, an urgent need to rebuild overfished groundfish stocks, and the appearance of no imminent harm, the Council tabled action on Amendment 15 in 2002.

At the March 2006 Council meeting, the Council’s Legislative Committee discussed a request by staff of the U.S. Senate Committee on Commerce, Science, and Transportation for Council input on draft AFA amendatory language. The Council sent a letter dated March 17, 2006 to the U.S. Senate Committee recommending that “all AFA qualified vessels (original or replacement) - not just catcher/processor vessels - without West Coast landing history prior to June 29, 2000 be prohibited from participating in the Pacific whiting fishery.”

At the June 2006 meeting, the Legislative Committee and the Council heard testimony regarding participation by AFA qualified vessels in the shore-based sector of the Pacific whiting fishery. Additional public comments stated that Council recommended restrictions on AFA qualified vessels would not go far enough to protect all sectors of the West Coast Pacific whiting fishery and that sector specific “side board” landing requirements should be requested and that current efforts to address the issue through Federal legislation were unlikely to address all of the Council’s concerns. In response, the Council recommended revisiting Amendment 15 to the Groundfish Fishery Management Plan (FMP) as a potential mechanism for protecting West Coast fisheries from adverse impacts caused by the AFA. At its June 12-16, 2006 meeting in Foster City, California, the Council heard testimony regarding concerns of harm to the Pacific whiting fishery from an influx of vessels qualified under the AFA and scheduled a review of various mechanisms for achieving the protective provisions called for in the original act.

At its September 10-15, 2006 meeting in Foster City, California, the Council discussed the previously tabled Amendment 15 and the current status and future prospects for the Pacific whiting fishery and heard considerable testimony that AFA-qualified vessels have entered the Pacific Whiting fishery since the Council tabled Amendment 15 in 2002. The Council concluded additional fishing effort by AFA-qualified vessels in 2006 likely contributed to a shortened season resulting in decreased revenue for traditional fishery participants and their communities. Additionally, the Council has expressed concern that additional fishing effort and shortened fishing seasons can create a ‘race for fish’ in the fishery which could lead to higher bycatch of the depleted rockfish and salmon stocks. The Council is concerned about detrimental effects that have occurred since AFA-qualified vessels with no history in the fishery have entered the West Coast Pacific whiting fishery, and the risk that detrimental effects could intensify in future seasons if no action is taken.

Consequently, the Council passed its September 2006 motion to expeditiously complete Council action on Amendment 15 and to recommend NMFS approve an emergency rule to be implemented for the 2007 season to prohibit participation of AFA-qualified vessels with no
sector specific catch history in the fishery prior to 2006 (effectively December 31, 2005) in the shore-based, mothership, or catcher-processor sectors of the 2007 Pacific whiting fishery.

JUSTIFICATION AND RATIONALE FOR AN EMERGENCY RULE

During its September 2006 deliberations concerning a temporary or emergency rulemaking activity for the 2007 Pacific whiting fishery, the Council reviewed the criteria for an emergency rule as detailed in Federal Register on August 21, 1997 (62FR44421). This notice states that “For the purpose of Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act ‘an emergency exists in any fishery’ is defined as a situation that:

1) Results from recent, unforeseen events or recently discovered circumstances; and
2) Presents serious conservation or management problems in the fishery; and
3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.”

The following section of this letter will address each of these criteria listed above individually to provide sufficient justification and rationale for determining an emergency in the Pacific whiting fishery exists and that temporary or emergency rulemaking efforts are warranted until such time the Council can complete work on Amendment 15.

1) The Current Situation “Results from recent, unforeseen events or recently discovered circumstances.”

As mentioned above, the Council did not foresee any imminent threat from AFA-qualified vessels when it tabled activity on Amendment 15 in 2002 and no substantial threat was perceived by the Council until 2006 when the potential harm to West Coast groundfish fisheries, specifically to the shore-based Pacific whiting fishery, by AFA-qualified vessels was realized. Table 1, at the end of this letter, details Pacific whiting harvest, duration of the shore-based Pacific whiting fishery, and participation levels from 1992 through 2006. Landings of the AFA-qualified, non-AFA-qualified, and traditional vessels in the 2006 shore-based whiting fishery are detailed in Table 2.

Compared to prior years, the 2006 shore-based Pacific whiting season demonstrated differentially high risks from AFA-qualified vessel entrants due to bycatch, economic instability, and changes in fishery behavior inherent in a derby fishery. In the 2006 shore-based Pacific whiting fishery, 37 vessels landed 97,314 metric tons (mt) of Pacific whiting. Of the 37 vessels participating in 2006, 15 are AFA-qualified vessels 11 of which participated in the shore-based Pacific whiting fishery prior to the enactment of the AFA in 2000. Of the remaining four AFA-qualified vessels, one vessel has participated in the shore-based Pacific whiting exempted fishing permit (EFP) fishery since 2001. The remaining three vessels first participated in the shore-based Pacific whiting EFP fishery in 2006. The recent entry of these vessels in 2006 was not anticipated when management measures for the 2006 fishery were adopted by the Council and were only recently brought to the Council’s attention as reviewed in the previous background material. The four AFA-qualified vessels that participated in 2006 that had not participated prior to the enactment of
the AFA and the establishment of the control date landed a total of 15,742 mt. This amount was 16% of the 97,314 mt of whiting landed in the shoreside fishery coastwide, and 17% of the 91,840 mt of whiting landed in Washington and Oregon (Table 2).

Five additional vessels that were non-AFA-qualified participated in the 2006 shore-based fishery and not in the 2005 fishery. Four of those vessels had not landed whiting in the shore-based fishery since the inception of EFP fishing in 1992, while one of those non-AFA-qualified vessels does have prior participation in this fishery. Two of those non-AFA-qualified vessels elected to sort-at-sea, and not participate in the EFP fishery. These five non-AFA-qualified participants made 101 deliveries (9%), landing 3,239 mt of whiting, or 3% of the coastwide landings, and 4% of the landings in Washington and Oregon (Table 2). These vessels averaged 32 mt of whiting per landing (Table 2).

There were 28 “traditional” vessels (i.e. those vessels with shore-based Pacific whiting participation history prior to 2006) that participated in the 2006 shore-based Pacific whiting fishery. All of those vessels participated in the EFP fishery. These vessels had significant shore-based Pacific whiting participation history prior to 2006.

AFA-qualified vessels have the necessary infrastructure, the management flexibility, and, under current market conditions there are increasing incentives for AFA-qualified vessels to begin participating in the West Coast groundfish fishery. The price of whiting was unusually high in 2006 at $0.065 per pound (1992-2005 average price of $0.04 per pound), and, combined with the expanding markets for white fish have increased the attractiveness of this fishery for those vessels already equipped to participate in this fishery. Existing processors are increasing whiting processing capabilities to supply both domestic and international markets. These new and changing market conditions were not anticipated by the Council prior to recent Pacific whiting fisheries.

In summary, new market incentives and participation in the fishery from AFA-qualified vessels, unforeseen by the Council in 2002 when Amendment 15 was tabled, combined with existing fishing capacity of AFA-qualified vessels likely contributed to increased effort and a shortened season in the 2006 Pacific whiting fishery.

2) The Current Situation “Presents serious conservation or management problems in the fishery”

An intensive management regime is in place for West Coast fisheries to avoid or minimize impacts to species of concern and adding capacity to existing traditional fleets creates both management and conservation problems. Council managed groundfish fisheries are constrained by rebuilding requirements for seven groundfish species declared overfished. The entry of new participants to West Coast fisheries could be very disruptive with regard to the incidental catch of overfished rockfish species because additional effort from such vessels creates a derby-style “race for fish” leading to higher bycatch of depleted rockfish. The shore-based whiting fishery is one of low overall bycatch achieved through fleet feedback mechanisms and informed, cautious fishing patterns. As the “race for fish,” and thus the “race for bycatch” escalate, the incentives for maintaining fishery practices that result in low bycatch are sacrificed. The likely result of an influx of new vessel participation is promotion of a derby-style fishery, lasting a few weeks or less, and the associated increased bycatch that typically results from this type of fishery.
Spillover of vessels from the shore-based whiting fishery into the bottom trawl fishery after the completion of an amplified derby-style fishery for whiting has the potential to negatively impact the West Coast groundfish fishery management due to unanticipated increases in effort, and increased uncertainty in the inseason regulation assessment model.

Avoiding bycatch of overfished groundfish species is of critical importance to groundfish fisheries including the Pacific whiting fishery and efforts to minimize bycatch benefit from knowledge of local fishing patterns and conditions. The very low levels of allowable bycatch in these fisheries create a situation where a single tow that is high in bycatch can have significant impacts on overfished species and the management regime. Even with the bycatch efforts listed above, tows with high bycatch have occurred. For example, in June 2004, a catcher vessel for a mothership caught 3.9 mt of canary rockfish in a single tow representing 53% of the annual fleet-wide bycatch allowance for this species. Additionally, in 2005 and 2006 research trawl surveys designed to assess stock health experienced single tow events with a much larger catch of canary rockfish than anticipated. Although the latter example is a potentially desirable outcome, each of these examples created the potential for fishery closures and unacceptable impacts to overfished species. The likelihood of future high bycatch tows increases with an influx of vessels less familiar with the West Coast whiting fishery, particularly when increased fishing effort creates a derby-style fishery where both traditional vessels and new entrants are forced to land Pacific whiting as quickly as possible. This situation represents a serious conservation problem for several overfished species which are potentially vulnerable to the Pacific whiting fishery.

The intensive and well-developed management program currently in place to manage the shore-based whiting fishery on a daily basis is unable to accommodate a fast-paced derby-style fishery. As the duration of the fishery decreases, so does the ability of fishery management agencies to react to and adjust for problem situations. The current shore-based whiting fishery is intensively managed, using a daily processor reporting system. The current tracking system is overburdened at the current pace of the fishery. It is expensive and difficult to try to attempt daily tracking of this fishery. Acceleration of the fishery will likely cause a breakdown in the ability to monitor the harvest of whiting as well as the impacts to species of concern and hinder the ability of fishery managers to respond to either slow the fishery or close it completely in a timely manner. The tacking of both landed whiting catch and bycatch is critical to the management of the groundfish fishery and deterioration of the existing monitoring program represents a serious management problem for West Coast States, the Council, and NMFS.

There exists serious concerns regarding increased pressure associated with a derby-style fishery which is perpetuated by the unique characteristics of AFA-qualified vessels. These vessels pose a unique and substantial risk to the bycatch reduction measures that have already been established by the traditional participants in this fishery. The infrastructure needed to effectively fish in the Pacific whiting fishery is expensive and unattainable for most of the existing bottom trawl fleet. For those vessels that lack the equipment and specifications needed, the cost of outfitting a vessel is prohibitively expensive and outweighs the potential profits in the fishery. For these reasons, the existing traditional whiting fleet has been relatively stable since the inception of the EFP fishery in 1992. However, the needed infrastructure currently exists for AFA-qualified vessels, as the same equipment is used in the Bering Strait/Aleutian Islands (BSAI) pollock fishery. Moreover, the latent capacity of AFA-qualified vessels has greater potential to adversely impact
the West Coast groundfish fishery than that of the bottom trawl fleet due to their larger capacity (the average landing by the four AFA-qualified vessels was 171.11 mt while the average landing by the remaining 33 vessels was 79.93 mt, an average of more than double). AFA-qualified vessels, with their existing equipment and large capacities, create considerable potential for future derby-style whiting fisheries and their associated management and conservation problems.

An existing trawl vessel no smaller than roughly 70 feet in length is required to effectively haul and operate the equipment needed to fish whiting in a safe manner. Older trawl vessels are not wide enough to maintain stability under the heavy equipment load needed for this fishery. The equipment needed to effectively target whiting includes: sonar, head rope sounder, mid-water trawl net, and a separate engine for the hydraulics needed to operate the mid-water net. To preserve the product once it is brought on board, tanking capabilities and refrigerated sea water systems are required. A conservative estimate of the overall costs associated with configuring a current non-whiting trawl vessel of small size to effectively fish in the shore-based whiting fishery is approximately $195,000. That cost increases with capacity and size of vessel, with a potential to exceed $800,000. This cost outweighs the potential profits made in the shore-based whiting fishery by existing bottom trawl vessels. AFA-benefited vessels escape the equipment and vessel re-fitting costs, as the equipment needed to efficiently harvest pollock in the BSAI management area is the same equipment described above, needed to efficiently harvest whiting in the shore-based whiting fishery.

In addition to the needed infrastructure to enter the fishery, the current structure of the BSAI pollock fishery grants AFA-qualified vessels the flexibility needed to adjust fishing strategies to participate in West Coast groundfish fisheries. After enactment of AFA, vessels were granted BSAI pollock dedicated access privileges (DAP) under which fishing cooperatives are assigned a portion of the overall sector allocation based on the historical participation levels of each of the member vessels. Those vessels are then assigned an amount of pollock by the cooperative. The vessel has the flexibility to either harvest their DAP within the set season, lease or trade their DAP to another vessel, or not use the DAP at all. The lengthened season allows AFA-qualified vessels to participate in other fisheries and still achieve their pollock harvest limits.

3) The situation can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

The Council has revitalized the Amendment 15 process but there is insufficient time to complete the amendment process for implementation prior to the 2007 Pacific whiting fishery. As demonstrated above, there is reason to believe AFA-qualified vessels with no qualified history in the traditional West Coast whiting fishery will continue to participate in, or newly enter, the fishery in 2007. The immediate benefits of preventing a derby-style race for fish, both in terms of conservation of rebuilding rockfish species and preserving a stable traditional fishery with its well developed management program, provide adequate justification to forego the normal rulemaking process for the 2007 fishery. The Council’s public process and deliberative consideration and analysis of potential harm to West Coast fisheries resulting from the AFA, has and will result in informed decision-making in this matter. Therefore, the Council is requesting
an expedited rulemaking process to complete and implement the necessary protective measures for 2007 while the normal rulemaking process is underway.

There is both West Coast and North Pacific precedent for this proposed emergency action. The risks to West Coast groundfish fisheries and stocks from a derby-style fishing effort, expanding over-capitalization, and potential overages in bycatch limits exceed the risks and uncertainty present in 2005 when NMFS took action by emergency rule (1) in May 2005 to implement bycatch caps in the open access groundfish fishery when a large longline freezer vessel threatened to enter the fishery targeting on dogfish shark and (2) in August 2005 to implement salmon conservation zones in Pacific whiting fishery. Additionally, initial implementation of AFA sideboards in the BSAI and Gulf of Alaska (GOA) groundfish fisheries, the BSAI crab fishery, and the Alaska scallop fishery were done through emergency rule while the North Pacific Fishery Management Council was executing the amendment process.

As stated in the Council's September 2006 motion, the Council intends to move forward on Amendment 15 as expeditiously as possible. The Council's goal is to complete Amendment 15 and associated rulemaking process in time for the 2008 whiting fishery. To achieve this goal, the Council is scheduled to revise and simplify the existing Amendment 15 alternatives for protecting West Coast fisheries between now and the April 2007 Council meeting in Seattle, Washington. At the April 2007 meeting, the Council is scheduled to hear testimony from its advisory bodies and the public before approving a range of alternatives for additional public review and detailed analysis of the impact of such actions on the fishery participants and the resource. To allow time for advance notice and the normal rulemaking process, the Council will strive to fully analyze the alternatives and choose a preferred alternative at its June 2007 meeting.

It is important to note that under the last deliberative process and normal rulemaking effort by the Council in 1999-2002, the Council implemented control dates of 1999 and 2001 and identified a preliminary preferred alternative to requiring vessel participation by 1999, well before December 31, 2005 as requested in the Council's September motion. It is likely that these existing control dates and qualifying landing periods will again be considered by the Council in 2007 during deliberative analysis and review of a new suite of Amendment 15 alternatives. The requested emergency rulemaking action is intended as an interim and intermediate step towards protecting West Coast fisheries.

CONCLUSION

The Council is quite concerned about detrimental effects occurring to the Pacific whiting fishery caused by vessels advantaged by the AFA. The Council is committed to considering the proper action to addressing the current influx of AFA-qualified vessels with no landing history from entering or switching sectors in the traditional West Coast whiting fisheries. To achieve the necessary protective measures the Council made a motion in September 2006 to move forward expeditiously to complete Council action on a simplified Amendment 15. The Council is currently scheduled to develop and analyze a range of alternatives under its usual public process and identify a preferred alternative by June of 2007 to allow adequate time for the requisite rulemaking and public comment periods before the start of the 2008 fishery.
While the deliberative process to complete Amendment 15 is underway, and to protect the 2007 West Coast whiting fishery from the potential harm from AFA-qualified vessels as demonstrated in this letter and the Council's administrative record, the Council is requesting that NMFS approve an emergency rule to be implemented for the 2007 Pacific whiting season. This rule should prohibit participation of AFA-qualified vessels with no sector specific catch history in the fishery prior to 2006 (effectively December 31, 2005) in the shore-based, mothership, or catcher-processor sectors of the 2007 Pacific whiting fishery. The emergency rule can be justified by both the criteria required and the precedence of recent similar emergency action taken by NMFS on West Coast groundfish and North Pacific fisheries.

Additionally, for your information, we have enclosed the written public comment received at the Council office to date regarding this matter. Although the Council is not scheduled to address Amendment 15 or the emergency rule request directly at the November 2006 Council meeting, these written comments will be presented to the Council and the public as an informational report.

If you or your staff has any questions regarding this letter, please contact me or Mr. Mike Burner, the lead Staff Officer on this matter at 503-820-2280.

Sincerely,

[Signature]

Donald Melsaak, Ph.D.
Executive Director

MDB:ckc

c:  Council Members
    Mr. Rod McGinnis, NMFS, Southwest Regional Administrator
    Ms. Eileen Cooney
    Dr. John Coon
    Mr. Jim Seger
    Mr. John DeVore
    Ms. Laura Bozzi
    Mr. Kit Dahl
    Mr. Chuck Tracy
Table 1. Summary of the whiting harvest, season start and end dates, season duration, and vessel and processor participants in the shore-based whiting fishery from 1992-2006.

<table>
<thead>
<tr>
<th>Year</th>
<th>Whiting Harvest (mt)</th>
<th>Whiting Allocation (mt)</th>
<th>Start Date</th>
<th>End Date</th>
<th>Duration (Days)</th>
<th># Vessels</th>
<th># Processors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>41,926</td>
<td>42,000</td>
<td>4/15/1993</td>
<td>8/24/1993</td>
<td>131</td>
<td>24</td>
<td>13</td>
</tr>
<tr>
<td>2001</td>
<td>73,326</td>
<td>72,618</td>
<td>6/15/2001</td>
<td>9/26/2001</td>
<td>103</td>
<td>29</td>
<td>13</td>
</tr>
<tr>
<td>2004</td>
<td>89,251</td>
<td>90,510</td>
<td>6/15/2004</td>
<td>8/14/2004</td>
<td>60</td>
<td>26</td>
<td>9</td>
</tr>
<tr>
<td>2005</td>
<td>97,378</td>
<td>97,469</td>
<td>6/15/2005</td>
<td>8/18/2005</td>
<td>64</td>
<td>29</td>
<td>10</td>
</tr>
</tbody>
</table>

Average 74,616 78,459 98 32 11

Table 2. Comparison of whiting landings made by AFA-qualified, non-AFA-qualified, and traditional vessel in the 2006 shore-based whiting fishery. (W = Washington, O = Oregon, and C = California)

<table>
<thead>
<tr>
<th>AFA-Qualified Vessels (4)</th>
<th>Non-AFA-Qualified Vessels (5)</th>
<th>Traditional Vessels (28)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>92</td>
<td>29</td>
</tr>
<tr>
<td>% of W-O</td>
<td>9%</td>
<td>3%</td>
</tr>
<tr>
<td>% of W-O-C</td>
<td>8%</td>
<td>2%</td>
</tr>
<tr>
<td>Volume (mt)</td>
<td>15,742</td>
<td>4,576</td>
</tr>
<tr>
<td>% of W-O</td>
<td>17%</td>
<td>5%</td>
</tr>
<tr>
<td>% of W-O-C</td>
<td>16%</td>
<td>5%</td>
</tr>
<tr>
<td>mt/landing</td>
<td>171</td>
<td>158</td>
</tr>
</tbody>
</table>

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