

**OREGON DEPARTMENT OF FISH AND WILDLIFE COMMENTS REGARDING THE
NEED FOR A TEMPORARY RULE LIMITING
AFA VESSEL PARTICIPATION IN THE WEST COAST WHITING FISHERY**

The Oregon Department of Fish and Wildlife (ODFW) asserts that it is necessary and in the public's interest to implement protection from vessels receiving benefits under the American Fisheries Act (AFA) for the Pacific whiting fishery and west coast groundfish fisheries through enactment of Amendment 15 to the Groundfish Fishery Management Plan. ODFW further asserts that it is necessary, urgent, and in the public's interest to implement protection from vessels receiving benefits under the AFA for the Pacific whiting fishery in 2007 and until the Council acts to amend the groundfish FMP to protect west coast fisheries from AFA vessel effort shifts.

The Pacific Fishery Management Council (Council), in September, 2006 expressed its desire to prevent adverse impacts to west coast fisheries from AFA-qualified vessels by requesting that the National Marine Fisheries Service (NMFS) enact an emergency rule – a request which NMFS denied – which would prohibit AFA-qualified vessels from participating in any sector of the Pacific whiting fishery unless they had participated in that sector prior to December 31, 2005. The motion that was made at the September 2006 Council meeting held in Foster City, California by Mr. Curt Melcher, ODFW, and amended by Mr. Dale Meyers, is as follows:

1) The Council shall continue working expeditiously on Amendment 15. 2) The Council recommends to NMFS that there be an adoption of an emergency rule prior to the 2007 Pacific whiting fishery that would prohibit participation in the shoreside, catcher/processor, and mothership sectors of the Pacific whiting fishery by AFA-qualified vessels that do not have a historic participation record in those sectors prior to 2006.

The motion stipulated that participation in the shoreside, catcher-processor, or mothership sector by December 31, 2005 was required for participation in the 2007 fishery. There was no provision in that motion for cross-over between sectors. That is, historical participation in the mothership sector would not qualify a vessel to participate in the shoreside sector in 2007.

The state of Oregon and the Council (Agenda Item E.6.a. Attachment 1, March 2007) provided evidence that this situation meets or exceeds the criteria for an emergency rule as specified in 62 CFR 44421, August 21, 1997 as documented in this March 2007 Agenda Item E.6.a, Attachment 5. We would like to reiterate the following points:

- 1) Participation of AFA-qualified vessels results in increased bycatch risk and economic instability: The 2006 shoreside Pacific whiting season demonstrated differentially high risks of bycatch and economic instability from new AFA-qualified vessel entrants as a result of changes in fishery behavior inherent in a derby fishery. This conservation concern is perpetuated by the unique characteristics of AFA-qualified vessels. In 2007, there are several reports of additional participation by AFA-qualified vessels expected in

all sectors of the Pacific whiting fishery. This was not factored in to the denial of emergency rule action by NMFS (Agenda Item E.6.a Attachment 2, March 2007). Supporters of the emergency rule point out that this is not an allocation issue, but one of differential impacts on the fishery, which therefore will adversely impact fishery conservation and the economics of this fishery.

- 2) **AFA vessels pose a disproportional threat vs non-AFA vessels to the west coast whiting fishery:** The latent capacity of AFA-qualified vessels has greater potential than the west coast bottom trawl fleet to adversely impact the west coast groundfish fishery due to the unique characteristics of the AFA-qualified fleet. The infrastructure needed to effectively fish in the Pacific whiting fishery is expensive and unattainable for most of the existing bottom trawl fleet vessels. However, the needed infrastructure currently exists for AFA-qualified vessels, as the same equipment is used in the Bering Sea/Aleutian Islands (BSAI) pollock fishery, and the current structure of the BSAI pollock fishery grants AFA-qualified vessels the flexibility needed to participate in west coast groundfish fisheries with little or no added expense. (Detailed in Agenda Item E.6.a. Attachment 5, March 2007) .
- 3) **The Council's schedule for Amendment 15 will not protect the 2007 fishery from impacts.** Due to the risks posed by the addition of new AFA vessels in 2006, the Council has revitalized the effort to develop an amendment to the West Coast Groundfish Fishery Management Plan (Amendment 15) to establish protection from adverse impacts caused by the AFA. There was not sufficient time to complete the amendment process for implementation prior to the 2007 Pacific whiting fishery when first indications of rapid increase in AFA vessel participation surfaced. Protection from the adverse impacts is urgently needed due to new AFA vessel participation in 2006 and information demonstrating interest in additional AFA participation in 2007. Additionally, the AFA-qualified fleet has been notified multiple times that their participation in West Coast groundfish fisheries, and more specifically, the Pacific whiting fishery, would be limited, beginning with the enactment of the AFA by the Congress. Congressional language (AFA/Public Law 105-277 Section 211(c)(3)(B)) mandated the Council act to implement such protections and that absent Council actions, NMFS should be positioned to take action to prevent such effort shifts by AFA vessels: ...

*“If the Pacific Council does not recommend such conservation and management measures by such date [July 1, 2000], or if the **Secretary determines that such conservation and management measures recommended by the Pacific Council are not adequate to fulfill the purposes of this paragraph**, the Secretary may by regulation implement adequate measures including, but not limited to, restrictions on vessels which harvest pollock under a fishery cooperative which will prevent such vessels from harvesting Pacific groundfish, and restrictions on the number of processors eligible to process Pacific groundfish.”.*

Additionally, it is clear that an emergency rule that may be in effect a maximum of 366 days (as allowed in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act) would not afford the Pacific whiting fishery protection from adverse impacts generated by AFA-qualified vessels until such time that permanent protection can be implemented through limited access privilege programs, individual fishing quota programs, or the FMP Amendment 15.

Therefore, due to the delay in protective action, ODFW recommends the Council adopt an expedited rule to be implemented on a temporary basis (with a two year time limit), based on AFA protections mandated, and mirroring the provisions in the motion for an emergency rule adopted by the Council in September 2006. It is recommended that such a rule be effective through December 31, 2008, or such time as permanent protections through an FMP amendment or other Council actions resulting in a similar protection from AFA vessel effort shifts are in place.

There is a great urgency to putting these expedited protections in place, as the primary Pacific whiting fishery will commence on April 1, 2007, with the start of the California early season shoreside fishery. The off-shore fishery (mothership and catcher/processor sectors) opens on May 15, 2007, with 9 motherships and 9 catcher/processor vessels that are prepared to start fishing when this fishery opens. These vessels are reported to be committed to continuously fishing until the Pacific whiting allocation for those sectors is attained. One of the proposed catcher/processors is an AFA-qualified vessel that is new to the fishery, and is not a member of the Pacific Whiting Conservation Co-operative (PWCC). The PWCC is a private business arrangement with approval from the Department of Justice, comprised of four companies, which own all of the catcher/processor vessels that have fished in this sector prior to 2007. These companies divide between themselves the Pacific whiting allocation received by this sector (34% of the allowed non-tribal Pacific whiting harvest). The entry of the above mentioned AFA-qualified vessel effectively voids the PWCC, creating a “race for fish” in the catcher/processor sector of the Pacific whiting fishery. **The additional AFA-qualified vessels that fished in the 2006 shoreside whiting fisheries and these new AFA-qualified vessels in the 2007 fishery pose a specific threat to the conservation and value of this fishery that did not exist prior to 2006.**

The 2006 Shoreside Pacific Whiting Fishery:

In 2006, there were four vessels without AFA benefits that entered the Pacific whiting shoreside fishery for the first time. Those four vessels landed a total of 2,578 mt of whiting or 3% of the coastwide shoreside landings. The remaining 30 vessels have prior participation in the Pacific whiting shoreside fishery, most participating continuously since the inception of the EFP fishery in 1992

Finalized catch data show a total of 97,296 metric tons (mt) of Pacific whiting harvested in the primary shoreside season in 2006. There were 37 total vessels that landed Pacific whiting in the 2006 shoreside fishery; two of those vessels elected to sort-at-sea and not participate in the exempted fishing permit fishery (EFP). The proposed temporary rule would exclude three AFA qualified vessels that fished in the shoreside fishery for the first time in 2006. Those three vessels landed a total of 11,166 mt of Pacific whiting, or 11% of the coastwide landings. Two of the three vessels had bycatch rates (excluding salmon and Pacific halibut) that were higher than the overall bycatch rate of 0.0036 mt of bycatch per mt of Pacific whiting landed. Those three vessels would be allowed to continue operating in the mothership sector, where they fished previously, and their AFA privileges in Alaska would not be affected by the proposed rule. Allowing these three vessels into the shoreside fishery through Council action now, would argue

that the additional AFA vessels without prior participation in the whiting fishery prior to December 31, 2005 that anticipate entering the fishery in 2007 have some differential impact on the fishery. There is no difference between the newly participating 2006 AFA vessels and the newly participating 2007 AFA vessels. The point at which the Council expressed concern about negative AFA impacts was in 2006 due to the three additional new AFA vessels which were added in 2006. The concern is exacerbated by the additional potential for more vessels in 2007, but it is the same concern and **to allow those three new 2006 AFA vessels into the shoreside fishery under a rule intended to protect the shoreside fishery from detrimental effects of the AFA would be inconsistent and contradictory to the intent of the protections described in the AFA law.**

As stated above, there are reports of increased participation in all sectors of the 2007 Pacific whiting fishery, including the previously mentioned 9 motherships and 9 catcher/processor vessels that are prepared to start fishing on May 15, 2007, when the off-shore Pacific whiting fishery opens. There are also reports of several AFA-qualified vessels securing processor contracts to deliver Pacific whiting shoreside. This increased participation of large capacity vessels contributes substantively to reduced season duration, and thus promotes the “race for fish”. As this fishery changes rapidly into a derby style fishery, any incentive to maintain low bycatch levels is at risk. Additionally, coastal communities and local economies dependent on this fishery will suffer, as the employment duration of plant personnel hired specifically for this fishery will decrease. The quality of the product and conduct of this fishery are reflected negatively in per-vessel ex-vessel revenues and community economic impacts. It is impractical for the Council and NMFS to delay action further due to the threats to both the fishery and the economies that are dependant on the Pacific whiting shoreside fishery from this increased effort by AFA-qualified vessels.

Latent Capacity:

As detailed in Agenda Item E.6.a, Attachment 5, March 2006, AFA-qualified vessels possess the infrastructure needed to effectively participate in the shoreside whiting fishery, including vessel size and horsepower, appropriate electronics and fishing gear, and refrigeration and tanking capabilities, as it is exactly the same equipment that is used in the BSAI pollock fishery. For those vessels that lack the equipment and specifications needed, the cost of outfitting a vessel outweighs the potential profit and is prohibitively expensive (\$195,000-\$800,000) and unattainable for most of the existing bottom trawl fleet. The existing whiting fleet has been relatively stable since the inception of the EFP fishery in 1992, primarily due to the prohibitive cost of re-fitting the vessel.

The threat of latent AFA-qualified vessel participation is large. A total of 15 AFA-qualified vessels participated in the 2006 shoreside whiting fishery (12 of those vessels fished prior to 2006 and thus traditional participants in the shoreside Pacific whiting fishery). In addition, NMFS issued another 96 Catcher Vessel Permits to AFA-qualified vessels fishing in the BSAI pollock fishery. Twelve of the 96 vessels have existing west coast groundfish limited entry trawl

permits, and the infrastructure and flexibility to effectively participate in the Pacific whiting fishery.

The latent capacity within the current west coast groundfish limited entry trawl fishery pales in comparison to that of the AFA-qualified vessels. As imparted in Agenda Item E.6.a, Attachment 5, Brad Pettinger, Executive Director of the Oregon Trawl Commission, reviewed the non-AFA-qualified vessels that currently hold a West Coast groundfish limited entry trawl permit (142 catcher vessels). He concluded that approximately 21 vessels could potentially fish for whiting in the future, with hold capacities ranging from 80,000 – 120,000 lbs. Only five of those vessels are currently tanked, and not one of the 21 trawl vessels is currently configured to fish for whiting without additional equipment and alteration of their current business plans.

Justification for waiver of public notice and comment periods:

The Administrative Procedures Act (APA) defines the guidelines under which expedited rulemaking can occur. Section 553(a)(3)(B) of the APA specifies that “*Except when notice or hearing is required by statute, this subsection does not apply... (B) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.*” (5 USC 553). This situation is one in which not forgoing the public notice and comment period is impracticable, unnecessary, and contrary to the public interest due not only to the conservation and biological concerns detailed in Agenda Item E.6.a, Attachment 5, but also for economic concerns.

To date, there has already been significant public notice and comment/involvement in this issue: This recommendation for timely rulemaking that waives public notice and comment is justified by the urgency to protect against an AFA vessel effort shift noted above. In addition, the processing and vessel participants in this fishery, the public, and state agencies managing this fishery have been fully engaged in a public discussion of the Amendment 15/ AFA vessel effort shift and the need for regulatory protections in the public setting of the Council since September of 2006. The Council has noticed this meeting and the past meetings in 2006 with agenda items on this topic and the clear intent by the motion of the Council in September of 2006 was to provide public notice of the need for such protections by the Secretary. Industry participants and regulators testified at these PFMC meetings and provided significant written comment prior to this Council meeting (Agenda Item E.6. March 2006). Extensive public comment and notice has been provided and no further action is necessary. The Pacific Council’s mandate, specified within AFA in October 1998, to prevent spillover was clear. The Council should act to protect west coast groundfish fisheries from effort shift by AFA qualified vessels.

Furthermore, AFA-qualified vessels have been given ample notice of potential restrictions in west coast groundfish fisheries. Notice was first given to AFA-qualified vessels when the AFA was signed into federal law in October 1998. Section 211(c)(3)(A) of the AFA states “*By not later than July 1, 2000, the Pacific Fishery Management Council established under section 302(a)(1)(F) of the Magnuson-Stevens Act (16 U.S.C. 1852 (a)(1)(F)) shall recommend for approval by the Secretary conservation and management measures to protect fisheries under its*

jurisdiction and the participants in those fisheries from adverse impacts caused by this Act or by any fishery cooperatives in the directed pollock fishery.”

The Council subsequently adopted control dates on two separate occasions in response to the directive clearly stated in the AFA. On November 24, 1999, NMFS published an advance notice of proposed rulemaking in Vol. 64, No. 226 of the Federal Register. The summary of the action was as follows: *“This document announces a control date of September 16, 1999, after which vessels eligible for benefits under the American Fisheries Act (AFA) may be subject to restrictions on participation in the Pacific coast groundfish fisheries. The intended effect of announcing this control date is to discourage speculative entry into the Pacific coast groundfish fisheries by AFA-qualified vessels while the Pacific Fishery Management Council (Council) develops recommendations to protect the Pacific Coast groundfish fisheries from adverse impacts caused by the AFA.”* The document further cautions AFA-qualified vessels: *“The control date provides notice to AFA-qualified vessels that might seek to participate in the Pacific Coast groundfish fisheries that current requirements for accessing these fisheries may change. Vessels entering the fisheries after the control date may be subject to new restrictions that do not currently exist, and they may not receive credit for fishing after the control date... If catch history is used as a basis for participation, it is likely that AFA-qualified vessel participation in the fishery after the control date will receive little or no credit. Fishers are not guaranteed future participation in the groundfish fishery, regardless of their date of entry or level of participation in the fishery.”*

Again, on September 13, 2000, NMFS published another advance notice of proposed rulemaking in Vol. 65, No. 178 of the Federal Register, notifying fishery participants of the adoption of a second control date, with the same stated intentions and cautions as those published for public comment previously. This item has remained a potential agenda item in the planning of the Council workload ever since, signifying the Council’s intent to complete the amendment should the urgency of the problem of an AFA effort shift be presented.

In 2006, the potential harm to west coast groundfish fisheries, specifically to the shoreside whiting fishery, from entry by three new AFA vessels was realized. At the June 2006 meeting, the Council voted to re-initiate discussion on implementing sideboards protecting the west coast groundfish fishery from adverse impacts caused by AFA vessels. At the September 2006 meeting, the Council voted to prohibit participation of AFA-qualified vessels in the shoreside, catcher/processor, or mothership whiting fisheries, without participation in those fisheries prior to 2006 by emergency rule. This action further conveyed the Council’s desire to protect the west coast groundfish fisheries from adverse impacts caused by AFA-qualified vessels, and notified those vessels that potential restrictions were being considered. There has been significant public participation and testimony resulting from these Council agenda items.

However, no such notice has been given to the traditional west coast groundfish trawl fleet. To restrict participation of traditional bottom trawl vessels, as is suggested in the letter to the Council dated February 13, 2007 from Mr. Bob Lohn, NMFS (Agenda Item E.6.a, Attachment 3), without similar notice as that received by AFA-qualified vessels would be an injustice. As demonstrated in Agenda Item E.6.a, Attachment 5, the latent capacity and threat of adverse impacts from the traditional trawl fleet is substantially less than from AFA-qualified vessels.

In conclusion, with the justification above, the following points argue for expedited rulemaking:

1. AFA vessels pose a unique threat to west coast groundfish/whiting fisheries.
2. The additional AFA vessels in the 2006 shoreside whiting fisheries and additional AFA vessels in the 2007 fishery pose a specific threat to the conservation and value of this fishery that did not exist prior to 2006.
3. To allow the three new AFA vessels into the shoreside fishery in 2006, while prohibiting other AFA vessels entering after 2006 under a rule intended to protect the shoreside fishery from detrimental effects of the AFA would be inconsistent and contradictory to the intent of the desired protections.
4. There has been significant public notice and comment on this concern through past Council actions and the recent Council process.
5. There is an urgency to address the problem that was identified in 2006 prior to exacerbating the problem of new AFA vessel entrants throughout the whiting fishery sectors in the 2007 season and in future years pending Council/NMFS action to establish protections as directed by the original AFA legislation.

The Pacific whiting fishery, especially the shoreside component makes significant contributions to the economic resources of coastal communities. Shoreside vessels made landings in 6 coastal ports (Westport, Ilwaco, Astoria, Newport, Charleston, and Eureka).

It is documented in the *Proposed Acceptable Biological Catch and Optimum Yield Specifications and Management Measures for the 2007-2008 Pacific Coast Groundfish Fishery Final Environmental Impact Statement* (Table 7-50) that the whiting fishery (all sectors combined) generated \$29,562,000 in ex-vessel revenue in 2005, which was 43% of the total for all commercial groundfish fisheries. Due to higher price per pound paid for whiting in 2006, the ex-vessel revenue generated increased to \$42,934,281. The shoreside sector of the fishery generated \$13,727,881 in ex-vessel revenue, or 32% of the 2006 non Tribal Pacific whiting fishery total.

Many processing plants specialize in the processing of Pacific whiting, converting to equipment and personnel specific to the process. The Pacific whiting shoreside fishery employs not only the plant personnel needed to process the catch, convert to value-added surimi, but also additional personnel required to observe off-loading, sort bycatch, and collect biological data. As with all industries, there is significant economic compounding value which supports all aspects of the communities that depend on this fishery such as restaurants, and marine supply/repair businesses. As the fishery duration is shortened, the employment duration of the staff hired specifically to fulfill the unique needs of this fishery is also shortened, causing undue hardship to those individuals, and the communities in which they reside.

Amendment 15

In addition to the justification for immediate action contained in Agenda Item E.6.a, Attachment 5 and this report, it is clear that the normal regulatory and amendment process may not be completed before the adverse impacts to the Pacific whiting fishery and the economies dependent upon it is realized in 2007 and possibly in 2008, furthering the need for protections to be put in place now.

ODFW Recommendations:

- 1. National Marine Fisheries Service enact an expedited rule to be in place until December 31, 2008 or such time as permanent provisions are afforded, prohibiting participation in any sector of the Pacific whiting fishery by AFA-qualified vessels that did not participate in that sector prior to December 31, 2005.**
- 2. Direct the Pacific Fishery Management Council to provide staff resources to lead continuing work on Amendment 15, permanently protecting West Coast groundfish fisheries from potential or realized adverse impacts from AFA-qualified vessels no later than 2008.**