November 4, 2008

Mr. Donald Hansen
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220-1384

RE:  Groundfish Fishery Management Plan Amendment 20 to Establish a Limited Access Privilege Program for the Trawl Fishery

Dear Mr. Hanson and Members of the Pacific Fishery Management Council,

These comments are submitted by the Marine Fish Conservation Network on behalf of its nearly 200 member groups in response to the Decision Document for the Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery.

The Magnuson-Stevens Reauthorization Act of 2006, Sec. 106, created a new MSA Section 303A authorizing Councils to create market-based Limited Access Privilege Programs (LAPPs), as defined in amended MSA Section 3(26-27). Among other things, the MSA’s new LAPP provisions

- affirm that fish managers can use dedicated access privileges, including community quotas, cooperatives, and geographically based programs;
- define limited access fishery quotas as a privilege which may be modified or revoked if the holder violates the terms;
- achieve conservation of stocks;
- involve a transferable permit that specifies the amount of catch a privilege holder may take; and
- establish regular (5-year) reviews and 10-year sunset provisions for LAP programs, with renewal.

Although the Act’s new LAPP provisions are billed as “national standards,” they do not constitute national guidelines and they are subject to the interpretation of the regional fishery management councils on a number of critical issues, leaving it to the councils to establish policies, criteria and methodologies for compliance. Poorly conceived or structured LAPPs can have serious unintended consequences. Without clear guidance from NMFS, LAPPs could lead to wholesale consolidation of fisheries under the control of larger companies at the expense of

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coastal communities and working fishermen, who stand to lose access to public resources and livelihoods if LAPPs are not carefully designed and regulated. Poorly designed LAPPs can increase the risk of overfishing and undermine efforts to rebuild overfished stocks, reduce bycatch, and conserve fish habitat. These are the kinds of outcomes that regulatory guidelines on LAPPs should seek to prevent, which is why we requested that NMFS should write regulatory guidelines for the implementation of LAPPs. The agency did in fact initiate preliminary scoping and sought public comment on the nature of such guidance in 2007, and the Network provided detailed comments which we incorporate by reference here. However, this initiative has languished and national guidelines on LAPPs are still pending.

In the absence of clear agency guidance on LAPPs, we are concerned that the Pacific Council’s proposed groundfish trawl rationalization plan does not fully comply with the letter and spirit of the MSA’s new LAPP provisions. There are some promising conservation features in the proposed trawl rationalization plan that we could support, such as an adaptive management trust which allocates quota for conservation issues, one hundred percent observer coverage, and area-specific quota allocations based on geographic and oceanographic boundaries. On the other hand, the “decision document” is extremely vague on some features of the plan, such as the limit on excessive shares, the rules for transferability of quota shares, and program cost recovery. In addition, the impacts to fishing communities are not adequately analyzed or quantified to demonstrate that the plan will protect the public interest or achieve its stated social and economic objectives.

Finally, we are concerned that the decision document does not comply with NEPA. Although characterized as a “preliminary draft EIS,” the decision document being used by the Council is clearly not a fully formed draft EIS. The Council should have a full EIS decision document and allow public comments on this document at a council meeting before making a final decision. To do otherwise is to make the NEPA process into a rubber stamp on decisions already made, a clear violation of the letter and spirit of NEPA.

We provide more detailed comments on the MSA’s requirements for LAPPs below, which must be fully incorporated into any EIS decision document for consideration by the Council before deciding on a trawl rationalization plan.

**Criteria and Constraints for LAPPs**

Congress authorizes a Council to submit a limited access privilege program for a fishery that is managed under an existing limited access system, with the following criteria and constraints:

- LAPPs do not create any right, title, or interest (MSA 303A(b)(1-5))
- Any LAPP must promote and foster fishery conservation and management objectives, including rebuilding plans, capacity reduction, etc. (MSA 303A(c)(1))
- Regular monitoring and review by the Council and the Secretary are required, including a detailed 5-year review (MSA 303A(c)(1))
- LAPP permits may be issued for a period of not more than 10 years, but will be renewed before the end of the period unless otherwise modified or revoked (MSA 303A(f))
The Plan Must Promote and Foster Fishery Conservation and Management Objectives, Including Rebuilding Plans, Capacity Reduction, Etc. (MSA 303A(c)(1))

The council’s plan lacks clear measures to reduce bycatch and achieve conservation of overfished species. Most of the overfished species in the trawl fishery are constraining species caught predominantly as bycatch, including cowcod, bronzespotted and widow rockfish. Although the Council’s ITQ program could reduce bycatch by creating incentives to switch to lower bycatch gears, it instead allows indiscriminate gear switching, even from a lower bycatch fixed gear to high-impact, higher bycatch trawl gear. Instead, the program should have only discriminate gear switching and incentives for permanent gear conversion to lower impact gears (e.g., pots). It is also important that analysis be provided for the current preferred alternative’s impact due to gear switching. The alternative allows for switching between trawl and fixed gear, but the analysis only address trawl impacts. The trawl and fixed gear fisheries impact stocks differently, and the impacts of both need to be analyzed.

Another issue of concern for achieving conservation in the groundfish fishery is the species that will be given quota under the ITQ program. To ensure that fisherman have an incentive to reduce bycatch of overfished and vulnerable species, quota pounds should be established for all species caught excepting those species that are de minimus in both the trawl and fixed gear fisheries. Additionally, it is crucial that the program establish a trigger that requires automatic quota establishment if a species reaches the precautionary or overfished management level, or is experiencing overfishing, or if fishing effort or mortality increases significantly. This trigger should apply to all species, even those managed in stock complexes, such as the blue rockfish, greenspotted rockfish, and the spiny dogfish.

The Adaptive Management Trust included in the preferred alternative was envisioned as means to address any unintended consequences to fish stocks, fish habitat, and other conservation concerns. The primary allocation of this Trust must be to ameliorate conservation concerns that arise within the program or affected fish stocks.

The Plan Cannot Create Any Right, Title, or Interest (MSA 303A(b)(1-5))

The MSA is very clear in its directive at 303A(b)(1-5)) that no private property right can be exerted over the public ocean resources. The ITQ program should contain fixed term limits that clearly recognize both fish stocks and oceans as a public trust, not a private property right.

The Plan Must Establish Clear Eligibility Criteria and Provide Adequate Consideration of the Impacts to Fishing Communities (MSA Sec. 303A(c)(3)(A)(i), 303A(c)(3)(B); 303A(c)(4)(C))

MSRA 303A(c)(3) and (4) lays out the eligibility criteria for fishing communities or regional fishery associations to participate in LAPPs:

- Be located within the management area of the relevant Council
- Meet criteria developed by the relevant council, approved by the Secretary, and published in the Federal Register
• Consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses
• Develop and submit a community sustainability plan to the Council and the Secretary that demonstrates how the plan will address the social and economic development needs of coastal communities

The MSRA lays out a detailed set of criteria for participation in a LAPP. In developing participation criteria for eligible communities or regional fishery associations, a Council is required to consider all aspects of the fishery, specifically:

• Traditional fishing or processing practices/dependence on the fishery
• Cultural and social framework of the fishery
• Economic barriers to access to the fishery
• Projected economic and social impacts on harvesters, crew, processors, and other businesses dependent on the fishery
• Administrative and fiscal soundness of the association
• Expected effectiveness, transparency, and equitability of the plan
• Potential for improving economic conditions in remote coastal communities

We are concerned that the current decision document before the Pacific Council does not adequately consider all aspects of the fishery, nor does it quantify the impacts to fishing communities. We believe the document fails to comply with the MSA in this significant respect. We ask the Council and NMFS to analyze community fishing associations or other community programs that will meet the criteria above. We also propose that the following elements be analyzed and incorporated into the ITQ program:

• Pooled contributions for 100% observer coverage program that are distributed based on landings, so smaller boats with smaller catch will not be disproportionately affected by observer payments.
• No processor quota. Processor quota may disproportionately affect smaller fishermen through lower availability of harvester quota and forced associations with particular processors.

The Plan Must Establish an Excessive Share Cap and Prevent Excessive Consolidation of the Fishery (MSA Sec. 303A(c)(5))

MSA Sec. 303A(c)(5)(D) requires a Council or the Secretary to ensure that participants in LAPPs do not acquire an excessive share. However, key considerations such as “excessive consolidation” and “excessive share” are not defined. In the absence of clearer national guidelines for LAPP development, the determination of what constitutes an “excessive share” of a fishery quota under any LAPP will be determined on a case-by-case basis by a Council or perhaps by the Secretary of Commerce.

In the groundfish trawl rationalization plan, the decision document proposes a three percent excessive share cap as one option but the basis for that limit is not entirely clear and seems uncertain. Thus the Pacific Council seem poised to make a decision without clearly establishing
the limit of quota shares that may be obtained by any individual, accompanied by a clear explanation of how it meets the requirements of the MSA.

For instance, Sec. 303A(c)(5)(A) requires a Council or the Secretary to establish procedures to ensure fair and equitable initial allocations, which will include consideration of:

- Current and historical harvests
- Employment in the harvesting and processing sectors
- Investments in, and dependence upon, the fishery
- Current and historical participation of fishing communities

Sec. 303A(c)(5)(B) requires a Council or the Secretary to consider the basic cultural and social framework of the fishery, including policies to promote the participation of small owner-operated fishing vessels and fishing communities and procedures to address excessive consolidation of the fishery.

Sec. 303A(c)(5)(C) requires a Council to include, if necessary, measures to assist entry-level and small vessel owner-operators, captains, crews, and fishing communities through set-asides of harvesting privileges, or economic assistance in the purchase of limited access privileges.

We believe all these elements should be fully incorporated into the groundfish trawl rationalization plan before it is approved. Specifically, we urge the Council and NMFS to select a cap of no greater than three percent (3%) on initial distribution and accumulation of control. A ‘no grandfather’ clause should be also be enacted for the ITQ program accumulation limits. Furthermore, the council needs to address to potential for excessive consolidation of trawl gear fisheries. The alternatives for initial quota distribution are based on time periods during which trawl had become a predominant gear type. Earlier periods had much higher participation by fixed gear fishermen. Thus the current program may excessively consolidate quota pounds and control within the trawl gear type to the detriment of lower impact fixed gear fishermen. Further detail and analysis of the impact of this program to the range of potential gear types is needed, in addition to an allocation that better represents fixed and other non-trawl gears, provides equitable distribution of quota among gear types, and rewards use of lower impact or lower bycatch gears.

**The Plan Must Establish a Policy and Criteria for Transferability of Quota Shares That Consider Social Impacts, Not Just Efficiency (Sec. 303A(c)(7))**

Transferability allows holders of LAPs to buy, sell, give away or lease their privileges.\(^2\) Freely transferable quota shares, however, will tend to concentrate fishery benefits into the hands of wealthy few. MSA § 303A(c)(7) states that a council must establish a policy and criteria for the transferability of limited access privileges (through sale or lease), which is consistent with the policies of 303A(c)(5), including a process for monitoring transfers.

In establishing policies for transferability in this plan, the Pacific Council should give as much weight to social considerations as to economic efficiency so that the interests of affected

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communities and working fishermen are not lost. In addition, the trawl rationalization plan’s should include the following measures to p:

- Where participation in a fishery includes a diversity of vessel size classes or a wide range of producers (low volume to high volume), LAPPs shall be available in appropriate quantities, blocks or by criteria such that the range of participants can reasonably compete for LAPs that are transferable.

- Set-asides of a predetermined quantity of quota shares should be employed where circumstances warrant to ensure that owners of small vessels, fishing communities and prospective new entrants have opportunities to gain access to fisheries. Such set-asides are not sufficient to satisfy regulatory guidelines and program objectives focused on enhancing resource conservation and resource access by independent, community-based fishermen. LAPs initially allocated to owner-operators should only be transferred to owner-operators.

The Plan Should Be Subject to Referendum by Eligible Permit Holders in the Fishery (MSA Sec. 303A(c)(6))

Sec. 303A(c)(6) specifies that more than 50% of the permit holders in a fishery, or holders of more than 50 percent of the allocation in a fishery, may submit a petition to the Secretary requesting the relevant Council to initiate development of a LAPP, but more than two-thirds of eligible permit holders must approve the petition in the New England region and a majority of eligible permit holders must approve the petition in the Gulf of Mexico region.

We feel that the Pacific Council’s trawl rationalization plan should also be put to a vote of all affected permit holders (including fixed gear and other non-trawl affected fisheries) in the fishery before approval because of the massive restructuring that it will entail. MSA Sec. 407(c) lays out the rules for conducting referendums in the Gulf of Mexico red snapper fishery in which any referendum shall be decided by a majority of votes, which may serve as one example of how such a referendum could be conducted in this case. We emphasize, however, that referenda apply to LAPPs only and should not be applied to other decisions made by the Council and NMFS.

Sincerely,

Bruce Stedman, Executive Director
Marine Fish Conservation Network