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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

GLACIER FISH COMPANY LLC, a)
Washington limited liability company,)
)
Plaintiff,)
)
v.)
PENNY PRITZKER, in her official capacity as)
Secretary of the United States Department of)
Commerce; NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION; and)
NATIONAL MARINE FISHERIES)
SERVICE,)
Defendants.)

Case No. 2:14-cv-00040

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF, AND PETITION FOR REVIEW

Plaintiff, Glacier Fish Company LLC (“Plaintiff,” “Glacier Fish Company” or “Glacier”),
alleges as follows:

PARTIES

Plaintiff

1. Plaintiff, Glacier Fish Company, is a member of the Pacific Whiting Conservation
Cooperative (“PWCC”), whose members operate all of the vessels licensed to harvest and process
Pacific whiting at-sea in the catcher-processor (“CP”) sector of the federal Pacific coast groundfish
limited entry trawl fishery (the “CP sector”). Glacier owns and operates two vessels that catch and
process whiting at-sea in the CP sector. Glacier also owns the trawl limited entry permits

1 authorizing its vessels to catch and process whiting in the CP sector.

2 Defendants

3 2. Defendant Penny Pritzker is the Secretary of the United States Department of Commerce
4 (“Secretary”) and is being sued in her official capacity.

5 3. Defendant National Oceanic and Atmospheric Administration (“NOAA”) is an agency
6 within the Department of Commerce.

7 4. Defendant National Marine Fisheries Service (“NMFS”) is an agency within NOAA.

8 **JURISDICTION AND VENUE**

9 5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
10 question jurisdiction) and §§ 2201-2202 (Declaratory Judgment Act); 16 U.S.C. §§ 1855(f) and
11 1861(d) (Magnuson-Stevens Fishery Conservation and Management Act or “MSA” or “the Act”);
12 and 5 U.S.C. §§ 702 and 706 (Administrative Procedure Act or “APA”).

13 6. Defendants have waived sovereign immunity in this action pursuant to 5 U.S.C. § 702
14 and 16 U.S.C. § 1855(f).

15 7. This Complaint and Petition for Review under the MSA and APA (“Complaint”) is
16 timely under 16 U.S.C. § 1855(f) because it has been brought within thirty (30) days of Defendants’
17 promulgation of the regulations challenged herein through publication in the Federal Register on
18 December 11, 2013. 78 Fed. Reg. 75,268.

19 8. Glacier Fish Company has exhausted all of its administrative remedies and is a “person
20 suffering legal wrong because of agency action, or adversely affected or aggrieved by agency
21 action” within the meaning of the MSA and APA. 5 U.S.C. § 702.

22 9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because this
23 action is brought against an officer of an agency of the United States in her official capacity and
24 against agencies of the United States; Glacier Fish Company resides in this district; and a substantial
25 part of the events or omissions giving rise to the claims for relief stated herein occurred in this

1 district.

2 **BACKGROUND**

3 10. PWCC formed in 1997 as a private, voluntary cooperative of companies operating all
4 vessels in the CP sector of the federal Pacific whiting fishery. PWCC was formed to promote
5 rational harvest, optimal utilization and minimal waste in the whiting fishery.

6 11. Defendants, along with the Pacific Fishery Management Council (the “Council”), manage
7 the federal fishery for Pacific whiting and other groundfish species off the Pacific coast under the
8 MSA.

9 12. In a 2007 publication, Defendants noted that “[m]anagement costs [to Defendants] for the
10 [CP] sector may have declined because industry has taken responsibility for funding real-time
11 reporting” of the CP sector’s harvesting activities. To cover the management expenses borne by
12 industry, Defendants observed that “PWCC members voluntarily assess themselves a tonnage fee
13 that is used to fund co-op administrative costs, scientific research (stock assessment and bycatch
14 avoidance) and public education.” Lee G. Anderson and Mark C. Holliday, *The Design and Use of*
15 *Limited Access Privilege Programs* (Nov. 2007), pp. 110-11, at
16 http://www.nmfs.noaa.gov/sfa/domes_fish/catchshare/docs/design_and_useLAPs2007.pdf.

17 13. Subsequent to their 2007 publication, Defendants implemented the Pacific coast
18 groundfish trawl rationalization program. That program significantly altered management of the
19 shorebased catcher vessel sector and, for that sector, Defendants’ management costs may have
20 increased. However, the CP sector operates largely as it did before the trawl rationalization
21 program.

22 14. To date, Defendants have not made publicly available any evidence of increased costs of
23 managing the CP sector incurred by Defendants as a result of the trawl rationalization program.

24 15. Notwithstanding Defendants’ failure to produce evidence of any additional costs and
25 their previous acknowledgement of potential savings from PWCC’s co-management activities,

1 Defendants are now asserting that they incurred \$176,460.05 in additional costs in 2013 related to
2 managing the CP sector under the trawl rationalization program. 78 Fed. Reg. at 75,268.

3 16. Defendants seek to recoup their purported additional costs through “cost recovery
4 program” regulations published in the Federal Register on December 11, 2013. Those regulations
5 authorize defendant NMFS to “collect[] mandatory fees of up to three percent of the ex-vessel value
6 of fish harvested by sector” from “fish buyers.” 78 Fed. Reg. at 75,280. In the CP sector, “fish
7 buyers” include “[t]he owner of a vessel registered to a C/P-endorsed limited entry trawl permit, the
8 operator of a vessel registered to a C/P-endorsed limited entry trawl permit, and the owner of the
9 C/P-endorsed limited entry trawl permit registered to that vessel.” 78 Fed. Reg. at 75,281, 75,283.
10 Glacier Fish Company and other PWCC members meet the definition of “fish buyer” in the CP
11 sector, and each of them would be responsible for a share of the fees collected from that sector by
12 defendant NMFS.

13 **CLAIMS FOR RELIEF**

14 First Claim for Relief – MSA [16 U.S.C. § 1854(d)(2)(A)(i)]

15 17. Plaintiff incorporates and re-alleges all previous paragraphs in this Complaint.

16 18. The only basis on which Defendants claim authority to collect cost recovery fees from
17 Glacier Fish Company and other PWCC members is 16 U.S.C. § 1854(d)(2)(A)(i), a section of the
18 MSA that in pertinent part requires the Secretary to “collect a fee to recover the actual costs directly
19 related to the management, data collection, and enforcement of any (i) limited access privilege
20 program [“LAPP”]” The MSA, at 16 U.S.C. § 1802(26)(A), defines a “limited access privilege”
21 as “a Federal permit, issued as part of a limited access system under section 1853a of this title to
22 harvest a quantity of fish expressed by a unit or units representing a portion of the total allowable
23 catch of the fishery that may be received or held for exclusive use by a person....” The MSA at 16
24 U.S.C. § 1853a(f) describes additional defining characteristics of a limited access privilege, one of
25 which is that the permit must be “issued for a period of not more than 10 years” and “will be

1 renewed before the end of that period, unless it has been revoked, limited, or modified” as a result of
2 certain violations.

3 19. Under the trawl rationalization program, PWCC and its members are categorized as part
4 of the “C/P Coop Program.” However, the C/P Coop Program is not a LAPP (and therefore not
5 subject to cost recovery fees) because neither of the two types of permits associated with the C/P
6 Coop Program is a limited access privilege.

7 20. One of the permits is the “C/P endorsed limited entry trawl permit,” which each PWCC
8 member holds. That permit is not a limited access privilege because it does not allow its holder the
9 “exclusive use” of a specific “quantity of fish expressed by a unit or units representing a portion of
10 the total allowable catch of the” CP sector.

11 21. The other permit is the “C/P coop permit,” which is issued to a single “eligible coop
12 entity” each year, 50 C.F.R. § 660.160(d)(ii), including to PWCC in 2013. The C/P coop permit is
13 “not a limited entry permit,” 50 C.F.R. § 660.25(e)(2), and therefore, under trawl rationalization
14 program regulations, does not allow the cooperative itself to harvest fish. Because the C/P coop
15 permit “does not, by itself, allow [the cooperative] to catch any fish,” it does not constitute a
16 “harvesting” permit as required under the limited access privilege definition. *Lovgren v. Locke*, 701
17 F.3d 5, 27 (1st Cir. 2012). In addition, the C/P coop permit “expires” at the end of the year it was
18 issued, 50 C.F.R. § 660.160(d)(1)(ii), instead of being subject to continuous “renewal” as required
19 under 16 U.S.C. § 1853a(f)(1).

20 22. Indirectly acknowledging what may be their own doubts about whether the C/P Coop
21 Program currently qualifies as a LAPP, Defendants point to regulations contemplating a
22 fundamentally different program structure contingent upon the future occurrence of a “coop failure.”
23 78 Fed. Reg. at 75,272. In that event, those regulations would “convert [the CP sector] to an
24 [individual fishing quota (“IFQ”)]-based fishery beginning the following calendar year after a coop
25 failure, or a[s] soon as practicable thereafter. NMFS will develop additional regulations, as

1 necessary to implement an IFQ fishery for the C/P sector. Each C/P-endorsed permit would receive
2 an equal distribution of [quota share] from the total IFQ for the catcher/processor sector allocation.”
3 50 C.F.R. § 660.160(h)(4).

4 23. Whether or not the C/P Coop Program would qualify as a LAPP under those criteria, they
5 are not in effect now – and would not be effective for some unspecified time even after a future
6 “coop failure.” Consequently, those future criteria cannot serve as a basis on which to conclude the
7 C/P Coop Program as presently organized is a LAPP.

8 24. Because the C/P Coop Program is not a LAPP, Defendants are not authorized to collect
9 any of their purported additional management costs from Glacier Fish Company and other PWCC
10 members. Accordingly, to the extent the cost recovery program regulations apply to the C/P Coop
11 Program, Glacier Fish Company and other PWCC members, they are contrary to 16 U.S.C. §
12 1854(d)(2)(A)(i) and should be set aside.

13 Second Claim for Relief – MSA [16 U.S.C. §§ 1853(e)(1)-(2), 1854(d)(2)(A)(i)]

14 25. Plaintiff incorporates and re-alleges all previous paragraphs in this Complaint.

15 26. If this Court concludes the C/P Coop Program is a LAPP, this second claim and the
16 following claims are pleaded in the alternative and would provide other grounds on which to set
17 aside all or some of the cost recovery program regulations applicable to the C/P Coop Program,
18 Glacier Fish Company and other PWCC members.

19 27. The MSA requires the Council to “develop” the “methodology and means to identify and
20 assess the management, data collection and analysis, and enforcement programs that are directly
21 related to and in support of” the LAPP and to “provide” for a “program” of fees paid to cover the
22 costs of those activities (subject to certain limitations on fee amounts). 16 U.S.C. § 1853a(e)(1)-(2).
23 The Act then requires defendant Secretary to “collect” fees generated by the Council-developed
24 program to recover “the actual costs directly related to the management, data collection, and
25 enforcement” of a LAPP. 16 U.S.C. § 1854(d)(2)(A)(i).

1 28. The cost recovery program was developed by Defendants and not the Council, and the
2 program also does not contain the required “methodology and means” to “identify and assess” the
3 management activities claimed to be subject to cost recovery. Because the cost recovery program
4 regulations were promulgated contrary to 16 U.S.C. §§ 1853a(e)(1)-(2) and 1854(d)(2)(A)(i), they
5 should be set aside to the extent they apply to the C/P Coop Program, Glacier Fish Company and
6 other PWCC members.

7 Third Claim for Relief – MSA [16 U.S.C. § 1853a(e)(2)]

8 29. Plaintiff incorporates and re-alleges all previous paragraphs in this Complaint.

9 30. The MSA limits the class of persons required to pay cost recovery fees to “limited access
10 privilege holders.” 16 U.S.C. §1853a(e)(2). However, under Defendants’ cost recovery program,
11 the persons in the C/P Coop Program subject to the fee payment obligation are not limited access
12 privilege holders.

13 31. The persons subject to paying the fee are “[t]he owner of a vessel registered to a C/P-
14 endorsed limited entry trawl permit, the operator of a vessel registered to a C/P-endorsed limited
15 entry trawl permit, and the owner of the C/P-endorsed limited entry trawl permit registered to that
16 vessel.” 78 Fed. Reg. at 75,281, 75,283.

17 32. As explained above, the owner of a C/P endorsed limited entry trawl permit does not hold
18 a limited access privilege because the permit does not provide its owner with the “exclusive use” of
19 a specific “quantity of fish expressed by a unit or units representing a portion of the total allowable
20 catch of the” CP sector. Likewise, neither owners nor operators of vessels qualify as holders of a
21 limited access privilege because a vessel is not “a Federal permit,” one element of the limited access
22 privilege definition at 16 U.S.C. §1802(26)(A).

23 33. Because Defendants’ cost recovery program regulations impose cost recovery fees on
24 persons in the C/P Coop Program who are not required to pay those fees, including Glacier Fish
25 Company, they are contrary to 16 U.S.C. §1853a(e)(2) and should be set aside to the extent they

1 apply to the C/P Coop Program, Glacier Fish Company and other PWCC members.

2 Fourth Claim for Relief – APA [5 U.S.C. § 706(2)(A)]

3 34. Plaintiff incorporates and re-alleges all previous paragraphs in this Complaint.

4 35. In the preamble to the December 11, 2013 final rule promulgating Defendants’ cost
5 recovery program regulations, Defendants also announced a 1.1% cost recovery fee percentage that
6 they intend to apply to the ex-vessel value of PWCC members’ harvest in 2014. 78 Fed. Reg. at
7 75,268.

8 36. Defendants calculated that percentage by (i) dividing what Defendants assert are
9 \$176,460.05 in additional “direct program costs” associated with their management of the C/P Coop
10 Program by \$16,763,066, the ex-vessel value of the CP sector in 2013 as determined by Defendants,
11 and (ii) multiplying the quotient from (i) by 100. Expressed mathematically,
12 $(\$176,460.05/\$16,763,066) \times 100 = 1.1\%$. Defendants apparently intend to collect from Glacier Fish
13 Company and other PWCC members collectively 1.1% of the ex-vessel value of the CP sector’s
14 harvest in 2014. 78 Fed. Reg. at 75,268.

15 37. Defendants have not provided any basis for their assertion that they have incurred
16 \$176,460.05 in additional management costs directly related to the C/P Coop Program, which
17 involves the same CP sector that Defendants noted in 2007 may have actually reduced management
18 costs to Defendants through industry-funded harvest reporting and other measures.

19 38. Because Defendants have not provided any basis for their cost figure, the 2014 cost
20 recovery fee percentage based in part on that unsupported cost figure is arbitrary and capricious and
21 an abuse of discretion. Consequently, the 2014 cost recovery fee percentage for the C/P Coop
22 Program, Glacier Fish Company and other PWCC members is contrary to the APA, 5 U.S.C. §
23 706(2)(A), and should be set aside.

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REQUEST FOR RELIEF

Plaintiff requests the following relief:

1. For expedited consideration of this matter pursuant to 16 U.S.C. § 1855(f)(4);

2. For a judicial declaration that, as applied to the C/P Coop Program, Glacier Fish Company and other PWCC members, Defendants’ cost recovery program regulations violate the MSA and APA and are arbitrary, capricious, an abuse of discretion, not in accordance with law and in excess of statutory jurisdiction, authority, or limitations and short of statutory right;

3. For a) an order requiring that Defendants’ cost recovery program regulations be set aside in their entirety to the extent they apply to the C/P Coop Program, Glacier Fish Company and other PWCC members, or, to the extent the Court determines the regulations should not be set aside in their entirety, b) an order setting aside Defendants’ 2014 cost recovery fee percentage for the C/P Coop Program, Glacier Fish Company and other PWCC members;

4. For an award of costs of suit and other expenses, including reasonable fees and expenses of attorneys to the extent available; and

5. For such other and further relief as the Court may deem necessary and appropriate.

Dated this 9th day of January, 2014.

Sullivan & Richards LLP

By Andrew Richards

Andrew Richards

WSB No. 35920

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7

8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

DAVIS WRIGHT TREMAINE LLP

12 PACIFIC DAWN LLC, , OCEAN GOLD)
13 SEAFOODS, INC., CHELLISSA LLC INC., and)
JESSIE’S ILWACO FISH COMPANY,)
14 Plaintiffs,)
15 v.)
16 PENNY PRITZKER, Secretary of Commerce, in)
her official capacity as Secretary of the United)
17 States Department of Commerce, NATIONAL)
OCEANIC AND ATMOSPHERIC)
18 ADMINISTRATION, and NATIONAL)
MARINE FISHERIES SERVICE,)
19 Defendants.)
20)
21)

Case No. 3:13-cv-01419 TEH
JOINT NOTICE OF APPEAL

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NOTICE IS HEREBY GIVEN that plaintiffs Pacific Dawn LLC and Jessie’s Ilwaco Fish Company appeal in the above-named case to the United States Court of Appeals for the Ninth Circuit from (1) the judgment entered on December 6, 2013 (Dkt. No. 65) and (2) the order granting Federal Defendants’ and Defendant-Intervenors’ cross motions for summary judgment entered December 5, 2013 (Dkt. No. 64).

Dated: February 3, 2014

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP

By : /s/ James P. Walsh
James P. Walsh
Gwen L. Fanger

Attorneys for Plaintiffs, Pacific Dawn LLC and
Jessie’s Ilwaco Fish Company

DAVIS WRIGHT TREMAINE LLP