



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way NE
Seattle, Washington 98115

Agenda Item I.5.a
Attachment 1
September 2010

August 9, 2010

Mr. Dave Ortmann, Chairman
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97220-1384

Dear Chairman Ortmann:

By this letter, I am approving Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan (FMP) in large part, with a partial disapproval on certain technical and conforming aspects of the amendments, as explained below. As you know, Amendment 20 establishes the trawl rationalization program, a limited access privilege program (LAPP) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Amendment 21 establishes fixed allocations for limited entry trawl participants.

The National Marine Fisheries Service (NMFS) appreciates the Pacific Fishery Management Council's (Council's) hard work over the last six years to develop, analyze, and adopt a major restructuring of our west coast trawl groundfish program. The groundfish trawl fishery has been struggling for many years and NMFS strongly supports the Council's efforts with these amendments to increase net economic benefits, create individual economic stability, provide for full utilization of the trawl sector allocation, consider environmental impacts, and achieve individual accountability of catch and bycatch.

NMFS has determined that, except for the minor items listed below for disapproval, Amendments 20 and 21 are consistent with the national standards and other provisions of the MSA and other applicable laws.

Items for Disapproval

NMFS has identified certain minor items for disapproval in Amendment 20. These are further explained in attachment 1. We have determined that these items can be disapproved without affecting our ability to implement the Amendments.

We are addressing in more detail in this letter the provisions of Amendment 21 that we are disapproving. As with the minor items referred to above, we have determined that our disapproval of these provisions does not affect our ability to implement the Amendments. We have disapproved the following provisions that address Amendment 21's effect on limited entry/open access allocations established in the FMP:



1) Section 6.3.2.3 Limited Entry Trawl Allocations for Amendment 21 Species

Delete the sentence, “Amendment 6 limited entry and open access allocations are superseded by these allocation percentages.”

2) Section 11.2.2 Allocations Between the Limited and Open Access Fisheries and Management of the Open Access Fishery

Delete the sentence in paragraph 1, “For those species, species groups and areas covered by the trawl/non-trawl allocations provided in Table 6-1 and for which the Council determines an allocation is necessary, open access allocations will be established as needed through the biennial specifications process.”

Reject the edit to the first sentence in paragraph 2. The edit reads: “For those species for which trawl-/non-trawl allocations are not established in Table 6-1,”

We have determined that there are ambiguities in the record associated with the relationship of Amendment 21 to the limited entry/open access allocations, generating a potentially serious procedural issue which could be a convenient target for litigation. Thus, we concluded that it is necessary and prudent to partially disapprove Amendment 21 so the ambiguity can be addressed in an open and timely manner through a technical and conforming amendment.

The assertion that Amendment 21 overrides the limited entry/open access allocations must be supported in the record. The 1994 FMP amendments established that these allocations could only be changed by a plan amendment. The relationship of Amendment 21 to these other underlying allocations was not clearly and unambiguously described during the development of Amendment 21 or in the DEIS or the FMP language during the development. When the Council adopted the FMP language in March 2010, there was no express description that it overrode the open access/limited entry allocation; in fact, it did not even directly amend the FMP language that established the open access/limited entry allocation. Therefore, the record is ambiguous on the question of whether the Council took this action in its Amendment 21. While there is no apparent disagreement amongst the members of the Council on the intent of the Council in its design of Amendment 21, the procedural issue relates most directly to the question of the adequacy of the notice to the public of the intended effect of Amendment 21 on these underlying allocations and the adequacy of the opportunity for meaningful public review and comment. Members of the open access fishery may assert that they have had insufficient notice that their long-standing allocations were being eliminated for the newly allocated species, so had no opportunity to comment on this issue. Members of the public may also make similar claims of lack of adequate notice. A major procedural requirement of the MSA is public notice and participation.

We are partially disapproving the Amendment 21 override of the limited entry/open access allocations to ameliorate an administrative deficiency in the supporting record. However, based

on the Council staff's statement that limited entry/open access allocations have not been and are not being implemented because of the constraints of the rebuilding plans, we also fully expect that this deficiency can be rectified through the proposing of a closely tailored additional technical amendment and public review that will not delay or otherwise disrupt the anticipated schedule of implementation for the program in early 2011. With this partial disapproval, NMFS is recommending that the Council follow up with a specific amendment to override Amendment 6 allocations.

Technical Edits

In addition to the items identified for disapproval, NMFS has identified several technical edits to both Amendments 20 and 21 (see attachment 2). It is NMFS' understanding that NMFS staff and Council staff are working together to ensure that these edits are completed prior to the incorporation of the two amendments into the FMP.

Rulemakings

As you are aware, and consistent with Council direction, implementation of the program has been separated into three separate rulemakings. The first rule (75 FR 4684, RIN 0648-AX98, final rule published January 29, 2010) established data reporting and collection requirements used to determine the initial allocations of quota shares; the second rule (75 FR 32994, RIN 0648-AY68, proposed rule published June 10, 2010) would cover initial issuance of allocations of quota shares according to the formulas in Amendments 20 and 21, specify appeal procedures, and implement other related measures. The third rule (RIN 0648-AY68, currently in review and scheduled to be published as a proposed rule on August 18, 2010) would complete the measures necessary to implement the program and includes specific program details, such as requirements for tracking and monitoring, permits, Individual Fishing Quota and Coop programs, economic data collection, and other measures. In addition, the notice of availability for Amendments 20 and 21 published on May 12, 2010 (75 FR 26702, RIN 0648-AY68).

In addition, it is NMFS' understanding that the trawl rationalization program will continue to be modified through trailing regulatory and FMP amendments, including but not limited to an adaptive management program, community fishing associations, cost recovery methodology, and potential "safe harbors" for control language. In addition, as you are aware, the MSA requires the Council and NMFS to review LAPPs to determine their progress in meeting the goals of the program and the MSA. Amendment 20 specifies that the Council will conduct a formal review of the trawl rationalization program no later than five years after implementation and every four years thereafter. Within the first 5 years of the trawl rationalization program, the Council must also conduct further analyses of the effects of allocation on nontrawl fisheries and the potential use of allocation among gear types as a tool to promote conservation goals as stated in a NMFS report at the April 2009 Council meeting (Agenda Item F.3.b, Supplemental NMFS Report, April 2009). We look forward to working with the Council on these future actions.

Again, NMFS appreciates the Council's ongoing efforts to promote sustainable fisheries and fishing communities on the west coast.

Sincerely,

A handwritten signature in black ink that reads "William Stelle, Jr." in a cursive, slightly slanted script.

William W. Stelle, Jr.
Regional Administrator

cc: Mark Cedergreen

Attachments:

1. Disapproval List
2. Technical Edits

Attachment 1

DISAPPROVAL LIST

NMFS has identified 3 minor items for disapproval in Amendment 20, and 2 items for disapproval in Amendment 21 (both relating to the same issue). Each of these, and their rationales for disapproval, are discussed below.

AMENDMENT 20

For Amendment 20, the following items are listed for disapproval:

1. Language at Appendix E of the FMP, B-2.3.3(a), regarding mothership coop contracts should be deleted as follows: **“Co-op permit and agreement.** Federal co-op permits will be issued for co-op agreements approved by NMFS. Signed copies of the cooperative contracts must be filed with ~~the Council and NMFS and available for public review~~ before the co-op is authorized to engage in fishing activities.”

Rationale: Public review of coop contracts, which may contain private information, may violate MSA confidentiality. In addition, it would prolong issuance of coop permits each year before the primary whiting season, with no benefit being gained by allowing public review. Therefore, NMFS is disapproving this specific language because it is not necessary and appropriate for the conservation and management of the fishery, pursuant to section 303(a) and 304(a)(3) of the MSA.

2. Language at Appendix E of the FMP, B-2.3.3(a), regarding a letter to the Department of Justice should be deleted as follows: **“Letter to Department of Justice.** ~~Co-ops must also file with the Council and NMFS a copy of a letter from the co-op requesting a business review letter on the fishery cooperative from the Department of Justice and any response to such request.”~~

Rationale: Compliance with antitrust laws is a separate and distinct obligation of each and every participant and does not need to be a requirement specified in the FMP. Therefore, NMFS is disapproving this specific language because it is not necessary and appropriate for the conservation and management of the fishery, pursuant to section 303(a) and 304(a)(3) of the MSA.

3. Language at Appendix E of the FMP, B-2.3.3(e)(7), regarding mothership coop agreement contents should be deleted as follows: **“A requirement that agreement by at least a majority of the members is required to dissolve a co-op (During council discussion this was flagged by NOAA GC as a potential legal problem).”** Language at Appendix E, B-2.3.3(f)(2) should also be deleted to reflect this change as follow: “The requirements of Sections 2.3.3.a-2.3.3.e apply to the inter-co-op agreement, ~~except that for the purpose~~

~~of Section 2.3.3.e., subparagraph 7, the members of the inter co-ops are the co-ops and not the participants in each co-op.”~~

Rationale: This provision interferes with private parties’ ability to contract and should not be a Federal requirement in the FMP or in regulation. Private parties can agree to the terms of dissolution that are appropriate for their coop. Therefore, NMFS is disapproving this specific language because it is not necessary and appropriate for the conservation and management of the fishery, pursuant to section 303(a) and 304(a)(3) of the MSA.

AMENDMENT 21

For Amendment 21, the following items are listed for disapproval:

1. In Section 6.3.2.3 of the FMP, “Limited Entry Trawl Allocations for Amendment 21 Species,” NMFS is deleting the sentence, “Amendment 6 limited entry and open access allocations are superseded by these allocation percentages.”
2. In Section 11.2.2 of the FMP, “Allocations Between the Limited and Open Access Fisheries and Management of the Open Access Fishery,” NMFS is deleting the sentence in paragraph 1. that reads: “For those species, species groups and areas covered by the trawl/non-trawl allocations provided in Table 6-1 and for which the Council determines an allocation is necessary, open access allocations will be established as needed through the biennial specifications process.” NMFS is also rejecting the edit to the first sentence in paragraph 2. The edit reads: “For those species for which trawl-/non-trawl allocations are not established in Table 6-1,”

Rationale: The rationale is described in the body of this letter. The disapproval of these items is pursuant to section 303(a) and 304(a)(3) of the MSA.

Attachment 2

TECHNICAL EDITS

In addition to the items identified for disapproval, NMFS has identified several technical edits to both Amendments 20 and 21.

For Amendment 20, the following items are listed for technical edits:

1. Language at Appendix E of the FMP, B-2.3.3(e)(1), regarding mothership coop agreement contents should be edited to read as follows: “A list of all vessels, permit holders participating in the coop and their share of allocated catch and which must match the amount distributed to individual permit owners by NMFS.”

Rationale: This was an inadvertent omission from the FMP language that if left out results in a sentence that is unclear. The added text clarifies the sentence.

2. Language at Appendix E of the FMP, Table 2, should be edited to delete the row labeled “Other fish” and to update the table header to delete the reference to “options” and “Council preferred alternative.”

Rationale: “Other fish” was not adopted by the Council as an Individual Fishing Quota species, and should therefore be deleted. The title to the table should no longer reflect alternatives or options from the environmental impact statement analysis.

3. Some “explanatory” footnotes in Appendix E of the FMP should be deleted because they are out of date. We will work with council staff to determine which footnotes.

For Amendment 21, the following items are listed for technical edits:

4. Language in Section 6.3.2.3 of the FMP, should be edited as follows: “The provision to temporarily suspend the ~~LE, open access~~formal allocation if a species is declared overfished (see Section 4.6.1(5) of the FMP) is maintained under Amendment 21.

Rationale: The record on this issue in the EIS refers both to suspending formal allocations, and suspending the limited entry/open access allocation. Therefore, the record is ambiguous. The motion in writing that was passed by the Council, however, refers to suspending formal allocations if a stock is declared as overfished. This decision makes sense, since once a stock is overfished the priority must be rebuilding in as short a time as possible, taking into account the appropriate factors, rather than a preexisting allocation. Therefore, we believe it is reasonable to make this technical change to the language of the FMP as submitted.

5. In Section 6.3.2.3 of the FMP, Limited Entry Trawl Allocations for Amendment 21 Species, first paragraph, revise the third sentence to read as follows, “The OYs/ACLs are then reduced by deducting the estimated total mortality of these species in research, tribal, and non-groundfish fisheries, and the ~~bycatch limits specified in adopted~~ estimated exempted fishing permits set-asides.”

Rationale: As explained in NMFS’ clarifications document at the April Council meeting (Agenda Item I.1.b, Supplemental NMFS Report 4, April 2010, Issue 1), ‘the bycatch limits specified in adopted EFPs’ are not yet available when the Council is finalizing its action on the harvest specifications and reductions from OY. It is NMFS’ understanding that EFP projects and their associated catch limits for the following year are tentatively adopted at the June Council meeting. The final catch limits for EFPs are adopted in November and are sometimes different than the tentative catch limits from June. The June meeting (in even numbered years) is also when the Council takes final action on OYs and harvest guidelines for the next biennium. Therefore, the deduction to the OY for the next biennium would be from the estimated mortality from EFPs that may occur in the next biennium. The mortality from future EFPs is estimated assuming that similar catch limits are adopted as were adopted in the current year (i.e., the catch limits that are specified in the adopted EFPs). NMFS’ technical edit would make deductions from the OY better follow the amounts for EFPs that will be available at that time in the harvest specifications process.