

NMFS RESPONSE TO COUNCIL STAFF DOCUMENT -
“AREAS OF THE PROPOSED COMPONENTS RULE
ON WHICH NMFS HAS REQUESTED SPECIFIC COMMENT”

NMFS appreciates the Council staff providing a list of items for the Council and the public where NMFS specifically requested comment in the preamble of the program components proposed rule (75 FR 53380, August 31, 2010). However, NMFS is concerned that the Council staff document (Agenda Item I.5.a, Attachment 6, September 2010) does not provide NMFS full rationale for all of the items listed. Therefore, NMFS is providing this supplemental with the full rationale from the preamble included for these items (additional rationale is in italics). As stated in the Council staff document, the preamble and components rule are provided in their entirety as Agenda Item I.5.a, Attachment 5.

Permits (p. 53382 of the proposed rule)

Under the proposed initial issuance rule, several new permits that could be registered to a vessel would be issued. The program components proposed rule sets forth the rules for registration and transfer of registration that would apply to these permits. Consistent with current regulations, when the owner of a limited entry trawl permit registered to a vessel operating in the Shorebased IFQ Program transfers the registration to another vessel, the registration would be effective at the start of the next cumulative trip limit period. This provision would remain in place because trip limits would remain in place in the Shorebased IFQ Program (for non-IFQ species and for Pacific whiting outside the primary whiting season). A transfer of registration for MS/CV-endorsed limited entry trawl permits would also be effective at the start of the next cumulative limit period because vessels registered to MS/CV-endorsed permits would be eligible to participate in both the Shorebased IFQ Program and the MS Coop Program. Transfers of MS permits and C/P-endorsed limited entry trawl permits would be effective immediately upon reissuance to the new vessel, because neither of these permits would be affected by trip limits.

With respect to transfer of MS/CV-endorsed permits, the Council motion included a provision (Appendix D, Page D-34) that would allow an MS/CV-endorsed permit to have two changes in vessel registration in the same calendar year, provided that the second change in vessel registration would return the registration to the original vessel assigned to the permit in that year. Transfer rules for limited entry trawl permits without an MS/CV endorsement, however, limit the permit owner to only one transfer in a given year. During its March 2010 meeting, the Council considered that because vessels registered to an MS/CV-endorsed permit would be able to deliver whiting to the MS sector and would also potentially be able to deliver IFQ groundfish to shorebased first receivers, it may be possible for owners of an MS/CV endorsed permit to circumvent the restrictions on transfers of limited entry permits in the Shorebased IFQ Program for owners of permits that lack an MS/CV-endorsement. Consequently, the Council decided that if the owner of an MS/CV-endorsed permit were to transfer registration of the permit a second time, the vessel to which the permit is transferred to would not be eligible to fish in the Shorebased IFQ Program under that permit during the remainder of the year. The Council's motion on this issue did not address the timing of when the second transfer would be effective. Under the regulations being proposed, the second transfer would be effective at the start of the next cumulative limit period (i.e., 2-month period). If there are no trip limits for the mothership

fishery, then this restriction on the effective date of transfers may not be necessary. NMFS solicits public comment on the effective date for a second transfer within the same year of an MS/CV-endorsed limited entry permit.

Conflict of Interest Regulations in the Observer or Catch Monitor Programs
(p. 53385 of the proposed rule)

The proposed regulations, as deemed by the Council, contain language on conflict of interest provisions for observers (§§ 660.140(h)(6)(vii), 660.150(j)(6)(vii), and 660.160(g)(6)(i)(G)) and catch monitors (§ 660.18(c)). However, NMFS has concerns with the language and believes it has the potential to undermine the integrity of the shorebased and at-sea monitoring programs.

The data coming from observers aboard fishing vessels and catch monitors at shorebased first receivers is crucial to NMFS's ability to sustainably manage groundfish in general, and would be particularly important during management of the pending groundfish trawl rationalization program. A crucial component of NMFS's tracking and monitoring system for the trawl rationalization program is the collection of timely and accurate landings and discard data to allow managers to ensure that landings stay within prescribed limits in order to prevent overfishing and promote rebuilding. Such landings and discard data would also provide fishermen with an accurate accounting of their harvesting activities so that they can efficiently plan their fishing operations. Maintaining strict conflict of interest standards for monitors and observers would give managers and fishermen a high level of assurance that they are basing their decisions on accurate data. NMFS believes that the changes proposed by the Council would unacceptably reduce the assurance that NMFS is receiving the best available information from its monitoring programs.

In addition, if the language deemed by the Council were to be implemented, there would be inconsistent conflict of interest requirements within NMFS regulations, both between the regions, and on the West Coast. The conflict of interest requirements that were presented to the Council at its June 2010 meeting (see http://www.pcouncil.org/wp-content/uploads/B6a_ATT2_DRAFT_PRGRM_COMPONENTS_JUNE2010BB.pdf; requirements for catch monitors starting on page 9, and for observers on page 41) are consistent with conflict of interest standards set forth in the NMFS policy statement 04-109-01, National Minimum Eligibility Standards for Marine Fisheries Observers, implemented on August 6, 2007. In addition, the provisions proposed by NMFS are consistent with existing requirements in the WCGOP, which will remain in place for the fixed gear and open access fleets. NMFS believes that the changes proposed by the Council would create discrepancies both within the region and nationally, and would place undue administrative burdens on NMFS.

Because of these reasons, NMFS intends to use its authority under section 305(d) of the MSA to publish language in the final rule that differs from what was deemed by the Council. This proposed rule includes both the Council-deemed regulatory language and the language proposed by NMFS. The regulatory language labeled Alternative 1 in the conflict of interest provisions for observers (§§ 660.140(h)(6)(vii), 660.150(j)(6)(vii), and 660.160(g)(6)(i)(G)) and for catch monitors (§ 660.18(c)) is the Council-deemed language, and Alternative 2 is the language NMFS proposes to publish in the final rule. [See appendix to this attachment for example language for the alternatives.]

NMFS specifically requests comment on these conflict of interest provisions for observers and catch monitors, and on NMFS's intent to publish Alternative 2 to make these requirements consistent within the region and with other NMFS programs.

Ownership Information (p. 53386 of the proposed rule)

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In some cases, the structure of the ownership interests may raise questions as to how NMFS interprets the ownership interest in order to make its determination. NMFS has identified two such instances: (1) joint ownership, and (2) ownership by a trust. Each of these situations is addressed in the proposed rule, and NMFS specifically requests comments on the implications of its interpretations of these ownership structures, or of any other ownership structure not previously identified that may raise questions.

A joint ownership situation exists where more than one person claims an interest indivisible from that of another person, such that the total ownership interest is greater than 100 percent. An example of this would be a joint tenancy, a form of property ownership where two parties (often a husband and wife) each own 100 percent, and in the event of death of one of them, the survivor would retain the indivisible 100 percent already owned. In these situations, NMFS would credit each owner with the full percent claimed (e.g., in this example, 100 percent each), even though the sum of all ownership interests would exceed 100 percent. *NMFS believes that for some owners, the benefits of joint tenancy may be greater than the parties' concern for accumulation limits, particularly if they are more interested in estate planning than accumulation of privileges, and that if the parties to a joint tenancy don't want to avoid individual accountability for the entire ownership interest, they would have the option of restructuring.*

Ownership by a trust creates another area where questions arise regarding compliance with accumulation limits. In any consideration of trusts, there are three parties that need to be considered: the trustee, the beneficiaries, and the trustor. *Generally speaking, the trustee manages the property held in the trust according to the terms of the trust document for the benefit of the beneficiaries of the trust. The beneficiaries are equitable owners of the property, but generally, since they are not the legal owners do not exercise control over the property. The trustor is the party that sets up and grants property to the trust.* Because a trust vests the legal title to the property in the trustee, under the proposed rule NMFS would credit ownership to the trustee. If there is more than one trustee (i.e., "co-trustees"), NMFS would consider each trustee to have 100 percent ownership of the trust property. *NMFS recognizes that whether other parties besides the trustee would be impacted by ownership and control rules depends upon the nature of the trust and how it is set up. For instance, a trustor might retain authority to take the property back from the trust (i.e., a revocable trust), or, in some circumstances, beneficiaries could assert control over the trust property, modify the trust document, and/or wrest the legal ownership away from the trustee. For both of these cases, ownership would not appear to be an issue unless the trustor or beneficiaries gain actual legal ownership of the trust property, however, whether control rules would be implicated is harder to say and would depend upon the trust document. Thus, the program components rule includes provisions that NMFS may ask for additional information it believes to be necessary for its determination.*

Maximized Retention in the Pacific Whiting IFQ Fishery (p. 53389 of the proposed rule)

Under current practices in the maximized retention Pacific whiting fisheries, some minor amounts of operational discard are allowed. Under trawl rationalization, any minor operational amounts of discard would be estimated by the observer and deducted from allocations. NMFS raised this issue at the Council's March 2010 meeting for the maximized retention fishery in the mothership sector (Agenda Item E.6.b, NMFS Report 1, March 2010, #25). For the Shorebased IFQ Program, however, the Council motion at Appendix D, A-2.3.1, p. D-13 states: "Whiting: Maximized retention vessels: Discarding of fish covered by IFQ or IBQ, and nongroundfish species prohibited." The proposed rule adopts this language at § 660.140(g)(2), which states: "Maximized retention vessels participating in the Pacific whiting IFQ fishery are prohibited from discarding any IFQ species/species group and nongroundfish species[;]" however, this language is potentially ambiguous in that it refers to maximized retention vessels, but prohibits discarding. NMFS specifically requests public comment on any implications that the prohibition on discarding may have on the prosecution of a maximized retention fishery, and further requests comment on what should constitute discarding under this provision of the Shorebased IFQ Program.

Weight Limits and Conversions (p. 53390 of the proposed rule)

Groundfish allocations, harvest guidelines, and quotas are expressed in round weight. In cases where fish are landed dressed (headed and gutted, or in the case of Pacific whiting, headed and gutted with tails removed (neither activity is considered processing under the groundfish regulations which prohibit processing at-sea for the shorebased fishery), catch weight conversions are used to determine actual round weight of the harvested fish. *To derive the weight of round fish harvested by a vessel that delivers dressed fish, a weight conversion factor is multiplied by the dressed weight.*

Due to the increased individual accountability of catch (landings and discards) and the individual allocations of harvest opportunity under the Shorebased IFQ Program, NMFS proposes to revise regulations at § 660.60(h)(5)(ii) to create more consistent use of weight conversion factors coastwide. Currently, some discrepancies exist between the weight conversions used by the states of Washington, Oregon, and California. *The use of state weight conversions would remain in place for the limited entry fixed gear and open access fisheries because they would continue to be managed under sector allocations (rather than individual quotas) and would continue to be tracked under the state paper fish ticket system. However, under trawl rationalization, landings of groundfish in the Shorebased IFQ Program would be reported through a Federal electronic fish ticket system in addition to the state paper fish ticket system. A consistent, accurate round weight must be reported on the electronic fish ticket submitted to NMFS, and would be used to determine total catch in the Shorebased IFQ Program.*

The use of different weight conversions in the different states for catch estimates under the Shorebased IFQ Program may influence vessels to make deliveries based on conversion factors perceived to be more favorable for a particular species, especially if landing near a state border. Another concern from using different state weight conversions would be discrepancies in reported landings values. NMFS believes that the use of consistent coastwide conversion factors in the Shoreside IFQ Program would provide consistency in catch estimates between states, prevent artificial influences on individual landings choices, and benefit NMFS's ability to track landings values. Thus, NMFS proposes Federal conversion factors for species within the scope of the IFQ program at § 660.60(h)(5)(ii) based on published values.

The new catch weight conversion values for dressed IFQ species proposed by this action were derived from an Alaska Sea Grant College Program publication titled, “Recoveries and Yields from Pacific Fish and Shellfish” (Marine Advisory Bulletin number 37, 2004). For Pacific whiting that has been dressed (headed and gutted) with tails removed, the weight conversion was derived from the value for pollock as published at § 679 for the Alaska groundfish fishery. NMFS informed the Council at its March 2010 meeting of its intent to use published values for these weight conversions, however, NMFS specifically requests public comment on the actual values and implications of the proposed conversion factors.

Gear Switching Provisions (p. 53391 of the proposed rule)

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One issue under consideration with regards to gear switching is how often a fisherman would be able to declare and switch gears. Although the declaration system managed by the NMFS Office of Law Enforcement can manage frequent changes in vessel declarations as would be the case for frequent gear switching, NMFS believes the process must be managed in an orderly fashion so as to not compromise the efficient management of the observer program by the Northwest Fisheries Science Center. NMFS specifically requests comment regarding the impact of any restrictions on changes in declarations on gear switching in the Shorebased IFQ Program.

IFQ Carryover Provision (p. 53392 of the proposed rule)

... a vessel account that incurs a deficit (a negative balance for any IFQ species) that is lower than the carryover limit where the vessel account owner is unable to transfer QP or IBQ pounds into the vessel account to cure the deficit within 30 days, the vessel account owner could cure the deficit by declaring the vessel out of the fishery for the remainder of the year and transferring sufficient QP or IBQ pounds into the vessel account within 30 days of NMFS’s issuance of QP and IBQ pounds in the following year. *In the case of a deficit, the carryover limit would be based on the cumulative total QP or IBQ pounds in the account (used and unused, less any transfers out of the account and any prior carryover amounts) at the date upon which the deficit was documented. If a vessel declares out of the fishery for the remainder of the year, remaining QP or IBQ pounds in the vessel account (species for which there is no deficit) would still be transferable.*

During discussions at the RDW, some commenters expressed concern that the requirement to declare out of the fishery for the remainder of the year in order to invoke the carryover provision for a deficit would be overly restrictive and that, in their view, a vessel that declares out of the IFQ fishery under the carryover provision should be able to declare back into the fishery if able to obtain sufficient QP or IBQ pounds later in the year. *Under the proposed rule, a vessel would be able to declare back into the Shorebased IFQ Program if it cures the deficit in the same year in which the deficit occurs, however, if a vessel opts to do so, it would no longer meet the requirements for the carryover provision. Instead, the vessel would be subject to enforcement for a violation of the requirement to cure a deficit within 30 days of the date the deficit is documented. The Council was emphatic on the importance of curing deficits within 30 days, and that the carryover provision was a narrow exception to this requirement. If a vessel were allowed to declare out of the fishery under the carryover provision, and subsequently declare back into the fishery before the end of the year, a vessel could effectively circumvent the requirement to cure a deficit within 30 days. The RDW did not achieve consensus regarding this issue, and it was suggested that if any approach different from that in this proposed rule were*

considered preferable, the Council could address it in the trailing amendments for the rationalization program. Thus, NMFS specifically highlights this issue to solicit public comment.

At-sea Sector Donation Program (p. 53393 of the proposed rule)

A management measure that may no longer be necessary or may need further revision is the optional “bycatch reduction and full utilization program for at-sea processors” (called bycatch reduction and donation program). *The bycatch reduction and donation program was established to allow vessels harvesting unsorted catch to retain and donate amounts of groundfish that were in excess of trip limits.* Under trawl rationalization, the at-sea sector regulations may not require vessels to be subject to trip limits for groundfish species other than Pacific whiting outside of the primary whiting season. Therefore, the donation program may no longer be necessary or may require minor adjustments. *In this proposed rule, the bycatch reductions and donation program remains as stated in existing regulations.* NMFS specifically requests comment on the implications of removing or retaining this program and suggested language revisions.

Processor Obligations (p. 53395 of the proposed rule)

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In developing the regulations for the processor obligation provision, NMFS discovered that there may be some confusion over the extent of the annual obligation of an MS/CV endorsed permit to a specific processor. *The Council motion states that “Each year, a permit will obligate to a processor all of its catch for a coming year[.]” and that “CV(MS) permits will be obligated to a single MS permit for an entire year[.]” (Appendix D, B-2.4, p. D-31).* As the motion further describes this obligation, it refers to the obligation as a “linkage” between the MS/CV-endorsed permit and the MS permit, and states that the “CV permit must notify the MS permit that the CV permit QP will be linked to.” *Id.* at p. D-32 (emphasis added). Because of this language in the Council motion, NMFS believes the nature and extent of the processor obligation is the commitment of the annual catch history assignment associated with the MS/CV-endorsed permit, analogous to QP in the Shorebased IFQ Program. Draft regulations provided to the Council for review as part of the deeming process referred only to the obligation of the MS/CV-endorsed permit to the MS permit, and did not specify the nature or extent of that obligation. Members of the Council’s RDW expressed concern that such language could be interpreted to require all deliveries of a vessel registered to the MS/CV-endorsed permit to be delivered to the mothership registered to the MS permit, not just deliveries of the fish associated with the MS/CV-endorsed permit’s catch history assignment, and that under such an interpretation, for a vessel to deliver to a processor other than that to which its permit is obligated would require registration of the vessel to another permit or release of the permit through mutual agreement with the processor to which the permit is obligated. For the reasons described above, NMFS does not believe that such an interpretation comports with the intent of the Council motion. Accordingly, NMFS has clarified the regulation to specify that the processor obligation refers only to the commitment of the permit’s catch history assignment to a given MS permit, and specifically requests comment on the implications that this interpretation may have on anticipated operations within the MS Coop Program.

Appendix
Alternatives on Conflict of Interest Regulations

660.18(c) (shaded text = no difference between the alternatives)

[Similar alternatives for observers are in 660.140(h)(6)(vii), 660.150(j)(6)(vii) and 660.160(g)(6)(i)(G).]

[Alternative 1 for paragraph (c) (Council-deemed)]

(c) Limitations on conflict of interest for catch monitors. (1) Catch monitors must not have a direct financial interest in the first receivers at which they serve as catch monitors or vessels that deliver to those first receivers, other than the provision of observer or catch monitor services.

(2) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS or has interests that may be substantially affected by the performance or nonperformance of the catch monitor's official duties.

(3) May not serve as a catch monitor at any shoreside or floating stationary processing facility owned or operated where a person was previously employed in the last two years.

(4) May not solicit or accept employment as a crew member or an employee of a vessel, or shoreside processor while employed by a catch monitor provider.

(5) Provisions for remuneration of catch monitors under this section do not constitute a conflict of interest.

[Alternative 2 for paragraph (c) (NMFS-proposed)]

(c) Limitations on conflict of interest for catch monitors. (1) Catch monitors must not have a direct financial interest, other than the provision of observer or catch monitor services, in a North Pacific fishery managed pursuant to an FMP for the waters off the coast of Alaska, Alaska state waters, or in a Pacific Coast fishery managed by either the state or Federal governments in waters off Washington, Oregon, or California, including but not limited to:

(i) Any ownership, mortgage holder, or other secured interest in a vessel, shore-based or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(ii) Any business involved with selling supplies or services to any vessel, shore-based or floating stationary processing facility; or

(iii) Any business involved with purchasing raw or processed products from any vessel, shore-based or floating stationary processing facilities.

(2) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS or has interests that may be substantially affected by the performance or nonperformance of the catch monitor's official duties.

(3) May not serve as a catch monitor at any shoreside or floating stationary processing facility owned or operated where a person was previously employed in the last two years.

(4) May not solicit or accept employment as a crew member or an employee of a vessel, or shoreside processor while employed by a catch monitor provider.

(5) Provisions for remuneration of catch monitors under this section do not constitute a conflict of interest.