James P. Walsh (CA State bar No. 184620)
Gwen Fanger (CA State bar No. 191161)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: budwalsh@dwt.com
gwenfanger@dwt.com

Attorneys for Plaintiffs
PACIFIC DAWN LLC, OCEAN GOLD SEAFOOD, INC.,
CHELLISSA LLC, and JESSIE'S ILWACO FISH COMPANY

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PACIFIC DAWN LLC, , OCEAN GOLD SEAFOODS, INC., CHELLISSA LLC INC., and JESSIE'S ILWACO FISH COMPANY, Plaintiffs, v. PENNY PRITZKER, Secretary of Commerce, 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. 3:13-cv-01419 TEH **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: November 4, 2013 Time: 10:00 a.m. Judge: Hon. Thelton E. Henderson Courtroom: 12

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 4, 2013, at 10:00 a.m. in Courtroom 12 of the above-referenced court located at 450 Golden Gate Ave., 19th Floor, San Francisco, California 94102, the Honorable Thelton E. Henderson, presiding, Pacific Dawn LLC, Ocean Gold Seafoods, Inc., Chellissa LLC and Jessie's Ilwaco Fish Company (collectively, "Plaintiffs") will move jointly for summary judgment (the "Motion") as to all causes of action set forth in their Complaint for Declaratory and Injunctive Relief pursuant to Fed. R. Civ. P. 56(a).

The Motion is based on the grounds that Secretary of Commerce Penny Pritzker,[1] the National Oceanic and Atmospheric Administration ("NOAA"), and the National Marine Fisheries Service ("NMFS") (collectively, "Federal Defendants") violated the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-84, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701-706, as a matter of law by maintaining the 2010 regulations that made the important initial allocation of Individual Fishing Quotas ("IFQ") for Pacific whiting (mothership and shoreside sectors) (the "IFQ Regulations") in a manner inconsistent with the standards set forth in the Magnuson-Stevens Act and without a rational connection between the action chosen, the facts found, and the guidance in the Magnuson-Stevens Act and related agency regulations. This Court had previously found the 2010 IFQ Regulations to be in violation of the Magnuson-Stevens Act and the APA.

Specifically, Plaintiffs contend Federal Defendants acted unlawfully as a matter of law in refusing to change the IFQ Regulations to include more recent history reflecting dependence on and participation in the fishery and request summary judgment as to each of the issues below:

1. Making initial allocations of IFQ (a) to approximately 34 permit holders who had no recent participation in the fishery after 2003, contrary to the goal of the Fishery Management Plan (FMP) to reduce capacity in the fishery; (b) without taking into account any of the most recent fishing history of eligible and active permit holders after 2003, which the agency has regularly interpreted as demonstrating dependency in other

[1] Penny Pritzker is substituted for Rebecca Blank as Ms. Pritzker has now become the Secretary of Commerce. Secretary Pritzker is being sued in her official capacity.

IFQ programs; (c) by interpreting and applying the term "dependency" in an arbitrary manner inconsistent with prior agency practice; and (d) providing unreasonable, unsupported, speculative, and arbitrary analysis of the allocation determinations in the new agency record, in violation of the Magnuson-Stevens Act, including 16 U.S.C. §§1853(b)(6) and 1853a(c)(5)(A), and the APA, 5 U.S.C. § 706(a)(A);

2. Failing to properly consider and credit recent processing history after 2004 for dependent, small, and local whiting shoreside processors despite the changes in the markets for the fishery after 2004, in violation of the Magnuson-Stevens Act, including, 16 U.S.C. § §1853(b)(6) and 1853a(c)(5), and the APA, 5 U.S.C. § 706(a)(A);
3. Failing to properly consider efficiency in designing the initial allocation of IFQ in violation of National Standard 5 of the Magnuson-Stevens Act by allocating IFQ to permit holders who had left the fishery, thereby forcing active participants to lease or buy IFQ from these non-participants and decreasing the efficiency of post-IFQ operations, in violation of the Magnuson-Stevens Act, including 16 U.S.C. §1851(a)(5), and the APA, 5 U.S.C. § 706(a)(A) ;
4. Failing to minimize costs for those active in the fishery in designing the initial allocation of IFQ in violation of National Standard 7 of the Magnuson-Stevens Act to require that current participants to lease or purchase IFQ from non-participants who left the fishery in 2003 or before, including 16 U.S.C. §1851(a)(7), and the APA, 5 U.S.C. § 706(a)(A);
5. Failing to take into account the needs of small fishing communities and providing for sustained participation of such communities in the Pacific whiting fishery in violation of National Standard 8 of the Magnuson-Stevens Act, including 16 U.S.C. §1851(a)(8), and the APA, 5 U.S.C. § 706(a)(A); and
6. Implementing regulations that are arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law in violation of the APA, and basing such regulations on analysis which does not track the relevant factors in the Magnuson-Stevens Act but which is designed more like a legal brief attempting to defend the initial allocation through post hoc rationalization.

The Motion is based on this Notice, the accompanying Memorandum of Points and authorities, declarations of Burt Parker, Pierre Marchand, Dennis Rydman, Joseph Hamm and James Walsh, the Administrative Record filed in this case, all other papers filed in this case, and all argument and evidence as may be presented prior to or at the hearing of the Motion.

Respectfully submitted,

DATED: July 29, 2013

DAVIS WRIGHT TREMAINE LLP

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

Attorneys for Plaintiffs

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I. INTRODUCTION AND STATEMENT OF ISSUES

Plaintiffs Pacific Dawn LLC ("Pacific Dawn"), Ocean Gold Seafoods, Inc. ("Ocean Gold"), Chellissa LLC ("Chellissa"), and Jessie's Ilwaco Fish Company ("Jessie's") (collectively, "Plaintiffs") move pursuant to Fed, R. Civ. P. 56(a) for summary judgment on all causes of action alleged in their Complaint for Declaratory and Injunctive Relief (Dkt. No. 1) ("Compl.") against Penny Pritzker, the Secretary of Commerce, the National Oceanic and Atmospheric Administration ("NOAA" or the "agency"), and the National Marine Fisheries Service ("NMFS") (collectively "Federal Defendants"). Plaintiffs challenge regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act" or "Act") that implement an Individual Fishing Quota ("IFQ") program which allocates a limited portion of the year's available catch to permit holders[2] in the Pacific whiting fishery (the "IFQ Program").

In a predecessor case, Plaintiffs Pacific Dawn, Chellissa, and Jessie's challenged the initial allocation of IFQ for Pacific whiting that was based on history years 1994-2003 for harvesters and 1998-2004 for processors as promulgated in 2010 regulations by Federal Defendants (the "2010 IFQ Regulations"). This Court found that the 2010 IFQ Regulations, which created an IFQ system for the management of Pacific whiting, were arbitrary and capricious in that Federal Defendants failed to take into account more recent history years given the listed factors set forth by Congress in the Act. *See Pacific Dawn LLC et al. v. Blank*, No. C10-4829 TEH ("*Pacific Dawn I*"), Order Granting in Part and Denying in Part Plaintiffs' and Defendants' Motions for Summary Judgment, Dec. 22, 2011 (Dkt. 49) ("MSJ Order"). The Court remanded those portions of the 2010 regulations, which involved initial IFQ allocations to harvesting vessels in the shoreside and mothership sectors of the Pacific whiting fishery and to processors in that fishery, for further consideration in light of the MSJ Order and the requirements of the Magnuson-Stevens Act. *Pacific Dawn I*, Order on Remedy, Feb. 21, 2012 (Dkt. 60) ("Remedy Order").

Following "reconsideration" of the initial allocation of IFQ for Pacific whiting, Federal

[2] Under the regulations, the "permit holder" is the owner of a vessel registered to a limited entry permit. NOAA is currently seeking to amend its regulations to clarify the proper use of the term in the regulations. 78 Fed. Reg. 43125, 43128 (July 19, 2013).

Defendants published a final rule on March 28, 2013. Administrative Record ("AR") at AR007569[3] (78 Fed. Reg. 18879 (Mar. 28, 2013) ("Final Rule")). After developing a new Administrative Record and claiming to have reasonably considered all the relevant factors in the Magnuson-Stevens Act, Federal Defendants nevertheless adopted the Final Rule effective April 1, 2013 that allocated quota share based on exactly the same basis as the 2010 IFQ Regulations (the "2013 IFQ Regulations") and again failed to take more recent history beyond 2003 and 2004 into account. *Id.* at AR007570 (78 Fed. Reg. at 18880); 50 C.F.R. § 660.140(d)(8)(iv)(C)(2) and (G). Using the same history, the Final Rule will continue to make IFQ allocations to Pacific whiting harvesters without regard to the history of actual landings by such harvesters after 2003 and to processors without regard to any processing history after 2004. Notably, Federal Defendants admit in the new Administrative Record that, during the reconsideration, NOAA learned that a significant number of permits allocated IFQ under the original regulations had not participated at all in the shore based-based and mothership sectors of Pacific whiting fishery (i.e. landed no Pacific whiting using the permit) after 2003. AR009661 at 9669 (Decision Memorandum Approving the 2013 IFQ Regulations, March 13, 2013 ("Decision Memo") at 9).[4] Despite a regular practice in previous agency-approved IFQ Programs of requiring actual "present or recent" participation in a fishery in order to qualify for an initial allocation of IFQ or limited entry permits, Federal Defendants refused to institute such a requirement even though requested to do so and even though NOAA has more or less consistently interpreted recent history and participation as evidence of dependence on a fishery. Moreover, the underlying fishery management plan contains an Objective (#14) that states: "When considering alternative management measures to resolve an issue, choose the measure that best accomplishes the change with the least disruption of current fishing practices, marketing procedures, and the environment." Sec. 2.1, Pacific Coast Groundfish Fishery Management Plan

[3] Citations to the Administrative Record or "AR" reference documents contained in the Administrative Record lodged by Federal Defendants on May 16, 2013 pursuant to a Notice of Lodging Administrative Record (Dkt. No. 14). For the Court's convenience, cited excerpts of the Administrative Record are attached as Exhibits ("Exhs.") to the Declaration of James Walsh ("Walsh Decl.") accompanying this Motion. A copy of the Final Rule, 78 Fed. Reg. 18879 (March 28, 2013)) (AR007569) is attached as Exh. 1 to the Walsh Decl.

[4] A copy of the Decision Memo is attached as Exh. 2 to Walsh Decl.

for the California, Oregon, and Washington Groundfish Fishery, December 2011 (the "FMP") at 9.[5]

Federal Defendants also refused to alter the initial allocation of IFQ to shore-side processors based on processing history after 2004 even though NOAA included a recent participation requirement for such processors in the original regulations. Under the 2010 IFQ Regulations, NOAA allocated IFQ only to processors "which [have] received deliveries of at least 1 [metric tons] of whiting from whiting trips in each of any two years from 1998 through 2004." 50 C.F.R. § 660.140(d)(8)(iv)(G)(1). Although NOAA learned that marketing practices had significantly changed (i.e. product form went from surimi to blocks and fillets) and greater fishing experience moved north off Washington State from Oregon after 2004 and admitted that the original processor allocations needed to be based on recent participation and dependency, it refused to change the allocation to benefit those smaller processors who are based in communities in Washington State who are most dependent on these new markets. AR009661 at 67-68 (Decision Memo at p. 7-8).

II. STATEMENT OF FACTS

A. The Parties

Plaintiffs are fishing vessel owners and fish processors that participate in the Pacific Groundfish fishery. Both Pacific Dawn and Chellissa are "harvesters" and permit holders for fishing in the Pacific Groundfish fishery, including whiting. Declaration of Burt Parker ("Parker Decl.") at ¶1; Declaration of Joseph Hamm, at ¶1. Both are eligible to receive IFQ and have received allocation under the IFQ Program. Parker Decl. at ¶3; Hamm Decl. at ¶4. Pacific Dawn has participated in the Pacific whiting fishery since the 1980's and has history through today. Parker Decl. at ¶3. Chellissa has fished in the Pacific whiting fishery since 1996 through 2010. Hamm Decl. at ¶2. Neither of their IFQ allocations reflect their more recent fishing history since 2003. Parker Decl. at ¶3; Hamm Decl. at ¶4.

Ocean Gold and Jessie's are both fish processing companies. They are eligible for and have received initial IFQ as processing entities for use in the Pacific Groundfish fishery. Declaration of Dennis Rydman ("Rydman Decl.") at ¶1; Declaration of Pierre Marchand ("Marchand Decl.") at 1,

[5] Excerpts from the FMP are attached as Exh. 3 to Walsh Decl. Plaintiffs respectfully request that the Court take judicial notice of the FMP, which was not included in the Administrative Record.

8. Ocean Gold has depended on the Pacific whiting fishery since 1997. Rydman Decl. at 3. It presently processes substantial amounts of whiting from the fishery, although its production has fallen since the rationalization. *Id*. at ¶6. Jessie's, which also processes a significant amount of whiting from the fishery, received a quota share does not reflect its more recent history of processing after 2004, to the present, which includes 14 million pounds in 2005, 18 million pounds in 2006, 9 million pounds in 2007, and over 6 million pounds in 2008. Marchand Decl. at ¶4, 8.

None of the Plaintiffs can be considered speculators who entered the Pacific whiting fishery after a "control date" was announced in 2003/2004 by adding harvesting or processing capacity to the fishery. *See e.g.*, Parker Decl. at ¶2, 4; Marchand Decl. at ¶4; and Rydman Decl. at ¶5. Each simply continued in the Pacific whiting business they each had been in, and were dependent upon, and responded to market opportunities and the availability of the overall quota for Pacific whiting. Hamm Decl. at ¶2, 7; Parker Decl. at ¶3, 6; Rydman Decl. at ¶3-4; and Marchand Decl. at ¶8.

Defendant Penny Pritzker, the Secretary of the U.S. Department of Commerce, has responsibility under the Magnuson-Stevens Act for approving fishery management plans and promulgating related regulations, including the IFQ Program. NOAA, a subunit of the Department of Commerce has supervisory responsibility over NMFS. NMFS is the federal agency that administers the fishery management plans for the Pacific Coast Groundfish Fishery, including whiting, of which the IFQ Program is a part. In addition, the Magnuson-Stevens Act creates regional councils, in this case the Pacific Fishery Management Council (the "Council"), to assist in developing fishery management plans and regulations. 16 U.S.C. § 1852(a). But a council does not possess final statutory decision-making authority and therefore cannot be sued directly. *Id*. at § 1852(h); 50 C.F.R. § 600.305(a)(2).

B. Applicable Provisions of the Magnuson-Stevens Act

1. Initial Allocation of IFQ: Statutory Standards

Congress has specified standards for adoption of fishery management plans and implementing regulations that establish a limited access system. 16 U.S.C. § 1853. As stated in the statute, these standards have characteristics that are both procedural and substantive. The first provision is found in the section dealing with discretionary provisions for a fishery management

plan. *Id*. at § 1853(b)(6). There are eight categories of factors which the Council or the Secretary of Commerce must "take into account:" present participation in the fishery; historical fishing practices in, and dependence on the fishery; the economics of the fishery; the capability of fishing vessels used in the fishery to engage in other fisheries; the cultural and social framework relevant to the fishery and any affected fishing communities; the fair and equitable distribution of access privileges in the fishery; and any other relevant consideration. *Id*. In addition, a new provision was added in 2007 addressing limited access privilege programs in particular, including a subsection that addresses the initial allocation of such privileges, such as the quota shares at issue in this case. *Id*. at § 1853a(c)(5). The provisions relevant here instruct Federal Defendants to:

> (A) establish procedures to ensure fair and equitable initial allocations, including consideration of —
>
> (i) current and historical harvests;
>
> (ii) employment in the harvesting and processing sectors;
>
> (iii) investments in, and dependence upon, the fishery; and
>
> (iv) the current and historical participation of fishing communities;… [and]
>
> (B) consider the basic cultural and social framework of the fishery, especially through --
>
> (i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on fisheries, including regional or port-specific landing or delivery requirements; and
>
> (ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;…. 16 U.S.C. §§ 1853a(c)(5).

Under the IFQ Regulations for Pacific whiting, a permit holder, once given IFQ, may either use the permit and IFQ to harvest whiting using a qualified vessel or that permit holder may lease the IFQ to another qualified permit holder who catches the fish. After two years, anyone with IFQ may sell it to the highest bidder, subject to limits on the amount a single entity can hold. *See* 50 C.F.R. § 660.140(d)(3)(ii)(B)(2); AR007569 at 85 (78 Fed. Reg. 18879, 18895). Explained another way, under an IFQ program, a permit holder who uses his or her own IFQ to catch fish has no fishing entry expense other than the cost of operating the vessel or maintaining a federal license. However, a permit holder who has to lease or buy IFQ, for example, to fish at a successful level would take on added leasing and purchase costs that did not exist prior to creation of IFQs. The cost of leasing or purchasing IFQ, depending on the fishery, can be quite substantial and significant to a participant's business. *See e.g.*, Rydman Decl. at ¶9. The Pacific whiting fishery is the most

valuable groundfish fishery on the West Coast. Thus, the initial allocation of IFQ is a very important government allocation crossroads for which Congress mandated careful consideration by including strict procedural and substantive conditions on the creation of IFQ Programs and initial allocation of IFQs.

2. National Standards: Statutory Guidance

The Magnuson-Stevens Act contains ten national standards which provide a framework of principles that should guide the preparation of fishery management plans, such as plan Amendments 20 and 21 being implemented through agency regulations in this case. 16 U.S.C. § 1851(a). Under the Act, the agency also has established "advisory guidelines (which do not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans" (the "Guidelines"). *Id*. at § 1851(b). NOAA has published the regulatory Guidelines called for under the Act to assist in applying the national standard to particular issues. *See* 50 C.F.R. § 600.305 *et seq*. Fishery management plans must be consistent with the National Standards and reasonably take into account NOAA's Guidelines. 16 U.S.C. § 1851(a); 50 C.F.R. 600.305(a)(3). The National Standards and related Guidelines implicated in this case are the following:

National Standard 4: Management and conservation measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among fishermen, such allocation must be fair and equitable, reasonably calculated to promote conservation, and cannot give any entity an excessive share. 16 U.S.C. § 1851(a)(4); 50 C.F.R. § 600.325(a)(1). The following test applies where, as here, the 2013 IFQ Regulations allocate IFQ (1) between permit holders who did not engage in the fishery after 2003 and those who remained active after that date through 2010; (2) between permits holders based on historical harvests prior to 2003 and not the entire history of harvests through 2010; and (3) between processors based on processing history before 2004 and not the entire history of processing through 2010:

> (i) *Fairness and Equity.*
>
> (A) An allocation of fishing privileges should be rationally connected to the achievement of OY [optimum yield] or the furtherance of legitimate FMP [fishery management plan] goals. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in the terms of the objectives of the FMP; otherwise, disadvantaged user

> groups would suffer without cause. For example, an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of longtime participants in the fishery…
>
> (B) An allocation may impose a hardship on one group if it is outweighed by the total benefit received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as "fair and equitable," if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with alternative allocation schemes, including the status quo…
>
> (iv) *Other factors.* In designing an allocation scheme, a Council should consider other factors relevant to FMP's objectives. Examples are economic and social consequences of the scheme, food production, consumer interest, dependence on the fishery of present participants and coastal communities, efficiency of various types of gear used in the fishery, transferability of effort to and impact on other fisheries, opportunity for new participants to enter the fishery, and enhancement of opportunities for recreational fishing. 50 C.F.R. §600.352(c)(3)(i), (iv).

National Standard 5: Under National Standard 5, "[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." 16 U.S.C. § 1851(a)(5). The Guidelines related to National Standard 5 emphasize the importance of considering efficiency when designing an FMP. 50 C.F.R. § 600.330(b). Under the Guidelines, efficiency is considered to be the full range of economic inputs required to harvest fish, including labor, capital, interest and fuel. *Id*. at § 600.330(b)(2). The Guidelines state: "Given a set of objectives [such as the efficiency of operation under an IFQ Program, a stated objective of Amendment 20], an FMP should contain management measures that result in as efficient a fishery as is practicable or desirable." *Id*. at § 600.330(b)(1), (2). Also, an FMP "should demonstrate that management measures aimed at efficiency do not simply redistribute gains and burdens without an increase in efficiency. *Id*. Efficiency is implicated here because the creation of IFQ, a transferable fishing privilege, allows for lease or sale to other qualified permit holders. For those whose initial IFQ allocation was below recent harvest experience, the lease or purchase of additional IFQ may be necessary to support their operations, which creates a new cost of doing business.

National Standard 7: National Standard 7 provides that "conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C.

§ 1851(a)(7). IFQ programs create new costs of operation that did not exist previously, namely the added cost of leasing or buying IFQ. The Guidelines state that management measures should not, however, impose unnecessary burdens on individual fishing operations. 50 C.F.R. § 600.340(c). The effects of redistributing the burden of additional costs from one sector to another, such as requiring recent and continuing permit holders in the Pacific whiting to pay IFQ leasing and purchase costs to those who received IFQ despite having little or no participation in the fishery after 2003, harms those who actively participate in and depend on the fishery by increasing their costs of doing business. *Id*. at § 600.340(c), (d); *see* Hamm Decl. at ¶7; Marchand Decl. at ¶9; Parker Decl. at ¶8; and Rydman Decl. at ¶9-10.

National Standard 8: Conservation and management measures under National Standard 8 shall "take into account the importance of fishery resources to fishing communities" in order to provide for sustained participation or those communities and to minimize the adverse economic impacts on such communities. 16 U.S.C. § 1851(a)(8). Ilwaco and Westport, Washington are communities that meet the definition of "fishing community" in NOAA Guidelines. 50 C.F.R. § 600.345(b)(3). The Guidelines for National Standard 8 contemplate close analysis where an allocation system benefits one community over another, as occurred here. The goal is to then structure the allocation system to minimize those impacts. *Id*. at § 600.345(a)(2).

C. Overview of the Council Process

The regulatory process under the Magnuson-Stevens Act begins with consideration of the overall management issues in a particular fishery by unique advisory bodies, called regional fishery management councils, which are tasked to develop fishery management plans from the "bottom-up" that must adhere to the conservation and management directives in the Magnuson-Stevens Act, and other applicable law. 16 U.S.C. § 1852. The regional councils then submit proposed FMPs, or amendments thereto, to NOAA for review. 16 U.S.C. §§ 1852(h), 1853(c), and 1854(a)-(b). NOAA may either approve, disapprove or partially approve the proposals from the councils based on the requirements of the Magnuson-Stevens Act and other applicable law. 16 U.S.C. §§ 1854(a) (NOAA to review and determine consistency with Magnuson-Stevens Act and other applicable law). If NOAA approves a plan, it then moves on to the rulemaking stage. 16 U.S.C. §§ 1854(b).

Once NOAA issues final regulations implementing a fishery management plan, such regulations are subject to judicial review, if review is requested within 30 days of publication of the final rule. 16 U.S.C. §§ 1855(f).; *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1112-16 (9th Cir. 2006).

Federal Defendants may not simply defer to the Council when reviewing a proposed plan or approach, such as in allocating IFQs, and must conduct an independent review of whether the allocation complies with the Magnuson-Stevens Act provisions and standards. *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D.D.C. 2012) (the Act gives NOAA final responsibility for ensuring any fishery management plan is consistent with the Act's National Standards, and the overall objectives of the law). Moreover, agency decisions in this regard cannot be made on the basis of pure political compromise. *Midwater Trawlers Coop. v. Department of Commerce*, 282 F.3d 710, 720-21 (9th Cir. 2004) (remanding NMFS regulations where the court found that "the rule was a product of pure political compromise, not reasoned scientific endeavor" as required under the Act.); *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346 (D. R.I. 2003) ("hallway compromise" between New York and New Jersey vessel factions could not be the proper basis for allocation of harvest permit privileges); *see* Marchand Decl. at ¶7; Parker Decl. at ¶5. A regulation must therefore be based on an analysis that rationally concludes, and explains clearly, that a particular allocation meets the objectives and standards of the Magnuson-Stevens Act. *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1061-62 (W.D. Wash. 2008) (NOAA regulations impermissible in light of the statutory language and purpose and are not supported by a rational basis); *Fishing Co. of Alaska v. United States*, 195 F. Supp. 2d, 1239, 1248 (W.D. Wash. 2002).

D. The 2010 IFQ Regulations: Approved Again Without Change in 2013

In 2010, the Council recommended to NMFS that it allocate IFQ for Pacific whiting to current permit holders based on their fishing history from 1994 to 2003 for harvesters and from 1998 to 2004 for processors. NMFS issued the final rules adopting the Council's recommendations and implementing Amendments 20 and 21 for the IFQ program beginning on January 1, 2011. 75 Fed. Reg. 60868 (Oct. 1, 2010). The 2010 IFQ Regulations contained standards and procedures for issuance of permits and initial allocations of IFQ (based on a catch history possessed by current permit holders), among other provisions. *Id.* The allocation formulas are based on vessel landings

for the trawl vessel sector or processor receipt history for the shoreside sector. The 2010 IFQ Regulations allocated 80 percent of the Pacific whiting IFQ to current vessel permit holders and 20 percent of the shoreside harvest allocation to shoreside processors. *Id*. at 60874.

Upon remand, Federal Defendants adopted the status quo by implementing the 2013 IFQ Regulations which maintain exactly the same initial allocation of quota shares based on the same qualifying period as the 2010 IFQ Regulations. AR007569 at 70 (78 Fed. Reg. 18879, 18880). Federal Defendants refused to take more recent history beyond 2003 for harvesters and 2004 for processors into account and failed to provide a rational explanation for the failure to do so. Moreover, no recent participation requirement was adopted for harvesters, in contrast to that adopted for processors, which enabled at least 35 permits to receive IFQ even though they were not used in the Pacific whiting fishery after 2003. AR009661 at 69 (Decision Memo at p. 9). These permits are sometimes referred to as "latent permits" because they can be used to bring additional fishing capacity back into the fishery at any time.

Just as under the 2010 IFQ Regulations, a fishing vessel must qualify under the prior limited entry permit system for Pacific whiting to obtain IFQ. Under the 2013 IFQ Regulations, if the vessel is properly permitted, a quantity of IFQ is allocated to the permit holder for the vessel based on relative catch history between the years 1994 and 2003, but not its more recent catch history in the years after 2003. This initial IFQ allocation entitles the vessel to catch a percentage of the total amount of Pacific whiting available each year for harvest, an annual harvest quota that is based on conservation principles fundamental to the Magnuson-Stevens Act management program. In addition, IFQ was initially allocated to processing plants located onshore that have a history of processing Pacific whiting in the past, between 1998 and 2004, but, again, not the more recent processing history after 2004. Only entities that possess the proper permits and IFQ allocations may engage in the fishery or process fish from the fishery.

E. The Pacific Whiting Fishery

Although sometimes lumped together with other Pacific Groundfish Fisheries, the Pacific whiting fishery has been separately managed because of its unique components and biological

features. According to NMFS, Pacific whiting is the most abundant fish stock on the Pacific Coast.[6] In 2011, fish landings of Pacific whiting were valued at approximately $53 million. 78 Fed. Reg. 14259, 14261 (May 5, 2013). The fish require unique treatment because of an enzyme that causes the flesh to deteriorate upon being caught, so rapid processing at sea or onshore is critical to the success of this fishery. The fishery is also shared with Canada, because of its migratory nature moving south to north along the coast, and a treaty is in place calling for international joint management of the fishery. Marchand Decl. at ¶5. Pacific whiting are also subject to a catch-sharing treaty with Indian tribes in the United States. 78 Fed. Reg. 14259. Typically the whiting fishing season begins in April each year and ends once the annual quota for each sector is taken, which usually occurs in the fall. 50 C.F.R. § 660.131(b)(2)(iii).

Each year, NMFS issues a volumetric quota for the fishery, split into three sectors: (1) catcher-processors (large vessels that catch and process their own fish at sea), which operates as a cooperative; (2) harvest vessels that serve motherships (which only process fish at sea); and (3) harvest vessels that deliver their fish to shore-side processors. 50 C.F.R. § 660.131(a). Only vessels with limited entry permits and endorsements for the Pacific whiting fishery may engage in the fishery, due to the adoption of Amendment 15 to the FMP. *See* 74 Fed. Reg. 10189 (Mar. 10, 2009). Each sector is allocated a portion of the annual quota and that sector is closed once the section allocation is reached: catcher-processors --- 34 percent; mothership sector --- 24 percent; and shoreside sector --- 42 percent. AR003035 at 79 (Environmental Assessment and Magnuson-Stevens Act Analysis, March 2013 (the "EA") at p. 40)[7]; 50 C.F.R. § 660.55(i)(2). In addition, each sector is allocated specific bycatch limits for overfished species. 50 C.F.R. § 660.131(c)(4). Once a bycatch limit is reached, the sector is closed. *Id*. Accordingly, the allocation of IFQ, including bycatch IFQ, to each sector is highly significant to those who participate in each sector.

In 2002, NOAA declared the Pacific whiting fishery "overfished." Prior to that date, the Council had begun work on a plan to reduce the number of fishing vessels in the overall groundfish fisheries (90 different species), including Pacific whiting, due to overcapitalization, meaning the

[6] *See Pacific whiting*, NOAA http://www.nwr.noaa.gov/fisheries/management/whiting/pacific_whiting.html.

[7] Excerpts from the EA are attached as Exh. 6 to Walsh Decl.

number of permits that had been issued allowed for far more fishing vessel harvest capacity than necessary to catch each year's quota. AR003035 at 79 (EA at p. 40). A buy-back program was implemented in 2003 to provide government funds for purchasing "surplus" vessels from those who held permits but who wanted to exit the fisheries, which began to reduce overcapacity. *Id*. The buy-back program is paid for by an annual levy on those who remained in the fishery. 68 Fed. Reg. 42613 (July 18, 2003). Further specific restrictions were placed on the Pacific whiting fishery in 2007, prohibiting any vessel from participating that did not have a history of sector-specific participation in the fishery, to further limit the "race for fish." The Council proposed a "historic participation requirement, meaning a vessel had to land some Pacific whiting in any one qualifying year: 1994-2006 for the shoreside section; and 1997-2006 for the mothership and catcher-processor sectors. AR003035 at 79 (EA at p. 40). Permanent regulations then became effective in 2009. 74 Fed. Reg. 10189, 10189-94 (Mar. 10, 2009) (Final Rule Implementing Amendment 15); 50 C.F.R. § 660.336. Thus, late-arriving speculators were barred from the fishery temporarily in 2007 and then permanently in 2009. *Id*. Only committed participants with "historic participation" were allowed to operate in the fishery as of 2010, when NOAA approved and implemented the IFQ Program.

In 2004, just two years after the overfishing declaration, NOAA declared that the Pacific whiting fishery was no longer overfished. AR0003035 at 79 (EA at p. 40). Since 2004, the Pacific whiting fishery has been well managed and, since 2001, the total harvests have been below established quotas.[8] Harvest levels significantly increased starting in 2003 and doubled by 2005 and 2006, then dropped in 2009 before increasing again through 2011. *Id*. at AR003082 (EA at p. 43). As a consequence, those who remained committed to the fishery after 2003 saw their fishing histories increase yearly because of greater stock availability.

F. Injury to Plaintiffs

For Plaintiffs, the initial allocation of IFQ that was below the level of operations conducted during the period 2003 to 2010 has led to a reduced ability to obtain Pacific whiting without paying leasing costs or purchasing additional IFQ when available. *See* Rydman Decl. at ¶9-10; Hamm

[8] *See* AR016266 at 16269 attached as Exh. 1 to Parker Decl. (Comments submitted by James Walsh on behalf of Plaintiffs, January 30, 2013 at p. 5 citing NMFS: Status of Pacific Hake (Whiting) stock in U.S. and Canadian Waters in 2012 (Feb. 29, 2012)).

Decl. at ¶4; Parker Decl. at ¶8; and Marchand Decl. at ¶8. Plaintiffs' overall history, and, as a result their quota share, would have increased significantly had Federal Defendants properly considered their dependence on the fishery. *See e.g.*, Parker Decl. at ¶6; Marchand Decl. at ¶8; Hamm Decl. at ¶6; and Rydman Decl. at ¶9. As a consequence, after the issuance of the 2010 IFQ Regulations and the 20130 IFQ Regulations, each Plaintiff's Pacific whiting fishing or processing operations became more costly and less efficient. Parker Dec. at ¶8; Hamm Decl. at ¶7; Marchand Decl. at ¶8. Plaintiffs contend that Congress did not intend an initial allocation of IFQ to give retirement income to those who were not active in or committed to the Pacific whiting fishery and to have that income paid for by those remaining in the fishery. *See e.g.*, Parker Decl. at ¶3-4; Marchand Decl. at ¶6.

III. ARGUMENT

A. Standard of Review

This administrative review case will be resolved on cross-motions for summary judgment based on the Administrative Record. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). Summary judgment should be granted when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). Under the APA, a court may set aside NOAA's regulations if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2); *Oregon Trollers Ass'n v. Guitierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006). *See also* 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1855(f)(1)(B). Summary judgment, based on the administrative record, is particularly appropriate to determine a "legal question of whether the agency could reasonably have found the facts as it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). If Federal Defendants failed to consider the relevant factors under the Act and articulate a rational basis for the initial allocation of IFQ, the IFQ Regulations are arbitrary and capricious and should be set aside. *See Midwater Trawlers Coop. v. Department of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

B. The failure to take into account recent participation and fishing history after 2003 in the initial allocation of IFQs is inconsistent with the standards of the Magnuson-Stevens Act

As the Court knows, in allocating IFQ to harvesters in the shoreside and mothership sectors of the Pacific whiting fishery, the 2010 IFQ Regulations limited the fishing history years to 1994-

2003. Following reconsideration of this issue, the agency rubber-stamped the Council's recommendation not to change the history years, rejecting alternatives that would have incorporated fishing and processing history through 2010 in the allocation formula. *See* AR009661-90 (Decision Memo); AR007569-86 (78 Fed. Reg. 18879, 11879-96). Just as significantly, during the reconsideration, it came to the agency's attention that significant amounts of IFQ had been allocated to permit holders who had no actual participation in the fishery after 2003, i.e. the permit was not used to catch and land a single Pacific whiting. As noted in the Decision Memorandum signed by the Acting Director of the NMFS: "approximately 10.2 percent of quota allocated to 20 shore-based harvesting permits and 9.6 percent of quota allocated to 14 mothership permits that had no whiting landings post 2003." AR009661 at 69 (Decision Memo at p. 9).

The Magnuson-Stevens Act requires the agency to take into account recent participation in "the" fishery, i.e. the Pacific whiting fishery and its individual sectors. 16 U.S.C. § 1853(b)(6). Yet, in Amendment 20 to the Pacific Groundfish FMP, the agency offered the following rationale for not using recent participation in the initial allocation:

> While a recent participation requirement might be considered reasonable and responsive to MSA direction to consider current and historic participation and to consider investment and dependence, the likely impacts on the initial QS allocation appear to be minimal with respect to their impact on the landing history based portion of the allocation. AR000001 at 882 (Final Environmental Impact Statement, June 2010 ("Final EIS"), Appendix A: IFQ Program Components, Sec. A-2.1.2 "Recent Participation" at A-119).[9]

In contrast, the Final Regulatory Flexibility Analysis ("FRFA") that accompanied NOAA's 2013 decision documents found that, if the allocation was based on the ending year 2010 ("Alternative 4"), IFQ worth $3.7 million (based on the recent price of fish), or 17 percent of the quota, would be transferred away from "status quo" permit holders (i.e., the allocation under the 2010 IFQ Regulations) and distributed to those with greater history in the shore-based fishery. AR003417 at 29 (FRFA at p. 29).[10] For the mothership sector, use of the 2010 year in Alternative 4 would transfer $2 million worth of IFQ to permit holders with later history. *Id*. at AR003430

[9] Excerpts from the Final EIS are attached as Exh. 4 to Walsh Decl.
[10] A copy of the FRFA is attached as Exh. 7 to Walsh Decl.

(FRFA at p. 14). These totals underestimate the amounts because applying a recent participation requirement (e.g. had to land one ton of Pacific whiting in any year after 2003) would no doubt increase the transfer by eliminating a number of permits (20 in the shore-based fishery holding 10.2 percent of the quota; 14 permits holding 9.6 percent of the quota for the mothership sector) from being eligible for any IFQ, regardless of the fishing history associated with those permits prior to 2003. AR00661 at 69 (Decision Memo at p. 9). Therefore, instituting a recent participation requirement and applying later history would eliminate IFQ eligibility for 34 permits and would result in a major (not minimal) shift in IFQ allocations, contradicting the assessment found in Amendment 20, above. For each Plaintiff, the shift would be significant to their business. Parker Decl. at ¶8; Marchand Decl. at ¶9; Hamm Decl. at ¶7; and Rydman Decl. at ¶9-10.

NOAA included a recent participation requirement for processors to be eligible to receive IFQ. AR003035 at 64 (EA, Sec. 2.1.2 at p. 25); 50 C.F.R. § 660.140(d)(8)(iv)(G)(1). To be eligible, a processor must have received at least one metric ton of Pacific whiting in any two years from 1998 through 2004. *Id*. During reconsideration of the IFQ allocation, the Council adjusted this requirement for each of the four options, maintaining the requirement for "recent" participation, depending on the dates of the history consideration. For example, if the history years were 2000 to 2010, the recent participation period would be 2004 through 2010. *Id*. This requirement was included in the original 2010 IFQ Regulations because of the issues of "dependency and involvement" and it substantially reduced the number of those who could apply for IFQ. AR000001 at 891 (Final EIS, Sec. A-2.1.2.c "Processors (Shoreside)" at A-128).

Federal Defendants' exact justification for not requiring a recent participation requirement for harvesters that is at least contemporaneous with the year in which the IFQ Program was instituted is decidedly arbitrary and inconsistent. *See*, *id*. at AR0000882 (Final EIS at A-119) ("…it was determined that the harvest history of the vessels that would be screened out by a recent participation requirement was not significant enough to warrant the costs of developing and implementing the provision and the resistance likely to be encountered by those screened out"). NOAA's discussion of this issue in its decision documents does not comport with the framework of analysis set forth in the Act or its own Guidelines or practices, including with respect to the original

analysis in, and the objectives of, Amendment 20. NOAA now states that the initial allocation of IFQ to permit holders reflects their "historic participation" (albeit pre-2003) and "current permit investment" but not actual permit use. AR007569 at 74 (78 Fed. Reg. 18879, 18884).

This is a different formulation of the concept of "dependence" than it has applied before, including in Amendment 20. No balancing analysis of benefits is evident between those who receive IFQ for non-participation and those who are active but lose IFQ because of the allocation to non-participants and participants with less history. Consideration of a variety of statutory factors that intersect on this point is mandatory and Congress did not intend that they be "looked at" and then ignored. Moreover, giving IFQ to those who, by their objective actions, do not participate in the fishery and do not appear to be dependent on the Pacific whiting fishery is unfair and makes no sense because it increases IFQ leasing and purchase costs to other participants and disadvantages their operations going forward by significant individual amounts. Moreover, instead of achieving the FMP objective of reducing capacity in the fishery, allocating IFQ to non-participating permit holders encourages their reentry into the fishery, thereby allowing capacity that had left the fishery to return, contrary to the goal of Amendment 20 to reduce capacity in the fishery. AR002000 at 03 (Amendment 20 (August 2010), Sec. 6.9.3.1 at p.4)[11] ("The program is intended to reduce fishery capacity, minimize bycatch, and meet other goals of the FMP").

Federal Defendants' failure to take dependence on the fishery into account also is inconsistent with NOAA's practices in other fisheries. For example, NOAA took into account the historical and recent dependence on the Pacific cod fishery when it cut off the qualifying period one year before implementing license qualification regulations. *Yakutat, Inc. v. Guitierrez*, 407 F.3d 1054 (9th Cir. 2005). In *Yakutat*, the Ninth Circuit upheld a NOAA decision to exclude 1999 from a four-year qualifying period for allocating licenses in the Pacific cod fishery *Id*. NOAA had implemented a licensing program in 2000 based on fishing history between 1995 and 1998. *Id*. at 1063. Under the program, the agencies allocated licenses to boats that caught a certain amount of fish in any two years between 1995 and 1998. *Id*. at 1057. The owner of the F/V Blue North, which had caught fish only in 1997 and 1999, challenged the program on the grounds that the

[11] Excerpts from Amendment 20 are attached as Exh. 5 to Walsh Decl.

exclusion of 1999 from the qualifying period violated the Magnuson-Stevens Act by not taking recent participation into account. *Id*. at 1068-69.

The Court noted that the purpose of a limited entry program is to "protect fishermen with past dependence on and recent participation in the fisheries." *Id*. at 1061. The program would deny a permit (and any fishing privileges) to those who might hold a license for Pacific cod but "who [had] not participated at a level that could constitute significant dependence on those fisheries." *Id*. at 1062. However, the agencies approved these years knowing that the program would decrease the number of participants in the fishery "to ensure the vessels in the sector that had historical and consistent participation . . . would be allowed to continue to participate at a level that reflected what the Council determined to be economic dependence." *Id*. at 1065.

NOAA also considered dependence of those active in the halibut and sablefish fishery when initially allocating quota shares to those participants. *Alliance Against IFQs v. Brown*, 84 F.3d 343 (9th Cir. 1996). In *Alliance Against IFQs*, NOAA gave quota shares only to those permit holders who owned or leased vessels and landed sablefish in 1988, 1989, and 1990. *Id*. at 345. In 1990, the council began working on the FMP, which NOAA approved in 1993. *Id*. at 346-347. The council chose those years because it found that actual participation should reflect both dependency and capital investment and not business decisions by those who decided to exit the fisheries. *Id*. at 348-349 ("The motive for making a particular allocation should be justified in terms of the [FMP]; otherwise, the disadvantaged user groups or individuals would suffer without cause….")

Unlike their regular practice in other fisheries, Federal Defendants adopted regulations that did not: (1) take into account recent participation in the Pacific whiting fishery or articulate a reasonable basis for giving IFQ to non-participants and disfavoring those who objectively demonstrated their dependence on the fishery; and (2) take into account relevant fishing history after 2003 that also demonstrated greater dependence on the fishery than those with less history.

C. NOAA's interpretation of the term "dependence" and application of statutory factors to the issues with respect to harvesters is arbitrary, inconsistent with agency practice, and lacks substantial evidentiary support

Summary judgment as to Plaintiffs' First Cause of Action is appropriate because Federal Defendants violated the Act as a matter of law by failing to properly consider and credit fishing

history after 2003 in favor of permit-holders with little to no dependence on the fishery at the expense of harvesters who presently participate in and depend on the fishery for their livelihood. Compl. at ¶¶ 32-34. In the discussion of the Final Rule, NOAA attempts to find a basis for allocating IFQ to permit-holders that were not active in the Pacific whiting fishery, after first admitting that "quota was allocated to some permits that did not actively participate by harvesting or landing whiting in the whiting fishery in the years between 2004 and 2010." AR007569 at 73-75 (78 Fed. Reg. 18879, 18883). The agency uses classic sophistry to argue that the impact is de minimis, contrary to the record evidence with regard to the Pacific whiting fishery.

First, NOAA claims that operators in this fishery have some unique "portfolio" of permits (including for other fisheries or sectors) that somehow transcends the objective fact of non-participation and, with it, evidence of non-dependence. *Id*. at 7573 (78 Fed. Reg. 18879, 18883). No real evidence of what this "portfolio" analysis is based on was discussed or cited and it appears to be the figment of some NOAA employee's imagination. Moreover, the discussion does not track at all the analysis factors set forth in the statute or the National Standards or Guidelines. Specifically, the Guidelines require NOAA, in considering "fairness and equity" to weigh the pros and cons between those who are given IFQ and those who are disadvantaged. 50 C.F.R. § 600.325(c)(3)(i). NOAA clearly is attempting to protect these "portfolio" non-participants for some reason not found in the statute, in particular by focusing on investment in "the permit," which is a fishing privilege subject to revocation without compensation at any time. The discussion did not compare this kind of "investment" to the investment in (and associated risks of) actual fishing operations by active participants. Moreover, each of those permit-holders who remained active in the fishery held that same "permit" investment (if it can be called that), plus added value to the economy and local communities by actually using the permit to produce something.

Second, NOAA's failure to choose a management measure alternative that considered more recent history runs afoul of FMP Objective 14. Objective 14 provides that "[w]hen considering alternative management measures to resolve an issue, choose the measure that best accomplishes the change with the least disruption of current domestic fishing practices, marketing procedures, and the environment." Walsh Decl. Exh. 3 (Sec. 2.1, FMP at p. 9). Indeed, allocating IFQ that is not

based on present participation disrupts "current…fishing practices" because it provides less IFQ to those who actively fish and process in the fishery and causes them to either reduce their operations or buy or lease additional IFQ. Rydman Decl. at ¶9; Hamm Decl. at ¶7; Marchand Decl. at ¶9 and Parker Decl. at ¶8. NOAA's claim that maintaining the 2011 allocations in the 2013 IFQ Regulations is "fair and equitable" because "maintaining status quo would have the least disruption to the current 2013 fishery…" is based on an incorrect premise. AR009661 at 83 (Decision Memo at p. 23). The 2013 IFQ Regulations adopt the same history years that NOAA unlawfully adopted in 2011, when it first implemented the IFQ Program. NOAA's focus should have been on avoiding disruption to the fishing practices in 2011 as directed by the FMP.

Third, the Act's limited access privilege provisions are quite clear: the analysis must focus on "the fishery" and not other fisheries. 16 U.S.C. §§ 1853(b)(6) (repeated use of the term "the fishery") and 1853a(c)(5) (similar use of the term "the fishery"). NOAA, however, defined this dependent "portfolio" permit activity to include those operating in other fisheries who simultaneously hold more than one permit for the whiting fishery but use only one and hold permits as "investments." AR009661 at 69-70 (Decision Memo at p. 9-10). Using this never before applied "portfolio" analysis as a basis for IFQ allocations is inconsistent with the explicit words of the statute that focus on "*the* fishery" and emphasize "investments in, and dependence on "*the* fishery" and not other fisheries.

Fourth, without citing any basis in the statute, NOAA has placed inordinate emphasis on the "control dates" published at the beginning of the regulatory process. AR007569 at 79 (78 Fed. Reg. 18879, 18889). Yet, a control date is not a regulation and is merely notice. *See e.g.*, 78 Fed. Reg. 17340 at 17341 ("notification [of a control date] is intended to promote awareness…and to provide notice to the public that any current or future accumulation of fishing privilege interests…may be affected, restricted, or even nullified…."). No one can reasonably rely on a control date, as the agency appears to believe is appropriate here. *Id.* ("establishment of a control date does not obligate the Council to use this control date or take any action or prevent the Council from selecting another control date or imposing limits on permits acquired prior to the control date."). In fact, the agency has rewarded those who left the fishery on speculation that, regardless of any fishing

activity after 2003, they would not only receive IFQ but also be able to lease or sell it to active participants. Rewarding speculative behavior that anticipates regulatory change before a regulation becomes law is objectively unfair to those who pursued their fishing livelihoods in the fishery after 2003 by and contrary to the goals of Amendment 20 and the intent of Congress.

Finally, application of the term "dependence" is directly inconsistent with how the agency has interpreted and applied the term in other limited access programs, notably the programs discussed above in the *Yakutat* and *Alliance Against IFQs* cases. *See* Sec. III(B) above. The agency has consistently found that, in general, greater history and active recent participation reflect dependence on a particular fishery. *See e.g., Yakutat, Inc. v. Guitierrez*, 407 F.3d 1054 (9th Cir. 2005); *Alliance Against IFQs v. Brown*, 84 F.3d 343 (9th Cir. 1996). NOAA even included a recent participation requirement for IFQ allocations to processors for this fishery, using a similar concept. *See e.g.*, AR003035 at 64 (EA, Sec. 2.1.2 at p. 25). Why the agency suddenly changed its practice to defend allocations in the Pacific whiting to those with no active recent participation and less fishing history was not explained on any reasonable basis consistent with the objectives of the Act.

D. NOAA's failure to properly consider and credit recent processing history after 2004 for dependent, small, and local shoreside processors despite the changes in the markets for the fishery after 2004, violates the Magnuson-Stevens Act

Plaintiffs are entitled to summary judgment as to their Second Cause of Action because Federal Defendants failed to take into account the local processors' active participation in the Pacific whiting fishery after 2004. Compl. at ¶¶35-37. Similar to the impact on harvesters, the adoption of the 2013 IFQ Regulations harms processors who have not left the fishery but rather invested in it and supported it over the years. For reasons described above in Section III(C) relating to harvesters, NOAA's interpretation of the term "dependence" also fails with respect to processors.

Moreover, the 2013 IFQ Regulations blatantly ignore the economic realities of the Pacific whiting fishery and improperly fail to take into account the processors' dependence on it. 16 U.S.C. § 1853(b)(6)(C). The changes in the Pacific whiting fishery are reflected in the increased investments by processors who currently participate in the fishery. Over the last ten years, the Pacific whiting fishery has experienced dramatic changes and become one of the best managed fisheries in the nation, if not the world. The changes are the result of the enhanced diversification

of product forms, development of new international markets for whiting products, entry of new processors into the market, and increased ex vessel prices, for example. *See e.g.*, Parker Decl. at ¶7; Rydman Decl. at ¶4-5. The overall economic stability and value of the fishery has improved for a greater number of participants. At the same time, the fishery has recovered from its overfished status. *See e.g.*, AR003035 at 79 (EA, Sec. 3.3.1.2 at p. 40). In addition, the agency admits that "whiting landings have been shifting northward in recent years (due to fish availability and investments in ports."). AR007569 at 71 (78 Fed. Reg. 18879, 18881). Under Alternative 4, eight percent of the overall quota would be shifted north to Plaintiffs, or two percent of the processor quota and six percent of the harvester quota. *Id*. Moreover, the agency agrees "that northern processors may have a greater opportunity to process larger and higher quality fish." *Id*.

The 2013 IFQ Regulations do not take the processors' support of the fishery into account in violation of the Magnuson-Stevens Act. 16 U.S.C. § 1853(b)(6)(C) and (E). Processors, like Ocean Gold and Jessie's, who presently participate in the fishery have contributed to the improvements in the fishery over the years and have done so to support the fishery on which they are dependent for their livelihoods. *See e.g.*, Marchand Decl. at ¶2-4. Processors who are active in the fishery have spent significant capital to upgrade and expand their processing facilities and add capacity to their operations as contemplated by the Act, 16 U.S.C. § 1853a(5)(A)(iii); *see e.g.*, Rydman Decl. at ¶4-5, 10. Their investment in the fishery has in turn benefitted fishing vessels, who have been able to expand in-line with the processors' expansion. *Id*. at ¶11. The processors have also been able to employ increased numbers of workers to run their facilities, which benefits the local communities that are also dependent on the fishery and should have been considered under the Act, 16 U.S.C. §1853a(5)(A)(ii). Rydman Decl. at ¶11; Marchand Decl. at ¶3.

These activities by processors represent "investments in, and dependence upon, the fishery" as set forth in the Magnuson-Stevens Act. 16 U.S.C. § 1853a(5)(A)(iii). NOAA explained that:

> [D]ependence upon the fishery relates to the degree to which participants rely on the whiting fishery as a source of wealth, income or employment to financially support their business. Current harvests, historical harvests, levels of investment over time, and levels of participation over time are all aspects of dependence, as they can all be connected to the processes that fishers and processors use to generate income. AR007569 at 74 (78 Fed. Reg. 18879, 18884).

Yet, NOAA does not and cannot explain why it elected to benefit a subset of processors who may have left the fishery taking their investments, jobs, and support of the fishery with them at the expense of those processors who have continuously participated in and supported the fishery as evidenced by their recent history. Rather, NOAA has ignored without justification the investments of processors who continue to be in the fishery, which reflects their ongoing dependence on the fishery. NOAA's action in maintaining the status quo without basis unfairly harms these processors who have long participated in the fishery and continue to do so.[12]

Including the later processing history years, which NOAA failed to do, would have enlarged the initial IFQ allocation to processors, such as Ocean Gold and Jessie's, who have proven their support of and dependence on the fishery. *See e.g.*, Marchand Decl. at ¶8; Rydman Decl. at ¶3-6, 11. The reduced IFQ allocation, however, forces processors to lease or buy additional IFQ to maximize their operating capacity. *Id*. at ¶9; Rydman Decl. at ¶9. Thus, NOAA's decision to limit processing history to the qualifying period of 1998-2004 rather than include more recent history harms the processors' ability to earn a return on their investments in the fishery through reduced capacity as well as continue to support the local fishing communities. Marchand Decl. at ¶9-10. Both Ocean Gold and Jessie's have made significant capital investments that benefitted the fishery but their ability to fully realize the benefits of those investments is inhibited because of their reduced IFQ. *Id*. at ¶3; Rydman Decl. at ¶4-5, 11.

E. The failure to properly consider national standards set forth in the Magnuson-Stevens Act violates the Magnuson-Stevens Act

The 2013 IFQ Regulations also violate the Magnuson-Stevens Act because they are inconsistent with the National Standards set forth in the Magnuson-Stevens Act, 16 U.S.C. § 1851, and related Guidelines. As explained above in Section II(B)(2), any regulations promulgated to implement an FMP, "shall be consistent with…national standards for fishery conservation and management…[,]" including the consideration of efficiency (National Standard 5), the ability to minimize costs (National Standard 7), and the importance of fishery resources to local, dependent

[12] *See generally*, AR016090 attached as Exh. 1 to Rydman Decl. (Comments submitted by Christopher Kayser on behalf of Ocean Gold, January 29, 2013).

communities (National Standard 8). §16 U.S.C. 1851(a)(5), (7), and (8); 50 C.F.R. §§600.330, 600.340, and 600.345. NOAA improperly failed to take these standards into account without sufficient justification in promulgating the 2013 IFQ Regulations and summary judgment is appropriate as to Plaintiffs' Third, Fourth, and Fifth Causes of Action.

1. The 2013 IFQ Regulations do not properly consider efficiency as required under National Standard 5

Plaintiffs alleged in their Third Cause of Action that the 2013 IFQ Regulations do not properly consider the efficiency of the fishery as required by National Standard 5 by failing to allocate IFQ to those most dependent on and active in the Pacific whiting fishery. Compl. at §41. National Standard 5 provides that "[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." 16 U.S.C. §1851(a)(5).

Under the Guidelines, management measures aimed at efficiency should "not simply redistribute gains and burdens without an increase in efficiency." 50 C.F.R. §600.330(b)(2)(i). Yet, NOAA allocation of IFQ to non-active permit-holders would have at least three results without any increasing efficiency and in fact, would decrease efficiency. First, the non-active permit-holders could return to the Pacific whiting fishery at any time, adding fishing capacity that had been absent since 2003, contrary to the goal of Amendment 20. Second, the non-active permit-holders could lease their IFQ to active permit-holders, increasing the cost of harvesting Pacific whiting and thereby reducing the efficiency of the active fleet. Third, the non-active permit-holders could, at the appropriate time, sell their IFQ, which also would increase the on-going cost of the active permit-holders. Federal Defendants did not adequately consider this efficiency issue or make any effort to minimize the inefficiencies that would result from the initial allocation of IFQ, for example, by denying IFQ to those who made the economic decision to leave the fishery after 2003.

2. The 2013 IFQ Regulations do not properly minimize costs as required under National Standard 7

In their Fourth Cause of Action, Plaintiffs allege that Federal Defendants did not adequately consider possible methods of minimizing costs from creation of the IFQ Program. Compl. at ¶¶43-

45. Specifically, the 2013 IFQ Regulations violate the Magnuson-Stevens Act because Federal Defendants' failed to consider the requirement of National Standard 7 that fishery management measures "shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7); 50 C.F.R. §600.340(a). The Guidelines are clear that management measures "should not impose unnecessary burdens" on participants or the fishery. 50 C.F.R. §600.340(c). The 2013 IFQ Regulations do just the opposite. Federal Defendants were aware of the fact that IFQ Programs frequently result in leasing and sale costs to those who require additional IFQ in their on-going fishing operations. *See e.g.*, AR009661 at 70 (Decision Memo at p. 10). Such costs do not exist prior to the institution of an IFQ Program. Indeed, Federal Defendants failed to analyze this question during reconsideration of the method for allocating initial IFQ in the Pacific whiting fishery. Rather, one method of minimizing costs to active permit-holders in the fishery is to deny IFQ to those who left the fishery after 2003, thereby making a larger pool of IFQ for those who depend on the fishery as evidenced by their fishing history and recent participation.

3. The 2013 IFQ Regulations do not properly consider local community dependence on the fishery as required under National Standard 8

As alleged in the Fifth Cause of Action, Federal Defendants did not take into account the importance of the fishery to local communities as required by National Standard 8. Compl. at ¶¶ 47-49. National Standard 8 requires that fishery management measures "shall, consistent with the conservation requirements (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8). As a result, the Guidelines direct Federal Defendants to consider "the importance of fishery resources to fishing communities" when designing an FMP. 50 C.F.R. §600.345(b).

Such consideration invariably entails assessing relative dependence of several communities and taking such dependence into account. Plaintiff Ocean Gold runs its own processing facility Westport, Washington; Plaintiff Jessie's operates its plant in Ilwaco, Washington. Rydman Decl. at

¶1, 3; Marchand Decl. at ¶1. Both are highly important to the economic structure of their local fishing communities. Rydman Decl. at ¶11; Marchand Decl. at ¶3. Federal Defendants failed to adequately consider the importance of these communities by not utilizing the most recent processing history between 2004 and 2010 in making initial IFQ allocations.

F. The 2013 IFQ Regulations are arbitrary and capricious in violation of the APA

Summary judgment should be granted as to Plaintiffs' Sixth Cause of Action that the 2013 IFQ Regulations are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law in violation of the APA. *See* cases, Section II(C) above. For the reasons above, the 2013 IFQ Regulations violate the Act as to the initial allocation of IFQ for Pacific whiting and Federal Defendants did not and cannot articulate a rational basis for failing to take more recent history into account and otherwise properly consider the requirements of National Standards 5, 7, and 8.

IV. REQUESTED RELIEF

Upon summary judgment, Plaintiffs respectfully request that this Court issue a remedial order directing Federal Defendants to bring the initial IFQ allocations into alignment with the Magnuson-Stevens Act. Plaintiffs further request that Federal Defendants be ordered to do so on an expedited basis to be completed by April 1, 2014.

V. CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court grant summary judgment as to each of their claims alleged in the Complaint that 2013 IFQ Regulations violate the Magnuson-Stevens Act and the APA.

Respectfully submitted,

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DAVIS WRIGHT TREMAINE LLP

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

Attorneys for Plaintiffs, Pacific Dawn LLC, Ocean Gold Seafoods Inc., Chellissa LLC, and Jessie's Ilwaco Fish Company