

DEPARTMENT OF FISH AND GAME

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March 23, 2001

Dr. Don McIsaac, Executive Director
Pacific Fishery Management Council
2130 SW Fifth Avenue, Suite 224
Portland, Oregon 97201

Dear Dr. McIsaac :

The California Department of Fish and Game (CDFG) urges the Council to reject the request by attorney Mary Hudson on behalf of the Los Angeles Commercial Fishermen's Association (LACFA), so that NMFS will proceed with the final rule revising the groundfish regulations (see 65 FR 31871, May 19, 2000), closing the federal portion of the Huntington Flats to gill nets. This letter also responds to the correspondence dated March 5, 2001 from Ms. Hudson. To assist the Council, we have attached a very brief chronology of events occurring during the past ten years leading up to the present efforts to adopt a federal rule to implement the Council's 1997 recommendation prohibiting the use of set nets to take groundfish in certain areas of federal waters off California (Attachment 1).

Since the Council's last meeting at which Ms. Hudson asked the Council to reconsider its previous action, the Department has examined more recent landing and logbook information for setnet vessels operating at the Huntington Flats off southern California (Fish and Game Blocks 718, 719, 739 and 740) to determine if there have been any substantive changes in setnet fishing practices and ability of vessels to target groundfish. The data are not appreciably different from those provided the Council at the time of the Council's recommendation in April 1997. The available landing and logbook data indicate that setnet fishers continue to rely on state-managed species, primarily California halibut, white seabass, yellowtail, thresher shark, barracuda, and white croaker. During 1998-2000, species of fish managed by the state accounted for about 92 percent of the weight, and 96 percent of the value of fish landed from the Huntington Flats catch blocks. Landings of skates, and leopard, dogfish, and soupfin sharks comprised the principal groundfish species taken from this area (Attachments 2 and 3).

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With regard to Ms. Hudson's reply to the Council's three questions, she makes several statements on which we offer comment. *As to the first question*, regarding post-1997 changes at the Huntington Flats, Ms. Hudson argues for reconsideration because LACFA claims it has no bycatch. As previously stated in the Department's July 31, 2000 comment letter, and as confirmed in the attachments, over 95 percent of the value of the total gillnet landings from the Huntington Flats is attributable to state-managed species. This level of catch of non-groundfish indicates that groundfish are not the target species for this fishery. Further, if the state's laws and regulations were able to be enforced to conserve and manage state-managed species, the non-groundfish catch would have to be discarded and thus would constitute a major bycatch problem. The NMFS proposed regulation would address this issue by establishing consistency between state regulations and federal regulations, with the result that the set gillnet fishery, which targets non-groundfish resources, would no longer be permitted in the federal waters at Huntington Flats. This means there would be no bycatch and there would be no excessive "incidental catch" of state-managed species under the guise of a groundfish fishery. The state's efforts to conserve and manage state species under state management plans would no longer be adversely affected by the gap in federal regulations.

A second argument is that closure of the Huntington Flats will force the LACFA vessels to move into deeper waters, with the undesirable result of subjecting the already strained groundfish resource to more fishing pressure. However, at the same time, LACFA indicates that its fleet generally cannot fish deeper waters due to the size of the vessels, so this is not the problem. Further, this claim implies that the vessels do not now participate in the groundfish fishery. Of course, this is a correct implication. The fact is that it is difficult for LACFA to claim that its vessels participate in the groundfish fishery, when 90 percent or more by weight and 95 percent of the value of their landings derives from state-managed fish and when the setnet fishery is not really a groundfish fishery. Moreover, from a fishery management standpoint, the groundfish resource cannot be reliably managed unless fishing pressure is accurately characterized and monitored. Currently, LACFA purports to target groundfish, but in reality relies on state-managed species. If the NMFS regulations actually result in shifting effort to groundfish, the fishing effort will more accurately be characterized for use in monitoring and stock assessment efforts. The effort now, since it really is directed at non-groundfish, cannot be used to derive any reliable measure of groundfish stocks' abundance and distribution. Thus, another effect of the NMFS action is that any redirected groundfish fishing effort will be more accurately characterized and monitored and thus support a more accurate assessment of true impacts of the fishery on groundfish.

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A third argument is that closure of the Huntington Flats is not warranted because of the increased reliance by LACFA on groundfish landings (p. 2, ¶ 1). However, the more recent landings data, which appear in attachments to this letter, show that the fishery is as reliant on state-managed species today as it was in 1996-97. The argument also asserts that the Huntington Flats vessels are "a vital part of the small vessel component of the Pacific fleet" (p. 2, ¶ 1). This statement cannot be reconciled with the earlier description (p. 1 ¶ 2) of the vessels as making only "modest landings" that fill a "primarily local niche market." Moreover, fewer than 10 percent of the total number of California gillnet permittees (223 permits issued in 2000) fish the Huntington Flats; of this subset, Ms. Hudson identifies 7 vessels as being "most active," but this figure represents only 3 percent of the permittees.

As to the second question, regarding catch of state-managed species, Ms. Hudson states that "the federal judge reviewing LACFA's case against the CDFG specifically found that a predominance of state-managed species does not remove these fishers from the coverage of the Magnuson-Stevens Act" (p. 3, ¶ 1). This statement only reflects the court's holding that preliminary injunctive relief was justified because the federal law preempted state law, but that order also made it clear that the injunction was operative "unless and until the NOAA changes the current regulations," a condition that recognizes that final resolution of the conflict would lie in amending the regulation. Ms. Hudson confirms this when she states that the December 2000 Consent Decree and permanent injunction "has resolved the dispute and will remain controlling unless the NMFS modifies the existing federal regulation" (p. 2, ¶ 3). However, the Council should know that the purpose of the consent decree was to avoid the expense of trial when both sides realized that the final resolution of the dispute would be determined by the final regulation. To that end, the consent decree imposed the current permanent injunction, but allowed the state to apply for its dissolution if the subsequent regulation closed the Huntington Flats; LACFA, for its part, agreed to not oppose such an application. Thus, none of these facts are reasons for reconsidering the regulation. Since the federal regulations would prevail, there would also no longer be a conflict between federal and state regulations governing setnet use in this area. Just as the Council's Groundfish Fishery Management Plan (FMP) is intended to manage where the fishery is predominately for FMP species, the Council agreed in its request for federal regulations that state management approaches were reasonable where the fishery is predominately for state-managed species. The Council agreed that prohibiting setnet fishing for groundfish at Huntington Flats would not adversely affect implementation of the FMP.

As to the third question, regarding what LACFA wants the Council to do, Ms. Hudson asserts that the Council should withdraw its recommendation that the rulemaking go forward because the regulation is deeply flawed. We disagree. The fact

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that conflicting federal and state laws have allowed state-managed species to be profitably exploited by a few individuals under a court order does not justify maintaining that conflict, but rather counsels its resolution through the NMFS regulatory action. The federal court, and even Ms. Hudson herself, recognized that NOAA/NMFS have the authority to do this. As for the regulation itself, it is entirely consistent with the National Standards and the Council's Groundfish FMP, while the existing court-order fishery is not. The proposed regulation represents a reasonable and prudent method of harmonizing the two fisheries management regimes and removing this conflict. We urge the Council to reaffirm its 1997 recommendation to close setnet fishing for groundfish at the Huntington Flats and for the NMFS to proceed with the final rule.

Sincerely,



L.B. Boydston, Representative
Office of Intergovernmental Affairs

cc: Mr. Robert Hight, California Department of Fish and Game
Dr. Rebecca Lent, National Marine Fisheries Service, Southwest Region
Ms. Mary Hudson, Los Angeles Commercial Fishermen's Association

Attachment 1
Chronology of Events

- 11/06/90: Proposition 132 enacts Marine Resources Protection Act (MRPA).
- 02/25/93: Vietnamese Fishermen Assn Permanent Injunction.¹
- 01/01/94: MRPA closure of Huntington Flats (HF) becomes effective.
- 10/03/94: DFG Letter requests PFMC consistency determination
- 06/21/95: DFG Letter to LACFA re Continuing MRPA Enforcement at HF.
- 00/00/95: DFG withdraws request for PFMC consistency determination.
- 06/18/96: DFG requests regulatory action at PFMC meeting.
- 08/23/96: PFMC considers issue.
- 10/23/96: PFMC defers issue to 03/00/97 meeting.
- 10/00/96: NMFS preliminary rulemaking initiated.
- 11/22/96: LACFA TRO issued.
- 03/19/97: Preliminary Injunction Issued
- 04/00/97: PFMC recommends regulatory action.
- 12/23/99: Court requests views of NOAA re rulemaking.
- 05/19/00: Proposed rulemaking noticed in Federal Register (65 FR 31871).
- 07/31/00: DFG comment letter supports NMFS rulemaking.
- 11/20/00: Consent Decree makes settlement contingent on rulemaking outcome.

¹Vietnamese Fishermen Assn v. DFG (1993) 816 F.Supp. 1468.

Attachment 2

Pounds and Value of Fish Reported Taken in Setnets and Landed by Vessels Fishing at the Huntington Flats (Catch Blocks 718, 719, 739, 740) During 1998, 1999, and 2000

Year	POUNDS			VALUE		
	State Species	Groundfish	Total	State Species	Groundfish	Total
1998	280,139	26,089	306,228	\$385,078	\$17,576	\$402,654
1999	381,251	37,431	418,682	\$632,139	\$28,068	\$660,207
2000	385,364	32,664	418,028	\$714,559	\$22,298	\$736,857
Total of 3-years	1,046,754	96,184	1,142,938	\$1,731,776	\$67,942	\$1,799,718
Percent	91.6	8.4	100	96.2	3.8	100

Ranking of Top 10 Species/Species Groups by Pounds for the Total of the Three Years and All Catch Blocks

Rank	Pounds	(\$)
1) California halibut	318,665	(943,842)
2) White seabass	174,735	(275,691)
3) Yellowtail	157,587	(154,976)
4) Thresher shark	135,114	(208,843)
5) California barracuda	85,607	(42,633)
6) White croaker	77,711	(43,226)
7) Skates*	39,072	(10,837)
8) Sharks (3-groundfish spp.)	37,122	(27,381)
dogfish*		
leopard*		
soupfin*		
9) Shortfin mako	26,548	(28,751)
10) Pacific mackerel	21,422	(4,550)
Total.....	1,073,583	(1,799,718)

Attachment 3

POUNDS AND NUMBER OF GROUND FISH AND STATE
MANAGED FISH TAKEN IN <35 FATHOMS AT THE HUNTINGTON FLATS
DURING 1999-2000
AS REPORTED IN GILL AND TRAMMEL NET LOGBOOKS

Catch Block	Pounds of Groundfish	Pounds of State Mngd.	Total Pounds	%Ground-fish	% State Mngd.	Tot. %
719	135	21,230	21,365	0.6	99.4	100
739	4,193	29,231	33,424	12.5	87.5	100
740	4,321	52,820	57,141	7.5	92.5	100
Total	8,649	103,281	111,930	7.7	92.3	100

Ranking of Top Species/Species Groups by Pounds for the Three Catch Blocks

Barracuda	45,488
White Croaker	34,397
California halibut	10,753
Mackerel	6,522
Skates*	4,975
Thresher shark	3,498
Combined	2,949
Leopard*	
Soupfin*	
Dogfish*	

Guitarfish 1,555

Total 110,137 (= 98.4 percent of total fish reported for waters <35fthms)

*Groundfish Species

