Agenda Item H.3.c
Supplemental Public Comment
April 2008

The paradigm shift

Twenty years ago people didn't care how their fish were harvested. Now it is foremost on their minds. The allocations debate will never be an easy one to resolve, but sustainable harvest methods and handling and freshness are more important now than ever before. Hook and line caught fish have a long standing reputation for being easier on the habitat and better quality.

I fish for chillie rockfish with a fixed gear permit and have been doing so for the last thirty years. I have seen it go from abundance to scarcity and back to abundance. My current allocation allows me to fish one day a month. 1250 lbs, This is not really a fishery anymore, it is a hobby I enjoy.

I have nothing against trawl boats making a living. I would just like to make one myself again before I am too old. Buyers are fighting over the few fish I am allowed. Please keep the hook and line fishermen alive and give us enough of the allocations to live and fish along with the trawl vessels. Long before there was trawling there was a fisherman with a hook and a line.

Josh Churchman
Box 5 op
Bolinas Ca

Hello John , I'm a commercial fisherman from the port of Bolinas Calif. and I'd like to voice my concerns that there remain an allocation for the hook and line rock cod fishery . This is a sustainable way of catching the targeted species with little or no bycatch and meeting the given set qoutas with a high degree of accuracy . If the allocations are only given to the trawler fleet it is setting the stage for eventual corporate takeover of the fishery and the end of the hook and line fleet as we know it . Once again in this current day and age of maximum conservation and sustainability I believe the hook and line technique is far superior and should not be eliminated , please let my voice be heard at your next meeting ....Thankyou very much , Sincerely Andrew Kleinberg .....

From Tom Worthington <tom@montereyfish.com>
Sent Wednesday, April 2, 2008 3:18 am
To John.DeVore@noaa.gov
Subject FW: Ground Fishery Management Plan

-----Original Message-----
From: Tom Worthington [mailto:tom@montereyfish.com]
Sent: Tuesday, April 01, 2008 9:27 AM
To: 'tom.worthington@sbcglobal.net'
Subject: Ground Fishery Management Plan

John DeVore
Pacific Fishery Management Council

i.e. April Briefing Book section H.3

Dear Mr. DeVore,

I am writing to you with a specific request that you and the Groundfish Allocation Committee consider raising the percentage of allocations of the ground fish quota for all the Hook and Line fishermen.

As you know they are a small portion of the overall fishing fleet and only bring in a small percentage of the over all catch. That being said I would like to share with you the importance of there existence and what it means to the seafood industry and why they should not be overlooked or thought of as inconsequential.

First I would like to point out that the method in which they fish is soft on the environment, they have the ability to stop fishing when they have hit their actual quota with minimal by-catch. If they do run into a species that is not allowed to be caught they can quickly stop fishing and in many cases they can release the catch back alive.

Secondly as a seafood wholesaler based in San Francisco I can tell you that the demand for sustainable caught Hook and Line fish is of a premium to all of our 100 plus restaurants we sell to on a daily basis. The public request for ground fish caught using this method far out cries the supply and demand is on the rise. The fact that they are small part of the overall fleet does not mean that they are not a large part of the community in which they live. These small boat fishermen play an important roll in the economic fortune of not only there own lives but the communities they serve. The economic fabric of some of these costal communities is directly connected to the jobs these fishermen do. I ask that you fairly allocate a substantial portion of the overall quota to these Hook and Line fishermen.

Thank you for your consideration,

Tom Worthington

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April 1, 2008

BY FAX, EMAIL, and U.S. MAIL[1]

Mr. Donald Hansen and Members of the Pacific Fishery Management Council
Pacific Fishery Management Council
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Re: Public Comments on Proposed Amendment 21 to the FMP: Intersector Allocation

Dear Mr. Hansen and Members of the Pacific Fishery Management Council:

The organizations of the Natural Resources Defense Council, Pacific Marine Conservation Council, Ocean Conservancy, the Pacific Coast Federation of Fishermen's Associations, and the Marine Fish Conservation Network submit the following comments concerning proposed Amendment 21 to the Fishery Management Plan ("FMP") on groundfish intersector allocation.

We are writing to express our concern about the type of analysis being done on this amendment. We believe that the amendment is likely to have significant conservation and socioeconomic impacts on the groundfish fishery and thus that the agency should do an Environmental Impact Statement ("EIS") instead of an Environmental Assessment ("EA"). We also believe that the range of alternatives is too narrow and should include one that considers shifting fishing effort from trawl gear to lower impact gears such as long lines and pots. In addition, we support the recommendation made by the Groundfish Allocation Committee to analyze an alternative that reserves 15% of the groundfish.

We understand that there may be reluctance to conduct EIS analysis given the pressure to complete the Individual Quota ("IQ") trawl process on schedule. However, it appears

[1] Appendix material sent by U.S. Mail only.

from current timelines that National Marine Fisheries Service ("NMFS") can conduct EIS analysis on the sector allocation amendment without slowing down the schedule of the proposed trawl section IQ amendment process.

1. The proposed amendment would have significant and cumulative impacts, requiring EIS analysis under NEPA

"If the action will significantly affect the environment, an EIS must be prepared[.]" Ocean Advocates v. U.S. Army Corp of Engineers, 402 F.3d 846, 864 (9th Cir. 2005) (citing 40 C.R.F. §§1501.3, 1501.4). "Significant" has two components: context and intensity." Id. (citing 40 C.F.R. § 1508.27). "Context refers to the setting in which the proposed action takes place . . . . Intensity means 'the severity of the impact.'" Id. (quoting 40 C.F.R. § 1508.27 (b)). In considering the severity of the potential environmental impact, a reviewing agency "may consider up to ten factors that help inform the 'significance' of a project, such as the unique characteristics of the geographic area, including proximity to an ecologically sensitive area; whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts; the level of uncertainty of the risk and to what degree it involves unique or unknown risks; and whether the action threatens violation of an environmental law." Id. (citing 40 C.F.R. §§ 1508.27(b)(3), (5), (7), (10)). NMFS' own NEPA guidelines, consistent with Ninth Circuit law, also require it to do an EIS when the "proposed action may be reasonably expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat as defined under the Magnuson-Stevens Act and identified in the FMPs." NOAA Administrative Order 216-6 (May 20, 1999), Section 6.02(c).

Not only do trawl gear have the highest bycatch rates (see Lekelia Jenkins, Gear Conversion as a Means to Reduce Bycatch and Habitat Impacts in the U.S. West Coast Sablefish Fishery (2008) (Appendix 1)), it is highly destructive to ocean habitat. See National Research Council, Effects of Trawling & Dredging on Seafloor Habitat (2002) (Appendix 2); Korie A. Johnson, A Review of National and International Literature on the Effects of Fishing on Benthic Habitats (2002) (Appendix 3); Eleanor M. Dorsey and Judith Pederson (Eds.), Effects of Fishing Gear on the Sea Floor of New England (1998) (Appendix 4); Peter W. Barnes and James P. Thomas (Eds.), Benthic Habitats and the Effects of Fishing (2005) (Appendix 5); Christian Nellemann, Stefan Hain, and Jackie Alder, In Dead Water, Merging of Climate Change with Pollution, Over-Harvest, and Infestations in the World's Fishing Grounds (2008) (Appendix 6).

It is the work of a moment to conclude that the proposed action, which makes a permanent allocation of a vast majority of the groundfish to the sector that uses the most destructive, non-selective gear, would have a significant impact on the environment.[2] Therefore, NMFS is required to do EIS analysis if it seeks to adopt and implement the proposed amendment on sector allocation. See NOAA's Operational Guidelines Fishery

[2] It is difficult to tell the exact percentage of groundfish that would be allocated to trawl under the proposed amendment. Between data obtained from PacFIN data and calculations made from percentages provided in the draft EA, it appears that between 85-98% of the groundfish would be allocated by this amendment to the trawl sector.

Management Plan Process at B2 ("An EIS or SEIS must be prepared if the proposed action may be reasonably expected to . . . (2) allow substantial damage to the ocean and coastal habitats . . . (5) result in cumulative effects that could have a substantial adverse effect on the target resource species or any related stocks that may be affected by the action."). But see Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456 (9th Cir. 1987) (holding that agency approval of the allocation regulation at issue did not require EIS analysis –however, that regulation did the reverse of what is being proposed here; it gave 100% of the sablefish to hook and line fishermen and prohibited trawl fishing).

The cumulative impact of the proposed amendment, in particular, requires EIS analysis. It is one thing to allocate a high percentage of fish to the trawl gear for short periods of time (such as two-year increments, as is done through the biannual specification process). It is another scale of magnitude to propose to cement that allocation level in place forever. There are long-term impacts both to the marine environment and fishing communities from permanently allocating such high percentage of fish to the most destructive, non-selective gear. NEPA requires the agency to take a hard look at the potential impacts of such a proposed action. This is especially true given that conditions important to the allocation decision are likely to change over the long term, such as emerging fixed-gear fisheries, the size of the trawl footprint due to area closures, oceanographic changes from warming temperatures and acidification, etc. Thus, the cumulative, long-term impact of the proposed allocation to the trawl gear sector requires an EIS analysis.[3]

Because the proposed allocation amendment will effectively set in stone the amount of fish allocated to the different gear sectors now and in the future, NMFS must analyze the evolving future needs of each of the gear types for a decision on the proposed amendment to have a rational basis. See Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 548 (9th Cir. 2007) (finding the agency's NEPA analysis inadequate because it "'failed to address certain crucial factors.'") (quoting Found. for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982)). In the absence of an EIS, decision-makers have little information or analysis to guide them about the predicted future of the fishery. In such situations, NEPA requires EIS analysis. "Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS." Ocean Advocates, 402 F.3d at 864 (citing 40 C.F.R. § 1508.27(b)(5)); see Center for Biological Diversity, 508 F.3d at 548 (finding that an EA which forces decision-makers to speculate about the future impacts of an action to be insufficient because "'the very purpose of

[3] According to the draft EA issued a week ago, it appears that some NMFS staff believe that EIS analysis is unnecessary because this proposed action merely "formalizes" existing levels of trawling which were in place when EIS analysis was done for other FMP amendments. See draft EA at 28 ("The intersector allocation alternatives would not have effects on the marine ecosystem and fish habitat outside of those analyzed under the NEPA documents for Amendments 16-4 and 19 to the FMP."). These analyses, however, did not contemplate a permanent allocation of the vast majority of the groundfish to the trawl gear and consequently did not examine the long term, cumulative impacts of such an allocation. See NOAA Administrative Order 216-6 (May 20, 1999), Section 6.03d2 ("Fisheries Actions that Require an EIS. Consideration of cumulative impacts must also be taken into account when considering whether to prepare an EIS.").

NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for such speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.'") (quoting Found. for North American Wild Sheep, 681 F.2d at 1179).

Permanent allocation of groundfish to the trawl sector, moreover, will significantly affect many members of the public. Doing an EIS instead of an EA has the additional benefit of providing better opportunity for public comment and participation in the decision. "In addition, there is generally a longer time period for the public to comment on an EIS as opposed to an EA, and public hearings are often held." Anderson v. Evans, 371 F.3d 475, 494 (9th Cir. 2004). Preparation of an EIS could also provide more time to assess and better predict how the fishery will develop in the future.[4] See id. ("Furthermore, preparation of an EIS could allow additional study of a key scientific issue . . . .").

Even if there is only the possibility that the proposed amendment will have significant environmental effect, NEPA requires EIS analysis. "An EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor." Ocean Advocates, 402 F.3d at 864 (internal quotation and alteration from Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998) omitted) (emphasis in original). "If an EA establishes that the agency's action *may* have a significant effect upon the environment, an EIS must be prepared." Sierra Club v. Bosworth, 510 F.3d 1016, 1018 (9th Cir. 2007) (citing Nat'l Parks & Conservation Ass'n v. Babbit, 241 F.3d 722, 730 (9th Cir. 2001) (emphasis in original).

Even if the EA is robust, NMFS cannot avoid undertaking EIS analysis because the types of analyses and evaluations are different. "No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment." Anderson, 371 F.3d at 494. See Sierra Club v. Marsh, 769 F.2d 868, 874-76 (1st Cir. 1985). "An EA simply assesses whether there will be a significant impact on the environment. An EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public." Anderson, 371 F.3d at 494.

Nor does the fact that a gear-switching option is currently included for analysis in the proposed trawl IQ amendment substitute for the obligation to fully analyze the proposed sector allocation amendment. First, although the allocation amendment may have been motivated by the trawl IQ proposed amendment, the two would be separate amendments to the Fishery Management Plan. As such each requires its own justification and analysis. Second, because the trawl IQ amendment has not been adopted or

[4] As a related matter, the proposed allocation amendment is likely to be highly controversial, which is another reason to consider it "significant" and requiring EIS analysis. See NOAA Administrative Order 216-6 (May 20, 1999), Section 6.02i ("A final factor to be considered in any determination of significance is the degree to which the effects on the quality of the human environment are likely to be highly controversial.").

implemented, it is uncertain that gear-switching will be a part of the final action or what its form will be. Moreover, even if the final trawl IQ amendment contains a gear-switching option, it likely that using the allocation amendment to shift fishing effort to lower impact gears would have a more substantial conservation effect, because the gear-switching option in the trawl IQ amendment does not require switching towards lower impact gears or that any switching which takes place be permanent or long term. In addition, the gear switching option of the trawl IQ would depend on the individual desires of trawlers to switch gears, an uncertain outcome especially in the absence of any specific incentives. Thus, the gear-switching option in the trawl IQ proposed amendment is not a valid substitute for conducting a thorough NEPA analysis on the proposed allocation amendment.

We understand that the Council and NMFS are under pressure to finish the allocation process quickly in order to keep on track with the trawl IQ amendment process. Sector allocation, however, has enormous implications for shaping the future of the fishery both from socio-economic and conservation perspectives. Even though political forces may exert pressure to rush the process, good stewardship (and the law) requires that such an amendment undergo rigorous and thorough analysis and provide ample opportunity for public participation before it is adopted and implemented.

Moreover, it appears that an EIS analysis on the proposed allocation amendment could be conducted and completed prior to implementation of the trawl IQ program. So long as the allocation EIS was done by 2010, an ample amount of time of nearly two years from now, it would be able to inform implementation of the trawl IQ, currently scheduled for 2011. Thus, conducting appropriate analysis on the allocation amendment need not slow down the trawl IQ process.

2. NEPA requires NMFS to consider a more robust set of alternatives

To comply with the requirements of NEPA, federal agencies must present the environmental impacts of the proposal in comparative form, rigorously explore and objectively evaluate all reasonable alternatives, and briefly discuss the reason for eliminating any alternatives from detailed study. 40 C.R.F. §1502.14(a).

Currently, the only alternatives which NMFS is analyzing are the no action alternative and two others (each of which is based on recent historic use: one is based on sector fishing levels during 2003-2005 and the other is based on sector fishing levels from 1995-2005).[5]

[5] The draft EA lists one other alternative (Alternative 2), but it is virtually identical to the first alternative which is based on fishing levels from 2003-2005. The only difference is that it proposes to divide up the non-trawl allocation among the other sectors. This alternative does not appear to be seriously analyzed by the EA (see draft EA at 10 ("Longer term allocations to non-tribal, non-trawl groundfish sectors may be considered later in one or more trailing amendments to the FMP")) but in any case does not analyze a different allocation to the trawl sector, which is at the heart of the proposed action. See Friends of Yosemite Valley v. Kempthorne, Slip Op. No. 07-15124 at 3087 (9th Cir. March 27, 2008) (finding that the agency (National Park Service) violated NEPA because "the range of action alternatives is unreasonably narrow because the alternatives are virtually indistinguishable from each other.").

This is plainly an insufficient range of options under Ninth Circuit law to satisfy the required "hard look" at the proposed amendment's environmental impacts mandated by NEPA. In Environmental Protection Information Center v. United States Forest Service, the Ninth Circuit struck down the U.S. Forest Service's forest-thinning project in the Shasta-Trinity National Forest because the EA examined a too narrow a range of options, similar to what the Council and NMFS are proposing to do here. "First, the EA did not analyze an adequate range of alternatives. Though there is no 'numerical floor on alternatives to be considered,' the EA's analysis of only a no action alternative and USFS's preferred alternative, (the proposed project) was insufficient." 234 Fed. Appx. 440, 442 (9th Cir. 2007) (quoting Native Ecosystems Council v. United States Forest Service, 428 F.3d 1233, 1246 (9th Cir. 2005)). See Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 813 (9th Cir. 1999) (holding that the U.S. Forest Service failed to consider an adequate range of alternatives when an EIS considered only a no action alternative along with two "virtually identical" action alternatives). "[W]e hold that the EA's analysis of a no action alternative and the [agency's] preferred action alternative did not amount to the 'full and meaningful consideration of alternatives that NEPA requires." Environmental Protection Information Center, 234 Fed. Appx. at 443 (quoting Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 (9th Cir. 1988)).

Not only is the range of alternatives too narrow, reasonable alternatives for groundfish allocation exist which so far have not been included for analysis. NMFS should analyze an option that increases the limited-entry fixed gear's current harvest level by 20-30%. In other works, under this alternative limited entry fixed gear would harvest 20%-30% more metric tons than they currently do of certain species. Such fish include species that are shared (or have the potential to be shared) between trawl and limited-entry fixed gear such as shortspine thornyhead, longspine thornyhead, lingcod, spiny dogfish and sablefish.[6] This option deserves analysis because limited-entry fixed gear generally is a more environmentally friendly gear, having substantially lower bycatch rates and habitat impacts. See Lekelia Jenkins, Gear Conversion as a Means to Reduce Bycatch and Habitat Impacts in the U.S. West Coast Sablefish Fishery (2008) (Appendix 1). If this gear received a significantly higher allocation of fish, it could improve the overall conservation of the fishery which NMFS is obligated under the Magnuson-Stevens Act to promote.

Moreover, there is an historical basis for this alternative, as NMFS has allocated more fish to the fixed gear fishery in the past, similar to what is being suggested here. In the 1980s, the fixed gear fishery received 48% of the sablefish allocation while trawl gear received 52%. See 52 Fed. Reg. 790, 795 (January 9, 1987); 53 Fed. Reg. 231, 253 (January 6, 1988); 43 Fed. Reg. 299, 305 (January 5, 1989). That changed in 1990 when

[6] In summarizing comments received on the proposed allocation amendment, the EA correctly states that at the February 2008 GAC meeting Natural Resources Defense Council recommended that the analysis be developed as an EIS rather than an EA. Draft EA at 7. As part of this same public comment, Natural Resources Defense Council also recommended that the NMFS analyze the alternative of shifting allocation of the groundfish which are shared between gears by increasing the tonnage given to the less impactful fixed gears by 30%.

NMFS increased the trawl sector allocation to 58% and reduced the fixed gear allocation to 42%. See 55 Fed. Reg. 3747, 3748 (February 5, 1990). NMFS has continued this disposition since 1990, giving trawl 58% of the sablefish and fixed gear 42%. See, e.g., 70 Fed. Reg. 22812, 22820 n.f (May 3, 2005). Under the proposed alternative, a 20% increase of sablefish to the fixed gear fishery would result in an allocation of 50% to trawl and 50% to fixed gear, similar to the historic split of 52% trawl/48% fixed gear. A 30% increase of sablefish to the fixed gear fishery would result in a 45% trawl/55% fixed gear split.

The failure to examine a reasonable alternative is a violation of NEPA separate from considering a range of alternatives that is too narrow. "NEPA requires agencies to 'rigorously explore and objectively evaluate all reasonable alternatives' to a proposed plan of action that has significant environmental effects." Natural Resources Defense Council v. United States Forest Service, 421 F.3d 797, 813 (9th Cir. 2005) (quoting 40 C.F.R. §1502.14(a)). See Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 548 (9th Cir. 2007) (The agency "must rigorously explore and objectively evaluate all reasonable alternatives.") (internal quotation of 40 C.R.F. § 1502.14(a) omitted). See also Friends of Yosemite Valley v. Kempthorne, Slip Op. No. 07-15124 at 3086-87 (9th Cir. March 27, 2008) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.") (internal quotation omitted).

As discussed supra, NMFS must undertake EIS analysis for this proposed amendment. However, fully analyzing reasonable alternatives is required even under an EA. "NEPA requires that alternatives . . . be given full and meaningful consideration, whether the agency prepares an EA or an EIS." Center for Biological Diversity, 508 F.3d at 548 (internal quotation omitted). "[I]n every case, the agency's duty under NEPA remains to consider 'all reasonable alternatives.'" Environmental Protection Information Center, 234 Fed. Appx. at 443 (quoting Native Ecosystems Council, 428 F.3d at 1246).

As an additional alternative, we note that at their February 2008 meeting the Groundfish Allocation Committee recommended that 15% of the fish be reserved and explicitly not allocated under the proposed allocation amendment. This reserve would be distributed on an ad hoc basis as the future needs of the fishery became clearer. We believe that this alternative also deserves consideration and we are glad to see that the draft EA appears to have modeled a buffer not only of 15%, but of 5% and 25% as well.

3. The amendment, as proposed, could violate the Magnuson-Stevens Act

The Magnuson-Stevens Act ("MSA") requires NMFS to reduce bycatch and to rebuild overfished species as quickly as possible. See 16 U.S.C. § 1851(a)(9), § 1854(e). See also 16 U.S.C. § 1851(a)(4) ("If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be . . . reasonably calculated to promote conservation . . . .").

It could violate the MSA to permanently allocate the vast majority of the groundfish to the most destructive, non-selective gear, especially when the opportunity to shift a significant portion of that allocation away from trawl gears to lower-impact, lower bycatch gears exists.[7] For instance, a decision to allocate more sablefish away from trawl to pot fishermen would result in orders of magnitude less Darkblotch and Pacific Ocean Perch bycatch. See Lekelia Jenkins, Gear Conversion as a Means to Reduce Bycatch and Habitat Impacts in the U.S. West Coast Sablefish Fishery (2008) (Appendix 1). In addition, trawl gear catches far more young sablefish as bycatch than does pot gear. Id. Therefore, NMFS must fully consider the impact sector allocation will have and implement an alternative which complies with its MSA obligations. See Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996) (upholding a FMP allocation amendment among gear types in the Alaska sablefish and halibut fishery where "the regulations are tailored to solve a gear conflict problem and to promote the conservation of sablefish.") (internal quotations omitted).

4. The proposed amendment does not appear to be necessary or environmentally advantageous. Therefore, the analysis must fully consider the no-action alternative.

Fixing the amount of groundfish allocated to the sectors and cementing it in place for the future with an amendment to the Fishery Management Plan is a serious step, one that freezes the distribution levels of fish and makes any reorganization of the fishery among gears types going forward substantially more difficult. The future of the fishery has not been analyzed and contains a high degree of uncertainty (including upcoming system shocks such as warming ocean temperatures and increasing acidification as well as changing world-wide markets). Before taking action which immobilizes allocation levels and reduces management flexibility to adjust to changing economic and environmental conditions, the Council should require the analysis to prove a high level of fishery benefit as compared with the status quo or no action alternative.

An allocation amendment to the FMP does not, in fact, appear to be either necessary or perhaps even the exercise of good stewardship. Although proponents of the amendment might argue it is necessary to provide stability for the trawl IQ amendment, much uncertainty about fish amounts would remain because the proposed amendment would set percentages, not tonnage. With changing stock health, the amount of fish that will be assigned to each sector could vary significantly. In addition, under the allocation amendment as proposed, several important species will not be included (such as overfished species like canary and yelloweye). Thus, the amendment would not achieve its purported aim of providing a significant degree of certainty for the trawl IQ process.[8]

[7] The possibility that the proposed action could violate the MSA is an additional reason that EIS analysis is required. An agency must conduct EIS analysis when the proposed action "threatens violation of an environmental law." Ocean Advocates, 402 F.3d at 864 (citing 40 C.F.R. § 1508.27(b)(10)).

[8] This is not to say that the trawl sector does not strongly desire an allocation amendment or that they lack understandable reasons for wanting it. These reasons must be ones that benefit conservation of the fishery as a whole, however, not just the financial interests of specific users before the Council is persuaded by them.

The two-year biannual specifications process, moreover, appears to be adequate to the task of setting allocations by sector. This process is done frequently enough to be responsive to changing fishery conditions but has a reasonable period length of two years to help future business planning. Nothing prevents the Council and NMFS from dividing the trawl sector's allocation into individual percentage allocations according to quota shares.

Finally, even if an allocation amendment is a good idea, there is no compelling reason to rush one through such that it is completed prior to the trawl IQ amendment. It could be quite beneficial to have the fishery settle down and adjust to the trawl IQ before attempted to put in place an allocation amendment. The shape and direction of the fishery would be clearer and there would be more information to decide if an allocation amendment was needed and what kind of allocation between sectors was appropriate.

CONCLUSION

The proposed sector allocation is a separate FMP amendment with enormous implications for the future of the fishery. It deserves an independent and thorough EIS analysis, including an appropriate range of alternatives, before the agency takes final action. The Council and NMFS should also fully analyze whether this is amendment is necessary or in the best interests of the fishery.

Sincerely,

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REFERENCES

Peter W. Barnes and James P. Thomas (Eds.), Benthic Habitats and the Effects of Fishing (2005).

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Christian Nellemann, Stefan Hain, and Jackie Alder, In Dead Water, Merging of Climate Change with Pollution, Over-Harvest, and Infestations in the World's Fishing Grounds (2008).