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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NC

PACIFIC DAWN LLC, OCEAN GOLD SEAFOODS, INC., CHELLISSA LLC, and JESSIE'S ILWACO FISH COMPANY,

Plaintiffs,

v.

REBECCA BLANK, Acting Secretary of Commerce, in her official capacity as Secretary of the United States, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

Case No. C- C 13 1419

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Administrative Procedure Act Case]

DAVIS WRIGHT TREMAINE LLP

INTRODUCTION

1. This case is a further, follow-on legal challenge to actions taken, and regulations issued, by the Secretary of Commerce, acting through its subsidiary agencies, the National Oceanic and Atmospheric Administration ("NOAA") and the National Marine Fisheries Service ("NMFS") (collectively "Federal Defendants"), in carrying out regulatory responsibilities under

the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act"), 16 U.S.C. § 1801 et seq., with respect to management of the Pacific Coast Groundfish Fishery, in particular the Pacific whiting fishery. Plaintiffs filed a predecessor lawsuit on October 25, 2010 raising nearly the same issues being addressed in this lawsuit: the initial allocation of individual fishing quotas ("IFQs") for the shoreside and mothership sectors of the Pacific whiting fishery, including allocations to harvesters and processors. *See* Order, December 22, 2011, *Pacific Dawn LLC, et al. v. Rebecca Blank*, No. C10-4829 (TEH) ("*Pacific Dawn I*") (Dkt. No. 49) (Exhibit 1) (*Pacific Dawn I*); Remedy Order, January 21, 2012, Pacific Dawn I (Dkt. No. 60) (Exhibit 2). The Remedy Order issued in that action directed Federal Defendants to reconsider regulations initially promulgated on October 1, 2010. After "reconsideration," Federal Defendants determined that no change to the original IFQ allocations were necessary to comply with the Magnuson-Stevens Act. Notice of the agency action was published in the Federal Register on March 28, 2013 at 78 Fed. Reg. 18879 (Exhibit 3). There is now a new administrative record on these questions that is subject to judicial review.

2. Plaintiffs, fishing and processing entities with a history of participating in and depending on the Pacific whiting fishery, now challenge the decision not to change their initial IFQ allocations after remand in *Pacific Dawn I* in a manner that reflects their recent history and dependence on the fishery and without considering the overall impact of the IFQ Program on the efficiency of their businesses and the costs imposed by this new fishery management program. The IFQ Regulations originally made fixed allocations awarding fishery participants a certain quantity of fish that the participant could then harvest in a fishing season, based on relative fishing and/or processing history in the fishery. For harvesters, the history years were 1994-2003; for processors the history years were 1998-2004. Processors were allocated 20 percent of the overall annual quota, which was then apportioned out on the basis of the history of receiving lawful deliveries of Pacific whiting to their processing plants. The processors use the IFQ allocation to assure a continual supply of fish to their processing operations, which in the case of Plaintiffs Ocean Gold Seafoods, Inc. and Jessie's Ilwaco Fish Company, are located in small fishery-

dependent communities in the State of Washington.

3. Under the IFQ Program, a harvester must possess the proper permits from NMFS to harvest the fish and may not capture any more Pacific whiting than that allowed under that entity's IFQ allocation. To obtain the privilege of harvesting additional amounts over and above their initial IFQ allocations, Plaintiffs now must either lease or buy IFQ from another permit-holder, thereby creating a new overhead cost that did not exist prior to the institution of the IFQ Program and that reduces their productivity and efficiency. During the reconsideration process, it was brought to the attention of Federal Defendants that a significant amount of IFQ was issued to permit-holders who had ceased actively fishing in the Pacific whiting fishery after 2003 and, therefore, had not demonstrated real dependency on the fishery at the time the IFQ Program was created in 2011 and therefore were not "present participants" in the fishery at the time IFQ was actually distributed.

4. Plaintiffs submit that Federal Defendants have again failed to satisfy the requirements in the Magnuson-Stevens Act with respect to the design of the IFQ Program. In particular, IFQ allocations must give consideration to recent fishing activity of harvesting vessels and processing history for processing facilities so that dependency on the fishery is recognized and costs (including leasing and purchasing IFQ) are minimized. Instead, the IFQ Regulations favor those with fishing history in the period 1994 to 2003 and those with processing history from 1998 to 2004, history years that arbitrarily do not recognize, or give consideration for, recent fishing or processing history and the attendant investment commitment to the fishery on an on-going basis. Moreover, IFQ allocations were given to permit-holders who had not used their permits to land any Pacific whiting after 2003, transferring enormous amounts of wealth to former participants in the fishery who have made an objective decision to stop fishing Pacific whiting prior to the institution of the IFQ Program in 2010. Simply holding a permit that entitles the permit-holder to engage in a fishing privilege is not the same as making continual investments in a fishing operation in the Pacific whiting fishery.

5. Under the original 2010 regulations, IFQ was issued to each of the Plaintiffs in this

action and each is eligible to receive IFQ under the IFQ Program. Plaintiffs aver and believe that, had the agencies complied with the Magnuson-Stevens Act with regard to the initial allocation, each would have received more IFQ than they were in fact given by the agency. By refusing to change the initial allocation after the court-ordered "reconsideration," Federal Defendants have allocated IFQ to permit-holders with no active participation in the Pacific whiting fishery or dependence on that fishery and to permit-holders who have less dependence on the fishery than they do. As a result, the IFQ Regulations and Federal Defendants' recent regulatory action to affirm the original IFQ allocations without change violate the Magnuson-Stevens Act and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201-2202 (declaratory judgment); 16 U.S.C. §§ 1855(f), 1861(d) (Magnuson-Stevens Act); and 5 U.S.C. § 701-706 (APA).

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

8. The Pacific Groundfish Fishery that is the subject of this case is prosecuted along the coasts of Oregon, Washington, and California.

RELATED CASE

9. a. *Pacific Dawn I* is related to this case within the meaning of Local Rule 3-12 in that this action involves substantially the same parties or events and is a direct challenge to the same regulations issued by Federal Defendants following a court-ordered reconsideration by Federal Defendants of that regulation.

b. Remand oversight jurisdiction has been retained by Judge Thelton Henderson in *Pacific Dawn I* and to that extent, the case is still ongoing. Assignment of this case to Judge Henderson would promote the efficient determination of the present action.

PARTIES

10. Plaintiff Pacific Dawn LLC ("Pacific Dawn") is a company based in Seattle, Washington which operates the fishing vessel Pacific Challenger. Pacific Dawn currently holds

permits for fishing for Pacific Groundfish, including whiting, and is otherwise eligible to receive IFQ. Pacific Dawn has received an IFQ initial allocation under the IFQ Program. However, the IFQ Regulations do not recognize the recent fishing history held by Pacific Dawn from 2003 to 2010 in calculating its initial IFQ. As a consequence, Pacific Dawn must lease or buy IFQ from others in order to maintain harvests levels at or near the levels of their recent history in the fishery. If IFQ was not issued to permit-holders who did not land any Pacific whiting between 2003 and 2010, Pacific Dawn would have been issued a greater amount of IFQ. And, if Federal Defendants had included Pacific whiting fishing history between 2003 and 2010 in the allocation formula, Pacific Dawn would have been issued a greater amount of IFQ.

11. Ocean Gold Seafoods, Inc. ("Ocean Gold") is a corporation organized under the laws of the State of Washington with facilities located in Westport, Washington. Ocean Gold is eligible for and has been issued IFQ as a processing entity for use in the Pacific whiting fishery. In 1997, Ocean Gold constructed a new plant in Westport designed to process whiting into headed and gutted products, the first such plant to be dedicated to this type of product rather than the surimi products that dominated the processing industry at that time. Since then, foreign markets for headed and gutted product has become the dominant markets for selling Pacific whiting and the surimi market has declined significantly. Because of the history years chosen by Federal Defendants, the initial allocation of Pacific whiting IFQ went to companies with history during the surimi processing years, even though the current state of the market favors headed and gutted products. Because of the IFQ Regulations, Ocean Gold has had to reduce its operations below its recent Pacific whiting processing history and reduced employment at its plant.

12. Plaintiff Chellissa LLC ("Chellissa") owns the fishing vessel Chellissa and is based in Florence, Oregon. Chellissa currently holds permits for fishing for Pacific Groundfish, including whiting, and is otherwise eligible to receive IFQ under the Trawl Rationalization Program. The final rule fails to recognize the recent fishing history held by Chellissa from 2003 to the present in calculating its initial IFQ allocation and otherwise treats Chellissa unfairly and unlawfully under the IFQ Regulations.

13. Plaintiff Jessie's Ilwaco Fish Company ("Ilwaco Fish") is a fish processing firm based in Ilwaco, Washington that has purchased and processed Pacific whiting since 1976. Its plant is located in a small fishing community on the Washington Coast and it employs approximately 100-300 workers in its operations each year. Ilwaco Fish holds the appropriate permits to receive a share of the initial issuance of whiting quota share to be issued to qualified shoreside processors, which has been set at 20 percent of the overall quota share available. However, Ilwaco Fish's processor quota share does not reflect its recent history of processing after 2004 to the present, including 14 million pounds in 2005, 19 million pounds in 2006, and 10 million pounds in 2007. As a consequence, Ilwaco Fish has lost market share it has built up in the Pacific whiting fishery over recent years and reduced employment at its plant.

14. Defendant Rebecca Blank, the Acting Secretary of the U.S. Department of Commerce, is responsible under the Magnuson-Stevens Act for approving fishery management plans and promulgating fishery management regulations, including the IFQ Program, pursuant to the Magnuson-Stevens Act. Secretary Blank is sued in her official capacity.

15. Defendant National Oceanic and Atmospheric Administration (NOAA) is a subunit of the U.S. Department of Commerce with supervisory responsibility for NMFS. The Secretary of Commerce has delegated certain administrative functions under the Magnuson-Stevens Act to NOAA, which in turn has sub-delegated certain fishery management functions to NMFS.

16. Defendant NMFS is the federal agency that administers the fishery management plan for the Pacific Coast Groundfish Fishery, of which the IFQ Program is now a part, and is a subunit of NOAA and the U.S. Department of Commerce.

17. Secretary Blank, NOAA and NMFS approved Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan ("FMP") that comprise in substantial part the IFQ Program and issued final regulations implementing those Amendments in the Federal Register on October 1, 2010, 75 Fed. Reg. 60868-60999 (Oct.1, 2010), and on December 15, 2010, 75 Fed. Reg. 78344-78427 (Dec. 15, 2010). On March 28, 2013. NOAA issued a notice in the Federal Register of its determination that no change was required to the original IFQ

regulations or the FMP following remand in *Pacific Dawn I* and reconsideration of the IFQ allocation formula.

LEGAL AND FACTUAL BACKGROUND

18. The Magnuson-Stevens Act created a national fishery management system for fish resources and fishing activity located in a 200-nautical mile Exclusive Economic Zone along the U.S. coast, including California, Oregon and Washington.

19. Pursuant to that national fishery management system, the responsible federal agencies, NOAA and NMFS, acting upon recommendations of the Pacific Fishery Management Council created to provide for "bottom-up" fishery management plans for various groups of marine fisheries, long ago adopted the Pacific Coast Groundfish FMP. Approximately 90 species of groundfish, including whiting, are managed pursuant to the FMP through a number of measures, including annual harvest limits, trip and landing limits, no-fishing areas, seasonal closures, and gear restrictions. New entrants into the fisheries are limited and the size of the trawl fleet has declined by nearly 50 percent over the last decade. The Pacific Coast Groundfish Fishery is one of the most strictly regulated fisheries in the world, and overall is considered one of the healthiest by recent peer-reviewed scientific analysis.

20. Upon approval of the FMP by NOAA and NMFS, acting for the Secretary of Commerce, regulations were promulgated to implement the FMP, which is amended and updated on a regular basis as environmental and economic conditions change. Further, the FMP is updated and amended at least bi-annually but sometimes every quarter-year or monthly when appropriate. The goal is to conserve the various fisheries subject to the FMP to ensure the long-term conservation of fish stocks while taking into account the impacts of the FMP on fishing communities, individuals and companies that depend on the fisheries.

21. On October 1, 2010, NOAA published the October Regulations implementing Amendments 20 and 21 to the FMP. Amendment 20 establishes a Trawl Rationalization Program that consists of an IFQ program for the shorebased trawl fleet and cooperative programs, for the at-sea mothership and catcher/processors trawl fleets. The Trawl Rationalization Program is

intended to increase net economic benefits, create individual economic stability, provide full utilization of the trawl sector allocation, consider environmental impacts, and achieve individual accountability of catch and bycatch. Amendment 21 establishes fixed allocations of quotas for limited entry trawl participants.

22. On December 15, 2010, NOAA published additional regulations implementing Amendments 20 and 21 to the FMP (the "December Regulations").

23. The IFQ Regulations (the October Regulations and the December Regulations) contain standards and procedures for issuance of IFQ permits and initial allocations of IFQ (based on a catch history possessed by current permit holders), among other provisions. The allocation formulas in the IFQ Regulations are based on vessel landings for the trawl vessel sector or processor receipt history for the shoreside sector. For Plaintiffs, each is expected to receive an initial allocation of IFQ that will cause them to reduce their operations, leading to a reduction in the market share each has recently developed.

24. The Pacific whiting fishery is one of the most important commercial fisheries, and the largest, off the Pacific Coast and is found in Oregon, Washington, and California. Recent harvest levels have been within the annual conservation guidelines set by NOAA and NMFS and the stock is not considered overfished. In fact, the independent Marine Stewardship Council in 2009 certified the Pacific whiting fishery as sustainable and well-managed. Since 2001, the coast-wise limit on the harvest of Pacific whiting has never been exceeded.

25. The IFQ Regulations allocate 80 percent of the Pacific whiting IFQ to current vessel permit holders and 20 percent of the shoreside harvest allocation to shoreside processors.

26. With respect to vessel permits, the IFQ Regulations state the following (75 Fed. Reg. at 60959): "Whiting QS [quota share] based on each limited entry trawl permit's history will be allocated based on the permit's relative history from 1994 to 2003." History after 2003 was not considered important or relevant, and was rejected as a basis for allocation.

27. With respect to shoreside processors, the IFQ Regulations state the following: (75 Fed. Reg. at 60960): "For each eligible shoreside processor, whiting QS [quota share] will be

allocated based on the eligible shoreside processor's relative history from 1998 through 2004." History after 2004 was not considered important or relevant, and was rejected as a basis for allocation.

28. On December 22, 2011, Judge Thelton Henderson ruled that Federal Defendants had violated the Magnuson-Stevens Act by basing initial IFQ allocations on fishing history only through 2003 for harvesters and 2004 for processors. In his *Pacific Dawn I* Order on Remedy, issued February 21, 2012, Judge Henderson remanded the regulations for "reconsideration prior to the start of the fishing season that begins on April 1, 2013," ordered Federal Defendants to file status reports every three months, and retained oversight jurisdiction, if necessary, to conduct a hearing on the question of whether Federal Defendants were "on track."

29. On March 28, 2013, Federal Defendants published notice of the final rule in the Federal Register and announced the results of their "reconsideration" and decided, wrongfully in Plaintiffs' view, that no changes to the initial allocation were required. Under the final rule, effective April 1, 2013, the existing initial IFQ allocations will be maintained without any revisions despite the *Pacific Dawn I* ruling.

30. All fishery management plans and regulations implementing such plans must comply with the requirements of Magnuson-Stevens Act in order to be binding and effective. Any such regulations that are not so consistent are unenforceable.

31. The Administrative Procedure Act, 5 U.S.C. § 706(2), authorizes a federal court to hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Under the APA, among other requirements, Federal Defendants must articulate a satisfactory explanation for its action that demonstrates a rational connection between the facts found and the choices made.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of Magnuson-Stevens Act in failing to properly consider and credit fishing history after 2003 for dependent Pacific whiting trawl vessels)

32. Plaintiffs incorporate by reference all preceding paragraphs

33. The Magnuson-Stevens Act contains a number of requirements for adopting FMPs and implementing regulations to carry out FMPs, including, inter alia, the requirement of considering both recent harvests and historic harvests, basing determinations on the best available information, considering the impacts on local fishing communities, and making allocations fair and equitable to all fishermen, among other required considerations. In designing an IFQ program, Federal Defendants are required, among other things, to take into account historical fishing practices in, and dependence on, the particular fishery at issue (16 U.S.C. § 1853(b)(6)(B)) and in developing an allocation Federal Defendants shall provide for consideration of investments in, and dependence on, the fishery (16 U.S.C. § 1853a(c)(5)(A)(iii)).

34. By failing to consider and credit recent fishing history for trawl vessels after 2003 in the Pacific whiting fishery, the IFQ Regulations creating the IFQ Program violated the Magnuson-Stevens Act. In particular, among other things, failing to consider recent harvests caused IFQ to be allocated to permit-holders with less dependence on the fishery than Plaintiffs or gave IFQ to permit-holders who were not presently participating in the Pacific whiting fishery as of 2010.

SECOND CAUSE OF ACTION

(Violation of Magnuson-Stevens Acts for failing to properly consider and credit recent processing history after 2004 for dependent whiting shoreside processors)

35. Plaintiffs incorporate by reference all preceding paragraphs.

36. The Magnuson-Stevens Act contains a number of requirements for adopting FMPs and implementing regulations to carry out FMPs, including, inter alia, the requirement of considering both recent harvests and historic harvests, basing determinations on the best available information, considering the impacts on local fishing communities, and making allocations fair and equitable to all fishermen among other required considerations. In designing an IFQ program,

Federal Defendants are required, among other things, to take into account historical fishing practices in, and dependence on, the particular fishery at issue (16 U.S.C. § 1853(b)(6)(B)) and in developing an allocation Federal Defendants shall provide for consideration of investments in, and dependence on, the fishery (16 U.S.C. § 1853a(c)(5)(A)(iii)).

37. By failing to consider and credit recent fish receipts for shoreside processors in the Pacific whiting fishery after 2004, the IFQ Regulations creating the IFQ Program violated the Magnuson-Stevens Act. In particular, failing to consider and include recent history in the processing sector allocation caused IFQ to be allocated to processors with less dependence on Pacific whiting because their history was based on surimi processing.

THIRD CAUSE OF ACTION
(Violation of Magnuson-Stevens Act's National Standard 5 for failing to properly consider efficiency in designing the initial allocation of IFQ)

38. Plaintiffs incorporate by reference all preceding paragraphs.

39. The Magnuson-Stevens Act requires that fishery management plans, and regulations issued to implement them, to be consistent with ten National Standards. 16 U.S.C. § 1851. National Standard 5 states as follows: Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall economic allocation as its sole purpose. 16 U.S.C. § 1851(a)(5).

40. NOAA has issued guidelines with respect to National Standard 5 and state that "[g]iven a stated set of objectives for the fishery, an FMP should contain management measures that result in as efficient a fishery as is practicable or desirable." 50 C.F.R. § 600.330(b). The guidelines define an efficient fishery as one that enables the harvest of the maximum sustainable yield with the minimum use of economic inputs, such as labor, capital, interest and fuel. *Id.* at § 600.330(b)(2). The guidelines go on to say that efficiency in terms of aggregate costs then becomes a conservation objective, where "conservation" constitutes wise use of all resources involved in the fishery, not just fish stocks. *Id.* The guidelines go on further with respect to an allocation, such as an IFQ Program, and recommend that the alternatives examined should search for an efficient outcome and the FMP should demonstrate that the management measure aimed at

efficiency (i.e. the IFQ Program) does not simply distribute gains and burdens without an increase in efficiency.

41. Federal Defendants' initial allocation of IFQ, as confirmed by its recent "reconsideration," violates National Standard 5 in that IFQ has not been allocated to those most active in and dependent on the fishery, as demonstrated by fishing history and actual landings through 2010, thereby increasing the costs of active participants because of the obligation to buy or lease IFQ from others. Prior to the institution of the IFQ Program, no such lease or purchase costs existed. The IFQ allocation formula distributed gains to those less active in the fishery and did not result in increased efficiency in the fishery. The allocation of IFQ in the Pacific whiting fishery is not consistent with National Standard 5. As a consequence, the allocation of IFQ in the Pacific whiting fishery violated the Magnuson-Stevens Act.

FOURTH CAUSE OF ACTION
(Violation of Magnuson-Stevens Act's National Standard 7 for failing to minimize costs in designing the initial allocation of IFQ)

42. Plaintiffs incorporate by reference all preceding paragraphs.

43. National Standard 7 states as follows: Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication. 16 U.S.C. § 1851(a)(7); 50 C.F.R. § 600.340. In preparing an FMP and associated regulations, Federal Defendants must consider whether a particular management measure "can produce more efficient utilization" as well as the costs associated with an FMP.

44. Creation of the IFQ Program created IFQ leasing and purchase costs for on-going participants in the fishery that did not exist before. In addition, the agencies will be imposing new management costs of up to 3% to cover certain administrative costs associated with the IFQ Program. Other costs with regard to government regulatory expenses are also possible. Federal Defendants have not analyzed these costs nor considered how the initial IFQ allocation could be designed to produce more efficient utilization of the resource. For example, allocating more IFQ to participants the greatest history in the fishery would reduce the need to lease or buy more IFQ and not allocating any IFQ to permit-holders with no present participation or dependence on the

fishery would allow the active participants to be more efficient and be capable of managing impending and new administrative costs.

45. The allocation of IFQ in the Pacific whiting fishery is not consistent with National Standard 7. As a consequence, the allocation of IFQ in the Pacific whiting fishery violated the Magnuson-Stevens Act.

FIFTH CAUSE OF ACTION
(Violation of Magnuson-Stevens Act's National Standard 8 for failing to take into account the needs of fishing communities and to provide for sustained participation of such communities in the Pacific whiting fishery)

46. Plaintiffs incorporate by reference all preceding paragraphs.

47. National Standard 8 states as follows: "Conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to: (1) Provide for the sustained participation of such communities; and (2) To the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. §1851(a)(8); 50 C.F.R. 600.345(a). Federal Defendants must, therefore, take into account "the importance of fishery resources to fishing communities" when preparing a FMP. 50 C.F.R. 600.345(b).

48. Federal Defendants failed to analyze, among other things, the "likely positive and negative social and economic impacts of the alternative management measures, over both the short and the long term, on fishing communities." 50 C.F.R. 600.345(c)(4). In particular, the IFQ Program did not take into account the impact of the allocations on communities including Westport, Washington and Ilwaco, Washington, for example, where Ocean Gold and Ilwaco Fish are based. Both Ocean Gold and Ilwaco Fish are negatively affected by IFQ allocations that fail to include more recent history and have lost market share or been forced to reduce their operations as a result.

49. The allocation of IFQ in the Pacific whiting fishery is not consistent with National Standard 8. As a consequence, the allocation of IFQ in the Pacific whiting fishery violated the Magnuson-Stevens Act.

SIXTH CAUSE OF ACTION
(Violation of the APA)

50. Plaintiffs incorporate by reference all preceding paragraphs.

51. The IFQ Regulations with respect to the initial allocation of IFQ for the Pacific whiting fishery violate the Magnuson-Stevens Act and are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

52. The IFQ Regulations therefore violate the APA.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that finding that Federal Defendants, in the IFQ Regulations, violated the Magnuson-Stevens Act and the APA by:

a. unlawfully failing to consider and credit Pacific whiting trawl fishing history after 2003 in making initial allocations of IFQ and by allocating IFQ to permit-holders with less history and dependence on the fishery or to permit-holders who left the fishery after 2003;

b. unlawfully failing to consider and credit Pacific whiting processing history after 2004 in making initial allocations of IFQ to processing plants with less recent history and processors whose history was based on surimi;

c. unlawfully adopting an initial allocation of IFQ for the Pacific whiting fishery that is not consistent with National Standard 5 of the Magnuson-Stevens Act;

d. unlawfully adopting an initial allocation of IFQ for the Pacific whiting fishery that is not consistent with National Standard 7 of the Magnuson-Stevens Act;

e. unlawfully adopting an initial allocation of IFQ for the Pacific whiting fishery that is not consistent with National Standard 8 of the Magnuson-Stevens Act; and

f. unlawfully adopting an initial allocation of IFQ for the Pacific whiting fishery that is arbitrary and capricious, an abuse of discretion and inconsistent with applicable law.

2. Remand the IFQ Regulations for proceedings and action consistent with the

Magnuson-Steven Act and the APA;

3. Award plaintiffs their fees, expenses and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

4. Provide such other relief as is just and proper.

Respectfully submitted,

DATED: March 29, 2013

DAVIS WRIGHT TREMAINE LLP

By: _____
James P. Walsh
Gwen Fanger

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

DAVIS WRIGHT TREMAINE LLP

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PACIFIC DAWN, LLC, et al.,
Plaintiffs,
v.
JOHN BRYSON, et al.,
Defendants.

NO. C10-4829 TEH

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter came before the Court on December 12, 2011, on the parties' cross-motions for summary judgment. After carefully considering the parties' written and oral arguments, the Court now GRANTS IN PART and DENIES IN PART the motions for the reasons discussed below.

I. BACKGROUND

This case concerns the manner in which Defendants John Bryson, sued in his official capacity as Secretary of Commerce ("Secretary");[1] National Marine Fisheries Service ("NMFS"); and National Oceanic and Atmospheric Administration ("NOAA") regulate the fishing of Pacific whiting off the coasts of Washington, Oregon, and California. The Secretary oversees NOAA, which includes NMFS among its member agencies. Plaintiffs Pacific Dawn LLC, Chellissa LLC, James and Sandra Schones, Da Yang Seafood Inc., and Jessie's Ilwaco Fish Company own three fishing vessels and two processing companies that participate in the Pacific whiting industry.

[1]Bryson is substituted for Defendant Gary Locke pursuant to Federal Rule of Civil Procedure 25(d).

Plaintiffs contend that Defendants violated the Magnuson-Stevens Fishery Conservation and Management Act ("MSA" or "Act"), 16 U.S.C. §§ 1801-84, when they adopted Amendments 20 and 21 to the fishery management plan for Pacific groundfish, which includes Pacific whiting. Amendment 20 created a limited access privilege program through which participants in the trawl sector of the fishery receive permits to harvest a specific portion of the fishery's total allowable catch via individual fishing quotas ("IFQs"). Amendment 21 allocated total allowable catch for certain species in the fishery between the trawl and non-trawl sectors.

Congress enacted the MSA, among other purposes, "to conserve and manage the fishery resources found off the coasts of the United States," "to promote domestic commercial and recreational fishing under sound conservation and management principles," and "to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1801(b)(1), (3)-(4). The Act created eight regional fishery management councils, including the Pacific Fishery Management Council ("Council") that governs the fishery at issue in this case. 16 U.S.C. § 1852. These councils must develop, and submit to the Secretary for approval, fishery management plans ("FMPs") and "amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed)." 16 U.S.C. § 1852(b), (h)(1). FMPs must comply with ten national standards, 16 U.S.C. § 1851(a), and the MSA also enumerates certain factors that councils must take into account when developing programs that limit access to a fishery. *E.g.*, 16 U.S.C. §§ 1853(b)(6), 1853a.

Of relevance to Plaintiffs' instant claims,[2] NMFS issued regulations implementing Amendment 6 to the FMP for Pacific Groundfish in 1992, to take effect on January 1, 1994.

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[2]The parties are familiar with the facts of this case, and the Court here offers only a brief summary of relevant portions of the extensive administrative record.

Those regulations required federal permits to participate in the limited entry segment of the fishery and established different levels of endorsements, including "A" and "B." 57 Fed. Reg. 32,499, 32,501-03 (July 22, 1992). "A" endorsements were transferable endorsements that were granted to vessels that met specific minimum landing requirements during the qualifying window period of July 11, 1984, through August 1, 1988. *Id.* at 32,501. "B" endorsements were non-transferable and granted to vessels that "landed some groundfish prior to August 1, 1988," but that did not meet the requirements to receive an "A" endorsement. *Id.* "'B' endorsements expire[d] at the end of the 1996 fishing year, by which time vessel owners must have obtained a permit with an 'A' endorsement or have left the limited entry fishery." *Id.* at 32,503.

In 2004, NMFS published an advanced notice of proposed rulemaking announcing that the Council was:

> considering implementing an individual quota (IQ) program for the Pacific Coast groundfish limited entry trawl fishery off Washington, Oregon and California. The trawl IQ program would change management of harvest in the trawl fishery from a trip limit system with cumulative trip limits for every 2-month period to a quota system where each quota share could be harvested at any time during an open season. The trawl IQ program would increase fishermen's flexibility in making decisions on when and how much quota to fish. This document announces a control date of November 6, 2003, for the trawl IQ program. The control date for the trawl IQ program is intended to discourage increased fishing effort in the limited entry trawl fishery based on economic speculation while the Pacific Council develops and considers a trawl IQ program.

69 Fed. Reg. 1563 (Jan. 9, 2004).

The Council subsequently decided to allocate IFQs for Pacific whiting to current permit holders based on fishing history associated with such permits from 1994 to 2003 for harvesters, and from 1994 to 2004 for on-shore processors. Fishing history under "B"-endorsed permits was included when determining the total catch for the fishery in each year of the qualifying periods, but it was not included "in calculating any permit's individual qualifying history." Nov. 21, 2011 Joint Supplemental Br. at 3 (ECF Docket No. 47) (parties' jointly agreed description of how "B"-permit history was used in calculating IFQs);

see also 75 Fed. Reg.60,869, 60,956 (Oct. 1, 2010) (setting forth allocation rules). The final rules implementing Amendments 20 and 21 were issued in October and December 2010, and implementation of the IFQ system began on January 1, 2011. 75 Fed. Reg. 60,869; 75 Fed. Reg. 78,344 (Dec. 15, 2010).

The MSA requires that:

> In developing a limited access privilege program to harvest fish a Council or the Secretary shall –
>
> (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.

16 U.S.C. § 1853a(c)(5) (emphasis added). Plaintiffs contend that Defendants violated subsection (i) of this provision – and also failed to base their decisions on "the best scientific information available," as required by National Standard Two, 16 U.S.C. § 1851(2) – in two ways: first, by not considering fishing history for harvesters beyond 2003 and for processors beyond 2004 and, second, by not adequately considering fishing history associated with "B" permits.[3] Plaintiffs argue that their initial IFQs would have been higher had harvests beyond 2003 and 2004 been considered.[4] Plaintiff Pacific Dawn further asserts that it obtained ownership of the fishing history of the Amber Dawn, a vessel that fished under a "B"-endorsed permit from 1994 to 1996, and that this history was not but should have been included when Defendants determined Pacific Dawn's initial IFQ. The parties agree that

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[3]In their papers, Plaintiffs discuss separately the 2003 and 2004 cutoff dates for harvesters and processors, respectively. The Court considers these issues concurrently because they are based on the same legal arguments.

[4]Plaintiff Da Yang Seafood Inc. did not receive an initial IFQ because it had no history prior to the 2004 cut-off date for processors. It contends that it should have received one based on its more recent history.

summary judgment is an appropriate mechanism for resolving Plaintiffs' claims, and their cross-motions for summary judgment are now pending before the Court.

II. LEGAL STANDARD

A court shall set aside regulations adopted under the MSA if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1855(f)(1)(B) (adopting the standards for judicial review under 5 U.S.C. § 706(2)). This is a "highly deferential" standard of review, and an agency's action is presumed to be valid and should be affirmed "if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotation marks and citation omitted). A reviewing court's "only task is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002). The court "cannot substitute [its] judgment of what might be a better regulatory scheme . . . if the Secretary's reasons for adopting it were not arbitrary and capricious." *Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996).

"[S]ummary judgment is an appropriate mechanism for deciding the 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). Review is generally "limited to the administrative record on which the agency based the challenged decision." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). The Ninth Circuit allows expansion of the record only "in four narrowly construed circumstances: (1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency." *Id.* In this case, neither party has asked the Court to supplement the administrative record.

III. DISCUSSION

As an initial matter, Defendants correctly argue that the Act's use of the word "consideration" does not mandate a particular outcome. *See e.g., Pac. Coast Fed'n of Fishermen's Ass'ns v. Locke*, Case No. C10-4790 CRB, 2011 WL 3443533 (N.D. Cal. Aug. 5, 2011), at *5-7. However, unlike the plaintiffs in *Pacific Coast Federation*, Plaintiffs here challenge not simply the end result, but also whether Defendants considered the required statutory factors in reaching that result. The MSA unambiguously requires that Defendants consider certain factors, including "current and historical harvests." 16 U.S.C. § 1853a(c)(5)(A)(i). As explained above, Defendants must have "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Midwater Trawlers Coop.*, 282 F.3d at 716.

A. Consideration of fishing history beyond 2003 and 2004

Plaintiffs first argue that Defendants improperly failed to consider "current" harvests when, in 2010, they based initial IFQs on fishing histories through 2003 for harvesters and 2004 for processors. Defendants assert that they adequately considered current harvests by allocating quota shares to current permit owners rather than to individuals or vessels that may have participated in the fishery in the past. However, the statute requires consideration of current harvests, not current permits, and considering historical harvests of current permits is distinguishable from considering current harvests themselves. Defendants have cited no authority to the contrary.

Defendants' main argument on this issue is that they reasonably based the end of the qualifying period on the previously published 2003 control date. Plaintiffs raise several challenges to the validity of that control date, none of which have merit. First, Plaintiffs assert that the 2003 date reflected only a political statement or compromise, but they cite no evidence for this assertion.[5] Thus, this case is distinguishable from *Hadaja, Inc. v. Evans*, in which the regional council "urged the industry groups to reach a compromise," and the

[5]As noted below, there is evidence in the record, however, that the extension of the qualifying period for processors to 2004 was the result of compromise.

"limited access scheme was adopted directly from the compromise reached." 263 F. Supp. 2d 346, 350, 354 (D.R.I. 2003). Plaintiffs also argue that a proposed control date is only valid if it is adopted as a formal regulation. However, Plaintiffs cite no authority to support that conclusion, and the Third Circuit recently rejected that argument, concluding that the government need not go through formal rule promulgation procedures before setting a control date; instead, the court held that publication of a proposed control date in the Federal Register was sufficient. *Gen. Category Scallop Fishermen v. Sec'y of Commerce*, 635 F.3d 106, 113 (3d Cir. 2011). Finally, Plaintiffs argue that an interim amendment to the FMP – Amendment 15 – superseded the control date, but they cite no authority to rebut Defendants' conclusion in the record, in response to a comment to the proposed regulation, that:

> Nowhere does Amendment 15 address the 2003 control date or purport to change the qualifying period for the Groundfish trawl program. Amendment 15 was a limited interim action for the non-Tribal whiting fishery issued in anticipation of the trawl rationalization that in no way attempted to address matters beyond its limited scope. Moreover, the Council has explicitly stated that vessels that qualified for whiting fishery participation under Amendment 15 were not guaranteed future participation or inclusion in the Pacific whiting fishery under the provisions of Amendment 20.

B22:638 (June 2010 Final Environmental Impact Statement prepared by the Council and NMFS) (citation omitted).[6] In light of all of the above, the Court finds that the proposed control date was procedurally valid and was not subsequently invalidated by Amendment 15.

Defendants explain that they chose to base the qualifying period on the announced control date because using a later date would "reward those who disregarded the control date announcement, create perceptions of inequity, and encourage fishermen to ignore such dates in the future, negatively affecting the Council's ability to credibly use control dates." B22:A-151; *see also* B22:A-146 ("The allocation period that would most likely minimize dislocation and the attendant costs would be the few years just prior to the initial allocation.

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[6]The Court adopts the parties' system of citation to the administrative record. Thus, the quoted language appears at page 638 of document B22. Pagination denoted with an asterisk refers to page numbers in the document's PDF format rather than pagination identified on the document itself.

That period is not used, in part, because of issues related to the need to establish credible control dates to effectively manage the fishery while deliberations on new LE [limited entry] programs are underway."). A similar rationale was upheld by the Ninth Circuit in *Alliance Against IFQs v. Brown*. In that case, the relevant statute required that "present participation in the fishery" be "take[n] into account."[5] 84 F.3d at 346 (quoting 16 U.S.C. § 1853(b)(6)(A)). The government allocated quota shares in 1993 to owners or lessees of vessels that made legal landings of halibut or sablefish during the years 1988 to 1990. *Id.* at 345-46. The Ninth Circuit found that the most persuasive reason for a 1990 cutoff date "was that if participation in the fishery while the rule was under consideration had been considered, then people would have fished and invested in boats in order to obtain quota shares, even though that would have exacerbated overcapacity and made no economic sense independently of the regulatory benefit." *Id.* at 346. The court ultimately concluded that the three-year period between the end of the cutoff period and promulgation of the regulations was not arbitrary or capricious:

> Congress left the Secretary some room for the exercise of discretion, by not defining "present participation," and by listing it as only one of many factors which the Council and the Secretary must "take into account." While the "participation" that the Council actually considered was admittedly in the "past" judged from the time when the final regulations were promulgated, it was roughly "present" with the time when the regulations were first proposed: The Council began its process on this plan in 1990, and considered participation in 1988, 1989, and 1990. The process required to issue a regulation necessarily caused substantial delay. The process of review, publication, public comments, review of public comments, and so forth, had to take a substantial amount of time, *see* 16 U.S.C. § 1854(a), and the environmental impact review also was lengthy, as it typically is, *see* 42 U.S.C. § 4332(2)(C). "Present" cannot therefore prudently be contemporaneous with the promulgation of the final regulations.

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[5]Plaintiffs assert that Congress intended the word "current" to refer to more recent events than "present," but they cite no authority for that position. Moreover, their moving papers rely on a dictionary definition of "current" expressed in terms of "present." Pls.' Mot. at 9 (defining "current" as "presently elapsing, occurring in or existing at the present time; most recent") (quoting Merriam-Webster Unabridged Dictionary (2010)).

> We further believe that the Secretary had a good reason for disregarding participation in the fishery during this lengthy process, because the alternative would encourage the speculative over-investment and overfishing which the regulatory scheme was meant to restrain. Under the regulations, eligibility for quota shares depends on fishing during the years 1988, 1989, and 1990. Whatever years are used necessarily recede into the distant past. Even in 2005, assuming the regulatory scheme lasts that long, the quota shares will be based on fishing prior to 1991. Future generations of fishermen will continue to be governed by these pre-1991 allocations. Had the Secretary extended the 1990 cutoff, the incentive to pour money and time into the fishery in order to get a bigger quota share, for those who could afford a long term speculation, would have been enormous.
>
> Thus, while the length of time between the end of the participation period considered and the promulgation of the rule *pushed the limits of reasonableness*, we are unable to characterize use of a 1988 through 1990 period as so far from "present participation" when the regulation was promulgated in 1993 as to be "arbitrary or capricious."

Id. at 347-48 (emphasis added) (citations omitted).

Alliance Against IFQs would clearly support upholding the regulations at issue in this case had they been promulgated in 2006 rather than 2010. The same "good reason" that supported the cutoff date in that case applies equally here: the desire to curb speculation while the regulations were under review. *Id.* at 347. Plaintiffs counter that there is no evidence of rampant speculation in the whiting industry that would undermine conservation and management efforts, and a control date was therefore unnecessary, but it could very well be that the announcement of a control date is what curbed any such speculation.

However, if three years between the end of a qualifying period and promulgation of a regulation "pushe[s] the limits of reasonableness," *Alliance Against IFQs*, 84 F.3d at 348, then the six- and seven-year periods in this case arguably fall beyond those limits. While "current" cannot "prudently be contemporaneous with the promulgation of the final regulations," it may be that a 2003 cutoff date is "so far" from "current" harvests when the regulation was promulgated in 2010 as to be arbitrary or capricious. *Id.* at 347-48. At oral argument, Defendants asserted that this case was more factually complex than *Alliance Against IFQs* – for example, because more species were at issue and Congress passed amendments to the MSA while the regulations were under consideration – and that a longer

period of time to develop the regulations was therefore reasonable. The parties did not brief this issue, and it may be that the increased factual complexity would, indeed, render the delays in this case reasonable.

The Court need not and does not decide this question because an independent basis exists for rejecting the regulations in this case: Even if it was conceptually reasonable for Defendants to have relied on a 2003 control date when promulgating regulations in 2010, the manner in which they did so here was not rational. As Defendants correctly observe, the record demonstrates that harvests up to 2006 were considered for some purposes. At first glance, this would appear to support Defendants because it indicates that they considered harvests more recent than 2003. However, it actually undermines Defendants' position because Defendants fail to explain why it was rational to rely on the control date for some purposes but not others. For example, Defendants considered harvests from 2003 to 2006 when examining species considered to be overfished. *E.g.*, D45:*64-68 (Aug. 3, 2010 Decision Memorandum from NOAA Regional Administrator William W. Stelle, Jr. to NOAA Assistant Administrator for Fisheries Eric C. Schwaab). They justified going beyond the 2003 control date as follows:

> The ratios could not be calculated without using information from the West Coast Groundfish Observer Program. This program was not fully operational until 2003, so use of earlier years would not have been practicable. In addition, the Rockfish Conservation Areas (RCAs) were first created in 2003. Fishing operations were greatly affected by the creation of the RCAs, which will remain in place for the foreseeable future. The Council considered it important to recognize the changes caused by the RCAs, that choosing earlier years would not have done so, and that an estimate of likely patterns of activity should be based on a period of time when the RCAs were in place. The Council also considered using later years, but rejected this approach because the years 2003-2006 reasonably reflected recent fishing patterns, while not diverging too far from the target species allocation period of 1994-2003.

D45:*66. While the development of the RCAs provides a rational basis for departing from the 2003 control date in allocating QS for overfished species, it is questionable that Defendants considered whether the chosen qualifying period "reasonably reflected recent fishing patterns" for these species when they do not appear to have undertaken the same

analysis for Pacific whiting. For instance, the distribution of whiting among Washington, Oregon, and California appears to have shifted significantly after 2003, with Washington's share moving from 29% in 2003 to 50% in 2008, but Defendants have not cited to any portion of the record where they considered whether the IFQ allocations based on history through 2003 and 2004 "reasonably reflected" these more recent fishing patterns. *See* M379:6, 8 (July 9, 2010 comments on proposed rule prepared for Plaintiff Pacific Dawn by Steve Hughes).

Defendants also looked at more recent harvests when considering whether new entrants would be prejudiced. B22:A-216. They concluded that:

> With respect to whiting, five new buyers have entered the fishery since 2004 (the end of the whiting QS [quota share] allocation period for processors), but these buyers have purchased nearly 3 percent of the shoreside whiting landings and about 9 percent of the landings in California (which are much smaller than for Oregon and Washington, Table A-76). With the possible exception of California, it does not appear that there are many post-2004 entrants with significant amounts of landings that will not receive an initial allocation of whiting QS under the IFQ program.

Id. Defendants make no argument as to why it was rational for them to exclude these new entrants, particularly the ones that had "significant amounts of landings that will not receive an initial allocation of whiting QS under the IFQ program." There does not appear to be any evidence, for example, that the new entrants engaged in speculation when they entered the market after the announced 2003 control date.

Most problematic is Defendants' explanation of why the qualifying period for processors was extended to 2004. Defendants did not rely on the 2003 control date for processors "because keeping the date at 2003 was viewed to disadvantage a processor that was present as a participant during the window period but had increased its share of the processing substantially since the close of the original allocation period (2003)." B22:A-214. Thus, the extension to 2004 was made to benefit a single processor, which begs the question of why that particular processor should benefit – notwithstanding an earlier control date – when others should not. This appears to be a quintessential case of arbitrariness. Moreover,

the record unequivocally states that the extension of the period to 2004 for harvesters was the result of "a compromise arrived at during industry negotiations," B22:A-146, thus undermining any argument that Defendants' decision-making was free from political compromise.

While Defendants correctly argue that they have broad discretion to make decisions, and that no particular outcome is required by the MSA, they have failed to present a reasonable explanation for relying on the 2003 control date for some purposes but not others. Consequently, the Court finds that Defendants' failure to consider fishing history beyond 2003 for harvesters and 2004 for processors was arbitrary and capricious. Plaintiffs' motion for summary judgment is GRANTED on this issue, and Defendants' motion is DENIED.

B. Consideration of "B"-permit history

Plaintiffs next argue that Defendants violated the MSA by failing to give adequate consideration to fishing history conducted under "B" permits. The parties agree that "B"-permit history was not credited to any current permit holder when determining qualifying history for purposes of allocating initial IFQs. Defendants explain that such history was excluded because they followed a policy of having fishing history follow the permit – i.e., they allocated shares to owners of current permits to "ensure[] that the allocation will go to those that currently own assets in the fishery," B22:A-119, and based such allocations on the catch history associated with each given permit, not the catch history of any particular vessel.

Given the decision to base IFQs on fishing history associated with current permits – a decision that Plaintiffs do not challenge – it was not arbitrary or capricious for Defendants to exclude "B"-permit history when calculating qualifying fishing history. While Plaintiff Pacific Dawn may well have entered into an agreement to purchase the fishing history of the Amber Dawn, the "B" permit under which the Amber Dawn fished expired in 1996. Contrary to Plaintiffs' assertions, the record is clear that "B" permits were not transferable and were no longer valid after 1996. *E.g.*, 57 Fed. Reg. 32,499, 32,501 ("A 'B' endorsement allows the vessel to participate in the limited entry fishery through 1996, when all 'B'

endorsements will expire."); *id.* at 32,503 ("The non-transferable 'B' endorsement provides short-term access to the fishery. . . . 'B' endorsements expire at the end of the 1996 fishing year, by which time vessel owners must have obtained a permit with an 'A' endorsement or have left the limited entry fishery."). Plaintiffs have failed to establish that the history of the Amber Dawn when it fished under a "B" permit is associated with any current permit, and it was therefore reasonable for Defendants not to have credited such history when it allocated initial IFQs. Accordingly, Defendants' motion for summary judgment is GRANTED on this issue, and Plaintiffs' motion is DENIED.

C. Remedy

Having found for Plaintiffs on one issue, the Court must now determine an appropriate remedy. Plaintiffs ask that the regulations be set aside and the matter be remanded to NOAA, but Defendants request an opportunity to file additional briefs on an appropriate remedy. In their reply, Plaintiffs failed to offer any reason why such briefing would be unnecessary and instead merely repeated their conclusory request that the regulations be set aside and that NOAA be ordered to revise the regulations in compliance with the MSA. Although the parties could – and should – have included more discussion on an appropriate remedy in their papers, they did not. The Court therefore finds it prudent to consider supplemental briefing before granting any relief.

IV. CONCLUSION

As discussed above, Plaintiffs' and Defendants' motions for summary judgment are both GRANTED IN PART and DENIED IN PART. Plaintiffs prevail on the issue of whether Defendants violated the MSA by basing initial IFQ allocations on fishing history only through 2003 for harvesters and 2004 for processors. Defendants prevail on the issue of whether they adequately considered fishing history conducted under "B" permits.

The parties shall submit supplemental briefing on an appropriate remedy. They shall file simultaneous briefs on or before **January 30, 2012,** and simultaneous reply briefs on or before **February 13, 2012.** The matter will then be deemed submitted on the papers unless

the Court subsequently orders oral argument. Alternatively, if the parties wish to appeal this order before litigating an appropriate remedy, the Court will consider a motion to make the requisite findings for an interlocutory appeal under 28 U.S.C. § 1292.

IT IS SO ORDERED.

Dated: 12/22/11

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PACIFIC DAWN, LLC, et al.,
Plaintiffs,
v.
JOHN BRYSON, et al.,
Defendants.

NO. C10-4829 TEH
ORDER ON REMEDY

On December 22, 2011, this Court granted in part and denied in part Plaintiffs' motion for summary judgment. The Court found that Defendants' failure to consider history beyond 2003 for harvesters and 2004 for processors when setting initial fishing quotas ("IFQs") for Pacific whiting was arbitrary and capricious. The Court ordered supplemental briefing on remedy because the parties' summary judgment papers failed to address that issue adequately. Having carefully considered the parties' supplemental briefs, the Court finds it appropriate, for the reasons discussed below, to remand the regulations for reconsideration prior to the start of the fishing season that begins on April 1, 2013.

DISCUSSION

The parties agree that the regulations at issue should be remanded to Defendants for further consideration consistent with the Court's summary judgment ruling. However, they disagree on a deadline for adopting new regulations and whether the current regulations should be vacated pending remand.

Plaintiffs assert that Defendants can and should adopt new regulations prior to the start of the 2012 fishing season for Pacific whiting, which they contend begins on May 15, 2012. Their initial supplemental brief also suggested that the existing regulations remain in place unless Defendants fail to implement new regulations prior to December 1, 2012.

Plaintiffs altered their position in their supplemental reply, in which they request either that the existing regulations be vacated if Defendants fail to implement revised regulations prior to May 15, 2012, or that they be vacated indefinitely pending the implementation of revised regulations.

Defendants, by contrast, contend that it would be impossible for them to implement new regulations by the start of the 2012 Pacific whiting fishing season, which they assert begins on April 1, 2012, but state that new regulations can be in place by the start of the 2013 fishing season on April 1, 2013. Defendants further argue that this Court should not vacate the existing regulations while the matter is under review.

Time for Implementing New Regulations

The start of the Pacific whiting fishing season is governed by regulation. It begins on May 15 of each year for the catcher/processor and mothership sectors, but as early as April 1 for the shorebased IFQ program, depending on geographical latitude. 50 C.F.R. § 660.131(b)(2)(iii). Thus, Defendants are correct that the fishing season begins as early as April 1, and not on May 15, as Plaintiffs assert.

Defendants also presented evidence that it would be unworkable to change quota share amounts once the fishing season has begun:

> Each owner of a whiting quota share permit receives two distributions of whiting quota pounds. The first limited distribution of 2012 whiting quota pounds occurred on December 29, 2011, based on the lower range of potential whiting harvest amounts. The final whiting harvest amount is known by March 25. Once the final harvest amount is known, another distribution of whiting quota pounds occurs so that the total quota pounds issued for that year is equal to the permit owner's whiting quota share multiplied by that year's whiting shorebased trawl allocation. . . . Once the quota pounds are distributed to quota share accounts, the quota pounds can be sold, transferred, or leased to other participants in the shorebased IFQ fishery. Any change in initial quota share amounts that occurs during 2012 after the primary shorebased whiting fishery begins could be virtually impossible to implement. For example, if a permit owner's whiting quota share were reduced mid-season, the permit owner's corresponding whiting quota pounds would need to be reduced. However, if the quota share permit owner has already transferred quota pounds based on private business agreements, NMFS [the National Marine Fisheries Service] lacks

> the ability to determine who currently owns the quota pounds attributable to different quota share accounts, and also lacks the ability to determine if quota pounds already fished are attributable to a specific quota share account. Simply put, once quota pounds are issued and quota pound trading or fishing occurs, taking back quota pounds to adjust for changes in quota share amounts is impracticable mid-season.

Lockhart Decl. ¶ 12. The Court finds this evidence persuasive, especially in the absence of any contrary evidence or argument by Plaintiffs that changing quotas mid-season is feasible. The question for the Court is therefore whether it should order implementation of new regulations prior to April 1, 2012, or April 1, 2013.

Plaintiffs have presented no authority for ordering the implementation of revised regulations in less than two months, or even in three months if Plaintiffs' asserted start date were assumed to be true, and the Court finds such a timetable to be unreasonable. Indeed, Plaintiffs' initial supplemental brief appears to recognize that it may not be feasible to implement regulations by May 15, 2012, since it requested vacatur of existing regulations only if revised regulations were not in place by December 1, 2012. In addition, the primary case relied on by Plaintiffs in their supplemental reply brief ordered a one-year deadline on remand – far longer than the three months Plaintiffs request here. *See Natural Res. Def. Council v. Locke*, Case No. C01-0421 JL (N.D. Cal.), Apr. 29, 2010 Order on Remedy (Ex. 3 to Pls.' Suppl. Reply Br.).

Plaintiffs appear to assume that Defendants need only perform simple mathematical calculations using existing historical catch data before they can implement new regulations. While that is one option open to Defendants, it is not the only one. For example, Defendants might also want to consider whether it is "appropriate to increase the number of worst years that any individual may drop (from two in the current formula to some higher number); earlier years in the allocation period might be removed to maintain a consistent length for the allocation period; or a different method for weighting the years might be appropriate." Second Lockhart Decl. ¶ 13. Put simply, Plaintiffs are not entitled to have Defendants adopt their requested methodology, nor is it the Court's role to dictate to Defendants how the regulations should be revised. As the Supreme Court has explained:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); *see also Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 721 (9th Cir. 2002) (remanding to NMFS "to either promulgate a new allocation consistent with the law and based on the best available science, or to provide further justification for the current allocation that conforms to the requirements of the Magnuson-Stevens Act and the Treaty of Neah Bay," rather than remanding with specific instructions on how to determine a new allocation). Plaintiffs have not persuaded the Court that this case presents "rare circumstances" in which a specific remand order would be appropriate, and Plaintiffs themselves appear to recognize the impropriety of a specific remand order, noting that an order on timing "is all that plaintiffs seek here." Pls.' Suppl. Reply at 7 n.5.

In light of all of the above, the Court finds it appropriate to remand the affected regulations for reconsideration in light of the Court's summary judgment ruling, with revised regulations to be implemented no later than April 1, 2013. Plaintiffs argue that Defendants may adopt emergency regulations by statute, 16 U.S.C. § 1855(c), but the Court agrees with Defendants that it would be improper to order Defendants to exercise their discretionary power to adopt emergency regulations – although, on remand, Defendants should consider whether use of this mechanism is appropriate.

Whether Existing Regulations Should Be Vacated Pending Remand

When determining whether to vacate regulations pending remand, courts consider several factors, including "the seriousness of the [regulations'] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed," *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks and citation

omitted), as well as "the purposes of the substantive statute under which the agency was acting" and "potential prejudice to those who will be affected by maintaining the status quo," *Natural Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1144 (C.D. Cal. 2002).

Plaintiffs initially agreed that vacatur need not be ordered as long as new regulations were implemented by December 1, 2012. *See, e.g.*, Pls.' Suppl. Br. at 5 ("[E]quity supports a finding that the existing IFQ Regulations should be preserved pending remand."). As discussed above, the Court finds it would be unworkable to change allocations in the middle of a season. Thus, based on Plaintiffs' initial agreement that the regulations need not be vacated before December 1, 2012, it would be appropriate to leave the existing regulations in place through the start of the 2013 fishing season on April 1, 2013.

Plaintiffs changed their position in their supplemental reply brief and now argue that vacatur is necessary pending remand unless Defendants implement new regulations prior to May 15, 2012. However, they have presented no evidence of changed circumstances that would warrant a change in position from their opening supplemental brief, filed just two weeks earlier.

Moreover, the Court finds the balance of factors in this case to weigh against vacatur. Plaintiffs argue that they will be harmed economically if the existing regulations are left in place, but their assertions of harm are exaggerated, as well as imprecise as to the amount of their projected harm. Plaintiffs begin with the incorrect premise that the existing regulations will remain in place for an additional two years when, in fact, the Court has ordered the regulations to be revised by the start of the 2013 fishing season, leaving the regulations in place for only one additional year. In addition, while Plaintiffs might well gain quota share after Defendants have revised the regulations, this outcome is not guaranteed. Plaintiffs have also failed to present evidence that they would benefit economically from a fishing season in which overall harvest was limited but no individual quotas existed, which would be the effect of vacatur. It could be, for example, that other participants would increase their catch beyond their existing individual quotas and do so more quickly than Plaintiffs, thereby

diminishing the amount of catch available to Plaintiffs before the overall harvest limit were reached.

As Plaintiffs acknowledge, leaving existing regulations in place will benefit some fishery participants while harming others. Marchand Decl. ¶ 5. However, the magnitude of such benefits and harms remains unknown because it is uncertain how Defendants will revise the regulations on remand. Additionally, Plaintiffs have offered no evidence to rebut Defendants' evidence that vacatur would lead to significant disruptions in the fishery. For example:

> No shorebased processors would receive individual whiting quota, which would result in lost revenue and less flexibility to adapt to the changes in the groundfish fishery expected under the trawl rationalization program. Whiting processors may also have [to] revisit any contracts that they have entered into with fishers, while vessels involved with the coop may have to revisit decisions on whether to remain in Alaska to fish Pollock or come down to fish Pacific whiting. In addition, fishing strategies, business plans, capital investments, and other aspects of the whiting fishery that are currently being implemented based on the expectation that whiting will be managed with IFQs and coop programs, would all be affected if the existing regulations were vacated.

Lockhart Decl. ¶ 14. Vacatur would also cause disruption in the management of the fishery by NMFS and, due to the "highly variable behavior" that would result if no individual quotas were in place, could result either in "closing the fishery too early, resulting in millions of dollars of lost revenue to struggling coastal communities, or too late, with potential conservation costs to the affected stocks." *Id.* ¶ 15. After balancing relevant factors, the Court therefore finds it appropriate to leave the existing regulations in place pending remand. If Defendants fail to adopt revised regulations prior to the start of the 2013 fishing season, the Court may re-visit this determination.

CONCLUSION

For the reasons set forth above, the Court now remands the regulations affected by its December 22, 2011 summary judgment ruling for further consideration consistent with that ruling, the Magnuson-Stevens Fishery Conservation and Management Act, and all other

governing law. Defendants shall implement revised regulations before the 2013 Pacific whiting fishing season begins on April 1, 2013. In the interim, the existing regulations shall remain in effect. The Court shall retain jurisdiction over Defendants' actions on remand.

The Clerk shall enter judgment and close the file administratively. However, until the revised regulations have been implemented, Defendants shall file status reports with this Court every three months, beginning on April 1, 2012. The Court may schedule a hearing to consider whether interim remedies are appropriate if it becomes apparent that Defendants are not acting as expeditiously as possible and do not appear to be on track to meet the April 1, 2013 deadline ordered by this Court.

IT IS SO ORDERED.

Dated: 02/21/12

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

EXHIBIT 3

See: Agenda Item D.1.b
Supplemental Attachment 2
April 2013