CASE NO. 14-15224

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC DAWN LLC and JESSIE'S ILWACO FISH COMPANY

Plaintiffs/Appellants,

v.

PENNY PRITZKER, in her official capacity as Secretary, U.S. Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, and NATIONAL MARINE FISHERIES SERVICE,

Defendants/Appellees,

MIDWATER TRAWLERS COOPERATIVE; TRIDENT SEAFOODS GROUP; DULCICH, INC., dba Pacific Seafood Group; ARCTIC STORM MANAGEMENT GROUP, LLC; ENVIRONMENTAL DEFENSE FUND,

Intervenor-Defendants/Appellees

On appeal from the United States District Court
for the Northern District of California, San Francisco Division
(Hon. Thelton E. Henderson presiding)
D.C. No. 3:13-cv-01419-TEH

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellants Pacific Dawn LLC and Jessie's Ilwaco Fish Company, each a non-governmental corporate party, provide the following statement in compliance with Federal Rule of Appellate Procedure 26.1(a): No parent company or publicly held corporation owns 10% or more of the stock or interests in either Pacific Dawn LLC or Jessie's Ilwaco Fish Company.

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I. INTRODUCTION

Appellants and plaintiffs Pacific Dawn LLC ("Pacific Dawn"), a fish harvester, and Jessie's Ilwaco Fish Company ("Jessie's"), a fish processor, actively participate in the Pacific Whiting Groundfish Fishery (the "Fishery") and rely on it for their livelihoods. The Magnuson-Stevens Fishery Conservation and Management Act (the "MSA") invests the National Oceanic and Atmospheric Administration ("NOAA") with the authority to manage the Fishery. Pacific Dawn and Jessie's have challenged regulations governing the management of the Fishery through the initial allocation of individual fishing quota ("IFQ") under the authority of the MSA ("IFQ Program"). Under the IFQ Program, only entities that possess IFQ may harvest or process Pacific whiting and only in that amount of authorized IFQ which is legally owned or leased. Pacific Dawn and Jessie's contend NOAA has failed to meet its obligations under the MSA and the Administrative Procedure Act ("APA") by implementing regulations in 2013 in furtherance of the IFQ Program that use the history cut-off years of 2003 (for harvesting allocations) and 2004 (for processing allocations) as a basis for making critically important first-time allocations of IFQ (the "2013 Regulations").

NOAA has acted arbitrarily and capriciously in two primary ways by not accounting for more recent history in the 2013 Regulations that has affected both harvesters and processors. First, NOAA failed to properly take "dependence" on

the Fishery into account as mandated by the MSA by making initial allocations of IFQ using history years that do not reflect the Fishery participants' reliance and dependence on the Fishery through the years just prior to the creation of the IFQ program in 2010. In particular, the 2013 Regulations allocated IFQ to permit holders who had much less history (and less corresponding dependence) than Pacific Dawn and Jessie's, including those who had left the Fishery since 2003.

Second, NOAA failed to take "present participation" in the Fishery into account by not requiring that permit holders who received IFQ be actively participating in the Fishery just prior to the initial allocation. Therefore, NOAA allocated IFQ to permit holders who had left the Fishery, disrupting the on-going fishing operations of those still active in the Fishery by giving them less IFQ than their dependence required. Given these failings, and NOAA's inability to provide a clear rational basis for its conclusions, Pacific Dawn and Jessie's contend that the District Court erred in deferring to NOAA's decision to adhere to outdated history periods as a critical element of its plans for managing the Fishery through the IFQ Program.

II. STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because Pacific Dawn and Jessie's brought claims against federal defendants, Penny Pritzker in her official capacity as Secretary of Commerce

("Pritzker"), NOAA, and the National Marine Fisheries Service ("NMFS") for violations of 16 U.S.C. § 1801 *et seq.* of the MSA and 5 U.S.C. § 701 *et seq.* of the APA, in connection with NOAA's promulgation of regulations allocating IFQ for the Fishery. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291 because the District Court's order granting summary judgment as to all claims is a final decision and immediately appealable. *See e.g., Klestadt & Winters, LLP v. Cangelosi*, 672 F3d 809, 813 (9th Cir. 2012) (stating a final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

This appeal is timely. The District Court entered judgment on December 6, 2013. ER0039. Appellants filed a notice of appeal on February 3, 2013, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B). ER0033–0038.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the 2013 Regulations satisfy the requirements under the MSA and APA and whether NOAA's failure to articulate a clear, rational basis for its IFQ allocation decisions justified, based on the facts found, its conclusions: (1) not to include in the initial allocation of IFQ for two sectors of the Fishery, the history of harvests by Pacific Dawn after 2003 and the processing history of Jessie's after 2004, history which reflects their greater dependency on the Fishery than other participants who lacked such history entirely or had less history; and (2) not to

require present participation in the Fishery as a condition of allocation, thereby allocating IFQ to vessel permit holders that had left the fishery after 2003.

IV. STATEMENT OF AUTHORITIES

The relevant statutory provisions and regulations are set forth in Appellants' Addendum I.

V. STATEMENT OF THE CASE

Plaintiff-Appellants Pacific Dawn and Jessie's each participate in the Fishery as a harvester and processor, respectively. Pacific Dawn and Jessie's, along with other plaintiffs, Ocean Gold Seafoods, Inc. and Chellissa LLC (collectively, "Plaintiffs"), filed a complaint for declaratory and injunctive relief on March 29, 2013, against federal defendants Pritzker, NOAA, and NMFS (federal defendants, collectively, "NOAA" or the "Agency") challenging regulations promulgated by NOAA in 2013 under the MSA that implemented an IFQ allocation program for the Fishery (the "Complaint"). ER0252–309.

The 2013 Regulations allocated IFQ to Pacific whiting harvesters based on fishing history for the years 1994 to 2003 and to processors based on processing history for the years 1994 to 2004. Both Pacific Dawn and Jessie's are eligible for and have received initial IFQ for use in the Fishery. ER0233; ER0207–0211. Plaintiffs contend that the IFQ allocations do not reflect their actual dependence on and more recent participation in the Fishery at the time NOAA implemented the

IFQ Program. ER0208–0209; ER0231–232; ER0253–254. As a result, Plaintiffs alleged that NOAA abused its discretion and violated the MSA and APA by failing to properly consider and take into account dependence and "current" participation in the Fishery.

This case follows a prior challenge by Pacific Dawn and Jessie's, among other plaintiffs, to NOAA's original, initial allocation of IFQ that it originally made in 2010. *See* ER0268–281. In 2010, the Agency first implemented the IFQ Program – that allocates a limited portion of the year's available whiting catch to permit holders in the Fishery as part of its management of the Fishery – and promulgated regulations allocating initial IFQ to permit holders based on history years 1994–2003 for harvesters and 1998–2004 for processors (the "2010 Regulations"). ER0121–122. Pacific Dawn and Jessie's, among others, filed a complaint against the Agency challenging the 2010 Regulations ("*Pacific Dawn I*"). *Pacific Dawn I* raised nearly identical issues as the present case including allegations that that the Agency acted arbitrarily and capriciously by failing to take into account more recent history years given the requirements of the MSA. ER0209; ER0232; ER0268–281.

The Court in *Pacific Dawn I* found that NOAA failed to articulate a rational basis for its decision to rely on the 2003 date as a cut-off for some purposes but not others. ER0279. The Court concluded that NOAA acted in an arbitrary and

capricious manner in enacting the 2010 Regulations and remanded the 2010 Regulations for reconsideration. ER0280; ER0283–289.

Following "reconsideration," the Agency published a final rule on March 28, 2013, setting forth the 2013 Regulations containing the initial IFQ allocations for the Fishery. 78 Fed. Reg. 18,879 (Mar. 28, 2013). The Agency adopted the 2013 Regulations, effective April 1, 2013, that allocated quota share on exactly the same basis as the 2010 Regulations. *Id*. at 18,880, 18,891–92. As a result, Plaintiffs renewed their challenge claiming that NOAA lacked a reasonable basis for failing to take more recent history beyond 2003 and 2004 into account. ER0253-255.

Given the Agency's failure to take more recent history into account at the time when it considered and promulgated the quota share allocations, Plaintiffs filed the Complaint on March 29, 2013. ER0252–309. They alleged that the Agency failed to satisfy the MSA with respect to the design of the IFQ Program and did not give due consideration to actual dependence on the Fishery and recent fishing activity and processing history that recognized concomitant investments made in the Fishery on an ongoing basis. ER0261.

After Plaintiffs filed the Complaint, Midwater Trawlers Cooperative, Trident Seafoods Corporation, Dulcich, Inc., Arctic Storm Management Group, LLC, and Environmental Defense Fund (collectively, "Intervenors") moved to intervene as defendants alongside the Agency, which the Court granted. ER0235–238.

Subsequently, all parties moved for cross-motions for summary judgment based on the Administrative Record with Pacific Dawn and Jessie's arguing that the 2013 Regulations were arbitrary and capricious and violations of the MSA and APA. On December 5, 2013, the Court granted NOAA's and Intervenors' motions for summary judgment and denied Plaintiffs' motion for summary judgment (the "MSJ Order"). ER0032.

On February 3, 2014, Pacific Dawn and Jessie's filed a notice of appeal with this Court for review of the MSJ Order. ER0033–38.

VI. STATEMENT OF FACTS

Congress has created a national fishery conservation and management system under the MSA to regulate the nation's fishery resources. 16 U.S.C. § 1801 *et. seq*. Under the MSA, Congress specified standards for adopting fishery management plans and implementing regulations that establish a limited access system for the Fishery. 16 U.S.C. § 1853. Specifically, Congress enacted the MSA 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)(4).

Although sometimes lumped together with other Pacific groundfish fisheries, Congress separately manages the Fishery – one of the most valuable

fisheries in the United States – because of its unique components and biological features. ER0231. According to NMFS, Pacific whiting is the most abundant fish stock on the Pacific Coast.[1] Pacific whiting require unique treatment because they quickly deteriorate once caught and thus rapid processing at sea or onshore is critical to the success of this fishery. ER0231.

A. The MSA Guides the Management of the Fishery

Congress reauthorized the MSA in 2007 and created limited access privilege programs for certain fisheries, including Pacific whiting. *See generally, Pacific Coast Fed'n of Fishermen's Assns. v. Blank*, 693 F.3d 1084, 1087–88 (9th Cir. 2012) (describing MSA and role of limited access privilege programs). The management of national fisheries begins with consideration of the overall management issues in a particular fishery by unique advisory bodies, called regional councils. The MSA created eight of these regional councils, which develop fishery management plans that must adhere to the conservation and management directives in the MSA and other applicable law. 16 U.S.C. § 1852. The regional councils develop fishery management plans ("FMPs") and submit them for public comment and approval by NOAA that reviews them for consistency with the MSA. 16 U.S.C. §§ 1852(h), 1853(c), 1854(a)–(b). The

[1] *See Pacific Whiting*, NOAA FISHERIES W. COAST REGION, www.nwr.noaa.gov/fisheries/management/whiting/pacific_whiting.html (last visited May 12, 2014)

regional councils may also submit amendments of the FMPs from time to time to NOAA for approval. 16 U.S.C. § 1852(h)(1). If NOAA approves a FMP, it then moves on to the rulemaking stage. 16 U.S.C. § 1854(b). Once NOAA issues final regulations implementing a FMP, such regulations are subject to judicial review, if review is requested within 30 days of publication of the final rule. *See generally, Oregon Trollers Assn v. Gutierrez*, 452 F.3d 1104, 1113–16 (9th Cir. 2006) (describing review process).

The MSA mandates that NOAA and the regional councils meet certain statutory requirements in connection with creating a fishery management program, namely that FMPs, amendments, and their implementing regulations be consistent with the national standards for fishery conservation specified in the MSA and reasonably take into account guidelines prepared by NOAA. 16 U.S.C. § 1851(a); 50 C.F.R. § 600.305(a)(3). In connection with managing fisheries through allocations, the MSA requires that NOAA must:

> (A) establish procedures to ensure fair and equitable initial allocations, including consideration of —
>
> (i) current and historical harvests;
> (ii) employment in the harvesting and processing sectors;
> (iii) investments in, and dependence upon, the fishery; and
> (iv) the current and historical participation of fishing communities; [and]
>
> (B) consider the basic cultural and social framework of the fishery, especially through --
>
> (i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that

> depend on the fisheries, including regional or port-specific landing or delivery requirements; and
> (ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;….

16 U.S.C. §§ 1853a(c)(5)(A)–(B).

In support of the management directives in the MSA, the statute also contains ten national standards that provide a framework of principles to guide the preparation of FMPs being implemented through the Agency regulations in this case ("National Standards"). 16 U.S.C. § 1851(a). Pacific Dawn and Jessie's argued that this case directly implicates three of the National Standards, among others: (1) National Standard 4, which provides that management and conservation measures shall not discriminate between residents of different states and if it becomes necessary to allocate or assign fishing privileges among fishermen, such allocation must be fair and equitable, reasonably calculated to promote conservation, and cannot give any entity an excessive share; (2) National Standard 5, which requires that "[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose[;]" and (3) National Standard 7, which directs that "conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(4), (5), (7).

Under the authority of the MSA, NOAA also has established advisory guidelines, which do not have the force and effect of law, based on the national standards, to assist in the development of fishery management plans (the "Guidelines"). 16 U.S.C. § 1851(b). NOAA has published the regulatory Guidelines called for under the MSA to assist in applying the national standard to particular issues. *See* 50 C.F.R. § 600.305 *et seq*.

B. Development of the IFQ Program for the Fishery

Congress has delegated the authority to manage the Fishery to NOAA, which works with the Pacific Fishery Management Council (the "Council"), one of the regional councils created by the MSA, to assist in developing the Pacific Coast Groundfish Fishery Management Plan ("Groundfish FMP") and related regulations. 16 U.S.C. § 1852(a). Over the years, NOAA has approved various amendments to the Groundfish FMP to further manage the Fishery and address "overfishing" in the Fishery as reflected in the Fishery's ongoing management efforts. ER0183. The Council sought to regulate the Fishery by adopting the IFQ Program, which limits who can enter and participate in the Fishery. As a result, NOAA issued quota shares to Fishery participants that granted them the rights to harvest or process a certain amount of Pacific whiting. ER0182–83.

In 2002, NOAA declared the Fishery "overfished." ER0183. Prior to that date, the Council had begun work on a plan to reduce the number of fishing vessels

in the overall groundfish fisheries, including Pacific whiting, due to overcapitalization, meaning the number of permits that had been issued allowed for far more fishing vessel harvest capacity than necessary to catch each year's quota. ER0183. The Council also created a buy-back program in 2003 to provide government funds for purchasing "surplus" vessels from those who held permits but who wanted to exit the fisheries, which began to reduce overcapacity. *Id*. An annual levy on those Fishery participants who remained in the fishery paid for the buy-back program. 68 Fed. Reg. 42,613 (July 18, 2003).

In 2004, just two years after the overfishing declaration, NOAA declared that the Fishery was no longer overfished. ER0183. Since 2004, NOAA has successfully managed the Fishery and, since 2001, the total harvests have been below established quotas. ER0216. Harvest levels significantly increased starting in 2003 and doubled by 2005 and 2006, then dropped in 2009 before increasing again through 2011. ER0186. As a consequence, those who remained committed to the Fishery after 2003 saw their fishing histories increase yearly because of greater stock availability. ER0186.

In 2004, NOAA published a notice of a contemplated amendment to the Groundfish FMP that would implement the IFQ Program. 69 Fed. Reg. 1563 (Jan. 9, 2004). The Notice provided that the Council "may decide not to count activities occurring after [November 6, 2003] toward determining a person's qualification

for an initial allocation or determining the amount of initial allocation of quota shares." *Id*. The purpose of the Notice was to "discourage increased fishing effort in the limited entry trawl fishery based on economic speculation while the [Council] develops and considers [an IFQ Program]." *Id*. NOAA also intended that the Notice would discourage "economic speculation" while the Council developed and considered the IFQ Program. *Id*.

The Council and NOAA proceeded to develop the IFQ Program. The Council subsequently placed further specific restrictions on the Fishery through Amendments 20 and 21, which NOAA implemented as final rules in October and December, 2010, which became effective January 1, 2011. 75 Fed. Reg. 60,868, 60,869 (Oct. 1, 2010); 75 Fed. Reg. 78,344 (Dec. 15, 2010). Amendment 20 created the trawl rationalization program in which Fishery participants received permits to harvest a certain amount of the Fishery's total allowable IFQ. 75 Fed. Reg. 78,344. It also prohibited any vessel from participating that did not have a history of sector-specific participation in the fishery to further limit the "race for fish" by imposing a "historic participation requirement," meaning a vessel had to land some Pacific whiting in any one qualifying year: 1994–2006 for the shoreside section; and 1997–2006 for the mothership and catcher-processor sectors. ER0121–122. Amendment 21 allocated fixed catch shares for Pacific whiting between trawl and non-trawl sectors of the Fishery. 75 Fed. Reg. 78,344.

The 2010 Regulations contained standards and procedures for issuance of permits and initial allocations of IFQ (based on a catch history possessed by current permit holders), among other provisions. 75 Fed. Reg. 60,868. In crafting the 2010 Regulations, the Council recommended that NOAA allocate IFQ for Pacific whiting to current permit holders based on their fishing history from 1994 to 2003 for harvesters and from 1998 to 2004 for processors as part of the 2010 Regulations. *Id*. The Council based the allocation formulas on vessel landings for the trawl vessel sector or processor receipt history for the shoreside sector. The 2010 Regulations allocated 80 percent of the Pacific whiting IFQ to current vessel permit holders and 20 percent of the shoreside harvest allocation to shoreside processors. *Id*. at 60,874. NOAA issued the final rules adopting the Council's recommendations for the IFQ Program beginning on January 1, 2011. *Id*. at 60,868.

Under the IFQ Program, typically, the whiting fishing season begins in April each year and ends once the annual quota for each sector is taken, which usually occurs in the fall. 50 C.F.R. § 660.131(b)(2)(iii). Each year, NMFS issues a volumetric quota for the fishery, split into three sectors: (1) catcher-processors (large vessels that catch and process their own fish at sea), which operate as a cooperative; (2) harvest vessels that serve motherships (which only process fish at sea); and (3) harvest vessels that deliver their fish to shore-side processors.

50 C.F.R. § 660.131(a). Only vessels with limited entry permits and endorsements for the Pacific whiting fishery may engage in the fishery. *See* 74 Fed. Reg. 10,189 (Mar. 10, 2009). NMFS allocates a portion of the annual quota to each sector and then closes each sector once it reaches the allocation: catcher-processors -- 34 percent; mothership sector -- 24 percent; and shoreside sector -- 42 percent. ER0183. In addition, NMFS allocates a specific bycatch limit for overfished species to each sector. 50 C.F.R. § 660.131(c)(4). Once the sector reaches its bycatch limit, NMFS closes the sector. *Id*.

Importantly, a permit holder, once given IFQ, may either use the permit and IFQ to harvest whiting using a qualified vessel or that permit holder may lease the IFQ to another qualified permit holder who catches the fish. 78 Fed. Reg. 18,879, 18,886 (Mar. 28, 2013); 50 C.F.R. § 660.140(d)(3)(ii)(B)(2). After two years, anyone with IFQ may sell it to the highest bidder, subject to limits on the amount a single entity can hold. ER0118. In other words, under the IFQ Program, a permit holder who uses his or her own IFQ to catch fish has no fishing entry expense other than the cost of operating the vessel or maintaining a federal license. However, a permit holder who has to lease or buy IFQ, for example, to fish at a successful level would take on added leasing and purchase costs that did not exist prior to creation of the IFQ Program. ER0210–211. The cost of leasing or

purchasing IFQ, depending on the fishery, can be quite substantial and significant to a participant's business. ER0227.

C. In *Pacific Dawn I*, NOAA Failed to Consider Fishing History Beyond 2003 for Harvesters and 2004 for Processors When Implementing the 2010 Regulations.

Pacific Dawn and Jessie's, among others, challenged the 2010 Regulations on the grounds that the allocations failed to take more recent fishing and processing history into account. ER0273. Plaintiffs alleged that the 2010 Regulations violated the MSA (and the APA) because NOAA did not properly consider current participation in the Fishery given that in 2010, when NOAA issued the regulations, it did not include any fishing or processing history beyond 2003 and 2004. 16 U.S.C. § 1853a(c)(5)(A)(i).

The District Court granted Pacific Dawn's and Jessie's motion for summary judgment in *Pacific Dawn I*. ER0268–281. It concluded that NOAA failed to articulate a rational basis for relying on a 2003 history cut-off year for some purposes but not others and remanded the 2010 Regulations for reconsideration consistent with the MSA. ER0279; ER0286.

D. In the Present Case, NOAA Again Failed to Take More Recent History into Account when Adopting the 2013 Regulations.

Upon remand, NMFS presented the Council with four alternative ranges of history years. ER0174–175, ER0239–240. The first alternative, known as the "No Action Alternative" had the same qualifying history years of 1994-2003 for

harvesters and 1998–2004 for processors as the 2010 Regulations. The second alternative used qualifying history years of 1994–2007 for harvesters and 1998–2007 for processors. The third alternative used qualifying history years of 1994–2010 for harvesters and 1998–2010 for processors. Lastly, the fourth alternative looked at qualifying history years of 2000-2010 ("Alternative 4") for both harvesters and processors. *Id*.

The Council recommended that NOAA adopt the No Action Alternative for both harvesters and processors. ER0122. In other words, the Council recommended no changes to the qualifying catch and processing period of 1994–2003 for harvesters and 1998-2004 for processors used to allocate whiting quota shares. ER0240; ER0244.

Following "reconsideration" of the initial allocation of IFQ for Pacific whiting, NOAA published a final rule with the 2013 Regulations on March 28, 2013. 78 Fed. Reg. 18,879 (Mar. 28, 2013). After developing a new Administrative Record and claiming to have reasonably considered all the relevant factors in the MSA, NOAA agreed with the Council and selected the No Action Alternative and adopted the 2013 Regulations effective April 1, 2013, that allocated quota share based on exactly the same history years as the 2010 Regulations and again failed to take more recent history beyond 2003 and 2004 into account. *Id*. at 18,880; ER0121–150.

The initial IFQ allocation is a "one time distribution of wealth in the form of quota share and catch history assignments" to permit holders. 78 Fed. Reg. 18,879, 18,893 (Mar. 28, 2013). It entitles a vessel to catch a percentage of the total amount of Pacific whiting available each year for harvest, an annual harvest quota that is based on conservation principles fundamental to the MSA. 50 C.F.R. § 660.140(a). If a vessel is properly permitted, the 2013 Regulations allocate to harvesters a quantity of IFQ to the permit holder for the vessel based on relative catch history between the years 1994 and 2003, but not its more recent catch history in the years after 2003. *Id*. at § 660.140(b)(1); 78 Fed. Reg. 18,879, 18,880. In addition, the 2013 Regulations initially allocated IFQ to processing plants located onshore that have a history of processing Pacific whiting in the past, between 1998 and 2004, but, again, not the more recent processing history after 2004. 78 Fed. Reg. 18,879, 18,880.

Using the same history, the 2013 Regulations continue to make IFQ allocations to Pacific whiting harvesters without regard to the history of actual landings by harvesters who remained active in the Fishery after 2003 and to processors in the Fishery without regard to any processing history after 2004. Notably, during the reconsideration, NOAA learned that a number of permits allocated IFQ under the original regulations had not participated at all in the shore based and mothership sectors of Pacific whiting fishery (*i.e.*, landed no Pacific

whiting using the permit) after 2003. ER0129. These permits are sometimes referred to as "latent permits" because they can be used to bring additional fishing capacity back into the fishery at any time. *Id*. Indeed, NOAA's failure to adopt a recent participation requirement for harvesters, in contrast to that adopted for processors, enabled at least 34 "latent" permits to receive IFQ even though they were not used in the Pacific whiting fishery after 2003. ER0155.

NOAA refused to alter the initial allocation of IFQ to shore-side processors based on processing history after 2004 even though NOAA included a "recent" participation requirement for such processors in the original regulations. Under the 2010 Regulations, NOAA allocated IFQ only to processors "which received deliveries of at least 1 metric ton of whiting from whiting trips in each of any two years from 1998 through 2004." ER0177. Although NOAA learned that marketing practices had significantly changed (*i.e.*, product form went from surimi to blocks and fillets) and greater fishing experience had moved north off Washington State from Oregon after 2004, and admitted that the original processor allocations needed to be based on recent participation and dependency, it refused to change the allocation to benefit those smaller processors based in communities in Washington State who are most dependent on these new markets. ER0127–128.

For both Pacific Dawn and Jessie's, the initial allocation of IFQ under the 2013 Regulations is substantially below their actual level of operations conducted

during the period 2003 to 2010. ER0210; ER0233. The 2013 Regulations have reduced their ability to obtain Pacific whiting without having to pay leasing costs or purchase additional IFQ when available. ER0210–211. Their overall history, and thus their quota share, would have increased significantly had NOAA properly considered actual dependence on the Fishery. ER0210; ER0233. As a consequence, after the issuance of the 2013 Regulations, Pacific Dawn's fishing history and Jessie's processing history have become more costly and less efficient. ER0210; ER0233.

VII. SUMMARY OF ARGUMENT

The overarching question in this case is the extent of NOAA's discretion to regulate the Fishery given the underlying mandates and guidance of the MSA. Under the legal framework governing the Fishery, the goals and objectives of the MSA, the National Standards, the Agency's related guidelines and the Groundfish FMP itself all serve to cabin the scope of NOAA's discretion. Pacific Dawn and Jessie's contend that NOAA failed to satisfy its obligations under the MSA and APA by implementing the 2013 Regulations that determine initial IFQ allocations to Fishery harvesters and processors based on 2003/2004 history cut-off years and do not properly take dependence on the Fishery and present participation into account. NOAA has failed to articulate a rational basis for disregarding nearly 10 years of fishing and processing history.

Given the mandates of the MSA, Congress never intended that NOAA award IFQ to individual permit holders for no compelling reason other than their support of the IFQ Program in this case where such permit holders demonstrate no commitment to the Fishery (because of the objective facts in this case, *i.e.*, they simply did not use the permit to catch any fish). Objective 14 of the Groundfish FMP unambiguously directs NOAA to choose the management measure "with the least disruption of ***current*** domestic fishing practices." ER0083 (emphasis added). While NOAA claims it weighed investment and dependence factors, it nevertheless acknowledged that the Council "was not compelled to alter their allocation decision by the relatively small effect of possible greater dependence by a few vessels during a limited period of time." ER0251. Yet, it did not explain why the impact of the "relatively small effect" felt by current Fishery participants was outweighed by the interests of latent permit holders.

VIII. STANDARD OF REVIEW

The Court will review the grant of summary judgment *de novo*. *Midwater Trawlers Coop. v. Dept. of Commerce,* 282 F.3d 710, 716 (9th Cir. 2002). In cases challenging final agency actions, the MSA adopts the standard of review in Section 706 of the Administrative Procedure Act ("APA"). *Id*. Thus, the Court will set aside final regulations promulgated by NOAA under the MSA if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law." *Id*. (citing 5 U.S.C. § 706(2)(A)). Thus, the Court's task is to "determine whether [NOAA] has considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id*.

IX. ARGUMENT

The standard requirement that the Agency adequately demonstrate that it considered the relevant factors and articulated a rational connection between the facts found and the choices made illustrates that Congress did not intend for NOAA to have unfettered discretion in crafting Fishery management measures. *See generally id*. at 719 (finding NMFS "bound by the requirements of the [MSA]" and concluding that its allocation of fishing rights was inconsistent with relevant scientific principles as required by the statute). The mandate that NOAA not act in an arbitrary and capricious manner also demonstrates that Congress intended that some limits on NOAA's discretion would apply. *See generally Sierra Club v. U.S. Environmental Protection Agency*, 346 F.3d 955, 961 (9th Cir. 2003) (explaining that court may not defer to an agency decision "that is without substantial basis in fact").

NOAA may not simply defer to the Council when reviewing a proposed plan or approach, such as in allocating IFQ, and must conduct an independent review of whether the allocation complies with the MSA. *See, e.g.*, *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D.D.C. 2012) (explaining that the MSA gives NOAA final

responsibility for ensuring any fishery management plan is consistent with the Act's National Standards, and the overall objectives of the law). A regulation must therefore be based on an analysis that rationally concludes, and explains clearly, that a particular allocation meets the objectives and standards of the MSA. *See, e.g.*, *Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1061–62 (W.D. Wash. 2008) (finding NOAA regulations impermissible in light of the statutory language and purpose and are not supported by a rational basis).

When developing the IFQ Program, the MSA identifies seven factors that NOAA should "take into account" when crafting regulations to further the management of the Fishery:

> (A) present participation in the fishery;
> (B) historical fishing practices in, and dependence on, the fishery;
> (C) the economics of the fishery;
> (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
> (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
> (F) the fair and equitable distribution of access privileges in the fishery; and
> (G) any other relevant considerations;

16 U.S.C. § 1853(b)(6); *see also* 16 U.S.C. § 1853a (outlining factors for NOAA's consideration, including "current and historical harvests" and "investments in, and dependence upon, the fishery").

Here, Pacific Dawn and Jessie's challenged the IFQ Program on the grounds that it does not meet the requirements of the MSA in the context of the

"dependence" and "present participation" requirements outlined in the statute. Although NOAA appears to pay lip service to the requisite factors, it fails to articulate a rational basis for failing to properly take dependence into account as intended by the MSA and declining to include a present participation requirement as a basis for the allocation of IFQ.

Pacific Dawn and Jessie's do not suggest that their claims arose out of NOAA's failure to select their preferred outcome. They acknowledge that the MSA does not require the Agency to "guarantee" a particular outcome for a particular group. The MSA does require, however, that the Agency articulate a rational basis for the initial IFQ allocation within the confines of the applicable law, including the goals and objectives stated in the Groundfish FMP, which here it failed to do. *Midwater Trawlers*, 282 F.3d at 716 (The 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.").

A. The District Court erred in deferring to the Agency given the Agency's failure to properly consider dependence on the Fishery as required by the MSA when promulgating the 2013 Regulations.

Under the APA, a reviewing court must "engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010) (finding the National Fish & Wildlife Service had not articulated a rational

connection between the available facts and its conclusion that the effects of the operations of a trout hatchery would have no impact under the directives of the Endangered Species Act). NOAA's analysis of the 2013 Regulations falls short with respect to this standard and includes nothing more than mere cursory recitation of the factors and standards set forth by Congress in the limited access privilege program provisions of the MSA, particularly with respect to the dependence requirement.

1. The 2013 Regulations are inconsistent with the Groundfish FMP and related National Standards.

The underlying Groundfish FMP guides the promulgation of the IFQ allocation consistent the MSA's intention to account for current fishery practices as a measure of dependency. Objective 14 of the Groundfish FMP instructs NOAA: "When considering alternative management measures to resolve an issue, choose the measure that best accomplishes the change with the ***least disruption of current fishing practices***, marketing procedures, and the environment." ER0083 (emphasis added). Indeed, the IFQ Program "is intended to reduce fishery capacity, minimize bycatch, and meet other goals of the FMP." ER0170. Yet, NOAA failed to provide a rational explanation as to why its exclusion of nearly 10 years of recent fishing and processing history as a measure of actual dependence on the Fishery meets this objective and satisfies the directives of the MSA.

NOAA's own findings as to the relationship between recent history and

dependence on the Fishery contradict its conclusions in violation of the APA. *See Wild Fish Conservancy*, 628 F.3d at 527 (finding agency failed to explain contradiction between findings and conclusions). NOAA acknowledged that "including more recent history in the initial allocations would provide credit for more recent investments and harvests" in the Fishery. ER0128. NOAA claimed, however, that only a "minority" of participants would be harmed by applying the out-of-date history years. *Id*. Yet, NOAA provided no explanation as to why it concluded that the impact on 14 out of 43 fishing permits as a result of choosing the No Action Alternative was insignificant where those 14 permits admittedly "depended on whiting for more than 50 percent of their revenue" in the most recent years (2007–2010). *Id*.; *see, e.g.*, *Wild Fish Conservancy*, 628 F.3d at 527 (finding that a small number of trout were present did not support conclusion that the agency's action would not affect trout distribution in creek in light of overall hatchery plan).

NOAA attempted to justify its decision to disregard more recent fishing history as a measure of dependence by explaining that to "credit more recent fishing or processing history would require NMFS to abandon the original cut-off dates and the significant policy goals they support." ER0128. NOAA outlines two primary policy goals of the IFQ Program that it intended the "control date" to achieve: to reduce overcapitalization in the Fishery and to end the "race for fish."

ER0125.

The selection of the No Action Alternative, however, over Alternative 4 with more recent history, does not in fact implicate the apparent policy goals that NOAA claimed its choice supported. The use of a 2003 cut-off date to "discourage speculative capitalization and discourage effort by putting participants on notice that any fishing history earned beyond 2003 may not count towards allocation system" makes no rational sense when NOAA first implemented the IFQ Program in 2010. *Id*. At that time, several years had passed and NOAA knew which Fishery participants remained committed in the Fishery – not as speculators, but as active supporters and businesses. Rather, by excluding more recent history, the 2013 IFQ Regulations rewarded the true "speculators" who had gambled on the 2003 cut-off date and left the Fishery. ER0126 (No Action Alternative recognizes "business and investment decisions by persons who interpreted the control date as signaling the likely end of the qualifying period."); ER0208; ER0230-231. Again, given the Groundfish FMP objective to minimize disruption on "current" fishing practices, NOAA failed to explain why the interests of permit holders who had left the Fishery outweighed those permit holders who remained active in the Fishery when NOAA passed the 2013 Regulations.

The 2013 Regulations also are inconsistent with the National Standards, which should be analyzed under the same goal to minimize disruption on the

current Fishery. Any regulations promulgated to implement an FMP "shall be consistent with…national standards for fishery conservation and management…[,]" including the consideration of fairness and equity (National Standard 4), efficiency (National Standard 5), and cost minimization (National Standard 7). 16 U.S.C. §§ 1851(a)(4), (5), (7). NOAA, however, failed to reasonably justify why the 2013 Regulations do not comport with the National Standards outlined under the MSA.

National Standard 4 requires an allocation of IFQ among fishermen to be fair and equitable. 16 U.S.C. § 1853a(c)(5)(A). The Guidelines related to the National Standards bear directly on whether the Agency properly considered dependence on the Fishery. The Guidelines state that "[a]n allocation of fishing privileges should be rationally connected to the achievement of OY [Optimum Yield] or with the furtherance of a legitimate FMP objective." 50 C.F.R § 600.325(c)(3)(i)(A).

Indeed, "[t]he motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause." *Id*. The Guidelines with respect to National Standard 4 recognize that "an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of long-time participants in the fishery." 50 C.F.R. § 600.325(c)(3)(i)(A). Yet, NOAA unreasonably chose the

status quo and awarded IFQ to those who left the Fishery in 2003 at the expense of those who remain active and dedicated to it to this day.

NOAA's failure to allocate IFQ based on present participation in the Fishery also contradicts the objectives of National Standards 5 and 7 to consider "efficiency in the utilization of fishery resources" and minimize costs when crafting fishery management programs in the context of current fishing practices. 16 U.S.C. § 1851(a)(5), (7). The Guidelines related to National Standard 5 emphasize the importance of considering efficiency when designing an FMP. 50 C.F.R. § 600.330(b). Under the Guidelines, efficiency is considered to be the full range of economic inputs required to harvest fish, including labor, capital, interest and fuel. *Id*. § 600.330(b)(2). "Given a set of objectives [such as the efficiency of operation under an IFQ Program, a stated objective of Amendment 20], an FMP should contain management measures that result in as efficient a fishery as is practicable or desirable." *Id*. § 600.330(b). Also, "[a]n FMP should demonstrate that management measures aimed at efficiency do not simply redistribute gains and burdens without an increase in efficiency." *Id*.

Likewise, National Standard 7 requires that conservation and management measures "shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7). The 2013 Regulations create new costs of operation that did not exist previously, namely the added cost of leasing or buying

IFQ. Management measures should not, however, impose unnecessary burdens on individual fishing operations. 50 C.F.R. § 600.340(c).

The 2013 Regulations do not properly consider the efficiency and cost minimization of the Fishery as required by National Standards 5 and 7 by failing to balance the impact on those most dependent on and active in the Fishery. 50 C.F.R. § 600.340(d) (Analysis of "FMPs should demonstrate that the benefits of fishery regulation are real and substantial relative to the added [costs].") The IFQ Program implicates efficiency concerns because the creation of IFQ, a transferable fishing privilege, allows for lease or sale to other qualified permit holders. *See* 50 C.F.R. 660.140(d)(3)(ii)(B)(2); 78 Fed. Reg. 18,879, 18,886. For those permit holders whose initial IFQ allocation fell below recent harvest experience, the lease or purchase of additional IFQ may be necessary to support their operations, which creates a new cost of doing business that contradicts efficiency and cost minimization goals. ER0227; ER0210-211; ER0233.

NOAA contends that it has addressed efficiency concerns because "reducing excess capacity is expected to improve the efficiency in the utilization of fishery resources…." ER0146. It admits that leasing costs would result under any of the alternative history year ranges. *Id*. Yet, under the Guidelines, management measures aimed at efficiency should "not simply redistribute gains and burdens without an increase in efficiency." 50 C.F.R. § 600.330(b)(2)(i).

Here, NOAA's allocation of IFQ to non-active permit-holders would have at least three results without any increasing efficiency and in fact would decrease efficiency. First, the non-active permit holders could return to the Fishery at any time, adding fishing capacity that had been absent since 2003, contrary to the goal of Amendment 20 to "reduce fishery capacity." ER0170. Second, the non-active permit holders could lease their IFQ to active permit holders, increasing the cost of harvesting and processing Pacific whiting and thereby reducing the efficiency of the active fleet. ER0210, ER0227, ER0233. Third, the non-active permit holders could, at the appropriate time, sell their IFQ, which also would increase the ongoing cost of the active permit holders. *Id*. NOAA did not adequately consider this efficiency issue or make any effort to minimize the inefficiencies that would result from the initial allocation of IFQ, for example, by denying IFQ to those who made the economic decision to leave the Fishery after 2003.

The IFQ allocations under the 2013 Regulations also force active processors who were not given full credit for the current history to lease or buy additional IFQ to maximize their operating capacity. ER0227, ER0233. Thus, NOAA's decision to limit processing history to the qualifying period of 1998–2004 rather than include more recent history that reflects present participation in the Fishery harms the processors' ability to earn a return on their investments in the fishery through reduced capacity as well as support the local fishing communities. ER0233–234.

Processors like Jessie's have made significant capital investments that benefitted the fishery but their ability to fully realize the benefits of those investments is inhibited because of their reduced IFQ. ER0227; ER0230.

Because allocation of IFQ is not directly relevant to conservation (which is addressed by other aspects of the Groundfish FMP), the issue remains as to whether allocating IFQ to non-participants or active participants with less history is rationally connected with the goals of the Groundfish FMP. The Agency fails to address this question in any meaningful way. For example, the Agency provided no basis as to how the 2013 Regulations avoid disruption of current fishing practices and marketing procedures. *See generally* ER0128–130 (discussing and rejecting arguments to include more recent harvest history as a reflection of dependence). Nor did NOAA explain how simply holding a permit without using it serves the proper use of a public resource that is clearly being fished at a sustainable level. ER0129 (relying on "portfolio" analysis of market). Yet, investing in employees, fishing operations, and the payment of taxes also are fundamental goals in the prosecution of this nation's fisheries as the MSA emphasizes the "main street" objectives of full employment over the "Wall Street" goal of permit speculation, especially where the two conflict, as they do here.

2. The 2013 Regulations are inconsistent with NOAA's practices in other fisheries.

NOAA's erroneous application of the "dependence" factor also is

impermissibly inconsistent with NOAA's practices in other fisheries and illustrates the arbitrary limitation on the history period that excludes more recent history. *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 526 F.3d 591, 605 (9th Cir. 2008) (finding EPA's storm water discharge arbitrary and capricious based in part on agency's prior inconsistent interpretation and statements). While an agency may change its view regarding interpretation of a statute, "the consistency of an agency's position is a factor in assessing the weight that position is due." *Id*. (internal citations omitted). In other words, an "agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Id*. (internal citations omitted).

In other fisheries, NOAA has consistently found that, in general, greater history and active recent participation reflect dependence on a particular fishery. For example, NOAA took into account the historical and recent dependence on the Pacific cod fishery when it cut off the qualifying period one year before implementing license qualification regulations. *Yakutat, Inc. v. Guitierrez*, 407 F.3d 1054 (9th Cir. 2005). In *Yakutat*, the Ninth Circuit upheld a NOAA decision to exclude 1999 from a four-year qualifying period for allocating licenses in the Pacific cod fishery under a program it implemented in 2000. *Id*. NOAA had implemented a licensing program in 2000 based on fishing history between 1995

and 1998. *Id*. at 1063. Under the program, the Agency allocated licenses to boats that caught a certain amount of fish in any two years between 1995 and 1998. *Id*. at 1057. The owner of the F/V Blue North, which had caught fish only in 1997 and 1999, challenged the program on the grounds that the exclusion of 1999 from the qualifying period violated the MSA by not taking recent participation into account. *Id*. at 1068–69.

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

Similarly, NOAA took recent history into account as a measure of dependence in the halibut and sablefish fishery. NOAA considered dependence of those active in the halibut and sablefish fishery when initially allocating quota shares to those participants. *Alliance Against IFQs v. Brown*, 84 F.3d 343 (9th Cir.

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

Indeed, consistency with the MSA and NOAA's own practice requires NOAA to take actual dependence and current history into account. *See, e.g.*, *Montana Wilderness Assn. v. McAllister*, 666 F.3d 549, 556–557 (9th Cir. 2011) (finding Forest Service's management plan arbitrary and capricious where agency's determination that it need not maintain wilderness character for enjoyment of current users was "inconsistent with its own past practice"). Unlike their regular practice in the cod and sablefish fisheries described above, here NOAA adopted the 2013 Regulations that do not take into account actual dependence on the Fishery because NOAA disregarded recent fishing and processing history measured at the time it adopted the 2013 Regulations. Rather, the Agency maintained status quo, history cut-off years that were nearly 10 years

old at the time it implemented the 2013 Regulations and made the initial IFQ allocations. NOAA failed to articulate a reasonable basis for giving IFQ to non-participants and disfavoring those who objectively demonstrated their dependence on the fishery. It also failed to take into account relevant fishing history after 2003 that demonstrates greater dependence on the Fishery than those who have less history. Given the implications of the dependence requirement under the MSA, NOAA's discretion to forego the interests of current Fishery participants, without explanation as to why their interests are any less important than those the 2013 Regulations, stretches the bounds of reasonableness.

3. Awarding IFQ to latent permit holders at expense of current Fishery participants is inconsistent with the dependence requirement.

Although the MSA provides no definition of "dependence" and NOAA provides no guidelines regarding how to measure it, NOAA admits that "dependence on the fishery relates to the degree to which participants rely on the whiting fishery as a source of wealth, income, employment, revenue, sales, etc. to financially support their business." ER0249. NOAA's view of the requirement for considering "investment" in the Fishery does not comport with its recitation of these factors and purported analysis of dependence.

Approximately 34 permits would not have been eligible for IFQ if NOAA had included an actual present participation requirement (*i.e.*, post 2003 activity).

ER0155. NOAA adopted the No Action Alternative even though the Council admitted that "giving allocations to those permits that have not been recently active might seem on its face to be inequitable with respect to taking into account current harvest investment, and dependence, considerations related to fairness and equity." ER0091. The Council based its conclusions on the assumption that "there are many kinds of participation, investment, and dependence, and the Council is also mandated to take into account historic fishing practices." *Id*. The Council, however, focused on the so-called long-ago investment by latent permit holders in declining to credit post 2003/2004 history years. ER0092. Inexplicably, NOAA does not sufficiently rationalize why basing the allocations on historic participation to benefit permit holders appears to have carried the day given the significant ongoing investment and current operation by active Fishery participants and the goals of the Groundfish FMP. NOAA offered no reasonable explanation for why the interests of latent permit holders as a measure of "investment" outweigh the interests of those currently active in the Fishery in spite of the admitted inequality for doing so. *See id.*

The adoption of this apparently arbitrary definition of "investment" erroneously appears to confer protectable status on a revocable fishing permit as a property interest. To the contrary, courts have found that holders of fishery permits do not in fact possess property interests in such permits. *See, e.g.,*

American Pelagic Fishing Co., L.P. v. United States, 379 F.3d 1363, 1374 (Fed. Cir. 2004) (finding holder of fishing permit where "the government at all times retained the right to revoke, suspend, or modify it" did not possess a property interest in the permit); *see also* 16 U.S.C. § 1853a(b) (fishery permits "may be revoked, limited, or modified at any time" and do not "confer any right of compensation to the holder [of such permit]").

NOAA's apparent treatment of investment decisions also conflicts with its activities in other fisheries and illustrates the arbitrary nature of its decision to maintain the status quo. *See, e.g.*, *Natural Resources Defense Council*, 526 F.3d at 605. Other fishery management councils have recognized that simply holding permits does not equate to an operational investment in the fishery. For example, the North Pacific Fishery Management Council ("NPFMC") analyzed this issue with respect to its consideration of a catch share program for the Central Gulf of Alaska. ER0218–219. The NPFMC stated that "distributing shares to persons with minimal history may be argued to be inconsistent with the requirement to allocate shares based on fishery dependence." ER0219. The NPFMC explained that, if the only eligibility criterion is having a Central Gulf-endorsed trawl limited license permit, it is possible that a person's only connection to the fishery is the acquisition of the license. *Id*. Such an acquisition is "clearly an investment in the fishery," although "it reflects only an investment in a fishery privilege, and not an

investment in a fishery operation." *Id*.

In contrast, NOAA allocated IFQ to those with minimal history or participation at the expense of current participants without adequate justification. Thus, NOAA did not properly take "dependence" on the Fishery into account when promulgating the 2013 Regulations and as a result, the 2013 Regulations violate the MSA and the APA.

B. The District Court erred in deferring to the Agency given the Agency's failure to account for present participation in the Fishery as required by the MSA when promulgating the 2013 Regulations.

When creating the 2013 Regulations, the MSA also requires NOAA to take "present participation" in the Fishery into account, which NOAA failed to do. 16 U.S.C. § 1853(b)(6)(A). NOAA's refusal to consider present participation and update the history cut-off dates in 2013 upon reconsideration of the 2010 Regulations shows an arbitrary disregard for the dynamic improvements and changes to the Fishery that came about through the efforts of active Fishery participants such as Pacific Dawn and Jessie's with a proven long-term economic commitment to, and dependence on, the Fishery. ER0208-209; ER0225–226, ER0230. NOAA's Guidelines recognize that present participation in the Fishery demonstrates dependence on it.

> In designing an allocation scheme, a Council should consider other factors relevant to the FMP's objectives. Examples are economic and social consequences of the scheme, food production, consumer

> interest, ***dependence on the fishery by present participants*** and coastal communities, efficiency of various types of gear used in the fishery, transferability of effort to and impact on other fisheries, opportunity for new participants to enter the fishery, and enhancement of opportunities for recreational fishing.

50 C.F.R. § 600.325(c)(3)(iv) (emphasis added).

NOAA improperly failed to explain how the "control date" allows it to take into account the impact of the qualifying history years on "present participants." *Montana Wilderness Assn. v. McAllister*, 666 F.3d 549, 558 (9th Cir. 2011) (finding U.S. Forest Service's forest travel management plan arbitrary and capricious because agency "entirely failed to explain" how the plan complied with statutory requirements for managing the relevant forest area). Rather, it based its decision to maintain the status quo on the Council's recommended adherence to the control date based on an unsubstantiated of the risk of speculative increased fishing efforts post-2003 in the Fishery, which admittedly did not occur:

> While some public testimony indicated their increased effort post–2003 was not a result of speculation, there is no mechanism available to separate out speculative behavior from non-speculative nor is there any way to quantify the extent to which the control date prevented additional speculative effort or capital. By maintaining the control date as the cut-off, however, those who did not engage in such speculation are not rewarded and those who honored the control date are not penalized. ER0241–242.

Such "reasoning" assumes that any participant that stayed in the Fishery after 2003 did so purely on speculation and does not explain how the status quo takes into account the realities of the Fishery where participants like Pacific Dawn

and Jessie's continued to pursue their long-standing business endeavors without any regard to the control date. *Montana Wilderness Assn.*, 666 F.3d at 558 (Forest Service "entirely failed to consider an important aspect of its [statutory obligation], making the travel plan arbitrary and capricious."); ER0208–209; ER0230; ER0233. NOAA's analysis of the 2013 Regulations fails to explain why it did not consider actual, present participation in the Fishery as of 2013.

NOAA's conclusion that taking present participation into account would have a minor impact on the allocation of IFQ also runs counter to the evidence developed by the Council in the Administrative Record and deference to the Agency's decision regarding the 2013 Regulations should not be shown. *Sierra Club v. U.S. Environmental Protection Agency*, 346 F.3d 955, 961 (9th Cir. 2003) (vacating agency regional classification under Clean Air Act that had no basis in fact). A court "may not defer to an agency decision that 'is without substantial basis in fact.'" *Id*. (internal citations omitted). An agency decision "sufficient to constitute arbitrary and capricious agency action is when 'the agency offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id*. (finding scientific emissions evidence in Administrative Record did not comport with agency conclusion) (internal citations omitted).

Here, the information developed in the Administrative Record regarding the impact of IFQ on present participants contradicts NOAA's conclusions. In Amendment 20 to the Groundfish FMP, the Agency offered the following rationale for not using recent participation in the initial allocation:

> While a recent participation requirement might be considered reasonable and responsive to the MSA direction to consider current and historic participation and to consider investment and dependence, the likely impacts on the initial QS allocation appear to be minimal with respect to their impact on the landing history based portion of the allocation. ER0153.

This analysis that excluding a present participation requirement would have a minimal effect conflicts with the Council's findings and "runs counter to the evidence." *Sierra Club*, 346 F.3d at 962 (finding wind patterns did not comport with theory adopted by EPA on which it based its regional clean air attainment classification).

During the reconsideration of the 2010 Regulations, it came to the Agency's attention that significant amounts of IFQ had been allocated to permit holders who had no actual participation in the fishery after 2003, *i.e.*, the permit was not used to catch and land a single Pacific whiting. The Council found that "approximately 10.2 percent of quota allocated to 21 shore-based harvesting permits and 9.6 percent of quota allocated to 14 mothership permits that had no whiting landings post 2003." ER0129. These inactive Fishery participants could lose IFQ if NOAA took present participation into account.

In contrast, while acknowledging it would be possible to give some credit for more recent history years, the Council recognized that such an adjustment "would diminish the value (allocation to) other permits and processors, particularly those that have been latent after 2003/2004." ER0093. Disregarding the impact on current Fishery participants in favor of "latent" permit holders, however, NOAA, inexplicably concluded the impacts of a present participation requirement "appeared to be minimal." ER0153.

NOAA's analysis also does not comport with the Council's related findings as to the financial impact of not including a recent participation requirement. The Final Regulatory Flexibility Analysis ("FRFA") that accompanied NOAA's 2013 decision documents found that, if the allocation was based on the ending year 2010 ("Alternative 4"), IFQ worth $3.7 million (based on the recent price of fish), or 17 percent of the quota, would be transferred away from "status quo" permit holders (*i.e.*, the allocation under the 2010 IFQ Regulations) and distributed to those with greater history in the shore-based fishery. ER0200. For the mothership sector, use of the 2010 year in Alternative 4 would transfer $2 million worth of IFQ to permit holders with later history. ER0201.

These numbers underestimate the amounts because applying a recent participation requirement (*e.g.*, a participant had to land one ton of Pacific whiting in any year after 2003) would no doubt increase the transfer by eliminating a

number of permits (20 in the shore-based fishery holding 10.2 percent of the quota; 14 permits holding 9.6 percent of the quota for the mothership sector) from being eligible for any IFQ, regardless of the fishing history associated with those permits prior to 2003. ER0129. Therefore, instituting a recent participation requirement and applying later history would eliminate IFQ eligibility for 34 permits and would result in a major (not minimal) shift in IFQ allocations, contradicting the assessment found by the Council. ER0153.

The potential shift in IFQ allocation under Alternative 4 illustrates the extent to which the 2013 Regulations blatantly ignore the present economic realities of the Fishery. 16 U.S.C. § 1853(b)(6)(C). Over the last ten years, the Fishery has experienced dramatic changes and become one of the best managed fisheries in the nation, if not the world. The changes and overall increased stability and value of the Fishery are the result of the enhanced diversification of product forms, development of new international markets for whiting products, entry of new processors into the market, and increased ex vessel prices, for example. ER0210; ER0226–228; ER0230. At the same time, the Fishery has recovered from its overfished status. ER0183.

The 2013 Regulations also do not account for the processors' ongoing support of the Fishery as demonstrated by the "economics" and "cultural and social framework" of the Fishery. 16 U.S.C. § 1853(b)(6)(C), (E). Processors like

Jessie's have contributed to the improvements in the Fishery over the years, and have done so to support the fishery on which they are dependent for their livelihoods. ER0226–228, 0230–231. Processors who are active in the fishery have spent significant capital to upgrade and expand their processing facilities and add capacity to their operations as contemplated by the MSA. 16 U.S.C. § 1853a(c)(5)(A)(iii). Their investment in the fishery has in turn benefitted fishing vessels, which have been able to expand in-line with the processors' expansion. ER0228. The processors have also been able to employ increased numbers of workers to run their facilities, which benefits the local communities that are also dependent on the fishery and should have been considered under the MSA. 16 U.S.C. § 1853a(c)(5)(A)(ii); ER0230.

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

> [D]ependence upon the fishery relates to the degree to which participants rely on the whiting fishery as a source of wealth, income, or employment to financially support their business. Current harvests, historical harvests, levels of investment over time, and levels of participation over time are all aspects of dependence, as they can all be connected to the processes that fishers and processors use to generate income. ER0107; 78 Fed. Reg. 18,879, 18,884.

NOAA does not and cannot explain why it elected to benefit a subset of processors who may have left the fishery taking their investments, jobs, and support of the fishery with them at the expense of those processors who have continuously participated in and supported the fishery as evidenced by their recent participation and history. Including the later processing history years, which NOAA refused to do, would have enlarged the initial IFQ allocation to processors who have proven their support of and present participation in the Fishery. ER0227; ER0233.

The inclusion of the 2004 cut-off date for processors also demonstrates the arbitrary nature of NOAA's adherence to the status quo. NOAA included a present or at least "recent" participation requirement for IFQ allocations to processors for the Fishery by changing the history cut-off date for processors from 2003 to 2004. It nevertheless failed to do the same for harvesters. ER0177. To be eligible, a processor must have received at least one metric ton of Pacific whiting in any two years from 1998 through 2004. *Id*. During reconsideration of the IFQ allocation, the Council adjusted this requirement for each of the four alternatives for processors, maintaining the requirement for "recent" participation, depending on the dates of the history consideration. *Id*. For example, if the history years were 2000 to 2010, the recent participation period would be 2004 through 2010. *Id*. NOAA included this requirement in the original 2010 Regulations because of the

issues of "dependency and involvement" and it substantially reduced the number of those who could apply for IFQ. ER0162.

NOAA acknowledges that it moved beyond the original control date for processors, but not harvesters. ER0244; ER0246. It admits the inconsistencies by explaining that "it was determined that the harvest history of the vessels that would be screened out by a recent participation requirement was not significant enough to warrant the costs of developing and implementing the provision and the resistance likely to be encountered by those screened out." ER0153. NOAA states that the initial allocation of IFQ to permit holders reflects their "historic participation" (albeit pre-2003) and "current permit investment" but does not reflect not actual permit use or truly measures present participation. ER0107; 78 Fed. Reg. 18,879, 18,884. Such a "historic participation" metric does not, however, satisfy the directives of the Groundfish FMP and the Agency's own Guidelines, which contemplate consideration of the interests of present participants in the Fishery.

X. CONCLUSION

For the reasons above, the District Court's decision granting summary judgment to NOAA and Intervenors should be reversed and the 2013 Regulations remanded to NOAA with instructions to include recent history in the IFQ allocations. *Sierra Club*, 346 F.3d at 963 (remanding agency decision with instructions where further administrative proceedings would not serve a useful

purpose, the record had been fully developed and the conclusions that should follow from it were clear).

RESPECTFULLY SUBMITTED this 13th day of May, 2014.

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STATEMENT OF RELATED CASES

There are no cases that are deemed related pursuant to Ninth Circuit Rule 28-2.6 pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Ninth Circuit Rule 32(a)(7)(C):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,962 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman 14 point type font.

Dated: May 13, 2014

/s/ Gwen Fanger
GWEN L. FANGER
Attorney for Appellants

9th Circuit Case Number(s) 14-15224

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