

PLANNING AND NECESSARY ACTIONS FOR THE 2012-2013 PACIFIC WHITING
FISHING SEASONS, INCLUDING POTENTIAL IMPACTS FROM THE PACIFIC DAWN
LITIGATION

During planning for the March 2012 Council meeting agenda at the November 2011 Council meeting, this agenda item was scheduled to deal with coordination issues associated with the first year implementation of the U.S. - Canada Pacific Whiting (Hake) Treaty and what to expect in 2013, the second year of implementation. There has been a new development in a legal challenge to a Pacific whiting portion of the Groundfish Trawl Catch Share Program, and this agenda item has been expanded to brief the Council on a recent court decision and possible relevance to future Council processes under the Magnuson-Stevens Act. The litigation in question is the case C10-4829-TEH: Pacific Dawn, LLC, et al. v. John Bryson, et al., referred to here as the Pacific Dawn litigation.

U.S. – Canada Pacific Whiting Treaty Implementation

A new stock assessment for Pacific whiting has been done (Agenda Item F.1.a, Attachment 1) and will be reviewed and used for decision-making in the new international whiting treaty process which is fully implemented this year for the first time. The draft assessment in the briefing book is subject to change and won't be final until the Joint Management Committee acts on the assessment during their meeting scheduled for March 14-15, 2012. At that time, international decisions on the coastwide optimum yield (OY) catch level will be made. National Marine Fisheries Service (NMFS) would like to brief the Council on implementation status in the first year of the treaty, and encourages a Council discussion on the appropriate setting of a 2012 U.S. OY for Pacific whiting. Mr. Phil Anderson is the Council representative on the Joint Management Committee, as one of four voting members of the U.S. delegation.

The Council should consider advisory body and public comment before providing guidance on the 2012 U.S. OY for Pacific whiting and other relevant issues.

Pacific Dawn Litigation

On December 22, 2011, District Court Judge Henderson concluded summary judgment in the Pacific Dawn case (Agenda Item F.1.a, Attachment 2). The plaintiffs in this case filed suit challenging the allocation formulas for whiting in the Amendment 20 shore-based individual fishing quota program and the mothership co-op program. While finding for the government ("Defendants") on a number of issues, the court found that "Defendants . . . failed to present a reasonable explanation for relying on the 2003 control date for some purposes but not others" and consequently that "Defendants' failure to consider fishing history beyond 2003 for harvesters and 2004 for processors was arbitrary and capricious." NMFS and General Counsel will provide a briefing to the Council on details of the court decision, remedy being recommended by the defendants and plaintiffs, status of a court response on remedy, status of an appeal decision, and possible repercussions to future Council processes. This briefing will be for informational purposes, as opposed to for Council decision-making, as at the time of the advance Briefing Book deadline final remedy briefs have yet to be filed with the court, with a court

decision on remedy also obviously pending, and there is thus no relevant analysis to support Council decision-making.

Given that this is an informational item, it is not appropriate for advisory body or public input to the Council on possible remedial action by the Council such as how to appropriately consider fishing history information beyond 2003 or what alternative fishing history base periods should be analyzed. However, the Council may wish to discuss how it might consider such matters at future Council meetings, a discussion that would conclude under Agenda Item I.3, future agenda and workload planning, on the last day of this Council meeting.

Lastly, as a cross-reference to another matter related to the whiting season in 2013, the Council will be considering an option of changing the primary season opening date for all sectors to May 15, under trawl rationalization trailing actions (Agenda Item F.8).

Council Action:

- 1. Provide guidance to NMFS on the 2012 U.S. Pacific whiting OY.**
- 2. Receive information regarding the Pacific Dawn litigation and discuss future consideration of possible court ordered remedies.**

Reference Materials:

1. Agenda Item F.1.a, Attachment 1: Executive Summary of Status of the Pacific hake (Whiting) stock in U.S. and Canadian Waters in 2012. (*Full Version Available on Briefing Book Website and CD Only*).
2. Agenda Item F.1.a, Attachment 2: Summary judgment in case no. C10-4829-TEH: Pacific Dawn, LLC, et al. v. John Bryson, et al.
3. Agenda Item F.1.d, Public Comments. (*Full Version Available on Briefing Book Website and CD Only*)

Agenda Order:

- a. Agenda Item Overview
 - b. NMFS Briefing
 - c. Reports and Comments of Advisory Bodies and Management Entities
 - d. Public Comment
 - e. **Council Action:** Council Decisions and Planning as Necessary for Implementation of the 2012-2013 Pacific Whiting Fishing Seasons
- John DeVore
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PFMC
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