



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Sustainable Fisheries Division F/NWR2
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115-0070

Agenda Item F.1.c
Supplemental NMFS Report
March 20120

FEB 29 2012

Mr. Dan Wolford, Chairman
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, Oregon 97220-1384

Dear Mr. Wolford:

As you are aware, on February 21, 2012, Judge Henderson issued the remedy order in Pacific Dawn, LLC v. Bryson, No. C10-4829 THE (N.D. Cal.). The Order remands the regulations addressing the initial allocation of whiting for the shorebased individual fishing quota (IFQ) fishery and the at-sea mothership fishery "for further consideration" consistent with the court's December 22, 2011 summary judgment ruling, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and all other governing law. Further, the Order requires that the National Marine Fisheries Service (NMFS) implement revised regulations before the 2013 Pacific whiting fishing season begins on April 1, 2013. In the interim, the existing regulations remain in effect.

Judge Henderson, in response to plaintiffs' suggestion that revised regulations could be adopted by emergency action under the MSA, noted that the agency, on remand "should consider whether use of this mechanism is appropriate." NMFS does not believe that use of the emergency authority of the MSA is appropriate in this situation. As stated in the Policy Guidelines on the Use of Emergency Rules, generally controversial actions with serious economic effects should not be taken pursuant to emergency authority. Further, we do not believe that the immediate benefits of an emergency rulemaking in this situation outweigh the value of advance notice, public comment, and deliberative consideration. See 62 Fed. Reg. 44,421-22 (August 21, 1997).

By this letter, NMFS requests that the Pacific Fishery Management Council (Council) initiate the reconsideration of the initial allocations for quota share (QS) of whiting in the shorebased IFQ fishery and for whiting catch history assignments in the at-sea mothership fishery. An important step in this reconsideration is revising the Council's current agenda by scheduling the appropriate items for the April, June, and September meetings. The Council will also need to commit to submission of any revised recommendations to the agency as soon as practicable following the September Council meeting.

NMFS will also need to revise its workplan over the coming months and commit to helping the Council work through the additional workload, as follows.

Given the limited amount of time available, and in order to facilitate the Council's reconsideration of the issues, for the April meeting, NMFS will provide the Council with what we believe is an appropriate range of alternatives for reconsideration.

In addition, NMFS intends to publish an Advanced Notice of Proposed Rulemaking (ANPR) to inform the



public of the Court Order and the schedule that the Council and NMFS intend to follow to comply with the Court Order. In the ANPR, we will advise the public of the appropriate process to correct data that may be used for initial allocation; this process will be similar to that undertaken in early 2010 prior to the implementation of the trawl rationalization program. In the ANPR, we will also highlight the relevant aspects of the trawl rationalization program that may need to be suspended or adjusted, including the issues identified below.

NMFS has preliminarily concluded that, pending the reconsideration of the initial whiting allocation, it is necessary to initiate a rulemaking to delay at least two elements of the existing regulations—

- 1) Transfer of QS or Individual Bycatch Quota (IBQ) between QS accounts[§ 660.140(d)(3)(ii)(B)(2)]; this rule would need to be completed before at least December 1, 2012, and;
- 2) the ability to change mothership catcher vessel (MS/CV) endorsement and associated catch history assignment from one limited entry trawl permit to another [§ 660.150(g)(2)(iv)]; this rule would need to be completed by at least August 1, 2012.

Delaying these existing regulations is necessary due to the increased complications that would be caused by allowing transfer of QS or MS/CV endorsements, since these are all based on initial whiting allocations which may be subject to change.

Because quota shares for whiting may be revised, on January 1, 2013, NMFS may need to hold back sufficient quota pounds for whiting and all associated bycatch species in order for QS holders to receive the appropriate final amounts. In addition, for the at-sea mothership fishery, NMFS may need to consider impacts on the processor obligation and coop formation, both of which occur before April 1, 2013. We will work with the Council to consider and address these potential issues, as well as any additional issues that may arise.

We appreciate the Council setting aside the time to discuss these issues at the March meeting.

Sincerely,



Frank D. Lockhart
Assistant Regional Administrator