



November 7, 2008

Mr. Donald K. Hansen, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220-1384

Re: Initial Allocation of Harvest Privileges to Shoreside Processors

Dear Mr. Hansen:

The Fishermen's Marketing Association ("FMA") is concerned that the Council has not resolved substantial legal questions regarding the initial allocation of harvest privileges to shoreside processors. The Council's reliance on a 2007 Technical Memorandum¹ prepared by the National Marine Fisheries Service is misplaced because that memorandum does not address the legal questions the Council must resolve.

The core legal question before the Council is whether shoreside fish processors "substantially participate in the fishery" so as to be eligible for initial allocation of harvest privileges.² NMFS's 2007 Technical Memorandum does not address this precise question:

While the Councils have some latitude in determining who may or may not acquire harvesting privileges, it is certainly more restrictive than the "anybody can own" criterion mentioned above, because of the citizenship requirements and the "**substantially participate in the fishery**" clause. **It is the responsibility of the Council to determine what "substantially participate" actually means based on the fishery management objectives.** In addition to vessel owners, who have been recipients in previous IFQ fisheries, presumably recipients could include captains, crew members, processors, or participants in fishery dependent support businesses.³

¹ Lee G. Anderson and Mark C. Holiday, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, *The Design and Use of Limited Access Privilege Programs*, NOAA Technical Memorandum NMFS-F/SPO-86 (Nov. 2007) ("2007 Technical Memorandum").

² 16 U.S.C. § 1853a(c)(5)(E) (emphasis added).

³ 2007 Technical Memorandum at 38.

This analysis completely overlooks the key phrase “in the fishery.” The term “fishery” is defined in the Magnuson-Stevens Act (“MSA”) as either 1) one or more stocks of fish; or 2) any “fishing” for such stocks.⁴ It is NMFS’s longstanding position that shoreside processing does not constitute “fishing”:

An activity on land which merely provides an incentive to catch fish is insufficiently related to the catching of fish to constitute fishing under [the MSA]. This conclusion is consistent with the legislative history of the [MSA] which at no point indicates that the term “fishing” was intended to include on-shore processing.⁵

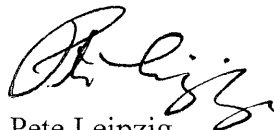
Therefore, since shoreside processors do not engage in “fishing,” they do not participate “in the fishery.” As such, shoreside processors are not eligible to receive an initial allocation of harvest privileges.

By ignoring the second half of the clause “substantially participate in the fishery,” the 2007 Technical Memorandum reads those key qualifying words right out of the MSA. As the FMA pointed out in our October 13, 2008 letter to the Council, the Council cannot simply ignore statutory language and substitute its own definition for “fishery” in order to conclude that shoreside processors “substantially participate in the fishery.” Courts will not defer to Council or NMFS action that rewrites the rules that Congress has affirmatively and specifically enacted. *See Schneider v. Chertoff*, 450 F.3d 944, 958 (9th Cir. 2006), *citing Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004).

In addition, the Council has not addressed the other points raised in FMA’s October 13 letter, namely that the Council’s preferred measures have the unlawful effect of allocating processing privileges, raise substantial competitiveness issues for the fishery, and are inconsistent with National Standard 4.

We strongly urge the Council to reject its current preferred alternative to allocate 20% of the harvest privileges to processors, because this alternative is not permitted under the MSA. We recommend the Council change its preferred alternative for Initial Allocation (A-2.1.1) to Option 1, and thereby allocate 100% of the harvest privileges to harvesters.

Sincerely,



Pete Leipzig
Executive Director

⁴ 16 U.S.C. §§ 1802(13)(A), (B).

⁵ *See* Memorandum to the North Pacific Fishery Management Council from NOAA General Counsel Lisa L. Lindeman (Sept. 20, 1993) at pp. 2, 7 (quoting 1978 legal opinion of the NOAA General Counsel, and finding that “On-shore processing is not “fishing.”). *See also* Letter to Council Chairman Donald K. Hansen from NMFS NW Regional Counsel Eileen M. Cooney (Oct. 30, 2007).