

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*  
Executive Director

DATE: January 20, 2003

SUBJECT: TAC-setting analysis

ESTIMATED TIME 4 HOURS (all D items)
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**ACTION REQUIRED**

Report from NOAA General Counsel

**BACKGROUND**

In October, final action to revise the annual specification (TAC-setting) process was rescheduled until NOAA General Counsel reported back to the Council on the viability of two additional alternatives proposed by industry. The two alternatives are: (1) minor adjustments to proposed rulemaking to include current biological information on groundfish that would best approximate the information available as a result of November Plan Team meetings; and (2) set preliminary specifications for 15-18 months. The Council has requested a legal assessment of these proposed alternatives to determine whether either would satisfy the requirements of the Administrative Procedures Act. NOAA General Counsel staff will advise the Council during the meeting. The executive summary of the initial review draft of the analysis is attached as Item D-1(c)(1).

## EXECUTIVE SUMMARY

Each year, normally in October, proposed groundfish harvest specifications for the Bering Sea and Aleutian Islands area (BSAI) and Gulf of Alaska (GOA) are published in the Federal Register. These proposed specifications are based upon total allowable catch (TAC), acceptable biological catch (ABC) and prohibited species catch (PSC) amounts, and apportionments thereof, which have been recommended by the North Pacific Fishery Management Council (Council) for the current year. Based on public comment on the proposed specifications and information made available at the December Council meeting, final specifications are published in the Federal Register during February or early March. So that fishing may begin January 1, regulations authorize the release of one-fourth of each proposed TAC and apportionment thereof, one-fourth of each PSC and apportionment thereof and the first seasonal allowance of pollock and Atka mackerel. These interim specifications are based upon the proposed specifications and published in the Federal Register in December and are superseded by the final specifications.

The existing harvest specification process is problematic for several reasons. The public is notified and given opportunity to comment on proposed specifications that often are outdated by the time they are published. The publication of proposed specifications each year can confuse the public, because incomplete and outdated information is provided due to the need to adhere to a strict time line in order to comply with all relevant regulations. Because the interim specifications are based on the proposed specifications, they do not take into account the recommendations contained in the Groundfish Plan Teams' final SAFE documents, or the recommendations coming from public testimony, the Science and Statistical Committee, Advisory Panel, and Council at its December meeting. One fourth of the initial TAC and PSC amounts have been found to be an inadequate amount for those fisheries that attract the greatest amount of effort at the beginning of the fishing year. As fisheries are seasonally apportioned to meet other management needs, (i.e., Steller sea lion protection measures) interim TACs based on one fourth of the annual TAC increasingly compromise other management objectives. Under the current process, administrative inefficiency exists in taking the regulatory actions necessary to set interim, proposed and final specifications. For these reasons, NMFS seeks to revise the harvest specification process.

The objectives of modifying the harvest specifications process are to manage fisheries based on best scientific information available, provide for adequate prior public review and comment to the Secretary on Council recommendations, provide for additional opportunity for Secretarial review, minimize unnecessary disruption to fisheries and public confusion, and promote administrative efficiency.

The management alternatives for amending this process are:

- Alternative 1. Status quo. (Publish proposed specifications, followed by interim and final specifications)
- Alternative 2: Eliminate publication of interim specifications. Issue proposed and final specifications prior to the start of the fishing year. Option of biennial harvest specification for BSAI and GOA target species on biennial survey schedule.
- Alternative 3: Issue Proposed and Final Harvest Specifications based on an alternate fishing year schedule (July 1 to June 30).
  - Option 1: Set sablefish TAC on a January through December schedule.
  - Option 2: Reschedule the December Council meeting to January.

Alternative 4: Use Stock Assessment Projections for biennial harvest specifications. For the BSAI and GOA set the annual harvest specifications based on the most recent stock assessment and set harvest specifications for the following year based on projected OFL and ABC values. For setting PSC there are two options:

Option 1: Set PSC limits annually

Option 2: Set PSC limits every two years based on regulations and projected values

Option A: Abolish TAC Reserves

Option B: Update FMPs to reflect current fishing participants and harvest specifications process.

Section 4.12 gives the environmental summary and conclusions. The environmental components that may be affected by the proposed action are the target groundfish species (including the State groundfish fisheries), prohibited species, and Steller sea lions. Results from simulation model and retrospective analysis indicated that under Alternatives 2, 3 and 4 groundfish harvests would be less and several target species biomasses would be more than under the Status Quo. This was primarily due to uncertainty resulting from projecting harvest amounts further into the future than under Alternative 1. Alternative 3 is likely to provide less biomass variability and more likelihood of setting TAC below the OFL compared to alternatives 2 and 4. Alternatives 1 and 3 have potential effects on the temporal dispersion of harvest of Steller sea lion prey species because of the lag between the biomass information used to set harvest specifications and the commencement of the fisheries.

The harvesting effects on groundfish from Alternatives 2, 3 and 4 are unknown due to a number of factors that are not part of the retrospective analysis and simulation model, including the full Council process which can have a substantial effect on the final TAC and has historically been more conservative than the analysis predicted. Potential overfishing identified in the analysis is likely to be mitigated through the Council process and may also be mitigated by additional regulatory action if new information becomes available during the current fishing year that indicates that the level of fishing is inappropriate. Because the effects on groundfish species are unknown, the effects on availability of prey for Steller sea lions are also unknown.

Alternative 3 may also have temporal effects on the groundfish fisheries and potentially conflict with Steller sea lion protection measures. These measures require the temporal dispersion of harvest and current seasons may need to be adjusted for BSAI pollock and Pacific cod trawl fisheries to meet Steller sea lion protection measures and to coincide with the July 1 through June 30 fishing year. During years of high pollock TAC, the BSAI pollock fishery may be conducted into October as the industry attempts to fully harvest the B season allocations, encountering potentially more salmon bycatch and worse weather. Alternative 3 also has the potential for higher levels of harvest in the A season during times of falling biomass than what would occur under the status quo. Because it is not possible to predict if the fishing behavior may change or to predict actions that may be taken by the Council or the State Board of Fish, and because of Steller sea lion protection measures, it is unknown if Alternative 3 could have an effect on target groundfish or Steller sea lions. Option 1 to Alternative 3 to set the sablefish TAC on a January through December schedule would allow the sablefish IFQ program to be managed concurrently with the halibut IFQ program, eliminating any potential effects on these programs from shifting the fishing year.

The Regulatory Impact Review (RIR) meets the requirements of Presidential Executive Order (E.O.) 12866 for a benefit-cost analysis of the proposed action and its alternatives. A complete benefit-cost analysis was

not possible. The information is not available to estimate dollar values for many of the benefits and costs. Moreover, the proposed action affects the conditions under which the Council and Secretary will make decisions about future TAC specifications. The actual benefits and costs will depend on the decisions made by the Council and Secretary, and those decisions cannot be predicted at this time. The RIR does examine a set of outcomes from this action that may affect the benefits and costs. Three general categories of outcomes are identified: (1) impacts on the TAC setting process itself, (2) changes in the fishing year under Alternative 3, and (3) changes in harvests and biomass size under Alternatives 2, 3, and 4.

Alternatives 2, 3 and 4, by extending the time within which the TAC setting should take place, will provide additional opportunities for scientific analysis, for peer review of scientific work, for public notice and comment on the proposed specifications regulations, and for consideration by the Council and the Secretary of Commerce. Since these alternatives will provide for public notice and comment on the specifications actually anticipated for the coming fishing year, comments received from the public will be more useful. Alternatives 2 and 4 provide the most time for this process; Alternative 3 increases the amount of time available, but not to the same extent. It may be difficult, moreover, to complete the entire rulemaking process in the time allotted under Alternative 3, especially with Option 2. Option 2 to Alternative 3 would provide additional time for stock assessment scientists to complete analysis but it may be administratively difficult to reschedule the December Council meeting to January.

Alternative 3 changes the fishing year to begin on July 1. A comparison of fishing seasons for different species with the proposed July 1 start date suggests that a shift from a January 1 to a July 1 start date would cause little disruption to many fisheries. The sablefish IFQ fishery in the GOA and BSAI is an important exception to this. A change in fishing year, and associated change in TAC, would be extremely disruptive in the middle of this fishing season, which currently runs from March 15 to November 15. It might be possible to delay the season, so that it started on July 1 with the start of the new fishing year. However, the administration of the individual quotas in this fishery requires a long closed period between the end of one fishing season and the start of the next. Currently the fishery is closed from November 15 to March 15. This closed period is best in the winter time since fishing conditions aren't as good, and there is less potential for bycatch conflicts with the related halibut fishery. However, a July 1 start for the year would mandate a closed period from March through June. Option 1 to Alternative 3, setting sablefish TAC on a January through December schedule, would eliminate this potential problem.

Alternatives 2, 3, and 4 lengthen the time between biomass surveys and the year in which specifications based on the surveys (specifications year) become effective. Under Alternative 1, the time between the survey information and implementation of the annual fishery based on that information is approximately 7 months, because the first three months of the year are managed under interim specification (which are based on the previous years TACs). Alternative 3 increases the period by three months, Alternative 2 increases the period by nine months, and Alternative 4 increases it by an average of 15 months per year (nine months for the first year of the biennial specifications, and 21 months for the second year). As the length of time between the biomass surveys and the specifications year increases, there is some evidence that biomass levels may vary more, ABCs and harvests may become smaller since lower harvest rates are triggered more often by the harvest control rule, mean spawning biomass levels become larger, and harvest variability increases. These results are extremely tentative.

If the harvest levels do decline as suggested by some modeling results, revenues to industry may also decline. Moreover, an increase in the year-to-year variability of harvest, also suggested by some model results, may impose increased interest and inventory carrying costs on industry.

The Initial Regulatory Flexibility Analysis (IRFA) identifies the numbers of small entities that may be regulated by the action, describes the adverse impacts that may be imposed on these small entities, and describes alternatives to the preferred alternative that may minimize the adverse impacts on the small entities and the reasons they weren't chosen. In this case a preferred action has not yet been identified. This IRFA addresses the statutory requirements imposed under the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Fairness Enforcement Act (SBREFA) of 1996.

The IRFA used the Small Business Administration (SBA) definitions of small entities. Small fishing entities were those that grossed less than \$3.5 million, small shoreside processing entities were those employing fewer than 500 persons. Non-profit entities were also considered small. The SBA also requires that an entity's affiliations be considered in determining its size. Large numbers of small entities may be regulated by this action. These include an estimated 1,353 small groundfish catcher vessel entities, 33 small groundfish catcher/processors, 36 shoreside groundfish processors, and six CDQ groups. The total numbers of entities regulated by this action include 1,366 groundfish catcher vessels, 79 groundfish catcher/processors, three groundfish motherships, 49 shoreside groundfish processors, and six CDQ groups.

There is some evidence that all alternatives compared to Alternative 1 would lead to somewhat reduced revenues, cash flow, and profits for the small entities, although this result is very uncertain. It was not possible to estimate the size of the impact on the small entities, although it was believed to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. Increased year-to-year fluctuations in gross revenues may occur, and these also were expected to be greatest for Alternative 4, less for Alternative 2, and least for Alternative 3. The analysis was unable to determine whether or not there would be a disproportionate impact on small entities (compared to large entities). The analysis did identify additional impacts that were not adverse. Alternatives 2 and 4, and to a lesser extent Alternative 3, provide better opportunities for small business input into decision making about specifications since they provide for more informed public notice and comment.

An important component of an IRFA is a review of the alternatives that have not been chosen, but that minimize the burden of the rule on regulated small entities, and an explanation of why each of these has not been chosen. In this case, a preferred alternative has not yet been chosen. Therefore it has not yet been possible to complete this portion of the IRFA.

Environmental impacts and socioeconomic impacts resulting from changing fishing patterns as a result of the preferred alternative would be assessed annually in the EA/RIR/IRFA that accompanies the final harvest specifications.

At this time, a preferred alternative has not been identified. The Council seeks public comments on these alternatives and on the potential impacts on fishery participants and the environment. Alternative 1 appears to have the least potential for environmental effects but does not meet the objectives of this action. Considering administrative procedural aspects, Alternative 2 is more desirable than Alternatives 1, 3, or 4. More time is provided under Alternative 2 to perform stock assessments, to develop Council recommendations and to allow NMFS to implement proposed and final rule making before the beginning of the fishing year. Alternative 4 for demersal shelf rockfish and option 1 for PSC limits, requires annual rulemaking, reducing the administrative efficiencies that could have been realized with a biennial harvest specifications process. Alternative 3 has the disadvantage of requiring changes to the Sablefish IFQ program to accommodate a new fishing year, potentially affecting the State fisheries, and providing less time for the stock assessment and rulemaking processes compared to Alternatives 2 and 4. Option 1 to Alternative 3 would eliminate the potential problems with the sablefish fisheries.

FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE  
COUNCIL, INC.; THE CENTER FOR  
MARINE CONSERVATION, INC.,  
*Plaintiffs-Appellees,*

v.

DONALD EVANS, Secretary of  
Commerce; THE NATIONAL MARINE  
FISHERIES SERVICE; NATIONAL  
OCEANIC AND ATMOSPHERIC  
ADMINISTRATION,  
*Defendants-Appellants.*

No. 01-17143

D.C. No.  
CV-01-00637-JL

OPINION

Appeal from the United States District Court  
for the Northern District of California  
James Larson, Magistrate Judge, Presiding

Argued and Submitted  
December 4, 2002—San Francisco, California

Filed January 13, 2003

Before: Pamela Ann Rymer, Sidney R. Thomas and  
Barry G. Silverman, Circuit Judges.

Opinion by Judge Rymer

NMFS's specifications and management measures for 2001 on the footing that they are subject to the notice and comment requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. §§ 1801-1883, and the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)-(c), but that no such opportunity was given. The district court ruled that notice and comment was required by the Magnuson Act, and prospectively by the APA because NMFS had not properly invoked the statutory exception allowing agencies to forgo this requirement upon a showing of good cause. The Secretary of Commerce, NMFS, and the National Oceanic and Atmospheric Administration appeal.

We conclude that NMFS's recitation of good cause in 2001 was inadequate to excuse compliance with the APA's notice and comment requirement. As we have previously indicated, good cause requires some showing of exigency beyond generic complexity of data collection and time constraints; notice and comment must interfere with the agency's ability to fulfill its statutory mandate to manage the fishery. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992); *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993). Given our determination that notice and comment was required under the APA for 2001, we do not need to decide whether it was also required under the Magnuson Act. Accordingly, we affirm the judgment in part and vacate in part.

## I

In 1976, Congress enacted the Magnuson Act as a response to overfishing and inadequate conservation measures that were threatening future commercial and recreational fishing, as well as the survival of a number of species of fish. *See* 16 U.S.C. § 1801(a). Among the purposes of the Magnuson Act are providing for "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), and estab-

In 1982, NMFS issued informal guidelines for preparing "framework fishery management plans and amendments" (framework FMPs), claiming that the review and implementation process provided by the Magnuson Act and other requirements of law was "often too slow for effective fishery management." As proposed by NMFS, framework FMPs would contain instructions to enable the Secretary to "make such changes as are needed from time to time to manage the fishery in accordance with the FMP", while still providing for participation by the Regional Councils.

The Pacific Fishery Management Council (Pacific Council) is authorized to prepare plans for the fisheries off the coasts of Washington, Oregon, California, and Idaho. 16 U.S.C. § 1852(a)(1)(F). In 1990, the Pacific Council proposed an amendment to the Pacific Coast Groundfish FMP (Groundfish FMP) adopting framework procedures (Amendment 4). NMFS subsequently approved the amendment, published it as a proposed rule, and, following the period for public comment, published the implementing regulations as a final rule in the Federal Register in January 1991. *See* 55 Fed. Reg. 38,105 (Sept. 17, 1990) (proposed rule); 56 Fed. Reg. 736 (Jan. 8, 1991) (final rule); *see also* 61 Fed. Reg. 34,570 (July 2, 1996) (reorganizing these regulations).

The annual management cycle described by the Groundfish FMP as modified by Amendment 4 consists of several steps taken in preparation for the next calendar year (which begins on January 1st). *See* 50 C.F.R. 660.302. The Pacific Council first gathers information about the state of the fishery throughout the year, then holds a public meeting in September at which, based upon the best available stock assessment information and public comment, it develops preliminary recommendations applicable to the following year. After the first meeting, the Pacific Council provides a summary of its preliminary recommendations and their basis to the public, and notifies the public of its intent to develop final recommendations at its second meeting, usually in November. At the sec-



with the need to have the specifications and management measures in place by the beginning of the fishing year, were accommodated by the scheme adopted in Amendment 4.<sup>4</sup> NMFS further represented that prior notice and comment were not required "by any other law." NMFS has employed the same rationale for invoking the good cause exception since the adoption of framework procedures in 1991.<sup>5</sup>

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<sup>4</sup>The good cause statement in full is as follows:

This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. [§] 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process . . . . Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

66 Fed. Reg. 2338, 2371-72.

<sup>5</sup>See 2000 Groundfish Fishery Specifications and Management Measures, 65 Fed. Reg. 221, 248-49 (Jan. 4, 2000); 1999 Groundfish Fishery Specifications and Management Measures, 64 Fed. Reg. 1316, 1340 (Jan. 8, 1999); 1998 Groundfish Fishery Specifications and Management Measures, 63 Fed. Reg. 419, 443 (Jan. 6, 1998); 1997 Groundfish Fishery Specifications and Management Measures, 62 Fed. Reg. 700, 720 (Jan. 6,

after consenting to proceed before a magistrate judge. On August 20, 2001, the court granted summary judgment in part to NRDC and in part to NMFS. On the claims at issue in this appeal, the magistrate judge ruled that the 2001 specifications were “proposed regulations” prepared under 16 U.S.C. § 1853(c) and, thus, were procedurally invalid for failing to comply with the notice and comment requirement of the Magnuson Act, 16 U.S.C. § 1854(b)(1). The court further ruled that NMFS failed to establish good cause to depart from the APA’s notice and comment requirement. It granted NRDC a declaratory judgment that “NMFS violated the [Magnuson Act] and the APA by not providing prior public notice and allowing for comment on the 2001 specifications after their publication by the Secretary,” and “[a]n order that, in accordance with the [Magnuson Act] and the APA, NMFS provide prior public notice and allow comment on future Pacific groundfish specifications.” This appeal followed.<sup>8</sup>

## II

The parties dispute whether the 2001 specifications and management measures recommended to NMFS by the Pacific Council constitute “proposed regulations” subject to the Magnuson Act’s notice and comment requirement. However, both parties agree that independent of the Magnuson Act, the notice and comment requirement of the APA’s rulemaking provision applies to the specifications and management measures. The APA-related dispute turns on whether NMFS properly invoked 5 U.S.C. § 553(b)(B), the good cause exception to that statute’s notice and comment provision. We review *de novo* the district court’s determinations on issues of statutory

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<sup>8</sup>While the order appealed from is characterized as an “Order Granting Partial Summary Judgment for Plaintiffs and Defendants,” the parties represent, and a review of the record confirms, that the order resolved all claims as to all parties. Thus, we have jurisdiction under 28 U.S.C. § 1291. See *In re Slimick*, 928 F.2d 304, 308 (9th Cir. 1990) (“Appealability turns on the effect of the ruling, not the label assigned to it by the trial court.”).

*Id.* at 1329-30. Similarly here, the one year time span for any given set of specifications and management measures renders it unlikely that any challenge to the rules will be fully litigated before they are replaced by a new set. Moreover, as the Groundfish FMP anticipates invocation of the good cause exception for every set of specifications and management measures, and because NMFS has repeated the same rationale for invoking the exception year after year, there is a reasonable expectation that the same issue will recur in future years. Accordingly, we conclude that this action is not moot.

## B

On the merits, NMFS argues that the district court erred by requiring all future groundfish specifications and management measures to undergo notice and comment under the APA. It points out that NRDC did not request relief regarding future agency actions that NMFS has yet to take. Furthermore, NMFS contends, the district court improperly assumed that future invocations of the good cause exception will be exactly the same as this one — which, it submits, is not necessarily so given that fishery conditions as well as the administrative record change from year to year. Finally, NMFS maintains that its showing of good cause was in fact sufficient.

[1] NRDC notes that we construe APA exceptions narrowly, see *Independent Guard Ass'n of Nevada, Local No. 1 v. O'Leary*, 57 F.3d 766, 767 (9th Cir. 1995), *amended on other grounds*, 69 F.3d 1038 (9th Cir. 1995), and that we refused in *Riverbend Farms* to approve an agency's invocation of the good cause exception where it was required to issue regulations on a *weekly* basis. *Riverbend Farms*, 958 F.2d at 1487. Logically, in NRDC's view, the same result should obtain here, as it did in *Cal-Almond* where this court applied *Riverbend Farms* to an annual cycle. *Cal-Almond*, 14 F.3d at 441. In addition, relying on *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212 (9th Cir. 1995), NRDC posits that the good cause exception should be restricted to rare

[3] NMFS has invoked the APA's good cause exception on the same basis for each set of annual specifications and management measures since the adoption of Amendment 4. On the one hand, this is understandable given that the public knows about Pacific Council hearings and prospective recommendations, and interested parties may attend those meetings and provide input; the procedure that has been followed for a decade was adopted after notice and comment and has never been challenged; and Amendment 4 itself anticipates the waiver of notice and comment. On the other hand, under the process that has been in place there is no notice or formal opportunity to comment to NMFS, which is the final decision-maker. In any event, NMFS failed to engage in any context-specific analysis of the circumstances giving rise to good cause in 2001 when it issued the 2001 specifications and management measures without notice and comment. Rather, it repeated the same generic timeliness concerns upon which it has relied each year, namely, that prior notice and comment would cause delay in the implementation of the rules given the time-sensitive data utilized in preparing them.

[4] NMFS emphasizes the complexity of managing the Pacific Coast Fishery, given the ever-changing nature of the data upon which it relies to issue annual specifications and management measures. Although the intricacy of the rules may have some bearing on the good cause calculus, NMFS does not explain why prior notice and comment would have interfered with its ability to promulgate specifications and management measures *in 2001*, when approximately two months passed between the Pacific Council's final public meeting setting the final recommendations and their issuance by the Secretary in January 2001. If there were no good cause in *Riverbend Farms* for failure to publish notice of *weekly* meetings advising the public of proposed volume restrictions on the marketing of oranges, despite the fact that the committee responsible for recommending to the Secretary of Agriculture weekly volume restrictions was "constantly revising projections right up until, and occasionally even during, the

future years to show that compliance is impracticable under specific circumstances pertinent to the year at issue.<sup>10</sup>

### *Conclusion*

[6] We affirm the district court's ruling that NMFS failed to comply with the APA's notice and comment requirement in issuing the 2001 specifications and management measures, and vacate that portion of the ruling requiring all future specifications and management measures to undergo notice and comment under the APA without considering the agency's articulated reasons establishing good cause to avoid that procedure. Given this disposition, we decline to reach the issue whether NMFS also violated the Magnuson Act's notice and comment provision.<sup>11</sup> Accordingly, we vacate that portion of the order holding that NMFS violated the Magnuson Act, as well as the prospective relief it granted with regard to the Magnuson Act.

AFFIRMED IN PART; VACATED IN PART.

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<sup>10</sup>We recognize our obligation to take "due account" of whether the failure to submit the 2001 specifications and management measures for notice and comment is harmless. Neither party briefed the issue. We take this as a concession by NMFS that it cannot be said that "the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" *Cal-Almond*, 14 F.3d at 442 (quoting *Riverbend Farms*, 958 F.2d at 1487 (quoting *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986))).

<sup>11</sup>We acknowledge that the two notice and comment provisions are not substantively identical, as the APA allows agencies to skirt notice and comment with good cause, while the Magnuson Act does not. If at some point NMFS validly invokes the APA's good cause exception, then it may be necessary to consider whether the Magnuson Act separately requires notice and comment. However, there is no need to reach the issue with regard to the particular specifications and management measures that are before us now.



UNITED STATES DEPARTMENT OF COMMERCE  
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January 30, 2003

MEMORANDUM FOR: North Pacific Fishery Management Council

FROM: Lisa L. Lindeman  
Alaska Regional Counsel *Lisa Lindeman*

SUBJECT: Decision in *Natural Resources Defense Council v. Evans*

On January 25 and February 9, 2001, the Natural Resources Defense Council filed two suits challenging the validity of the 2001 Pacific Coast Groundfish Fishery annual fishery specifications and management measures. The Natural Resources Defense Council had challenged the framework procedures employed by the Pacific Fishery Management Council and NMFS to implement annual fishery specifications and management measures for the groundfish fishery. Since 1991, NMFS has implemented these actions annually without prior notice and comment, invoking the "good cause" exception under the Administrative Procedure Act (APA). On August 20, 2001, the district court held that the 2001 fishery specifications and management measures required prior notice and comment under section 304(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1854(b); alternatively, the district court held that NMFS had insufficient grounds to invoke the good cause exception to the notice and comment requirement under the APA. *Natural Resources Defense Council v. Evans*, No. 01-1421 (N.D. Cal.). NMFS appealed to the Ninth Circuit Court of Appeals.

On January 13, 2003, the Ninth Circuit Court of Appeals issued a decision in *Natural Resources Defense Council v. Evans*, No. 01-17143. Noting that "good cause requires some showing of exigency beyond generic complexity of data collection and time constraints," the Court held that NMFS' recitation of good cause was inadequate to waive the APA requirement of prior notice and opportunity for comment on the 2001 annual fishery specifications and management measures. The Court stated that good cause is justified when "notice and comment . . . interfere[s] with the agency's ability to fulfill its statutory mandate to manage the fishery." The Court criticized NMFS for failing to "engage in any context-specific analysis of the circumstances giving rise to good cause" when it promulgated its 2001 Pacific Coast groundfish specifications. NMFS had included the following language in the Federal Register notice and provided for additional public comment after the rule issued:

This package of specifications and management measures is a delicate balance designed to allow as much harvest of healthy stocks as possible, while protecting overfished and other depressed stocks. Delay in implementation of the measures could upset that balance and cause harm to some stocks and it could require unnecessarily restrictive measures later in the year to make up for the late



implementation. Much of the data necessary for these specifications and management measures came from the current fishing year. The Assistant Administrator for Fisheries, NOAA (AA) has determined that there is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment for the specifications and management measures. Because of the timing of the receipt, development, review, and analysis of the fishery information necessary for setting the initial specifications and management measures, and the need to have these specifications and management measures in effect at the beginning of the 2001 fishing year, Amendment 4 to the FMP, implemented on January 1, 1991, recognized these timeliness considerations and set up a system by which the interested public is notified, through Federal Register publication and Council mailings, of Council meetings and of the development of these measures and is provided the opportunity to comment during the Council process. The public participated in GMT, Groundfish Advisory Subpanel, SSC, and Council meetings in September and November 2000 where these recommendations were formulated. Additional public comments on the specifications and management measures will be accepted for 30 days after publication of this document in the Federal Register.

66 Fed. Reg. 2338, 2372 (January 11, 2001). The Ninth Circuit noted that there was no notice and opportunity to comment before NMFS, the final decisionmaker, and that two months had passed between the time the fishery management council submitted its recommendations and the time the rule was published. The Court found the waiver language unconvincing, noting that it merely repeated generic concerns about timing and the complexity of fishery management and that timeliness concerns about annual rulemaking did not constitute good cause.

The Court declined to determine the precise contours of what constitutes good cause in the fisheries context, stating that "habitual invocation of the good cause exception" is not necessarily improper. However, in this case, NMFS needed to show that some "exigency" apart from generic data collection and timing concerns interfered with its ability to promulgate the specifications and management measures.

Given the Court's holding that notice and comment was required under the APA for 2001, the Court declined to decide whether notice and comment also was required under section 304(b) of the Magnuson-Stevens Act.

cc: Jane Chalmers  
Jonathan Pollard  
Jim Balsiger