

was the first receiver of the Pacific whiting in question and that its landings history for that fish should be conveyed to Appellant as a shoreside processor.⁸ Second, NMFS stated that it did not err in its use or application of landings data. NMFS stated that under applicable regulations, NMFS was instructed to identify who qualified as a shoreside processor based on PacFIN data that showed who was a first receiver.⁹ Thus, because AS was the first receiver of the Pacific whiting in the PacFIN database, NMFS did not credit Appellant with those landings.

ISSUES

The general issue is whether NMFS should credit Appellant with an additional 1,547.5 mt.¹⁰ of Pacific whiting for the purposes of determining Appellant's QS of Pacific whiting on Appellant's Pacific Groundfish Program Shorebased IFQ Quota Share Permit.¹¹

To resolve that issue, I must determine whether Appellant has shown by credible information that Appellant is the first shoreside processor of the 1,547.5 mt. of Pacific whiting at issue in this appeal.

FINDINGS OF FACT

1. AS was the first receiver of 1,547.5 mt. of Pacific whiting in 2004 as reflected in PacFIN data.¹²
2. In 2004 and all times relevant to this appeal, Appellant was a shoreside processor.¹³
3. In April and May 2004, Appellant purchased 1,547.5 mt. of Pacific whiting from AS.¹⁴
4. In April and May 2004, Appellant received whole fish (Pacific whiting) from AS. Appellant cut the whole fish, removed parts, packaged portions in 10 kg boxes, and then froze the boxes of fish for subsequent sale.¹⁵

⁸ IAD dated January 7, 2011, citing 50 C.F.R. § 660.140(d)(8)(vi)(B).

⁹ IAD dated January 7, 2011. PacFIN is an abbreviation for Pacific Fisheries Information Network of Pacific Marine Fisheries Commission. See Final Rule, 75 Fed.Reg. 60868, 60869 (2010).

¹⁰ Appellant originally asked for credit for 1,549.9 mt. but subsequently conducted a detailed review of its fish tickets and concluded it overstated the amount it bought from AS by 2.4 mt. Appellant changed the amount requested to 1,547.5 mt. See Appellant's letter dated February 1, 2011 with attachment.

¹¹ More precisely, 2011 Pacific Coast Groundfish Program Shorebased IFQ [Individual Fish Quota] Quota Share Permit. See 50 C.F.R. § 660.11(1)(i).

¹² IAD; Appellant's letter dated October 27, 2010; Appellant's letter dated February 1, 2011.

¹³ IAD; Appellant's letter dated October 27, 2010.

¹⁴ IAD dated January 7, 2011; Appeal dated February 1, 2011; AS letter dated February 18, 2011.

¹⁵ AS letter dated April 10, 2004; Letter with description of independent sampling of May 19, 2004 landing and review of fish tickets for landings between April 14, 2004, and May 19, 2004 (Sample letter), dated May 24, 2004; Appellant's letter dated October 27 2010.

5. When Appellant took possession of the Pacific whiting from AS, it was in an unprocessed state.¹⁶
6. On October 10, 2010, NMFS mailed a prequalified QS permit application to Appellant.¹⁷
7. On November 1, 2010, NMFS received Appellant's complete application.
8. On the application, Appellant indicated it did not agree with NMFS's preliminary assessment of its QS amount; Appellant believed NMFS failed to credit it with 1,549.9 mt. of Pacific whiting purchased from AS.¹⁸ Appellant subsequently changed its requested amount to 1,547.5 mt.¹⁹
9. Before and when submitting its application, Appellant did not submit a letter to NMFS from AS asking that AS's landing history for these landings of Pacific whiting be reassigned to Appellant.
10. NMFS issued a quota share permit to Appellant for .588% Pacific whiting.
11. In determining Appellant's quota share, NMFS did not attribute the disputed 2004 landings data referred to in Finding of Facts 1, 3 and 4 to Appellant.²⁰
12. AS agrees with Appellant that Appellant was the first shoreside processor for the Pacific whiting landings at issue in this appeal.²¹

PRINCIPLES OF LAW

The Shorebased Individual Fish Quota (IFQ)²² program was established by regulations implementing the Pacific Coast Groundfish Fishery Management Plan.²³ Part of the program is a permit system for quota share. Quota share appears on permits by species, including Pacific whiting.²⁴

¹⁶ AS letter dated April 10, 2004; Sampling letter dated May 24, 2004; Appellant's letter dated October 27 2010.

¹⁷ IAD dated January 7, 2011.

¹⁸ IAD dated January 7, 2011.

¹⁹ See Appellant's letter dated February 1, 2011 with attachment.

²⁰ IAD dated January 7, 2011.

²¹ AS letter dated February 18, 2011; AS letter dated April 10, 2004.

²² IFQ "means a Federal permit to harvest a quantity of fish, expressed as a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person. An IFQ is a harvest privilege that may be revoked at any time in accordance with the Magnuson-Stevens Act, IFQ species for the Shorebased IFQ Program are listed at § 660.140, subpart D." 50 C.F.R. § 660.111(2)(iii).

²³ See 50 C.F.R. §§ 660.10(a) and 660.140 et seq.

²⁴ See 50 C.F.R. § 660.25(g). See generally 50 C.F.R. § 660.140.

Quota share is the amount of fishing quota for an individual species or species group and area. The quota share is stated as a percentage of the annual allocation of fish pursuant to the Shorebased IFQ program.²⁵

"Only the deliveries for which the shoreside processor is the first processor of the fish will be used in the calculation of whiting relative history."²⁶ Quota share is allocated to "shoreside processors" who meet certain program requirements.²⁷ Shoreside processors are "operation[s], working on U.S. soil, that take[] delivery of trawl caught groundfish [including Pacific whiting] that has not been processed; and that thereafter engages that fish in shoreside processing."²⁸ The term "shoreside processing" is defined two ways: one, shoreside activities involving cutting into smaller pieces, freezing, cooking, smoking, drying groundfish, or packaging into units of 100 pounds or less for sale, or; two, the purchase and redistribution into a wholesale or retail market of live groundfish from a harvesting vessel.²⁹

Shoreside processors were initially identified by NMFS by fish tickets showing who was the first receiver of Pacific whiting shoreside. The fish tickets are those recorded in a database.³⁰ The database is the Pacific Fisheries Information Network of the Pacific States Marine Fisheries Commission or PacFIN.³¹

The designation of "first receiver" can be challenged by an applicant.³² That is, while an application for a permit is pending, an applicant can challenge NMFS's assessment and use of relevant data such as that used to determine who is the first receiver.³³ Further, an applicant who is a shoreside processor may ask NMFS to be considered the first receiver. Before an application is processed, an applicant may request that Pacific whittings landings history of the first receiver identified in PacFIN data be re-assigned to the applicant. Among the requirements for qualifying for a reassignment is that the applicant must submit a letter signed and dated by the first receiver indicating that its landing history should be transferred to the applicant. The letter had to be filed with NMFS by the deadline for permit applications and contain certain information enumerated in the regulations.³⁴

In the applicable regulations, NMFS specified several bases for appeal. Those bases are:

²⁵ See 50 C.F.R. §§ 660.11(2)(iii) and 660.140(b)(1).

²⁶ 50 C.F.R. § 660.140(d)(8)(iv)(G).

²⁷ 50 C.F.R. §§ 660.140(d)(8)(ii)(B) and 660.140(d)(8)(iv)(G).

²⁸ 50 C.F.R. § 660.140(d)(8)(i)(D).

²⁹ 50 C.F.R. § 660.140(d)(8)(i)(D)(1)&(2).

³⁰ See 50 C.F.R. § 660.140(d)(8)(ii)(B) and (d)(8)(iv)(G).

³¹ 50 C.F.R. §§ 660.140(d)(8)(i)(B) and 660.140(d)(8)(ii)(B).

³² See 50 C.F.R. § 660.140(d)(8)(ii)(B). Specifically, during the application process and on appeal and as relevant to this case, an applicant may challenge NMFS for: "Errors in NMFS' use or application of data, including...[e]rrors in NMFS' use or application of landings data from PacFIN...errors in NMFS' use or application of QS or IBQ allocation formula, [or]...errors in identification of ownership information for the first receiver or the processor that first processed the fish."

³³ 50 C.F.R. § 660.140(d)(8)(vi).

³⁴ See 50 C.F.R. § 660.140(d)(8)(vi)(B).

1. NMFS erred in its use or application of PacFIN data,³⁵ and;
2. NMFS erred in assignment of a QS permit and whiting QS inasmuch as the assignee was not the first processor of the fish.³⁶

In challenging NMFS's determination, including on appeal, an applicant must present credible information to support his or her claim.³⁷

ANALYSIS

Appellant requests credit for Pacific whiting sold by AS to Appellant in 2004. Appellant bases its appeal on 50 C.F.R. § 600.140(d)(8)(x). That regulation provides that on appeal "for whiting QS based on shoreside processing [an Appellant may assert] that the...Pacific whiting shoreside first receiver to which a QS permit and whiting QS have been assigned was not in fact the first processor of the fish included in the qualifying landings history."³⁸ Program regulations also mandate that QS go to shoreside processors "working on U.S. soil, that take[] delivery of trawl caught groundfish [including Pacific whiting] that has not been processed...thereafter [the processor] engages that fish in shoreside processing."³⁹ A shoreside processor includes one who cuts a fish into portions, freezes, cooks, or smokes a fish, or who packages fish into 100 kg. or less packages for future sale.⁴⁰ Appellant bears the burden of proving with "credible information....that they were in fact the first shoreside processor for the fish in question."⁴¹

NMFS used the default provisions in the applicable regulations to determine that AS was the first shoreside processor. That is, under applicable regulations, NMFS was permitted to presume that first receivers identified in PacFIN data were the same as the first shoreside processors.⁴² Since AS was the first receiver identified in PacFIN data, NMFS's initial conclusion comported with applicable regulations. However, that same provision of the regulation states that NMFS's determination that the first receiver is presumed to be the first shoreside processor is subject to correction and directs the reader to 50 C.F.R. § 660.140(d)(8)(iv)(G). Fifty C.F.R. § 660.140(d)(8)(iv)(G) provides in pertinent part that "deliveries for which the shoreside processor is the first processor of the fish will be used in the calculation of whiting relative history." Similarly, 50 C.F.R. § 660.140(d)(8)(x) allows for revision of NMFS's assumption that a first receiver (in this

³⁵ 50 C.F.R. § 660.140(d)(8)(vi).

³⁶ 50 C.F.R. § 660.140(d)(8)(vi) and (x).

³⁷ 50 C.F.R. § 660.140(d)(8)(x).

³⁸ 50 C.F.R. § 660.140(d)(8)(x). See also 50 C.F.R. § 140(d)(8)(iv)(G) ("Only the deliveries for which the shoreside processor is the first processor of the fish will be used in the calculation of whiting relative history.").

³⁹ 50 C.F.R. § 660.140(d)(8)(i)(D).

⁴⁰ 50 C.F.R. § 660.140(d)(8)(i)(D)(1).

⁴¹ 50 C.F.R. § 660.140(d)(8)(x).

⁴² See 50 C.F.R. § 660.140(d)(8)(ii)(B).

case, AS) was the first processor. The first shoreside processor is the first operation on U.S. soil that took delivery of the unprocessed Pacific whiting of concern in this appeal and then cut, froze, cook and/or packaged the fish in units of 100 pounds or less for subsequent sale.⁴³

In short, while NMFS initially determined that AS was the first processor based on PacFIN data, on appeal, NMFS need not maintain that position in the face of evidence showing that another entity was actually the first processor. Specific and credible evidence shows that in April and May 2004, Appellant received whole fish (Pacific whiting) from AS. Appellant cut the whole fish, removed parts, packaged portions in 10 kg boxes, and then froze the boxes of fish.⁴⁴ Further, in a written statement AS writes: We "acknowledge[] that [Appellant] was the sole recipient and processor for all 3,416,971 pounds of [Pacific] [w]hiting...that was unloaded through [our] plant in...April and May of 2004."⁴⁵ That statement is consistent with statements AS made previously in 2004:

AS...unloads Pacific [w]hiting. The whiting is pumped from the refrigerated hold of the vessel and onto a sorting conveyor which dumps into a bin which is weighed and then loaded onto a waiting truck for transport...[W]e are selling the whiting to [Appellant]. The trucks run from Crescent City to Ilwaco Wa. Without disturbing the load, in other words the product is sorted in Crescent City and not touched until it hits the processing line at Ilwaco Wa.⁴⁶

In contrast to the evidence that Appellant was the first shoreside processor, the PacFIN data shows that AS was the first receiver. PacFIN data does not establish that in point of fact AS was the first shoreside processor; rather the PacFIN data was proof of first receivers which in turn NMFS used to infer that a first receiver was the first processor. The inference is subject to disproof. In this case, specific and credible evidence, as outlined above, shows that in fact the first shoreside processor was Appellant. Since Appellant is the first shoreside processor, it should be credited with the 1,547.5 mt. of Pacific whiting at issue in this appeal.

CONCLUSIONS OF LAW

NMFS did not err when it initially determined that Appellant did not qualify for a reassignment of AS's Pacific whiting landings data because Appellant failed to timely produce a letter that met all of the requirements of 50 C.F.R. § 660.140(d)(8)(vi)(B).

⁴³ See 50 C.F.R. § 660.140(d)(8)(i)(D)(1)&(2).

⁴⁴ AS letter dated April 10, 2004; Sampling letter dated May 24, 2004, Appellant's letter dated October 27 2010.

⁴⁵ AS letter dated February 18, 2011.

⁴⁶ AS letter dated April 10, 2004.

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Appellant has shown by specific and credible evidence that it was the first shoreside processor of the Pacific whiting at issue in this appeal.

The IAD should be reversed and Appellant credited with the 1,547.5 mt. of Pacific whiting at issue in this appeal.

This decision is a recommendation and not final unless approved by the Regional Administrator.

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date: 07/21/2011