

affixed to each vessel subject to this section in block Arabic numerals at least 10 inches (25.40 cm) in height for vessels more than 25 ft (7.62 m) but equal to or less than 65 ft (19.81 m) in length; and 18 inches (45.72 cm) in height for vessels longer than 65 ft (19.81 m) in length. Markings must be legible and of a color that contrasts with the background.

(b) [Reserved].

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 110311192-1204-01]

RIN 0648-BA95

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2011 Tribal Fishery for Pacific Whiting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is issuing this proposed rule for the 2011 Pacific whiting tribal fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP) and the Magnuson Stevens Fishery Conservation and Management Act (Magnuson Act). Washington coastal treaty Indian tribes mean the Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation. This proposed rule establishes an interim tribal allocation of Pacific whiting for the 2011 season only, based on discussions with the Makah and Quileute tribes and Quinault Indian Nation regarding their fishing plans. At the March, 2011 Pacific Fishery Management Council (Council) meeting, the Council recommended a coastwide Optimum Yield (OY) of 393,751 mt. This would result in a U.S. OY of 290,903 mt. The proposed rule, based on communications to date with the tribes, proposes a tribal allocation of 66,908 mt, for 2011 only, given the Council's recommended OY.

DATES: Comments on this proposed rule must be received no later than 5 p.m., local time on April 19, 2011.

ADDRESSES: You may submit comments, identified by RIN 0648-BA95 by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

- *Fax:* 206-526-6736, *Attn:* Kevin C. Duffy

- *Mail:* William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070, *Attn:* Kevin C. Duffy.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kevin C. Duffy (Northwest Region, NMFS), *phone:* 206-526-4743, *fax:* 206-526-6736 and *e-mail:* kevin.duffy@noaa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

This proposed rule is accessible via the Internet at the Office of the Federal Register's Web site at <http://www.gpoaccess.gov/fr/index.html>. Background information and documents are available at the Pacific Fishery Management Council's Web site at <http://www.pcouncil.org/>.

Background

The regulations at 50 CFR 660.50(d) establish the process by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request new allocations or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations state "the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus." These procedures employed by NOAA in implementing tribal treaty rights under the FMP, in place since May 31, 1996, were designed to provide a framework process by which NMFS can accommodate tribal treaty rights by

setting aside appropriate amounts of fish in conjunction with the Pacific Fishery Management Council (Council) process for determining harvest specifications and management measures. The Council's groundfish fisheries require a high degree of coordination among the tribal, state, and federal co-managers in order to rebuild overfished species and prevent overfishing, while allowing fishermen opportunities to sustainably harvest over 90 species of groundfish managed under the FMP.

Since 1996, NMFS has been allocating a portion of the U.S. OY of Pacific whiting to the tribal fishery following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the whiting OY before allocation to the non-tribal sectors. To date, there has been no determination of the total amount of whiting for which the tribes are entitled to fish under their treaty right. Therefore, allocations to date have been on an interim basis, and are not considered to set precedent with respect to the amount of the treaty right.

To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting. The Makah Tribe has annually harvested a whiting allocation every year since 1996 using midwater trawl gear. From 1999 until 2009, the tribal allocation was based on a statement of need for their tribal fishery. In recent years prior to 2009, the specific tribal amount was generally, although not always, determined using a sliding scale relative to the U.S. whiting OY of between 14 and 17.5 percent, depending on the specific OY determined by the Council. In general, years with a relatively low OY resulted in a tribal allocation closer to 17.5 percent, and years with a relatively high OY result in a tribal allocation closer to 14 percent.

Between 2000 and 2008, the U.S. OY ranged from a high of 269,545 mt in 2008 to a low of 129,600 mt in 2002. In absolute amounts, the tribal allocation from 2000 to 2008 ranged from a high of 35,000 mt in 2005, 2007, and 2008 to a low of 22,680 mt in 2002.

For the 2009 fishery, the Quileute Tribe first stated their intent to participate in the fishery. That year, the U.S. OY was 135,939 mt, and the tribal allocation was set at 50,000 mt (36.78 percent of the U.S. OY). A set-aside of 42,000 mt was established for the Makah, and an 8,000 mt set-aside was established for the Quileute. The final rule in 2009 anticipated the Makah managing their fisheries to achieve a harvest of no more than 42,000 mt, and the Quileute managing their fisheries to achieve a harvest of no more than 8,000 mt. For 2010, both the Makah and

Quileute stated their intent to participate in the Pacific whiting fishery. Based on the formula for the tribal allocation used in the proposed rule, and taking into account public comments received on the proposed rule, the tribal allocation of Pacific whiting in 2010 was 49,939 mt (25.75 percent of the U.S. OY). Although an allocation was made to account for participation by two tribes, only the Makah actually participated in the 2009 and 2010 tribal whiting fisheries.

NMFS and the co-managers have been involved in a process designed to determine the long-term tribal allocation for whiting. At the September 2008 Council meeting, NMFS, the states and the Quinault, Quileute, and Makah tribes met and agreed on a process in which NMFS would pull together the current information regarding whiting, circulate it among the co-managers, seek comment on the information and possible analyses, and then prepare analyses of the information to be used by the co-managers in developing a tribal allocation for use in 2010 and beyond. The goal was agreement among the co-managers on a total tribal allocation for incorporation into the Council's planning process for the 2010 season. The further goal was to provide the tribes the time and information to develop an inter-tribal allocation or other necessary management agreement. The process has been moving forward but final agreement on a long-term tribal allocation has not been reached. In 2009, NMFS shared a preliminary report summarizing scientific information available on the migration and distribution of Pacific whiting on the west coast. The co-managers have met to discuss this information and plan further meetings. During 2010, NMFS finalized the report summarizing scientific information available on the migration and distribution of Pacific whiting on the west coast. In addition, NMFS responded in writing to requests from the tribes for clarifications on the paper and requests for additional information. Additionally, NMFS met with each of the tribes in the fall of 2010 to discuss the paper and to discuss a process for negotiation of the long-term tribal allocation of Pacific whiting. Those discussions are ongoing and it is not anticipated that these issues will be resolved prior to the start of the 2011 Pacific whiting tribal fishery.

Tribal Allocation for 2011

Over the last three months, NMFS has met individually with each of the coastal tribes that have expressed a potential interest in fishing for whiting in 2011 to discuss this year's tribal

fishery as well as the process for negotiating a long-term tribal allocation. For 2011, the Makah and the Quileute Tribes have indicated that they plan to participate in the 2011 fishery. The Quinault Indian Nation informed NMFS that while they are still pursuing entering the fishery in 2011, they have not yet made a final decision. Because the co-managers have not negotiated a long term tribal allocation, NMFS is again moving forward with this proposed rule as an interim measure to address the allocation for and management of the 2011 tribal Pacific whiting fishery. As with the 2010 allocation, this proposed rule is not intended to establish any precedent for future whiting seasons or for the long-term tribal allocation of whiting.

The proposed rule would be implemented under authority of Section 305(d) of the Magnuson Act, which gives the Secretary responsibility to "carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act." With this proposed rule, NMFS, acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of the Washington tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens. (*United States v. Washington*, 384 F. Supp. 313 (W.D. 1974)).

At the March, 2011 Pacific Fishery Management Council (Council) meeting, the Council recommended a coastwide Optimum Yield (OY) of 393,751 mt. This would result in a U.S. OY of 290,903 mt. The Makah Tribe has requested the opportunity to harvest up to 17.5 percent of the U.S. OY of whiting in 2011. The Quileute Tribe has stated that it plans to have two boats participating in the 2011 fishery, and that it believes that 8,000 mt of whiting per boat is necessary to ensure the economic viability of each boat.

Given past tribal allocations, the recent conversations with the Quinault Indian Nation, the Quileute Tribe, and the Makah Tribe, and the whiting U.S. OY recommendation from the Pacific Council, NMFS is proposing a 2011 interim tribal allocation of no higher than 66,908 mt, which is 23.00 percent of the recommended U.S. OY. NMFS is still in communication with the tribes on the 2011 interim allocation and the final allocation amount may differ from this proposal. In addition, NMFS has yet to consider and adopt the Council's recommendation for the U.S. OY of whiting. NMFS believes the proposed amount will allow for the anticipated 2011 participation in the fishery by the

Makah and Quileute tribes, and for the potential 2011 participation by the Quinault Indian Nation.

Regarding the 2011 tribal whiting allocation, NMFS believes the proposed allocation, although higher than the absolute amounts of prior tribal allocations, is well within the range of past percentages (12.08–36.78 percent). As described above, while further negotiation on the long-term tribal allocation of Pacific whiting will occur in 2011, NMFS believes that current knowledge on the distribution and abundance of the coastal Pacific whiting stock supports a conclusion that the proposed tribal allocation of 66,908 mt lies within the range of the tribal treaty right to Pacific whiting.

Classification

At this time, NMFS has preliminarily determined that the management measures for the 2011 Pacific whiting tribal fishery are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making the final determination, will take into account the data, views, and comments received during the comment period.

NMFS has initially determined that this proposed rule is not significant for purposes of Executive Order 12866.

An Initial Regulatory and Flexibility Act (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from NMFS (*see ADDRESSES*).

Under the RFA, the term "small entities" includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish

harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is one with annual receipts not in excess of \$7.0 million. The RFA defines small organizations as any nonprofit enterprise that is independently owned and operated and is not dominant in its field. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

In recent years the number of participants engaged in the Pacific whiting fishery has varied with changes in the whiting OY and economic conditions. Pacific whiting shoreside vessels (26 to 29), mothership processors (4 to 6), mothership catcher vessels (11 to 20), catcher/processors (5 to 9), Pacific whiting shoreside first receivers (8 to 16), and five whiting vessels participating in the Makah portion of the tribal whiting fishery, are the major units of this fishery. For 2011, there may be additional vessels participating in the tribal whiting fishery. NMFS records suggest the gross annual revenue for each of the catcher/processor and mothership operations participating in the Pacific coast whiting fishery exceeds \$4.0 million. Therefore, they are not considered small businesses. NMFS records also show that 10–43 catcher vessels have taken part in the mothership fishery on an annual basis since 1994. These companies are all assumed to be small businesses, although some of these vessels may be affiliated with larger processing companies. Since 1994, 26–31 catcher vessels have annually participated in the shoreside whiting fishery. These companies are all assumed to be small businesses, although some of the vessels may be affiliated with larger processing companies. Vessels participating in the tribal whiting fishery are presumed to be small businesses, whereas the Tribes are presumed to be small government jurisdictions.

Pacific whiting has grown in importance, especially in recent years. Through the 1990s, the volume of Pacific whiting landed in the fishery increased. In 2002 and 2003, landings of Pacific whiting declined due to information showing the stock was depleted and the subsequent regulations that restricted harvest in order to rebuild the species. Over the years 2003–2007, estimated Pacific whiting

ex-vessel values averaged about \$29 million. In 2008, these participants harvested about 248,000 mt of whiting worth about \$63 million in ex-vessel value based on shoreside ex-vessel prices of \$254 per ton—the highest ex-vessel revenues and prices on record. In comparison, the 2007 fishery harvested about 224,000 mt worth \$36 million at an average ex-vessel price of about \$160 per mt. In 2009, tribal and non-tribal fleets harvested about 122,000 mt of Pacific whiting, worth approximately \$14 million. During 2009, ex-vessel prices declined to about \$119.00 per ton, presumably due to the worldwide recession. For 2010, the preliminary ex-vessel price returned to \$160.00 per mt, leading to approximately \$27 million in revenues, based on a total harvest of 170,000 mt.

For 2010, the tribes were initially allocated 49,939 mt. In September and October, NMFS reapportioned a total of 16,000 mt from the tribal allocation to the non-tribal shorebased, mothership, and catcher processor sectors.

Based on conversations with the tribes regarding their intent for the 2011 tribal whiting fishery, a proposed tribal allocation of 66,908 mt is being considered. Using the average ex-vessel price of \$160.00 per ton, the ex-vessel value is estimated to be approximately \$10,705,280.

NMFS did not consider a broad range of alternatives to the proposed allocation because the tribal allocation is based primarily on the requests of the tribes for a level of participation in the fishery that will allow them to exercise their treaty right to fish for whiting. Consideration of amounts lower than the tribal requests is not appropriate here, where based on the information available to NMFS the requested amount appears to be within the amount to which the tribes are entitled. A higher amount would arguably be within the scope of the treaty right, but would unnecessarily limit the non-tribal fishery. A no action alternative was considered, but the regulatory structure provides for a tribal allocation on an annual basis only. Therefore, no action would result in no allocation of Pacific whiting to the tribal sector in 2011, inconsistent with NMFS' obligation to manage the fishery consistent with the tribes' treaty rights. Given that the Makah and Quileute tribes have made specific requests for allocations in 2011, this alternative received no further consideration.

With the implementation of Fishery Management Plan amendments 20 and 21, the ability to reapportion Pacific whiting from tribal to non-tribal fisheries was eliminated. Similarly,

unharvested whiting allocated to the non-tribal shoreside, mothership, and catcher-processor sectors cannot be reapportioned among these sectors. So, unlike 2010, the regulations do not provide NMFS a specific mechanism to reapportion unharvested tribal whiting to the non-tribal sectors, and will not be able to reapportion among the non-tribal sectors. Pending markets, available bycatch, and the ability of tribal fleets to develop the capacity to harvest the tribal allocation may result in unharvested Pacific whiting because there is no regulatory mechanism to reapportion. Similarly, there may be unharvested Pacific whiting in the other sectors as well.

Tribal fisheries include a mixture of activities similar to the non-tribal fisheries, where tribal fisheries will deliver shoreside for processing or to a mothership for at-sea processing. The processing facilities that the tribes use also process fish harvested by non-tribal fisheries. Increased allocations to tribal harvesters (harvest vessels are small entities, tribes are small jurisdictions) implies decreased allocations to non-tribal harvesters (a mixture of small and large businesses).

There are no reporting, recordkeeping or other compliance requirements in the proposed rule.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the Pacific Coast groundfish FMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the FMP for the Pacific Coast groundfish fishery was not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in

the destruction or adverse modification of critical habitat.

NMFS reinitiated a formal section 7 consultation under the ESA in 2005 for both the Pacific whiting midwater trawl fishery and the groundfish bottom trawl fishery. The December 19, 1999, Biological Opinion had defined an 11,000 Chinook incidental take threshold for the Pacific whiting fishery. During the 2005 Pacific whiting season, the 11,000 fish Chinook incidental take threshold was exceeded, triggering reinitiation. Also in 2005, new data from the West Coast Groundfish Observer Program became available, allowing NMFS to complete an analysis of salmon take in the bottom trawl fishery.

NMFS prepared a Supplemental Biological Opinion dated March 11, 2006, which addressed salmon take in both the Pacific whiting midwater trawl and groundfish bottom trawl fisheries. In its 2006 Supplemental Biological Opinion, NMFS concluded that catch rates of salmon in the 2005 whiting fishery were consistent with expectations considered during prior consultations. Chinook bycatch has averaged about 7,300 fish over the last 15 years and has only occasionally exceeded the reinitiation trigger of 11,000 fish.

Since 1999, annual Chinook bycatch has averaged about 8,450 fish. The Chinook ESUs most likely affected by the whiting fishery has generally improved in status since the 1999 ESA section 7 consultation. Although these species remain at risk, as indicated by their ESA listing, NMFS concluded that the higher observed bycatch in 2005 does not require a reconsideration of its prior "no jeopardy" conclusion with respect to the fishery. For the groundfish bottom trawl fishery, NMFS

concluded that incidental take in the groundfish fisheries is within the overall limits articulated in the Incidental Take Statement of the 1999 Biological Opinion. The groundfish bottom trawl limit from that opinion was 9,000 fish annually. NMFS will continue to monitor and collect data to analyze take levels. NMFS also reaffirmed its prior determination that implementation of the Groundfish FMP is not likely to jeopardize the continued existence of any of the affected ESUs.

Lower Columbia River coho (70 FR 37160, June 28, 2005) were recently listed and Oregon Coastal coho (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

The Southern Distinct Population Segment (DPS) of green sturgeon was listed as threatened under the ESA (71 FR 17757, April 7, 2006). The southern DPS of Pacific eulachon was listed as threatened on March 18, 2010, under the ESA (75 FR 13012). NMFS has reinitiated consultation on the fishery, including impacts on green sturgeon, eulachon, marine mammals, and turtles. After reviewing the available information, NMFS has concluded that, consistent with Sections 7(a)(2) and 7(d) of the ESA, the proposed action would not jeopardize any listed species, would not adversely modify any designated critical habitat, and would not result in any irreversible or irretrievable commitment of resources that would have the effects of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. NMFS has met and continues to meet with tribal officials and/or senior staff to address both their short and long term interests regarding Pacific whiting.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: March 31, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.50 paragraph (f)(4) is revised to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

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(f) * * *

(4) *Pacific whiting.* The tribal allocation for 2011 is 66,908 mt.

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