

Table 3 (North). Continued

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
42	Canary rockfish					
43	large & small footrope gear					
44	selective flatfish trawl gear					
45	multiple bottom trawl gear ^{8/}					
46	Yellowtail					
47	midwater trawl					
48	large & small footrope gear					
49	selective flatfish trawl gear					
50	multiple bottom trawl gear ^{8/}					
51	Minor nearshore rockfish & Black rockfish					
52	large & small footrope gear					
53	selective flatfish trawl gear					
54	multiple bottom trawl gear ^{8/}					
55	Lingcod ^{4/}					
56	large & small footrope gear					
57	selective flatfish trawl gear					
58	multiple bottom trawl gear ^{8/}					
59	Pacific cod					
60	Spliny dogfish					
61	Other Fish ^{5/}					

TABLE 3 (North) cont

1/ Bocaccio, chilipepper and cowcod are included in the trip limits for minor shelf rockfish.
 2/ Splinose rockfish is included in the trip limits for minor slope rockfish.
 3/ "Other flatfish" are defined at § 660.302 and include butter sole, curfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.
 4/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.
 5/ "Other fish" are defined at § 660.302 and include sharks, skates (including longnose skate), ratfish, morids, grenadiers, and kelp greenling. Cabezon is included in the trip limits for "other fish."
 6/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.391-660.394. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.
 7/ The "modified" fathom lines are modified to exclude certain petrale sole areas from the RCA.
 8/ If a vessel has both selective flatfish gear and large or small footrope gear on board during a cumulative limit period (either simultaneously or successively), the most restrictive cumulative limit for any gear on board during the cumulative limit period applies for the entire cumulative limit period.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 100421192-0193-01]

RIN 0648-AY78 and 0648-AY59

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Biennial Specifications and Management Measures

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

ACTION: Final rule; inseason adjustments to groundfish management measures; Pacific whiting harvest specifications and tribal allocation; request for comments.

SUMMARY: This final rule establishes the 2010 fishery specifications for Pacific whiting in the U.S. exclusive economic zone (EEZ) and state waters off the coasts of Washington, Oregon, and California, as authorized by the Pacific Coast Groundfish Fishery Management Plan (FMP). These specifications include the level of the acceptable biological catch (ABC), optimum yield (OY), and allocations for the non-tribal commercial sectors. This final rule also announces the tribal allocation of Pacific whiting for the 2010 season and inseason adjustments of bycatch limits for the 2010 Pacific whiting fishery.

DATES: Effective April 29, 2010. Comments on the revisions to bycatch limits must be received no later than 5 p.m., local time on May 19, 2010.

ADDRESSES: You may submit comments, identified by RIN 0648-AY78 by any 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:* Barry A. Thom, Acting Regional Administrator, Northwest Region, NMFS, Attn: Kevin C. Duffy, 7600 Sand Point Way NE., Seattle, WA 98115-0070.

Instructions: No comments will be posted for public viewing until after the comment period has closed. 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 (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments 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 final 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 information and documents are also available at the NMFS Northwest Region Web site at <http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/index.cfm>.

Copies of the final environmental impact statement (FEIS) for the 2009-2010 Groundfish Specifications and Management Measures are available from Donald McIsaac, Executive Director, Pacific Fishery Management Council (Council), 7700 NE Ambassador Place, Portland, OR 97220, phone: 503-820-2280.

Copies of additional reports referred to in this document may also be obtained from the Council. Copies of the Record of Decision (ROD), final regulatory flexibility analysis (FRFA), and the Small Entity Compliance Guide are available from Barry A. Thom, Acting Administrator, Northwest Region (Regional Administrator), NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115-0070.

Background

On December 31, 2008, NMFS published a proposed rule to implement the 2009-2010 specifications and management measures for the Pacific Coast groundfish fishery (73 FR 80516). A final rule was published on March 6, 2009 (74 FR 9874), which codified the specifications and management measures in the CFR (50 CFR part 660, subpart G), except for the Pacific whiting harvest specifications. This final rule establishes the 2010 harvest specifications for Pacific whiting. The proposed rule announced a range of Pacific whiting harvest specifications that were being considered for 2009 and 2010, and also announced the intent to adopt final specifications after the Council's March 2009 and 2010 meetings. As explained below, the information necessary for the annual updated stock assessment is not available until January or February, which necessarily delays the preparation of the stock assessment until February.

Delaying the adoption of Pacific whiting specifications until March is

also consistent with the U.S.-Canada agreement for Pacific whiting. The U.S.-Canada agreement for Pacific whiting was signed in November 2003. This agreement addresses the conservation, research, and catch sharing of Pacific whiting. Presently, both countries are taking steps to fully implement the agreement. Until this occurs, the negotiators recommended that each country apply the agreed-upon provisions to their respective fisheries. In addition to the time frame in which stock assessments are to be considered and harvest specifications established, the U.S.-Canada agreement specifies how the catch is to be shared between the two countries. The Pacific whiting catch sharing arrangement provides 73.88 percent of the total catch Optimum Yield (OY)^a to the U.S. fisheries, and 26.12 percent to the Canadian fisheries. This action accounts for this division of catch share allocation between the U.S. and Canada.

On April 23, 2010, NMFS received a decision in the case of *Natural Resources Defense Council v. Locke*, Case No. C 01-0421 JL (N.D. Cal.), in which the court has ruled against NMFS on an issue related to darkblotched rockfish. The court has not yet issued the Order on Remedy, and NMFS is in the process of determining the full implications of this decision. NMFS is publishing this rule as scheduled so that it will be in place for the start of the Pacific whiting season. Upon further review of the court decision, NMFS will determine whether additional measures may be needed with respect to darkblotched rockfish, and will implement any such measures through an emergency rule.

Comments and Responses

In addition to the December 2008 proposed rule, on March 12, 2010 NMFS issued a proposed rule for the allocation and management of the 2010 tribal Pacific whiting fishery (75 FR 11829). The comment period on this proposed rule closed on April 2, 2010. During the comment period, NMFS received four letters of comment. The Makah Tribe and the Quileute Tribe each submitted letters of comment concerning the tribal allocation for Pacific whiting. The Pacific Whiting Conservation Cooperative and the West

^aOY is the amount of fish that will provide the greatest overall benefit to the Nation, taking into account the protection of marine ecosystems. It is defined on the basis of maximum sustained yield from the fishery, as reduced by any relevant economic, social, or ecological factors. For overfished species, OY provides for rebuilding to a level consistent with producing maximum sustained yield.

Coast Seafood Processors Association also submitted letters of comment. As discussed further below, this final rule takes the tribal allocation figures into account in its final allocation of Pacific whiting.

Makah Tribe

Comment 1: The Makah Tribe requested that NMFS establish interim individual tribal set-asides for Makah and Quileute in 2010, as it did in 2009. They requested a 2010 Makah Pacific whiting set aside of 17.5 percent of the 2010 Pacific whiting U.S. OY, the amount reflected in the proposed rule. They commented on the Quileute's request for a 16,000 mt set aside in 2010, stating the Quileute have provided no indication that they have two boats that will participate. Further, they pointed out that when Makah entered the fishery in 1996, the tribal allocation was 5,000 mt per boat, and in the following two years, the allocation increased to 6,000 mt per boat. They said that during this time period, there were fewer serious bycatch constraints on the fishery than there are today. They also pointed out that the set aside for Makah in 2009 averaged less than 5,000 mt per boat.

The Makah also expressed support for NMFS's position regarding reapportionment of the tribal Pacific whiting allocation stated in the proposed rule. They stated their belief that the Quileute's usual and accustomed grounds are much less extensive than those currently designated by NMFS, and the Makah noted that they have initiated a sub-proceeding in *United States v. Washington* to determine the actual boundaries of those areas. Finally, the Makah clarified that there are five boats, rather than four, in their Pacific whiting fishery.

Response: NMFS supports the Makah request for 17.5 percent of the 2010 Pacific whiting U.S. OY, as stated in the proposed rule, and is using that amount in its calculation of the overall tribal allocation for 2010. However, NMFS supports this request as a component of the total tribal allocation for 2010 as opposed to an individual tribal set aside. On March 6, 2009, NMFS adopted a Pacific whiting tribal allocation of 50,000 mt for the 2009 fishing season (74 FR 9874). This allocation was codified at 50 CFR 660.385. In the rule, individual set asides for the Makah Tribe (42,000 mt) and Quileute Tribe (8,000 mt) were established for 2009. In a May, 2009 rule (74 FR 20620), NMFS reapportioned 18,211 mt of the tribal allocation to the non-tribal sector. This action was based on the low OY of

Pacific whiting for 2009, the Makah Tribe's intent to harvest only 23,789 mt of their 42,000 mt set aside, and their request that the 18,211 mt be reapportioned to the non-tribal sectors of the fishery.

Based on the separate requests by the Makah and Quileute Tribes, NMFS set the individual tribal set asides for 2009 at 42,000 mt and 8,000 mt, respectively. At the June 2008 Council meeting, where the specific motion to create tribal set asides was discussed, NMFS met with the Makah Tribe, the Quileute Tribe, and the State of Washington. For 2010, NMFS has decided to issue an overall tribal allocation, without individual set asides, primarily for two reasons. First, although the Makah Tribe made a request for a specific allocation, the Quileute Tribe did not. Second, NMFS has received comments from the Quileute Tribe (addressed below), disputing that they agreed to a set aside for the 2009 season, and specifically requesting that no such set aside be created this year.

NMFS acknowledges the Makah Tribes' comments on the Quileute Tribal request of 8,000 mt per boat for economic viability, but does not agree that this requested amount for 2010 is unreasonable. Further, as the Makah Tribe notes, the resulting tribal allocation appears to be within the total treaty right, based on the existing scientific information. NMFS is aware of the current litigation over the boundaries of the Quileute and Quinault usual and accustomed fishing grounds, and will make adjustments to the boundaries as described in its regulations if any are needed to achieve consistency with any court orders that result from that litigation. NMFS acknowledges the Makah's clarification on the number of boats in their Pacific whiting fishery.

Quileute Tribe

Comment 2: The Quileute Tribe stated that they never requested or agreed to specific set asides for their proposed Pacific whiting fishery in 2009, and feel NMFS lacks the authority to establish intertribal allocations. They did not object to the total amount of the tribal Pacific whiting allocation that would be derived under the formula stated in the proposed rule (17.5 percent of U.S. OY + 16,000 mt), but requested that the final rule simply provide for a total tribal allocation, as opposed to individual set asides. Regarding reapportionment, the Quileute Tribe feels a mechanism does not exist for reapportionment between these separately managed tribal and non-tribal fisheries, and stated their desire to

develop a process where reapportionment may be desirable, consistent with consultation required by Executive Order 13175 and with unanimous tribal consensus. The Quileute Tribe also indicated that they will likely have no more than one vessel participating in the fishery in 2010, and reiterated their belief that at least 8,000 mt per boat is necessary for economic feasibility. Finally, they stated that the total tribal Pacific whiting allocation should not be changed based on this information, because it is within the range of tribal treaty rights to Pacific whiting.

Response: NMFS notes that the Pacific whiting set asides established for the Makah and Quileute Tribes in 2009 were based on individual tribal requests, and did not set any precedent regarding future allocations of Pacific whiting to the tribes. The final rule for 2010 establishes a total tribal allocation, as opposed to individual tribal set asides. NMFS does not agree that no mechanism exists to reapportion unused Pacific whiting from the tribal to the non-tribal fishery. NMFS currently has the authority to reapportion Pacific whiting from the tribal to the non-tribal fishery under 50 CFR 660.323(c). NMFS will coordinate and consult with the affected tribes, and will attempt to reach consensus before any reapportionment decisions are made in 2010. However, absent consensus, the NMFS Regional Administrator will make reapportionment decisions. NMFS acknowledges the Quileute Tribe's comments that they will probably have no more than one vessel participating in the fishery in 2010, and that they believe the total tribal allocation should not be changed, given this information.

Pacific Whiting Conservation Cooperative

Comment 3: The Pacific Whiting Conservation Cooperative (PWCC) strongly supports NMFS' authority to reapportion unharvested whiting from the tribal fishery to the non-tribal fishery, consistent with 50 CFR 660.323(c), stating that current regulations and past practice provide the necessary authority. PWCC stated their support for the Makah tribal request of 17.5 percent of the U.S. OY. Finally, PWCC expressed concern that NMFS is not requiring greater certainty from the Quileute Tribe regarding their fishing operation's capacity to harvest 16,000 mt of Pacific whiting in 2010, and that NMFS is not requesting greater clarity from the Quileute Tribe about its plans to manage bycatch of overfished rockfish and salmonids in a manner consistent with the Pacific Fishery

Management Council's groundfish conservation goals and objectives.

Response 3: NMFS acknowledges and agrees with the PWCC comments supporting our authority to reapportion Pacific whiting. NMFS concurs with PWCC's support of the Makah request for 17.5 percent of the Pacific whiting U.S. OY in 2010, but acknowledges that this is only a portion of the total tribal allocation, and not an individual tribal set aside. NMFS is working with all tribes participating in the Pacific whiting fishery, encouraging them to share information about their fisheries plans and harvests before and during the fishing season. NMFS will make this reasonable request a priority for tribal participation in Pacific whiting fisheries in 2011 and beyond.

West Coast Seafood Processors Association

Comment 4: The West Coast Seafood Processors Association (WCSPA) did not object to the Makah Tribes' request for 17.5 percent of the U.S. OY to the extent that it falls within the range of tribal treaty rights. They also stated their belief that the allocation of 16,000 mt to the Quileute Tribe in the first year of their fishery is excessive. They state that 2 inexperienced vessels harvesting that amount of fish in the relatively short time that market-grade Pacific whiting are available in the Quileute Tribe's usual and accustomed fishing area, without exceeding bycatch limits, is exceedingly far-fetched, and that a lesser amount should be allocated. They also stated their support for NMFS' assertion of its authority to reapportion potentially unharvested whiting among all sectors, tribal and non-tribal, in accordance with regulations governing the Pacific groundfish fishery. They stated that they expect NMFS to exercise this authority "with due diligence" in 2010, and in consultation with all sectors of the fishery.

Response 4: NMFS agrees with WCSPA's lack of objection to the Makah Tribes' request for 17.5 percent of the Pacific whiting U.S. OY in 2010, and reflects that support in this final rule. NMFS acknowledges the WCSPA perspective that 16,000 mt to the Quileute Tribe in their first year of operation is excessive. NMFS has considered these comments, as well as others, in making a final determination of the tribal allocation for 2010. NMFS will take under advisement the WCSPA comment that NMFS assert its authority to reapportion potentially unharvested whiting among all sectors, tribal and non-tribal, in accordance with regulations governing the Pacific groundfish fishery. NMFS believes it

currently has the regulatory authority to reapportion Pacific whiting, through 50 CFR 660.323(c). NMFS will consult with all sectors of the fishery in determining whether and when to reapportion, consistent with WCSPA comment.

Pacific Whiting Stock Status

The joint U.S.-Canada Stock Assessment Review (STAR) panel met February 8–10, 2010 in Seattle, Washington, to review two draft stock assessment documents: one had been prepared by Stewart & Hamel (Stock Synthesis III model, 2010) and the second had been prepared by Martell (TINSS, 2010). The Stock Synthesis III model is an age-structured stock assessment model. Age-structured assessment models of various forms have been used to assess Pacific whiting since the early 1980s. The Stock Synthesis III model uses data on total fishery landings, fishery length and age compositions and survey abundance indices. The TINSS model provides an age-structured assessment that directly estimates management variables C^* (the maximum sustained yield) and F^* (the fishing mortality rate that produces C^*).

During its deliberations, the 2010 STAR panel identified major issues with both assessments, namely whether: (a) The age and length data from the acoustic survey are an accurate representation of Pacific whiting; (b) the commercial length and conditional catch-at-age data are inconsistent with the assumptions of the models; and (c) the 1986 acoustic survey estimate is biased because the pre- and post-survey calibrations are substantially different. These issues had been raised by past STAR panels, and have also been reflected in past research recommendations. Additionally, the 2010 Pacific whiting STAR panel expressed concern about the reliability of the acoustic signal because of the presence of Humboldt squid, which has an acoustic signal similar to Pacific whiting.

The STAR Panel responded to these concerns by identifying a simpler model that did not use data it considered questionable. This led to two new model formulations. The panel considered both of these as equally acceptable, but adopted the modified TINSS model as its base model because it had the capacity to provide immediate results that quantified uncertainty.

At the March 2010 Council meeting, the Council's Scientific and Statistical Committee (SSC) reviewed and discussed both the revised TINSS and the original Stock Synthesis III models in detail. The SSC was unable to reach consensus regarding which model

formulation reflected the best available science for Pacific whiting in 2010, and put forth both models as the best available science, without assigning weights to either.

In general, Pacific whiting is a very productive species with highly variable recruitment and a relatively short life span when compared to most other groundfish species. The base model indicates that the Pacific whiting female spawning biomass declined rapidly after a peak in 1984. The decline continued until 2000, and was followed by a brief increase to a peak in 2003 as the large 1999 year class matured (fish spawned during a particular year are referred to as a year class).

Acceptable Biological Catch (ABC)/OY Recommendations

From these stock assessments, the U.S. OYs analyzed in the FEIS for 2009 and 2010 specifications and management measures varied between a low OY of 134,773 mt and a high OY of 404,318 mt (a U.S.-Canada OY range of 182,421 mt—547,263 mt). This range represents 50 to 150 percent of the 2008 U.S. OY of 269,545. These broad ranges in Pacific whiting harvest levels were analyzed in order to assess the potential range of the effects of the harvest of Pacific whiting on incidentally-caught overfished species, and the economic effects to coastal communities.

The final Acceptable Biological Catch (ABC)^b and OY values recommended by the Council for 2010 are based on the new stock assessments, and are consistent with the U.S.-Canada agreement and the impacts considered in the FEIS for the 2009 and 2010 management measures. For this rule, ABC is used as defined in the current Pacific Coast Groundfish FMP.^c

Based on the SSC advice that both models be put forward as the best available science, and additional input from Council advisory bodies and public comment, the Council adopted both the Pacific whiting stock assessments to decide harvest specifications for 2010 Pacific whiting fisheries.

Ultimately, for the 2010 Pacific whiting fisheries, the Council adopted a coastwide (U.S. plus Canada) ABC of 455,550 mt, which is the average of the ABCs estimated in each of the two stock

^b Defined in the FMP as the Maximum Sustainable Yield, or the largest average catch that can be taken continuously from a stock under average environmental conditions while maintaining current stock abundance.

^c The term ABC is not used here in the same sense as it is in the Magnuson-Stevens Act's National Standard 1 Guidelines, which will be implemented in the groundfish harvest specifications and management measures for 2011–12.

assessments adopted by the Council. The U.S. share of the ABC is 336,560 mt (or 73.88 percent of the coastwide ABC). Due to the considerable uncertainty in the scientific advice, the Council used a more precautionary approach in choosing the OY and did not choose the average of the two model OYs. The OY values from the two models ranged from 186,000 mt (SS model) to 550,000 mt (TINSS model), and the average OY between the two models is 368,000 mt. Instead of choosing the average, the Council started with an OY value of 339,000 mt from the modified TINSS model. The TINSS model estimated the harvest rate that produces maximum sustained yield of F53%, which is more conservative than the proxy F_{MSY} harvest rate of F40%. The OY estimated in that assessment, using the F53% harvest rate, is 339,000 mt, and projects the stock depletion level to be 31 percent in 2011, which will maintain the stock well above the overfished threshold. Next, the Council selected the OY value of 186,000 mt from the Stock Synthesis III model under an F40% harvest rate, which is projected to result in a depletion of 25 percent in 2011. The Council then averaged these two OY values, and adopted a coastwide OY of 262,500 mt for 2010, which is considerably closer to the OY value of the more conservative Stock Synthesis III model. Under the terms of the U.S.-Canada agreement on Pacific whiting, the U.S. allocation of the coastwide OY is 73.88 percent, which equates to a U.S. OY of 193,935 mt.

Allocations

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 660.324(d). The tribal allocation is subtracted from the total U.S. Pacific whiting OY before it is allocated to the non-tribal sectors. The tribal Pacific whiting fishery is a separate fishery, and is not governed by the limited entry or open access regulations or allocations. To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting.

For 2010, both the Makah and Quileute have stated their intent to participate in the Pacific whiting fishery. The Quinault Nation has indicated that they plan to participate in the 2011 fishery, but not the 2010 fishery.

The final rule for the tribal allocation in 2010 is not intended to establish any precedent for future Pacific whiting seasons, or for the long-term tribal allocation of whiting. 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 is [17.5 percent * (U.S. OY)] + 16,000 mt. With a U.S. OY of 193,935 mt, the tribal allocation for the 2010 tribal Pacific whiting fishery is 49,939 mt.

The 2010 commercial (non-tribal) OY for Pacific whiting is 140,996 mt. This amount was determined by deducting from the total U.S. OY of 193,935 mt, the 49,939 mt tribal allocation, along with 3,000 mt for research catch and bycatch in non-groundfish fisheries. Regulations at 50 CFR 660.323(a)(2) allocate the commercial OY among the non-tribal catcher/processor, mothership, and shore-based sectors of the Pacific whiting fishery.

The catcher/processor sector is comprised of vessels that harvest and process Pacific whiting. The mothership sector is comprised of motherships and catcher vessels that harvest Pacific whiting for delivery to motherships. Motherships are vessels that process, but do not harvest, Pacific whiting. The shoreside sector is comprised of vessels that harvest Pacific whiting for delivery to shoreside processors. Each sector receives a portion of the commercial OY, with the catcher/processors getting 34 percent (or 47,939 mt for 2010), motherships getting 24 percent (or 33,839 mt for 2010), and the shore-based sector getting 42 percent (or 59,218 mt for 2010). The fishery south of 42°N. lat. may not take more than 2,961 mt (5 percent of the shore-based allocation) prior to the start of the primary Pacific whiting season North of 42°N. lat.

Bycatch Limit Adjustments

Bycatch limits have been used to restrict the catch of overfished species, particularly canary, darkblotched and widow rockfish, in the non-tribal Pacific whiting fisheries. With bycatch limits, the industry has the opportunity to harvest a larger Pacific whiting OY, provided the incidental catch of these overfished species does not exceed the adopted bycatch limits.

Since 2005, a single bycatch limit for darkblotched, canary and widow rockfish species has been used for all commercial sectors of the fishery. However, beginning in 2009, concern that bycatch in one sector would result in the closure of a different sector of the fishery led to the implementation of sector-specific bycatch limits, rather than a single bycatch limit, for all commercial sectors (74 FR 9874, March 6, 2009). This practice is continued in 2010.

If a sector-specific bycatch limit is reached, or is projected to be reached,

the Pacific whiting fishery for that sector will be closed, regardless of whether the Pacific whiting allocation has been achieved. When a sector is closed because a bycatch limit has been reached or was projected to be reached, unused amounts of the other bycatch limit species will be rolled-over to the remaining sectors of the non-tribal Pacific whiting fishery. If a sector reaches its Pacific whiting allocation, unused amounts of bycatch limit species will be shifted to those sectors of the non-tribal Pacific whiting fishery that remain open. Sector-specific bycatch limits are apportioned in the same percentages used to calculate the original sector Pacific whiting allocations.

During the development of the 2009–2010 specifications and management measures, the non-tribal Pacific whiting fishery bycatch limits were preliminarily set at 18 mt for canary rockfish, 25 mt for darkblotched rockfish, and 450 mt for widow rockfish (74 FR 9874, March 6, 2009). The final 2009 widow rockfish bycatch limit for the non-tribal Pacific whiting fishery was reduced to 250 mt, due to higher projected catch of widow rockfish in the non-Pacific whiting fisheries and the need to keep the total projected widow rockfish catch below the 2009 OY of 522 mt. The best available data at the March 2010 Council meeting indicated that there is an increasing trend in the bycatch rate for widow rockfish in the non-tribal Pacific whiting fishery and, given the higher 2010 Pacific whiting OY, the Council recommended increasing the widow rockfish bycatch limit for 2010. The 279 mt widow rockfish bycatch limit for 2010 is based on a linear interpolation of the bycatch rates for widow rockfish from 2006–2009. From the overall bycatch limit of 279 mt, the following sector-specific bycatch limits are established for widow rockfish: The catcher/processors bycatch limit is increased from 85.0 mt to 95.0 mt; the mothership bycatch limit is increased from 60.0 mt to 67.0 mt; and the shorebased bycatch limit is increased from 105.0 mt to 117.0 mt.

The 2009 canary rockfish bycatch limit was 18.0 mt. The 2009 canary bycatch limit was approximately 12 mt higher than it had been in the previous four years. The bycatch limit was increased for 2009–2010, based on the much higher canary rockfish harvest specifications for that period. The best available data at the March 2010 Council meeting indicated that there is an increasing trend in the bycatch rate for canary rockfish in the non-tribal whiting fishery. However, based on (1) The latest understanding of canary

biomass from the most recent assessment (biomass is lower than previously thought), (2) that only 17 percent of the 2009 bycatch limit was caught, and (3) that the non-Pacific whiting fisheries would need to be further limited to keep the projected impacts to canary rockfish below the 2010 OY of 105 mt if the 18 mt bycatch limit was not reduced, the Council recommended decreasing the canary rockfish bycatch limit for 2010. The 2010 canary rockfish bycatch limit of 14 mt is based on the need to balance an increasing canary rockfish bycatch rate in the non-tribal Pacific whiting fishery with the needs of the non-Pacific whiting sectors. From the overall bycatch limit of 14 mt, the following sector-specific bycatch limits are established for canary rockfish: The catcher/processors bycatch limit is decreased from 6.1 mt to 4.8 mt; the mothership bycatch limit is decreased from 4.3 mt to 3.3 mt; and the shore-based bycatch limit is decreased from 7.6 mt to 5.9 mt.

At their March 2010 meeting, the Council also considered revising the darkblotched rockfish bycatch limits, but found no reason to revise them before the start of the 2010 season.

Classification

The final Pacific whiting specifications and management measures for 2010 are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006, and are in accordance with 50 CFR part 660, subpart G, the regulations implementing the FMP. The Administrator, Northwest Region, NMFS, has determined that this rule is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws.

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b)(B), NMFS finds good cause to waive prior public notice and comment on the 2010 Pacific whiting specifications. NMFS also finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective as soon as possible after April 1, 2010, the typical fishery start date.

These waivers are necessary and in the public interest. The FMP requires that fishery specifications be evaluated periodically using the best scientific information available. Every year, NMFS conducts a Pacific whiting stock assessment in which U.S. and Canadian scientists cooperate. The 2010 stock assessment for Pacific whiting was prepared in early 2010, which is the

optimal time of year to conduct stock assessments for this species. New 2009 data used in this assessment that were not available until January, 2010 include: updated total catch; length and age data from the U.S. and Canadian fisheries; and biomass indices from the Joint US–Canadian acoustic/midwater trawl surveys. Pacific whiting differs from other groundfish species in that it has a shorter life span and the population fluctuates more swiftly. Thus, it is important to use the most recent stock assessment for Pacific whiting when determining ABC and OY. Because of the timing of obtaining the data and conducting the assessment, the results of Pacific whiting stock assessments are not available for use in developing the new ABC and OY until just before the Council's annual March meeting. The new Pacific whiting season begins in April 2010. Thus, if the actions in this final rule are to be implemented early in this fishing season, affording the time necessary for prior notice and opportunity for public comment would prevent the agency from managing the Pacific whiting and related fisheries using the best available science.

Moreover, delaying this rule would leave in place the harvest specifications and bycatch limits from the 2009 fishery. Through setting lower bycatch limits, this rule is intended to ensure that the rebuilding OYs for darkblotched, canary and widow rockfish are not exceeded. Without these lower limits, these rebuilding OY levels could be exceeded, contrary to the requirements of the Magnuson-Stevens Act and the Groundfish FMP. This would be contrary to not only the interest of the fishing communities, but to the public at large. Additionally, failing to implement the higher Pacific whiting harvest specifications as early as possible in 2010 could prevent the tribal and non-tribal fisheries from attaining their higher allocations, and thus would result in unnecessary short-term adverse economic effects for the Pacific whiting fishing vessels and the associated fishing communities.

The environmental impacts associated with the Pacific whiting harvest levels being adopted by this action are consistent with the impacts in the FEIS for the 2009–2010 specification and management measures. In approving the 2009–2010 groundfish harvest specifications and management measures, NMFS issued a Record of Decision (ROD). The ROD was signed on February 23, 2009. Copies of the FEIS and the ROD are available from the Council (*see ADDRESSES*).

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) and FRFA for the 2009–2010 harvest specifications and management measures. These analyses included the regulatory impacts of this action on small entities. The IRFA was summarized in the proposed rule published on December 31, 2008 (73 FR 80516). A summary of the FRFA analysis, which covers the entire groundfish regulatory scheme of which this is a part, was published in the final rule on March 6, 2009 (74 FR 9874). An IRFA was also prepared for the proposed rule on the tribal fishery for Pacific whiting in 2010. This proposed rule was published on March 12, 2010 (75 FR 11829). A FRFA for that rule was also prepared, and a summary of that FRFA is contained below. A copy of this analysis is available from NMFS (*see ADDRESSES*). The need for and objectives of this final rule are contained in the **SUMMARY** and in the Background section under **SUPPLEMENTARY INFORMATION**.

The final 2009–2010 specifications and management measures were intended to allow West Coast commercial and recreational fisheries participants to fish the harvestable surplus of more abundant stocks, while also ensuring that those fisheries do not exceed the allowable catch levels intended to rebuild and protect overfished stocks. The ABCs and OYS follow the guidance of the Magnuson-Stevens Act, the national standard guidelines, and the FMP for protecting and conserving fish stocks. Fishery management measures include trip and bag limits, size limits, time/area closures, gear restrictions, and others intended to allow year-round West Coast groundfish landings, without compromising overfished species rebuilding measures.

In recent years the number of participants engaged in the Pacific whiting fishery has varied with changes in the Pacific whiting OY and economic conditions. Pacific whiting shoreside vessels (26 to 29), mothership processors (4 to 6), mothership catcher vessels (11–20), catcher/processors (5 to 9), Pacific whiting shoreside first receivers (8–16), and five tribal trawlers are the major units of this fishery. For 2010, an additional one to two tribal trawlers may enter the fishery. NMFS records suggest the gross annual revenue for each of the catcher/processor and mothership operations on the Pacific coast exceeds \$4,000,000. Therefore, they are not considered small businesses. NMFS records also show that 10–43 catcher vessels have taken

part in the mothership fishery yearly since 1994. These companies are all assumed to be small businesses as defined by the RFA (although some of these vessels may be affiliated with larger processing companies). Since 1994, 26–31 catcher vessels participated in the shoreside fishery annually. These companies are all assumed to be small businesses (although some of these vessels may be affiliated to larger processing companies). Tribal trawlers are presumed to be small entities, whereas the Tribes are presumed to be small government jurisdictions.

In 2008, these participants harvested about 248,000 tons of Pacific 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 tons, worth \$36 million at an average ex-vessel price of about \$160 per ton. From 2003–2007, estimated Pacific whiting ex-vessel values averaged about \$29 million.

Seafood processors convert Pacific whiting into surimi, fillets, fish meal, and headed gutted products. Besides recent high OY levels, ex-vessel revenues have been increasing due to increased prices for headed and gutted Pacific whiting. From 2004–2007, wholesale prices for headed and gutted Pacific whiting product increased from about \$1,200 per ton, to \$1,600 per ton. In 2008, wholesale prices averaged \$1,980 per ton according to U.S. Export Trade statistics. Fuel prices, a major expense for Pacific whiting vessels, also increased dramatically. For example, at the start of the primary fishery in June 2008 fuel prices were about \$4.30 per gallon, compared to June 2007 levels of \$2.70 per gallon.

In 2009, wholesale headed gutted prices fell slightly to \$1,950 per ton. Fuel prices, a major expense for Pacific whiting vessels, continued to fluctuate. However, by 2009, these prices fell from their June, 2008 high to about \$2.32 per gallon.

The fisheries' ability to harvest the entire 2010 Pacific whiting OY will depend on how well the industry stays within the overfished species bycatch limits. For example, in 2008 the Pacific whiting shoreside fishery was closed prematurely because of overfished species bycatch issues, leaving a major portion its allocation unharvested. Although NMFS transferred the unharvested allocations to the other nontribal fleets, by year's end, 7 percent of the 2008 Pacific whiting OY remained unharvested. In 2009, the ex-vessel price of Pacific whiting averaged about \$115 per ton. Based on this price,

if the total amount of Pacific whiting available to the tribal and non-tribal commercial fisheries is harvested in 2010, the revenues generated would approach \$22 million—a potential increase over the \$14 million generated in 2009.

Pursuant to Executive Order 13175, this action was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Under the Magnuson-Stevens Act, 16 U.S.C. 1852(b)(5), one of the voting members of the Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council’s jurisdiction. In addition, regulations implementing the FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the FMP request, in writing, new allocations or regulations specific to the tribes before the first of the two meetings at which the Council considers groundfish management measures. Both the Makah and Quileute Tribes requested a Pacific whiting allocation for 2009. The regulations at 50 CFR 660.324(d) further state that, “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.”

This final rule has been determined to be not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indian fisheries.

Dated: April 29, 2010.

Eric C. Schwaab,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

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

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 is amended to read as follows:

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

■ 2. In § 660.373 paragraph (b)(4)(i) is revised to read as follows:

§ 660.373 Pacific whiting (whiting) fishery management.

* * * * *
(b) * * *

(4) * * *

(i) The whiting fishery bycatch limit is apportioned among the sectors identified in paragraph (a) of this section based on the same percentages used to allocate whiting among the sectors, established in § 660.323(a). The sector specific bycatch limits are: for catcher/processors 4.8 mt of canary rockfish, 95 mt of widow rockfish, and 8.5 mt of darkblotched rockfish; for motherships 3.3 mt of canary rockfish, 67 mt of widow rockfish, and 6.0 mt of darkblotched rockfish; and for shore-based 5.9 mt of canary rockfish, 117 mt of widow rockfish, and 10.5 mt of darkblotched rockfish.

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■ 3. In § 660.385 paragraph (e) is revised to read as follows:

§ 660.385 Washington coastal tribal fisheries management measures.

* * * * *

(e) *Pacific whiting*—The tribal allocation for 2010 is 49,939 mt.

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■ 4. Revise Table 2a to Part 660, Subpart G, and footnotes “/f” and “/q” following Tables 2a through 2c to Part 660, Subpart G to read as follows:

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Table 2a. To Part 660, Subpart G-2010, Specifications of ABCs, OYs, and HGs, by Management Area (weights in metric tons).

Species	ABC Specifications							OY	HG b/	
	ABC Contributions by Area								Commercial	Recreation
	Vancouver	Columbia	Eureka	Monterey	Concepti	ABC	OY			
ROUNDFISH:										
Lingcod c/										
N of 42 N. lat.	4,058			771		4,829	4,829			
S of 42 N. lat.										
Pacific Cod e/	3,200			d/		3,200	1,600			
Pacific Whiting f/			336,560			336,560	193,935			
Sablefish g/										
N of 36 N. lat.			9,217			9,217	6,471			
S of 36 N. lat.							1,258			
Cabazon h/										
S of 42 N. lat.	d/		86		25	111	79			
FLATFISH:										
Dover sole			28,582			28,582	16,500			
English sole j/			9,745			9,745	9,745			-
Petrale sole k/	1,514			1,237		2,751	1,200			-
Arrowtooth flounder l/			10,112			10,112	10,112			-
Starry Flounder m/			1,578			1,578	1,077			
Other flatfish n/			6,731			6,731	4,884			-
ROCKFISH:										
Pacific Ocean Perch o/			1,173			1,173	200			198

Species	ABC Specifications										OY	HG b/		
	ABC Contributions by Area											Commercial	Recreation	
	ABC Contributions by Area					Concepti on	ABC							
	Vancouve r a/	Columbia	Eureka	Monterey										
Shortbelly p/			6,950								6,950			
Widow q/			6,937								6,937	509	447.4	7.2
Canary r/			940								940	44 - 105		
Chilipepper s/		d/		2,576							2,576	2,447		
Bocaccio t/		d/		793							793	288	206.4	67.3
Splitnose u/		d/		615							615	461		
Yellowtail v/		4,562		d/							4,562	4,562		
Shortspine thornyhead w/ N of 34 27' N. lat. S of 34 27' N. lat.			2,411								2,411	1,591	1,591	
Longspine thornyhead x/ N of 34 27' N. lat. S of 34 27' N. lat.			3,671								3,671	2,175		
Cowcod y/		d/		14							14	4		
Darkblotched z/			440								440	291	288.05	
Yelloweye aa/											32	17	3.1	8.0
California Scorpionfish bb/					155						155	155		
Black cc/ N of 46 16' N. lat. S of 46 16' N. lat.		464									464	464		
											1,317	1,000		

to be at 36.2 percent of its unfished biomass in 2006. The ABC of 6,937 mt is based on the stock assessment update with an F50% FMSY proxy. The OY of 509 mt is based on a rebuilding plan with a target year to rebuild of 2015 and an SPR harvest rate or 95

percent. To derive the commercial harvest guideline of 447.4 mt, the OY is reduced by 1.1 mt for the amount anticipated to be taken during research activity, 45.5 mt for the tribal set-aside, 7.2 mt the amount estimated to be taken in the recreational fisheries, 0.4 mt for

the amount expected to be taken incidentally in non-groundfish fisheries, and 7.4 mt for EFP fishing activities.

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