

would need to need to take action through the annual or in-season framework adjustment process specified in paragraphs (a) and (b) of this section, respectively, to implement the SSC's recommendation. The SSC may also consider other related issues specified in the terms of reference developed by the Councils, including, but not limited to, OFLs, ACLs, and management uncertainty.

(ii) *ACL recommendations.* The Councils shall establish ACLs for each management area that are equivalent to the ABCs calculated using the control rule established in the FMP, and reviewed and recommended by the SSC.

(iii) *Timing.* If determined necessary under the annual review process, the Councils shall develop and approve any recommendations for ABCs and ACLs prior to December 31, to the extent possible. Once the Councils have approved the recommended ABCs and ACLs, only if they require adjustments to the ACTs described in paragraph (d) shall they be submitted to NMFS as part of an annual framework adjustment or in-season framework adjustment, as described in paragraphs (a) and (b) of this section, along with any necessary analysis required by applicable law. After receipt of the Councils' recommendation for ACLs, NMFS shall review the Councils' decision and, if consistent with applicable law, implement the ACLs in accordance with the Administrative Procedure Act.

(d) *Accountability Measures (AMs).*  
(1) *Specification of ACTs.* Through the annual review process described in paragraph (a) of this section, or as otherwise determined necessary, the Councils shall specify ACTs for each management area that are set sufficiently below the ACL to account for management uncertainty and prevent the ACL from being exceeded. The ACTs established for each management area shall be the basis for setting management measures (DAS and trip limits), after accounting for incidental catch in non-directed fisheries and discards in all fisheries.

(2) *ACL overages and adjustments—*  
(i) *Council action.* The Councils shall revise the ACT for a monkfish stock if it is determined that the ACL was exceeded in any given year, based upon, but not limited to, available landings and discard information. The amount of an ACL overage shall be deducted from the ACT for the corresponding monkfish stock on a pound-for-pound basis. The revised ACT and corresponding management measures (DAS and trip limits) shall be implemented through either the annual or in-season framework adjustment process,

specified in paragraphs (a) and (b) of this section, in the second fishing year following the fishing year in which the ACL overage occurred.

(ii) *NMFS action.* If the Councils fail to take appropriate action to correct an ACL overage consistent with paragraph (d)(1)(i) of this section, the Regional Administrator shall implement the required adjustment, as described in paragraph (d)(2)(i) of this section, including the specification of DAS and trip limits using a formulaic approach developed by the PDT, in accordance with the Administrative Procedure Act and other applicable law. Notification of the proposed ACL revision and DAS and/or trip limit adjustments shall be published in the **Federal Register** no later than January 1, if possible, for implementation on May 1 of the second fishing year following the fishing year in which the ACL overage occurred.

(e) *Emergency action.* Nothing in this section is meant to derogate from the authority of the Secretary to take emergency action under section 305(c) of the Magnuson-Stevens Act.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 110111018-1279-03]

RIN 0648-XA109

#### Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement the annual harvest guideline (HG) and seasonal allocations for Pacific sardine in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of January 1, 2011, through December 31, 2011. These specifications have been determined according to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The 2011 maximum HG for Pacific sardine is 50,526 metric tons (mt), of which 4,200 mt is initially set aside for potential use under Exempted Fishing Permits (EFPs). The remaining 46,326 mt, constituting the initial commercial fishing HG, has been divided across the

seasonal allocation periods in the following way: January 1–June 30—15,214 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt; July 1–September 14—17,530 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt; September 15–December 31—8,582 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt, plus an additional 2,000 mt set aside to buffer against reaching the total HG. This rule is intended to conserve and manage Pacific sardine off the West Coast.

**DATES:** Effective June 24, 2011 through December 31, 2011.

**ADDRESSES:** Copies of the report "Assessment of Pacific Sardine Stock for U.S. Management in 2011" may be obtained from the Southwest Regional Office (see **ADDRESSES**).

**FOR FURTHER INFORMATION CONTACT:** Joshua Lindsay, Southwest Region, NMFS, (562) 980-4034.

**SUPPLEMENTARY INFORMATION:** The CPS FMP, which was implemented by publication of a final rule in the **Federal Register** on December 15, 1999 (64 FR 69888), divides management unit species into two categories: actively managed, and monitored. Harvest guidelines for actively managed species (Pacific sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Conversely, annual biomass estimates are not currently calculated for species that are classified as monitored stocks (jack mackerel, northern anchovy, and market squid).

During public meetings each year, the estimated biomass for each actively managed species within the CPS FMP is presented to the Pacific Fishery Management Council's (Council) CPS Management Team (Team), the Council's CPS Advisory Subpanel (Subpanel) and the Council's Scientific and Statistical Committee (SSC), and the biomass and the status of the fisheries are reviewed and discussed. The biomass estimate is then presented to the Council along with HG recommendations and comments from the Team, Subpanel and SSC. Following review by the Council and after hearing public comment, the Council adopts a biomass estimate and makes its HG recommendation to NMFS.

This rule implements the 2011 HG for Pacific sardine in the U.S. EEZ off the Pacific coast, that is between 3 and 200 nautical miles seaward of the low water line along the coast. The CPS FMP and its implementing regulations require NMFS to set an annual HG for the Pacific sardine fishery based on the annual specification framework in the FMP. This framework includes a harvest

control rule that determines what the maximum HG for the current fishing season will be, based, in large part, on the estimate of stock biomass. The harvest control rule in the CPS FMP is  $HG = [(Biomass-Cutoff) * Fraction * Distribution]$  with the parameters described as follows:

1. *Biomass*. The estimated stock biomass of Pacific sardine age one and above for the 2011 management season is 537,173 mt.

2. *Cutoff*. This is the biomass level below which no commercial fishery is allowed. The FMP established this level at 150,000 mt.

3. *Distribution*. The portion of the Pacific sardine biomass estimated in the EEZ off the Pacific coast is 87 percent and is based on the average historical larval distribution obtained from scientific cruises and the distribution of the resource according to the logbooks of aerial fish-spotters.

4. *Fraction*. The harvest fraction is the percentage of the biomass above 150,000 mt that may be harvested.

At the November 2010 Council meeting, the Council adopted the 2010 Assessment of the Pacific Sardine Resource in 2010 for U.S. management in 2011, and a Pacific sardine biomass estimate of 537,173 mt. When this biomass estimate is applied to the harvest control rule for Pacific sardine in the CPS FMP, the resulting maximum HG is 50,526 mt. For the 2011 Pacific sardine fishing year, the Council recommended, and NMFS has approved, a maximum HG of 50,526 mt. Similar to the action taken in 2009 and 2010, the Council also recommended, and NMFS approved, that 4,200 mt of the available 2011 HG be initially reserved for fishing/research activities that would be undertaken under potential EFPs.

NMFS will likely make a decision on whether to issue EFPs for Pacific sardine some time prior to the start of the second seasonal period (July 1, 2011). Any of the 4,200 mt that is not issued or designated to be issued to EFPs will be rolled into the third allocation period's directed fishery. Any set-aside attributed to EFPs designed to be conducted during the closed fishing time in the second allocation period (prior to September 15), but not utilized, will roll into the third allocation period's directed fishery. Any set-aside attributed to EFPs designed to be conducted during closed fishing times in the third allocation, but not utilized, will not be re-allocated.

The Council also recommended, and NMFS approved, that the remaining 46,326 mt (HG of 50,526 mt minus proposed 4,200 mt EFP set-aside) be

used as the initial overall commercial fishing HG for Pacific sardine, and that this amount be allocated across the seasonal periods established by Amendment 11 (71 FR 36999, June 29, 2006). The Council recommended incidental catch set-asides of 1,000 mt per allocation period, and an additional management uncertainty buffer of 2,000 mt in the third period. The purpose of the incidental set-aside allotments and allowance of an incidental catch-only fishery is to allow for the restricted incidental landings of Pacific sardine in other fisheries, particularly other CPS fisheries, when a seasonal directed fishery is closed. The additional management buffer in the third period is due to the predictive difficulties associated with closing the fishery, and to help ensure that the fishery does not exceed the maximum HG.

Therefore, for the 2011 Pacific sardine fishing season, the maximum HG is 50,526 mt, and the directed harvest levels and incidental set-asides are initially allocated across the three seasonal allocation periods in the following way: from January 1–June 30, 15,214 mt is allocated for directed harvest with an incidental set aside of 1,000 mt; from July 1–September 14, 17,530 mt is allocated for directed harvest with an incidental set aside of 1,000 mt; and from September 15–December 31, 8,582 mt is allocated for directed harvest with an incidental set aside of 1,000 mt. If during any of the seasonal allocation periods the applicable adjusted directed harvest allocation is projected to be taken, fishing will be closed for the remainder of the allocation period to directed harvest and only incidental harvest is allowed. For the remainder of the period, any incidental Pacific sardine landings are counted against that period's incidental set-aside and the catch of Pacific sardine is constrained to a 30 percent by weight incidental catch rate when Pacific sardine are landed with other CPS so as to minimize the targeting of Pacific sardine. In the event that an incidental set-aside is projected to be attained, the incidental fishery will be closed for the remainder of the period. If the set-aside is not fully attained or is exceeded in a given seasonal period, the directed harvest allocation in the following seasonal period will be automatically adjusted (upward or downward) to account for the discrepancy. Additionally, if during any seasonal period the directed harvest allocation is not fully attained or is exceeded, then the following period's directed harvest total will be adjusted

accordingly to account for this discrepancy as well.

If the total HG or these apportionment levels for Pacific sardine are reached or are expected to be reached, the Pacific sardine fishery will be closed until it re-opens either per the allocation scheme or the beginning of the next fishing season. The NMFS Southwest Regional Administrator will publish a notice in the **Federal Register** announcing the date of any such closure.

Although it is not being implemented through this action, for the 2011 Pacific sardine fishing season the Council also recommended an overfishing limit (OFL) of 92,767 mt and an Acceptable Biological Catch (ABC) and Annual Catch Limit (ACL) of 84,681 mt. The HG for the 2011 fishing season is operationally similar to an Annual Catch Target (ACT) (as defined at § 600.310(f)(2)). These reference points are in accordance with the proposed Amendment 13 to the CPS FMP, on which the Council took final action on in June 2010, and that will undergo review by NMFS. The intent of Amendment 13 is to revise relevant sections of the CPS FMP to ensure consistency with the revised National Standard 1 (NS1) guidelines.

On January 27, 2011 NMFS published a proposed rule for this action soliciting public comments (76 FR 4854). NMFS received two comments regarding the Pacific sardine annual specifications.

*Comment 1:* One comment voiced concern regarding the parameters used in the HG control rule and urged further examination of the parameters for potential improvements in the future with particular reference to Pacific sardine being a forage species.

*Response:* The proposed rule was not intended to solicit comments on the existing HG control rule. That said, NMFS agrees that Pacific sardine is an important prey component of the California Current ecosystem and as such the current harvest control rule formula used to determine the harvest guideline takes into account Pacific sardine's ecological role as forage. The current harvest control was chosen from a wide range of FMP harvest policies based on analysis of a variety of measures of performance. Of these performance measures, six were chosen as priority considerations for determining which harvest policy to choose; three related specifically to sardine's role as forage in the California Current ecosystem, and three stemmed from an interest in maintaining a predictable and constant flow of catch and revenues over the long term. The current harvest policy was chosen because it is the most precautionary as

related to conserving sardine as forage, while still providing long-term consistent fishing yields.

*Comment 2:* The second commenter also recommended that a more conservative HG be adopted for the 2011 fishing season, in part based on alternative model runs in the stock assessment. Although not related to the current action, the commenter also stated that it should be determined that Pacific sardine is overfished and that Pacific sardine is experiencing overfishing, both on an international scale (combined United States, Canada and Mexico catches) and in the United States.

*Response:* The action being taken by this final rule is the implementation of the 2011 Pacific sardine HG and management measures. For the 2011 Pacific sardine management cycle, an updated assessment for Pacific sardine was conducted by a stock assessment team and reviewed by a stock assessment review panel consisting of members of the CPS subcommittee of the SSC, the CPSMT, and a representative of the CPSAS in October 2010 in La Jolla, CA. This assessment found an estimated Pacific sardine biomass of 537,173 metric tons (mt). This assessment was subsequently reviewed by the full SSC at the November 2010 Council meeting, where they recommended it for adoption by the Council as the best available science for the management of Pacific sardine in 2011. Other model runs that may have been completed by the stock assessment team (STAT) that resulted in different estimates of biomass were done solely for the purposes of sensitivity and uncertainty analysis, and were determined by the STAT and SSC not to be the best available science. Therefore, NMFS has determined that the biomass estimate used in the 2011 HG calculation is the appropriate biomass number for use in management.

NMFS recognizes that the 2011 Pacific sardine assessment indicates a continued decline in sardine biomass. This decline has also led NMFS and the Council to recommend the lowest harvest level since the onset of Federal sardine management in 2000, a direct result of the precautionary nature of the harvest control rule. The conservative and precautionary nature of the harvest control rule can be seen when comparing the biomass estimates and HGs from 2010 and 2011. In 2010 the biomass estimate was 702,204 mt and the resulting HG was 72,039 mt, only 10 percent of the biomass. Because of the precautionary nature of the harvest control rule, the approximately 23 percent decline in biomass in 2011 to

537,173 mt, resulted in a 30 percent decrease in the HG. The 2011 HG is 50,526 mt, or only 9 percent of the biomass. This reduction in allowable harvest from 2010 to 2011 is a direct result of the precautionary nature of the harvest control rule that reduces allowable harvest levels as biomass declines.

The commenter also requested that Pacific sardine be considered overfished. According to standards of the FMP, Pacific sardine is overfished when its biomass declines below 50,000 mt. The 2011 biomass estimate for Pacific sardine is 537,173 mt, therefore Pacific sardine is not overfished. Additionally, the harvest guideline control rule explicitly protects the stock from approaching an overfished condition through the use of a cutoff parameter that is three times that of the overfished level, or 150,000 mt. Due to this cutoff parameter, the harvest guideline will equal zero, and therefore fishing will not be allowed, when biomass declines to 150,000 mt, well above the overfished level of 50,000 mt. Of all CPS, sardine productivity is most strongly affected by environmental variation. Favorable and unfavorable periods for sardine tend to occur in cycles, meaning that periods of low abundance for sardine are probably inevitable, even in the absence of fishery. For this reason,  $B_{msy}$  is not used as a maximum sustainable yield (MSY) reference point for sardine and  $B_{msy}$  is not established in the FMP, contrary to statements made by the commenter.

Additionally, the commenter requested that NMFS determine overfishing of Pacific sardine is occurring. Overfishing occurs whenever a stock is subjected to a level of fishing mortality or annual total catch that jeopardizes the capacity of a stock to produce MSY on a continuing basis. The 2010 Pacific sardine HG was 72,039 mt, of which approximately 67,000 mt of sardine were landed, therefore not exceeding the HG. In 2009 the U.S. HG, or optimum yield (OY), of 66,932 mt was exceeded by approximately 150 mt or 0.2 percent. It was determined that overfishing did not occur that year because the CPS FMP recognizes that catch levels resulting from the HG control rule are more conservative than MSY levels and therefore overfishing occurs only when the HG is exceeded by a significant amount. In the context of a highly productive stock such as sardine, exceeding the HG by 0.2 percent was not enough to jeopardize its capacity to produce MSY and therefore overfishing did not occur. To ensure the HG was not exceeded in 2010, new management measures were put in place

by the Council and NMFS for the 2010 fishing season that allowed NMFS to close the fishery in a timely manner and the HG was not exceeded.

Finally, with regard to a concern that fishing might exceed a combined U.S., Mexico and Canada overfishing limit, Pacific sardine is not managed under an international agreement, and therefore there is not a total overfishing level. NMFS recognizes, however, that management of transboundary stocks, such as Pacific sardine, is one of the more difficult problems in managing CPS. In the absence of a cooperative management agreement, the current approach in the CPS FMP sets harvest levels for U.S. fisheries by prorating the total target harvest level according to the portion of the stock estimated to be in U.S. waters on average. The primary advantage of prorating the total target harvest level is that U.S. fisheries can be managed unilaterally in a responsible manner that is consistent with the MSA. Mexican and Canadian landings are not considered explicitly when harvest levels for U.S. waters is determined, so U.S. fishermen are not penalized directly for Mexican and Canadian harvests. However, the allowable harvest level in U.S. waters depends on current biomass estimates, so U.S. harvest will be reduced if the stock is depleted by fishing in either Mexico or Canada.

### Classification

The Administrator, Southwest Region, NMFS, determined that this action is necessary for the conservation and management of the Pacific sardine fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule is exempt from Office of Management and Budget review under Executive Order 12866.

No issues were raised by public comments in response to the Initial Regulatory Flexibility Analysis (IRFA) prepared pursuant to the Regulatory Flexibility Act for this action or on the economic impacts of the rule generally. Therefore, the Final Regulatory Flexibility Analysis (FRFA) contains no changes from the IRFA. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. The results of the FRFA are stated below. For copies of the FRFA please see the **ADDRESSES** section above.

The purpose of this action is to implement the 2011 HG for Pacific sardine in the U.S. EEZ off the Pacific

coast. The CPS FMP and its implementing regulations require NMFS to set an annual HG for the Pacific sardine fishery based on the harvest control rule in the FMP. The harvest control rule is applied to the current stock biomass estimate to derive the annual HG. The HG is determined using an environmentally-based formula accounting for the effect of ocean conditions on stock productivity.

The HG is apportioned based on the following allocation scheme: 35 percent of the HG is allocated coastwide on January 1; 40 percent of the HG, plus any portion not harvested from the initial allocation is then reallocated coastwide on July 1; and on September 15 the remaining 25 percent, plus any portion not harvested from earlier allocations will be released. If the total HG or these apportionment levels for Pacific sardine are reached at any time, the Pacific sardine fishery is closed until either it re-opens per the allocation scheme or the beginning of the next fishing season. There is no limit on the amount of catch that any single vessel can take during an allocation period or the year; the HG and seasonal allocations are available until fully utilized by the entire CPS fleet.

The small entities that would be affected by the proposed action are the vessels that compose the West Coast CPS finfish fleet. Approximately 108 vessels are permitted to operate in the sardine fishery component of the CPS fishery off the U.S. West Coast; 64 permits in the Federal CPS limited entry fishery off California (south of 39 N. lat.), and a combined 44 permits in Oregon and Washington's state-permitted Pacific sardine fisheries. The U.S. Small Business Administration defines small businesses engaged in fishing as those vessels with annual revenues of or below \$4 million. The average annual per vessel revenue in 2010 for the West Coast CPS finfish fleet was well below \$4 million, and all of these vessels therefore are considered small businesses under the RFA. Because each affected vessel is a small business, this proposed rule has an equal effect on all of these small entities, and therefore will impact a substantial number of these small entities in the same manner. Accordingly, there would be no economic impacts resulting from disproportionality between small and large business entities under the proposed action.

The profitability of these vessels as a result of this rule is based on the average Pacific sardine ex-vessel price per mt. NMFS used average Pacific sardine ex-vessel price per mt to

conduct a profitability analysis because cost data for the harvesting operations of CPS finfish vessels was unavailable.

For the 2010 fishing year, the maximum HG was set at 72,039 mt. Approximately 66,000 mt of the HG was harvested during the 2010 fishing season, with an estimated total coastwide ex-vessel value of \$12.2 million. Using these figures, the 2010 ex-vessel price per mt of Pacific sardines was \$185.

The HG for the 2011 Pacific sardine fishing season (January 1, 2011 through December 31, 2011) is 50,526 mt. This HG is approximately 25% less than the directed fishing HG for 2010 of 68,039 mt. This decrease in HG is due to a decrease in the coastwide Pacific sardine biomass from which the HG is directly derived.

If the fleet were to take the entire 2011 HG, and using the 2010 ex-vessel average price of \$185 per mt of Pacific sardine, the total potential revenue for the entire fleet would be approximately \$9.3 million. This decrease would be slightly less than the average coastwide total ex-vessel value achieved from 2001–2010 of approximately \$11.5 million. There will also likely be a drop in profitability based on this rule compared to last season due the lower HG this fishing season. Whether this will occur depends greatly on market forces within the fishery, and on the regional availability of the resource to the fleets and the fleets' ability to find pure schools of Pacific sardine. A change in the market rate and/or the potential lack of availability of the resource to the fleets could cause a reduction in the amount of Pacific sardine that is harvested which, in turn, would reduce the total revenue to the fleet from Pacific sardine.

However, the revenue derived from harvesting Pacific sardine is only one factor determining the overall revenue of a majority of the CPS fleet, and therefore the economic impact to the fleet from the proposed action, can not be viewed in isolation. CPS finfish vessels typically harvest a number of other species, including anchovy, mackerel, squid, and tuna, making Pacific sardine only one component of a multi-species CPS fishery. A reliance on multiple species is a necessity because each CPS stock is highly associated to present ocean and environmental conditions. Because each species responds to such conditions in its own way, not all CPS stocks are likely to be abundant at the same time; therefore as abundance levels and markets fluctuate, the CPS fishery as a whole has endured by depending on a group of species.

No significant alternatives to this rule were considered or exist that would accomplish the stated objectives of the applicable statutes, and which would minimize any significant economic impact of this rule on the affected small entities. The CPS FMP and its implementing regulations require NMFS to set an annual HG for the Pacific sardine fishery based on the harvest control rule in the FMP. The harvest control rule is applied to the current stock biomass estimate to determine what the HG for that fishing season will be; as biomass increases so will the HG, conversely as biomass decreases so does the HG. The determination of the annual HG merely implements the established procedures of the FMP with the goal of continuing to provide expected net benefits to the nation, regardless of the specific annual allowable harvest levels for the Pacific sardine fishery.

There are no reporting, record-keeping, or other compliance requirements required by this rule. Additionally, no other Federal rules duplicate, overlap or conflict with this rule.

This action does not contain a collection-of-information requirement for purposes of the Paper Reduction Act.

#### Small Business Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a notice to fishermen that also serves as a small entity compliance guide (guide) was prepared and will be distributed to fishermen and processors. The guide is also available on the Internet at <http://swr.nmfs.noaa.gov>. Copies of this final rule and guide, i.e. notice to fishermen, will be available upon request from the Southwest Regional Office (see ADDRESSES).

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

Dated: May 20, 2011.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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