

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 660**

[Docket No. 131119977-4143-01]

RIN 0648-BD75

**Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; 2014 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 issues this proposed rule for the 2014 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP), the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006. This proposed rule would allocate 17.5 percent of the U.S. Total Allowable Catch of Pacific whiting for 2014 to Pacific Coast Indian tribes that have a Treaty right to harvest groundfish.

**DATES:** Comments on this proposed rule must be received no later than March 31, 2014.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2014-0020, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to [www.regulations.gov/](http://www.regulations.gov/)

#!docketDetail;D=NOAA-NMFS-2014-0020, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- *Mail:* William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way

NE., Seattle, WA 98115-0070, Attn: Kevin C. Duffy.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Kevin C. Duffy (Northwest Region, NMFS), phone: 206-526-4743, and email: [kevin.duffy@noaa.gov](mailto:kevin.duffy@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This proposed rule is accessible via the Internet at the Office of the **Federal Register** Web site at <https://www.federalregister.gov>. Background information and documents are available at the NMFS West Coast Region Web site at [http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific\\_whiting.html](http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific_whiting.html) and 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 FMP request new allocations or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations 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." The procedures NOAA employs in implementing tribal treaty rights under the FMP, in place since May 31, 1996, were designed to provide a framework process by which NOAA Fisheries 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. total allowable catch (TAC) (called Optimum Yield (OY) or Annual Catch Limit (ACL) prior to 2012) of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

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. Since 1999, the tribal allocation has been made in consideration of their participation in the fishery. In 2008 the Quileute Tribe and Quinault Indian Nation expressed an interest in commencing participation in the whiting fishery. Tribal allocations for 2009-2013 were based on discussions with all three tribes regarding their intent for those fishing years. The table below provides a history of U.S. OYs/ACLs and the annual tribal allocation in metric tons (mt).

Year	U.S. OY	Tribal allocation
2000	232,000 mt	32,500 mt
2001	190,400 mt	27,500 mt
2002	129,600 mt	22,680 mt
2003	148,200 mt	25,000 mt
2004	250,000 mt	32,500 mt
2005	269,069 mt	35,000 mt
2006	269,069 mt	32,500 mt
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt
2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt
2012	<sup>1</sup> 186,037 mt TAC	48,556 mt

Year	U.S. OY	Tribal allocation
2013 .....	269,745 mt TAC	63,205 mt

<sup>1</sup> Beginning in 2012, the United States started using the term Total Allowable Catch, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting.

For the past five years, NMFS and the co-managers, including the States of Washington and Oregon, as well as the Treaty tribes, have been involved in a process designed to determine the long-term tribal allocation for Pacific whiting. 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 met in 2009 and discussed this preliminary information.

In 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 clarification on the paper and requests for additional information. NMFS also met with each of the tribes in the fall of 2010 to discuss the report and to discuss a process for negotiation of the long-term tribal allocation of Pacific whiting.

In 2011, NMFS again met individually with the Makah, Quileute, and Quinault tribes to discuss these matters. Due to the detailed nature of the evaluation of the scientific information, and the need to negotiate a long-term tribal allocation following completion of the evaluation, the process continued in 2012. No additional meetings were held on these matters in 2013. The 2014 tribal allocation of Pacific whiting will not reflect a negotiated long-term tribal allocation. Instead, it is an interim allocation not intended to set precedent for future allocations.

#### Tribal Allocation for 2014

In exchanges between NMFS and the tribes during November and December of 2013, the Makah tribe indicated their intent to participate in the tribal whiting fishery in 2014. The Makah tribe has requested 17.5% of the U.S. TAC. The Quileute tribe and the Quinault Indian Nation indicated that they are not planning to participate in 2014. The Hoh tribe has not expressed an interest in participating to date. NMFS proposes a tribal allocation that accommodates the Makah request, specifically 17.5% of the U.S. TAC. NMFS believes that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock suggests

that the 17.5% is within the range of the tribal treaty right to Pacific whiting.

NMFS cannot at this time propose a specific amount for the tribal allocation because this amount depends on the amount of the U.S. TAC of whiting, which will not be determined until late March. Because the whiting fishery typically begins in May, the final rule establishing the whiting specifications for 2014 must be published by early April. Therefore, in order to provide for public input on the tribal allocation, NMFS is issuing this proposed rule without knowledge of the 2014 TAC. However, to provide a basis for public input, NMFS is describing a range of potential tribal allocations in this proposed rule, applying the proposed approach to determining the tribal allocation to a range of potential TACs derived from historical experience. The Joint Management Committee (JMC), which was established pursuant to the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting (the Agreement), is anticipated to recommend the coastwide and corresponding U.S./Canada TACs no later than March 25, 2014. The U.S. TAC is 73.88% of the coastwide TAC.

As mentioned above, NMFS is applying its proposed approach to determining the tribal allocation to the range of U.S. TACs over the last ten years, 2004 through 2013 (plus or minus 25% to capture variability in stock abundance) in order to project a range of potential tribal allocations for 2014. The range of TACs is 135,939 mt (2009) to 290,903 mt (2011). Applying the 25% variability results in a range of potential TACs from 101,954 mt to 363,629 mt for 2014.

Application of the 17.5% requested by the Makah Tribe to the above modified range of U.S. TACs over the last ten years results in a tribal allocation of between 17,842 and 67,271 mt for 2014.

As described earlier, NOAA Fisheries proposes this rule as an interim allocation for the 2014 tribal Pacific whiting fishery. As with past allocations, this proposed rule is not intended to establish any precedent for future whiting seasons or for the long-term tribal allocation of whiting.

The rule would be implemented under authority of Section 305(d) of the

Magnuson-Stevens 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 four Northwest 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).

#### Classification

NMFS has preliminarily determined that the management measures for the 2014 Pacific whiting tribal fishery are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making the final determination, NMFS will take into account the data, views, and comments received during the comment period.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

An 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 and is published on the NMFS Web site under Groundfish Management (see ADDRESSES).

This proposed rule would allocate 17.5 percent of the U.S. Total Allowable Catch of Pacific whiting for 2014 to Pacific Coast Indian tribes that have a Treaty right to harvest groundfish. The entities that this rule impacts are catcher vessels in the tribal fishery, and the following in the non-tribal fishery: Catcher vessels delivering to shoreside facilities; catcher vessels delivering to mothership vessels at sea; and catcher/processor vessels.

Under the RFA, the term “small entities” includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration has established size criteria for all different industry sectors in the US, including fish harvesting and fish processing businesses. On June 20, 2013, the SBA

issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398; June 20, 2013). This change affects the classification of vessels that harvest groundfish under this program. The rule increased the size standard for Finfish Fishing from \$4.0 to 19.0 million, Shellfish Fishing from \$4.0 to 5.0 million, and Other Marine Fishing from \$4.0 to 7.0 million (Id. at 37400—Table 1). Prior to SBA's recent changes to the size standards for commercial harvesters, a business involved in both the harvesting and processing of seafood products, also referred to as a catcher/processor (C/P), was considered a small business if it met the \$4.0 million criterion for commercial fish harvesting operations. Prior NMFS policy was to apply the \$4 million Finfish Harvest standard to C/Ps. For purposes of this proposed rulemaking, NMFS is applying the \$19 million standard because whiting C/Ps are involved in the commercial harvest of finfish. The size standards for entities that process were not changed. 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.

This rule proposes to allocate fish to tribal harvesters. There are four tribes that can participate in the tribal whiting fishery: The Hoh, Makah, Quileute, and Quinault. The current tribal fleet is composed of 5 trawlers that either deliver to a shoreside plant or to a contracted mothership. Based on groundfish ex-vessel revenues and on tribal enrollments (the population size of each tribe), the four tribes and their fleets are considered "small" entities.

This rule would impact vessels in the non-tribal fishery that fish for Pacific whiting. Currently, there are three non-tribal sectors in the Pacific whiting fishery: Shorebased Individual Fishing Quota (IFQ) Program—Trawl Fishery; Mothership Coop (MS) Program—Whiting At-sea Trawl Fishery; and C/P Coop Program—Whiting At-sea Trawl Fishery.

The Shorebased IFQ Program is composed of 138 Quota Share permits/accounts, 136 vessel accounts, and 42 first receivers. The MS Coop fishery is currently composed of a single coop, with six mothership processor permits, and 36 Mothership/Catcher-Vessel (MS/CV) endorsed permits, with one permit having two catch history assignments endorsed to it. The C/P Coop Program is composed of 10 C/P permits owned by three companies.

Although there are three non-tribal sectors, many companies participate in two or more of these sectors. All mothership catcher-vessel participants participate in the shorebased IFQ sector, while two of the three catcher-processor companies also participate in both the shorebased IFQ sector and in the MS sector. Many companies own several QS accounts. After accounting for cross participation, multiple QS account holders, and for affiliation through ownership, there are 95 entities directly affected by these proposed regulations, 82 of which are considered to be "small" businesses.

For the years 2008 to 2012, the total whiting fishery (tribal and non-tribal) has averaged harvests of 186,000 mt annually, worth \$40 million in terms of ex-vessel revenues. As the U.S. TAC has been highly variable during this time, so have harvests. During this period, harvests have ranged from 121,000 mt (2009) to 248,000 mt (2008). In 2012, the harvest was approximately 160,000 mt. Ex-vessel revenues have also varied. Annual ex-vessel revenues have ranged from \$14 million (2009) to \$58 million (2008). Ex-vessel revenues in 2012 were about \$47 million, with an average shorebased ex-vessel price of \$295 per mt. Total whiting harvest in 2013 was approximately 233,000 mt worth \$61 million, at an ex-vessel price of \$262 per mt. The prices for whiting are largely determined by the world market for groundfish, because most of the whiting harvested is exported. Note that the use of ex-vessel values does not take into account the wholesale or export value of the fishery or the costs of harvesting and processing whiting into a finished product. NMFS does not have sufficient information to make a complete assessment of these values.

The Pacific whiting fishery harvests almost exclusively Pacific whiting. While bycatch of other species occurs, the fishery is constrained by bycatch limits on key overfished species. This is a high-volume fishery with low ex-vessel prices per pound. This fishery also has seasonal aspects based on the distribution of whiting off the west coast.

Since 1996, there has been a tribal allocation of the U.S. whiting TAC. Tribal fisheries undertake a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests are delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries.

This proposed rule would allocate 17.5 percent of Pacific whiting to the tribal fishery, and would ultimately

determine how much is left for allocation to the non-tribal sectors, which are the Shorebased IFQ Program—Trawl Fishery; Mothership Coop (MS) Program—Whiting At-sea Trawl Fishery; and C/P Coop Program—Whiting At-sea Trawl Fishery. The amount of whiting allocated to both the tribal and non-tribal sectors is based on the U.S. TAC. From the U.S. TAC, small amounts of whiting that account for research catch and for bycatch in other fisheries are deducted. The amount of the tribal allocation is also deducted directly from the TAC. After accounting for these deductions, the remainder is the commercial harvest guideline. This guideline is then allocated among the other three sectors as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program.

The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportioning process. Total whiting harvest in 2013 was approximately 233,000 mt worth \$61 million, at an ex-vessel price of \$262 per mt. Assuming a similar harvest level and ex-vessel price in 2014, if the tribe were to harvest 17.5%, the approximate value of that harvest would be \$10.7 million. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, last year, NMFS did such a reapportionment. On, September 18, 2013, NMFS announced: "The best available information on September 16, 2013, indicates that at least 30,000 mt of the tribal allocation of 63,205 mt for the 2013 tribal Pacific whiting fishery will not be used by December 31, 2013. Recent conversations with tribal fishery managers indicate that reapportioning 30,000 mt, leaving a tribal allocation of 33,205 mt, will not limit tribal harvest opportunities for the remainder of year. Tribal harvests to date amount to approximately 3,000 mt."

NMFS considered two alternatives for this action: The "No-Action" vs. the "Proposed Action." NMFS did not consider a broader range of alternatives to the proposed allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for whiting. Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5%, as requested by the tribes. This would yield a tribal allocation of between

17,842 and 67,271 mt for 2014. Consideration of a percentage lower than the tribal request of 17.5% is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would, arguably, also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

A no-action alternative was considered, but the regulatory framework 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 2014, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the tribes' treaty rights. Given that there is a tribal request for allocation in 2014, this alternative received no further consideration.

NMFS believes this proposed rule would not adversely affect small entities. This reapportioning process allows unharvested tribal allocations of whiting, fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities. Nonetheless, NMFS has prepared this IRFA and is requesting comments on this conclusion. See **ADDRESSES**.

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 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 issued a Supplemental Biological Opinion on March 11, 2006, concluding that neither the higher observed bycatch of Chinook in the 2005 whiting fishery nor new data regarding salmon bycatch in the groundfish bottom trawl fishery required a reconsideration of its prior "no jeopardy" conclusion. NMFS also reaffirmed its prior determination that implementation of the Groundfish PCGFMP is not likely to jeopardize the continued existence of any of the affected ESUs. Lower Columbia River coho (70 FR 37160, June 28, 2005) 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.

On December 7, 2012, NMFS completed a biological opinion concluding that the groundfish fishery is not likely to jeopardize non-salmonid marine species including listed eulachon, green sturgeon, humpback whales, Steller sea lions, and leatherback sea turtles. The opinion also concludes that the fishery is not likely to adversely modify critical habitat for green sturgeon and leatherback sea turtles. An analysis included in the same document as the opinion concludes that the fishery is not likely to adversely affect green sea turtles, olive ridley sea turtles, loggerhead sea turtles, sei whales, North Pacific right whales, blue whales, fin whales, sperm whales, Southern Resident killer whales, Guadalupe fur seals, or the critical habitat for Steller sea lions.

Steller sea lions and humpback whales are protected under the Marine Mammal Protection Act (MMPA). Impacts resulting from fishing activities proposed in this rule are discussed in the FEIS for the 2013–2014 groundfish fishery specifications and management measures. West coast pot fisheries for sablefish are considered Category II fisheries under the MMPA's List of Fisheries, indicating occasional interactions. All other west coast groundfish fisheries, including the trawl fishery, are considered Category III fisheries under the MMPA, indicating a remote likelihood of or no known serious injuries or mortalities to marine

mammals. MMPA section 101(a)(5)(E) requires that NMFS authorize the taking of ESA-listed marine mammals incidental to U.S. commercial fisheries if it makes the requisite findings, including a finding that the incidental mortality and serious injury from commercial fisheries will have negligible impact on the affected species or stock. As noted above, NMFS concluded in its biological opinion for the groundfish fisheries that these fisheries were not likely to jeopardize Steller sea lions or humpback whales. The eastern distinct population segment of Steller sea lions was delisted under the ESA on November 4, 2013 (78 FR 66140). On September 4, 2013, based on its negligible impact determination dated August 28, 2013, NMFS issued a permit for three years to authorize the incidental taking of humpback whales by the sablefish pot fishery (78 FR 54553).

On November 21, 2012, the U.S. Fish and Wildlife Service (FWS) issued a biological opinion concluding that the groundfish fishery will not jeopardize the continued existence of the short-tailed albatross. The FWS also concurred that the fishery is not likely to adversely affect the marbled murrelet, California least tern, southern sea otter, bull trout, nor bull trout critical habitat.

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. Consistent with the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council is a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, NMFS has coordinated specifically with the tribes interested in the whiting fishery regarding the issues addressed by this rule.

#### List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: February 24, 2014.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator For Regulatory Programs, 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 is amended to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 773 *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 2014 will be 17.5 percent of the U.S. TAC.

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[FR Doc. 2014-04375 Filed 2-27-14; 8:45 am]

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