

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 660**

[Docket No. 020402077-2077-01; I.D. 032502A]

RIN 0648-AP85

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Annual Specifications; Pacific Whiting

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

ACTION: Emergency rule and extension of expiration date.

SUMMARY: This action extends an emergency rule, now in effect, that establishes the 2002 fishery specifications for Pacific whiting (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), tribal allocation, and allocations for the non-tribal commercial sectors. The intended effect of this action is to maintain allowable harvest levels of whiting based on the best available scientific information.

DATES: The expiration date of the emergency rule published on April 15, 2002 (67 FR 18117), is October 15, 2002. This action extends the emergency rule until April 15, 2003.

ADDRESSES: Copies of the environmental assessment/regulatory impact review may be obtained from the Pacific Fishery Management Council (Council) by writing to the Council at 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201, or by contacting Donald McIsaac at 503-326-6352, or may be obtained from William L. Robinson, Northwest Region, NMFS, 7600 Sand Point Way N.E., BIN C15700, Bldg. 1, Seattle, WA 98115-0070.

FOR FURTHER INFORMATION CONTACT: Becky Renko or Yvonne deReynier (Northwest Region, NMFS) 206-526-6140; or Svein Fougner (Southwest Region, NMFS) 310-980-4040.

SUPPLEMENTARY INFORMATION: Electronic Access: This rule is accessible via the Internet at the Office of the Federal Register's Web site at http://www.access.gpo.gov/su_docs/aces/

[aces140.html](http://www.nwr.noaa.gov/1sustfsh/gdfsh01.htm). Background information and documents are available at the NMFS Northwest Region Web site at <http://www.nwr.noaa.gov/1sustfsh/gdfsh01.htm> and at the Council's Web site at <http://www.pcouncil.org>.

Background

On April 15, 2002, NMFS published an emergency rule (67 FR 18117) establishing a whiting acceptable biological catch (ABC) based on F40% F proxy with a medium recruitment scenario. The U.S.-Canada coastwide ABC was set at 208,000 mt, with a U.S. ABC of 166,000 mt. That emergency rule also adopted a U.S.-Canada coastwide optimum yield (OY) of 162,000 mt and a U.S. OY of 129,600 mt.

Each year, the whiting OY is allocated between the tribal and commercial sectors of the fishery. The Pacific Coast Indian treaty fishing rights, described at 50 CFR 660.324, allow for the allocation of fish to the tribes through the annual specification and management process. Regulations at 50 CFR 660.323(a)(4) divide the commercial OY into separate allocations for the non-tribal catcher/processor, mothership, and shore-based sectors of the whiting fishery.

For 2002, NMFS set the tribal whiting allocation at 22,680 mt. The non-tribal commercial OY for whiting is 106,920 mt (the 129,600 mt OY minus the 22,680 mt tribal allocation). Each non-tribal sector receives a portion of the commercial OY, with the catcher/processors getting 34 percent (36,353 mt), motherships getting 24 percent (25,661 mt), and the shore-based sector getting 42 percent (44,906 mt).

Additional information concerning the 2002 whiting ABC and OY and sector allocations of whiting may be found in the April 15, 2002 (67 FR 18117), **Federal Register** document for this action. Extension of this emergency rule is authorized under section 305(c)(3)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Comments and Responses

During the comment period, NMFS received 1 letter from an association representing seafood processors and associated businesses that process, transport and sell whiting products. The comments resulted in no change to the emergency rule.

Comment 1: We request that the emergency rule be withdrawn and re-issued to establish whiting harvest levels as recommended by the Pacific Fishery Management Council.

Response: The Council's recommendation was disapproved by NMFS after considering the best

available science. NMFS believes that the risk neutral medium recruitment scenario, instead of the Council's risk accepting recommendation, is supported by the best available science. With the April 15, 2002, emergency rule (67 FR 18117) extension herein, NMFS adopted a U.S. ABC of 166,000 mt and an OY of 129,600 mt, consistent with the risk neutral medium recruitment scenario.

Comment 2: The commenter requests that the treaty Indian tribal allocation of whiting be reduced to "reflect a percentage reduction equal to that imposed on non-tribal fishermen."

Response: Presumably the commenter refers to the fact that the tribal share for 2001 was 14.4 percent of the OY, while for 2002 it is 17.5 percent (and would have been 16.4 percent under the PFMC proposal rejected by NMFS).

The tribal share is determined by a "sliding scale," OY-based methodology. This methodology, which has been in use since 1999, provides for a slighter higher percentage of the OY to go to the treaty fishery at lower OY levels (to a maximum of 17.5 percent), with lower percentages to the treaty fishery at higher OY levels. The "sliding scale" methodology was used to set the tribal shares in both 2001 and 2002. For OYs under 145,000 (as in 2002), this method sets the tribal share at 17.5 percent.

The sliding scale methodology has been the subject of extensive litigation, which continues today. In *United States v. Washington*, the Court held that the "sliding scale" methodology is consistent with the Magnuson-Stevens Act, and is the best available scientific method to determine the appropriate allocation of whiting to the tribes. *United States v. Washington* 143 F.Supp.2d 1218 (W.D. Wash. 2001). This ruling was reaffirmed in July 2002. *Midwater Trawlers Cooperative v. Daley*, C96-1808R (W.D. Wash. 2002) (Order Granting Defendants' Motion to Supplement Record, July 17, 2002). Additional briefing will occur in this case. However, at this time NMFS remains under a Court Order in *United States v. Washington* to use the "sliding scale" methodology unless the Secretary of Commerce finds just cause for its alteration or abandonment, the parties agree to a permissible alternative methodology, or further order issues from the Court. As one of these events has not yet occurred, NMFS is obligated by the Court to continue to use the "sliding scale" methodology. Since the methodology already encompasses OYs at all levels, it is not appropriate to reduce the tribal share specified by the "sliding scale" methodology simply because the OY declines.

Comment 3: The **Federal Register** document lists recruitment assumptions and their probabilities as point estimates and ignores the ranges associated with these. The Council's recommended OY was within the medium range and is risk neutral in spite of NMFS' attempt to characterize it as something else.

Response: The Council's Scientific and Statistical Committee noted that the "medium" recruitment assumption with an F40% FMSY proxy was the risk neutral characterization of the incoming recruits to the fishery. NMFS believes that the Council's choice to use a 1999 year class estimate midway between the medium and high estimate did not adequately protect the whiting stock given the high variance associated with forecasting recruitment and future biomass levels.

Comment 4: The retrospective analysis which shows that past recruitment levels in previous assessments were lower than predicted has no bearing on future assessments.

Response: The primary source of uncertainty in the whiting assessment concerned estimates of the fish spawned in 1999. At the time of the 2001 survey, the fish spawned in 1999 had only

partially recruited to the fishery. Therefore, recruitment level of these young fish in the near future was not well estimated by the model and resulted in uncertainty about the effect they would have on the exploitable stock biomass. The 2002 stock assessment results suggest that a lower estimate of recruitment of the 1999 year class is two to three times more likely than a higher recruitment estimate. As fish spawned in 1999 mature and more survey and fishery dependent data become available, the strength of the 1999 year class will be better understood.

Comment 5: Detailed economic information provided by the public was not reflected in the **Federal Register** document and the economic impact was downplayed by NMFS.

Response: Although it was not specifically noted in the **Federal Register** document, NMFS did review economic information provided by the public at the Council's March 2002 meeting before making a final decision. NMFS recognized and clearly stated that the reduced whiting OY was expected to have a major economic impact on harvesters and processors in the short-

term. However, NMFS believes the reductions were necessary for the long-term health of the whiting fishery.

Classification

The Assistant Administrator for Fisheries, NOAA (AA,) has determined that this extension is needed to maintain the current ABC and OY for the entire year. The non-tribal catcher/processor sector's fishing activities are ongoing. Whiting is an overfished species and needs to be protected from overfishing. Maintaining the 2002 harvest levels set by the emergency rule (67 FR 18117, April 15, 2002,) will serve to protect whiting from overharvest for the remainder of 2002. Accordingly, the AA is extending the expiration date of this emergency rule until the effective date of the 2003 management measures, not to exceed 180 days.

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

Dated: October 1, 2002

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

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