

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 660

[Docket No. 981231333-8334-02; I.D. 122898E]

RIN 0648-AM12

**Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Tribal Allocation of Whiting for 1999**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS publishes a proposed rule to allocate a portion of the 1999 Optimum Yield (OY) specification (formerly called "harvest guideline") for Pacific whiting to Washington coastal tribal fisheries. This rule is intended to accommodate the Washington coastal treaty tribes rights to Pacific whiting and to provide equitable allocation of the whiting resource and thereby promote the goals and objectives of the Pacific Coast Groundfish Fishery Management Plan (FMP).

**DATES:** Comments must be submitted in writing by February 8, 1999.

**ADDRESSES:** Send comments to Mr. William Stelle, Jr., Administrator, Northwest Region (Regional Administrator), NMFS, 7600 Sand Point Way N.E., BIN C15700, Bldg. 1, Seattle, WA 98115-0070. Information relevant to this proposed rule, including an Initial Regulatory Flexibility Analysis (IRFA), is available for public review during business hours at the office of the Regional Administrator, or may be obtained from NMFS by writing to the Sustainable Fisheries Division, NMFS, 7600 Sand Point Way N.E., BIN C15700, Bldg. 1, Seattle, WA 98115-0070.

**FOR FURTHER INFORMATION CONTACT:** Katherine King or Yvonne deReynier (Northwest Region, NMFS) 206-526-6140.

**SUPPLEMENTARY INFORMATION:** NMFS is proposing this rule based on recommendations of the Makah and Quileute Indian Tribes and the Council, under the authority of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and regulations at 50 CFR 660.324. At its November 1998 meeting in Portland, OR, the Council recommended a range of alternative amounts of whiting from

25,000-35,000 mt to be set aside for the Washington coastal tribes. Those alternatives and the need to accommodate tribal treaty rights are discussed below.

**Background**

Whiting is the most abundant groundfish resource managed by the Council, and makes up over 50 percent of the potential annual groundfish harvest. In late 1994, the U.S. Government formally recognized that the four Washington Coastal Tribes (Makah, Quileute, Hoh, and Quinault) have treaty rights to fish for groundfish, and concluded that, in general terms, the quantification of those rights is 50 percent of the harvestable surplus of groundfish available in the tribes' usual and accustomed (U and A) fishing areas (described at 50 CFR 660.324). In 1996, whiting was allocated to the Makah treaty Indian tribe for the first time (61 FR 28786, June 6, 1996). Thereafter, any allocation among domestic sectors was to be based on the harvest guideline minus any tribal allocation. A tribal allocation is subtracted from the species OY before limited entry and open access allocations are derived. The treaty tribal fisheries for whiting, as well as those for sablefish and black rockfish, are separate fisheries, not governed by the limited entry or open access regulations or allocations. The tribes regulate these fisheries so as not to exceed their allocations. Tribal allocations of whiting have been included in final specifications and management measures published annually by NMFS, but for reasons explained below, the 1999 final specifications and allocations for whiting will not be recommended by the Council until its March 1999 meeting. After the Council recommends a final whiting acceptable biological catch (ABC) and an OY and a tribal whiting allocation, NMFS will publish approved final specifications and allocations for whiting in the **Federal Register**. Final specifications are published in the final rules section of the **Federal Register**, but are not codified. The 1999 groundfish fishery specifications and management measures for all other groundfish species managed under the FMP are published elsewhere in this issue and reference therein is made to this proposed rule.

**Preliminary ABC/OY**

A new stock assessment for whiting is expected in early 1999, so the Council has delayed its recommendation of a final whiting ABC and OY until March so that it will be able to consider the new stock assessment. The preliminary

ABC and OY considered by the Council for whiting are a range, with the upper end at the 1998 ABC/HG (232,000 mt) and the lower end (178,000 mt) at 80 percent of the ABC projected for the U.S. and Canada combined. (Eighty percent is the proportion of the combined ABC in Canadian and U.S. waters that is caught in U.S. waters.) The final ABC and OY will be recommended at the Council's March 1999 meeting, at which time the tribal allocation will also be considered. The commercial OY (the OY minus the tribal allocation) will be allocated 42 percent to the shore-based sector, 24 percent to the mothership sector, and 34 percent to catcher/processors.

**Projected 1998 Landings and Continuation of Regulations**

Landings projections indicate that the 1998 whiting fisheries catches will be very close to the whiting OY of 232,000 mt: 87,548 mt by the shore-based fleet; 70,364 mt by the catcher/processing sector; 50,086 mt by the non-tribal mothership sector, and about 25,000 mt by the Makah tribal fishery. The 10,000-lb (4,536-kg) trip limit for whiting taken before and after the regular whiting season and inside the 100-fathom (183-m) contour in the Eureka subarea (40°30'-43°00' N. lat.) continues in effect in 1999. Additional regulations, including the percentages used to allocate whiting among non-tribal sectors (42 percent to the shore-based sector, 24 percent to the mothership sector, and 34 percent to catcher/processors), are found at 50 CFR 660.323(a)(4).

**Options for 1999 Allocation**

In 1997 and in 1998, the tribal allocation for whiting was 25,000 mt and was announced in the annual specifications (62 FR 700, January 7, 1997, and 63 FR 419, January 6, 1998). For 1999, however, the tribal whiting allocation will not be determined until after the Council has made recommendations on the overall landed catch OY for whiting and on the tribal whiting allocation at its March 1999 meeting.

Two options for a 1999 tribal whiting allocation were proposed at the September 1998 Council meeting: (1) To set aside 25,000 mt of the U.S. OY for tribal whiting fisheries (which is the same amount that was set aside for the tribe in both 1997 and 1998); or (2) to adopt a tribal-Federal proposed allocation scheme that varies the amount of whiting set aside for the Makah Tribe according to the overall amount of the U.S. OY, and that sets aside 2,500 mt for the Quileute Tribe.

U.S. OY	Makah allocation	Quileute allocation (in mt)
Up to 145,000 mt .....	17.5% of the U.S. OY .....	2,500
145,001 to 175,000 mt .....	25,000 mt .....	2,500
175,001 to 200,000 mt .....	27,500 mt .....	2,500
200,001 to 225,000 mt .....	30,000 mt .....	2,500
225,001 to 250,000 mt .....	32,500 mt .....	2,500
Over 250,000 mt .....	35,000 mt .....	2,500

If the Quileute Tribe is unable to use its full allocation, the unused portion would be released to the Makah Tribe to harvest by the end of the year. This proposal is for 1999 only.

#### Classification

The Assistant Administrator for Fisheries, NOAA (AA), has preliminarily determined that this proposed rule is necessary for management of the Pacific Coast groundfish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable law.

This proposed rule has been determined by the Office of Management and Budget to be not significant for purposes of E.O. 12866.

For the proposed tribal allocation of whiting, NMFS prepared an IRFA, under the Regulatory Flexibility Act, that describes the impact this proposed rule, if adopted, would have on small entities. The RFA identifies six items to be discussed in the IRFA. Those items are summarized here. (1) *A description of the reasons why action by the agency is being considered:* At the Council's September and November 1999 meetings, the Makah and Quileute treaty tribes submitted a proposal for determining annual tribal allocations of whiting. In late 1994, the U.S. government formally recognized that the four Washington Coastal Tribes (Makah, Quileute, Hoh, and Quinault) have treaty rights to fish for groundfish, and concluded that, in general terms, the quantification of those rights is 50 percent of the harvestable surplus of groundfish available in the tribes' usual and accustomed fishing areas (described at 50 CFR 660.324). NMFS is obligated to accommodate the treaty rights of the treaty tribes off the Pacific coast of Washington State. The tribal proposal for allocation of whiting would be 30,000–35,000 mt in 1999. The Council proposed continuation of a 25,000-mt

allocation, as occurred in 1997 and 1998. Therefore, the tribal allocation being considered for whiting in 1999 would be from 25,000–35,000 mt. (2) *A succinct statement of the objectives of, and legal basis for, the proposed rule:* The objective is to accommodate tribal treaty rights, as required by the Stevens treaties and as interpreted in the case of *U.S. v. Washington*. See IRFA for further citations. (3) *A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply:* The small entities directly affected by the proposed rule include catcher boats (tribal and nontribal) that harvest whiting and deliver to either shore-based processors or mothership processors at sea; and shore-based processors that process whiting. A total of 74 small entities could be directly affected by the allocation because the amount of whiting available to them would change. Less whiting would be available to nontribal small businesses that use whiting because it is allocated to the treaty tribes. Conversely, one to six tribal catcher boats, which also are small businesses, would be directly affected, but in a positive manner, by receiving the tribal allocation. All limited entry groundfish fishing vessels and processors could be indirectly affected, which is virtually all small businesses participating in the Pacific coast groundfish fishery. The major, negative indirect effect of the proposed allocation is that the entire groundfish limited entry fleet and nontribal processors may find their limits for non-whiting species lowered, or allocations reached earlier, if established whiting operations are displaced by tribal whiting operations, resulting in additional effort on other fully utilized fisheries. (4) *A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of*

*the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record:* There are no projected reporting, recordkeeping, or compliance requirements in the proposed action. (5) *An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.* NMFS believes there are no Federal rules which may duplicate, overlap, or conflict with the proposed action. (6) *Significant alternatives to the proposed rule:* Because the tribes have a treaty right to harvest whiting and have indicated that they plan to exercise the treaty right, there is no way to accomplish the objective of accommodating the treaty right without setting aside an appropriate amount of whiting for the tribes. The Council is considering the range of alternative amounts of whiting described above. The lower amount of whiting being considered would result in a lesser impact to the non-treaty fishery, but may not accommodate the full treaty right of the tribes. The larger amount would have a larger impact on the non-treaty fishery. The tribes and NMFS are proposing the amount believed to most appropriately accommodate the treaty right pending final resolution of the quantification of the right through litigation or negotiation. A copy of this analysis is available from NMFS (see ADDRESSES).

This proposed rule does not contain any collection-of-information requirements subject to the Paperwork Reduction Act.

Dated: December 31, 1998.

**Andrew A. Rosenberg,**

*Deputy Assist. Administrator for Fisheries, National Marine Fisheries Service.*

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