

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 070510101-7101-01]

RIN 0648-AV57

#### Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; a Temporary Rule

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

**ACTION:** Temporary rule; emergency action; request for comments.

**SUMMARY:** NMFS publishes a temporary rule to prohibit any vessel from participating in either the mothership, catcher-processor or shoreside delivery sector of the directed Pacific whiting (whiting) fishery off the West Coast in 2007 if it does not have a history of sector-specific participation in the whiting fishery between January 1, 1997, and January 1, 2007. This rule is intended to prevent serious conservation and management problems that could be caused by new entrants in 2007 and to maintain the status quo while the Pacific Fishery Management Council (Council) addresses the issue of increased effort in the whiting fishery through an amendment to the Pacific Groundfish Fishery Management Plan (FMP) for the long term.

**DATES:** The amendments in this rule are effective May 14, 2007 through November 13, 2007, except for amendments to §§ 660.333 and 660.335, which are effective May 14, 2007.

Comments must be received by June 18, 2007.

**ADDRESSES:** Comments on the management measures and the related environmental assessment (EA) may be sent to Frank Lockhart, Assistant Regional Administrator for Sustainable Fisheries, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115-0070, fax: 206-526-6376.

Comments may be submitted via e-mail at [Whiting.emergencyrule2007@noaa.gov](mailto:Whiting.emergencyrule2007@noaa.gov) or at the Federal e-Rulemaking Portal: <http://www.Regulations.gov>.

Copies of the FONSI and its supporting EA and other documents cited in this document are available from Frank Lockhart at the address Assistant Regional Administrator for Sustainable Fisheries, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115-0070. Information presented by the Council for this temporary rule is available for public review during business hours at the office of the Council at 7700 NE Ambassador Place, Portland, OR 97220, phone: 503-820-2280. Copies of additional reports or testimony referenced in this document may also be obtained from the Council.

**FOR FURTHER INFORMATION:** Frank Lockhart (Northwest Region, NMFS), phone: 206-526-6142; fax: 206-526-6736) and e-mail: [Frank.Lockhart@noaa.gov](mailto:Frank.Lockhart@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

The temporary rule also 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, including the EA, are available at the Council's Web site at <http://pcouncil.org>.

##### Background

The whiting fishery off the West Coast is managed under the Groundfish FMP prepared by the Council and approved by the Secretary of Commerce under the Magnuson-Stevens Act. The Council has adopted a formal process through which, every two years, it establishes allowable catches and associated fishery conservation and management measures for most of the groundfish fishery sectors for a biennial management cycle. The whiting fishery is managed somewhat differently because there is an annual stock assessment on which the Council bases an annual determination of the U.S. optimum yield (OY) and the sub-quotas of the U.S. OY. Beginning in 1997, the Council makes annual allocations of the U.S. OY available to each of three directed fishing sectors: Mothership, catcher-processor, and shoreside delivery. Further, the directed whiting fishery has a distinct seasonal structure, with the primary season start dates for each of the three commercial sectors being the same since 1997. The primary seasons for the non-tribal catcher/processor and

mothership sectors begins May 15. The shoreside primary season in most of the Eureka statistical area (between 42° north latitude (N. lat.) and 40°30' N. lat.) begins on April 1, and the fishery south of 40°30' N. lat. begins April 15. The Pacific whiting shoreside fishery north of 42° N. lat. begins on June 15. No more than five percent of the shore-based sector allocation may be taken in the early season fishery off California before the primary season north of 42° N. lat. opens on June 15. This is intended to ensure an opportunity for all sectors of the shoreside industry to have fair opportunity to engage in the fishery when fish are available to them without excessive risk that any one area will receive disproportionately large opportunities. It also supports efforts to minimize bycatch of rockfish and salmon.

The current management regime with specific sector allocations and differences in area and sector season start dates was first implemented for the 1997 fishery (**Federal Register:** May 20, 1997 (Volume 62, Number 97)). At that time, the benefits of the sector allocations were to: Reduce the uncertainty of the amounts available for each sector, make the fishery easier to monitor, and eliminate the "first-come-first-serve" derby style incentives in the fishery associated with the "no-action" alternative as separate allocations encourage each sector to operate at a more leisurely and safe pace. By reducing the race for fish, separate sector allocations would provide greater incentives for vessels to move to other fishing grounds if necessary to lower bycatch levels, particularly of yellowtail rockfish and salmon. In addition, with separate allocations, each sector would have greater accountability and opportunity to minimize bycatch while providing each sector the flexibility of starting at different times without losing any competitive advantage. It also supported efforts to minimize bycatch of rockfish and salmon.

Since 1997, when sector specific allocations were made, the fishery has been fairly stable except for a few recent instances where additional rules had to be put in place to protect overfished species (2004) and endangered salmon (2005). As in many fisheries, when the fishery is stable, most of the participants know each other and have a shared interest in maintaining a stable situation. In this instance, cooperation includes a common interest in ensuring that bycatch is limited because excessive bycatch could close the fishery before the whiting quota is reached. Therefore, there is frequent sharing of information to ensure that

areas of high bycatch rates are known and avoided. This communication happens throughout the season but is especially crucial early in the season when the target species (whiting) and the sensitive bycatch species (overfished rockfish and salmon) are highly mobile. This communication allows fishing to be prosecuted in areas with high probability of large whiting catches with low bycatch. In turn, this has provided the directed whiting fishery with a long period to pursue the fishery and kept whiting vessels from engaging in other groundfish fishing sectors that were under severe economic stress. These are all benefits related to the enhanced communication among fishermen within a stable fishery.

In addition, keeping shoreside processing facilities open for longer periods also has helped maintain employment opportunities for many who otherwise would have been displaced by the severe cutbacks the Council had made in other groundfish fishery sectors to prevent overfishing and achieve rebuilding of overfished rockfish stocks. There is a further benefit to whiting fishers and processors, as the quality of the whiting is much better later in the season because the fish had regained weight lost during the spawning season. Finally, by shifting whiting fishing to later in the season, and through other industry voluntary actions and communications, the industry was able to reduce its likelihood of high bycatch of overfished rockfish and salmon.

In 2006, however, there was several shifts in fishery conditions that led to Council concern about the potential for major disruptions in the whiting fishery and related non-whiting groundfish fisheries. There was a significant increase in the ex-vessel price for whiting. This attracted several new vessels to the whiting shoreside fishery in 2006. Second, as rationalization of the Alaska pollock fishery was achieved, some vessels, including some American Fisheries Act-qualified vessels (AFA vessels), found they could engage in fishing for whiting off the West Coast in the spring and early summer and then shift to Alaska to take their shares of pollock later in the summer when Alaskan fishing conditions were more favorable. Among the new entries to the whiting fishery were several AFA vessels. The entry of new vessels to the whiting fishery resulted in achievement of the whiting harvest limits earlier in the year in 2006 than in 2005 and an earlier closure than anticipated of the shoreside sector, adversely affecting processors as well as fishers. The Council understood that

there was the prospect of additional entry of AFA vessels in 2007, as well as perhaps additional other vessels in the groundfish fishery.

The Council originally considered the issue of limiting new vessel entry to the whiting fishery in September 2006. At that time, the Council recommended that NMFS implement an emergency rule to prevent new entry of certain, but not all, vessels into the whiting fishery for the 2007 season, as well as prohibit certain vessels that participated in the 2006 season. The Council stated its belief that the conservation problems that would arise from an accelerated "race for fish" if certain AFA vessels were allowed to remain in the fishery, or if additional AFA vessels were allowed to enter the fishery. The prospect of more participation was alarming to the Council, which was concerned that additional vessels would result in an accelerated "race for fish," with increased harvest rates for whiting. Increased harvest rates, especially if the new vessels are of larger capacity or piloted by masters unfamiliar with the fishery, could lead to greater (and potentially disastrous) bycatch of overfished species of rockfish. In addition, the Council was advised by current whiting fishery participants that this accelerated race for fish would likely lead to higher levels of fishing earlier in the season by the at-sea portion (i.e., motherhips and catcher/processors) of the fishery; such an occurrence could result in higher bycatch of endangered or threatened salmon as bycatch rates are documented to be higher in the spring. The Council concluded that serious conservation and management problems would result from this accelerated "race for fish" caused by new entry of AFA vessels to the fishery. The Council also noted a concern was that new entry of AFA vessels could result in early achievement of the U.S. directed harvest quotas, leaving West Coast-based vessels facing no fishing or very limited fishing while the AFA vessels could return to the rationalized pollock fisheries in which they had an interest. However, the Council proposal would have prohibited only certain AFA vessels from entry to the fishery for the first time in 2007, and would have removed from the fishery only AFA vessels that had participated for the first time in 2006. The Council's recommendation would not have prevented additional non-AFA vessels from entering the fishery.

In a letter dated January 11, 2007, the Northwest Regional Administrator (RA), NMFS, notified the Council that he denied its request for an emergency rule. He noted that the Council's action

was intended to address actual or potential harm to West Coast fishers from the AFA, but that the evidence they presented to indicate harm (i.e., an earlier closure of the whiting fishery in 2006 than in 2005) was due to new participation by both AFA vessels and non-AFA vessels. While acknowledging that new market conditions were likely to attract additional vessels, he pointed out that the proposed action would have denied new entry to a selected category of vessels (i.e., AFA vessels) but not all vessels. The RA noted that the guidelines for the use of emergency rules call for use of notice-and-comment procedures when there are controversial actions with serious economic effects, especially when the decision is largely related to allocation and not conservation. Further, the Council's remedy would not have fully addressed the valid conservation concerns raised by the Council. Therefore, the proposal, as with other allocation decisions, would more appropriately be handled through the Council's full rulemaking process even if there were valid conservation concerns.

The RA subsequently advised the Council on February 13, 2007, that if it were to submit a proposal that dealt more fully with the issue of conservation risks and management problems due to potential new entry of any new vessels into the directed whiting fishery, NMFS would review that proposal on its own merits. NMFS would continue to be concerned if the request based the proposed action on the AFA rather than on the Magnuson-Stevens Act.

The Council discussed the issue at its meeting March 9, 2007, including the history of the issue, its earlier action, NMFS' rejection and indication of a possible remedy, and alternatives available to the Council. There were four new pieces of information presented at the Council meeting that exacerbated their concern about an increased race for fish. First, the price for whiting continues to increase to unprecedented levels. Ex-vessel prices increased from \$77 per ton in 2004 to \$137 per ton in 2006—nearly doubling since 2004 and increasing by more than 22 percent in 2006 from the 2005 price. Industry projections for 2007 are that prices will continue to increase to more than \$176 per ton. Second, the U.S. Optimum Yield (OY) for whiting in 2007 is 10 percent lower than the OY in 2006. Third, because of higher than projected rockfish bycatch rates, the Council took action in March 2007 that placed new and more severe constraints on non-whiting groundfish fishing. This reduces the fishing opportunities for

these non-whiting sectors. Fourth, the OY for Alaska pollock is reduced for 2007.

All of these recent and unanticipated changes in conditions increase the likelihood of an accelerated race for fish: The first by making entry more potentially lucrative for additional vessels; the second by constraining supply of whiting for harvest and leading to more pressure among vessels to quickly capture the limited whiting quota; and the third and fourth by increasing the relative attractiveness of whiting compared to other fishing opportunities. Faced with this new information, the Council adopted and submitted its new request that NMFS promulgate an emergency rule that would prohibit any vessel from operating in the mothership, catcher-processor, or shoreside delivery sector of the whiting fishery in 2007 if it did not have a history of sector-specific participation prior to January 1, 2007. The Council also committed to completing an amendment to its Groundfish FMP to resolve issues associated with AFA vessels for the long term, consistent with the Magnuson-Stevens Act, the AFA, and other applicable law. This could lead to an additional program under consideration of an individual fishermen's quota system as early as 2010.

NMFS agrees that if this rule is not implemented, an accelerated "race for fish" is likely to cause serious conservation and management problems, including excessive bycatch of overfished rockfish, excessive catch of endangered and threatened salmon, and severe disruption of other groundfish fishery sectors. This rule will help maintain stability in the whiting fishery and other groundfish fishing sectors in 2007 while the Council completes its FMP amendment to resolve groundfish and whiting fishing fleet capacity issues for the long term. This rule also provides that parties who invested in 2006 and early 2007 by purchasing groundfish trawl limited entry permits for aggregation and use on a single vessel in the whiting fishery in 2007 are exempted from the prohibition against subsequently disaggregating such permits. This will mitigate financial harm to such parties who invested in good faith without knowing that this emergency rule could be implemented. The rule also contains provisions to allow a person who transferred a permit to a "prohibited" vessel (a vessel not eligible to participate in the fishery) can reverse that action and return the permit to the previous vessel or transfer it to a vessel that is eligible. Normally, a permit can

only be transferred once a year. This person was not aware of the prospect of an emergency rule when he transferred the permit. Fairness justifies this exception to the regulation.

For purposes of implementing the Council request, which is for control of entry on a sector-by-sector basis, NMFS is using 1997 as the base year. That is the first year in which the three sectors began being considered for separate sub-quotas and management controls. State landings data, observer records, and NORPAC industry reports will be the sole evidence to demonstrate eligibility based on historic sector-specific participation.

#### Public Comments and Issues

At the Council meeting, the Council took comment on the issue prior to taking action. There were numerous expressions of support for the action as well as some comments opposed to the action. In addition, the Northwest Region and the Council have received written comments since the Council action was taken. At the meeting, fishers who commented were divided; some opposed the action while most testifying before the Council supported it. While most of those testifying stated their belief that allowing new entrants would cause a conservation problem, there was some testimony that a problem would not occur. Some argued that leaving the fishery open to new entry could result in a high probability of intensive fishing early in the season leading to conservation problems (especially with respect to bycatch), while others argued that the catch limit on whiting provided assurance that there would not be any threat to whiting, and that the limits on bycatch provided protection to overfished rockfish. There was agreement that there is an allocation issue that the Council needs to resolve. Some urged the Council to address this for the longer term through Amendment 15 without an emergency rule, while others supported an emergency rule to allow the fishery to proceed as it has in recent years (i.e., in a stable manner) without new entry while the Council develops Amendment 15. A spokesperson for the recreational sector supported the emergency rule as it could reduce the risk of excessive bycatch of salmon and rockfish, which in turn would reduce the risk of further constraints on recreational fishing for groundfish. A West Coast processing industry member also spoke in favor of the emergency rule.

The West Coast state officials voting at the meeting all supported the emergency rule. The California state official made the motion for the

emergency rule, expressing concern about the increased risk of excessive bycatch and noting restrictive actions the Council has taken toward other groundfish fishery sectors to prevent bycatch problems. NMFS believes it is likely that increased capacity in the whiting fishery could exacerbate such problems. It was noted that the whiting limit for 2007 is lower than in 2006, and thus there is a greater risk that new participation would lead to more intensive competition and problems. California also pointed out the risk of management problems if the whiting fishery were to close earlier than normal and whiting fishers were to place more pressure on other groundfish fishery sectors, thereby exacerbating problems in those sectors as well as coastal communities. Oregon's representative on the Council was strongly in favor of the emergency rule as the state was concerned that additional entry would result in intensive early fishing, with high risk of excessive rockfish and salmon bycatch. Further, an early closure of the fishery would have severe adverse impacts on coastal processors in Oregon and elsewhere. It is notable that Washington's representative had opposed the proposed emergency in September 2006 but was now convinced that 2007 presented different and unforeseen conditions. Washington noted that the Council's proposal would not force out any person who had participated in 2006. Washington supported action as reducing the risk of adverse impacts on rockfish (especially noting concern about canary rockfish) and salmon. The Washington representative also noted that this would be a one-year action; it will be incumbent on the Council to address the capacity issue for the long-term in a timely manner.

The Pacific Whiting Conservation Cooperative (Cooperative) recommended that the Council request the emergency rule. The Cooperative subsequently submitted written comments (see below).

A processor who has recently invested in shoreside facilities has written NMFS in favor of keeping the fishery open, which in this context means to not freeze new entry to the shoreside processing sector.

A company that invested in 2006 by purchasing limited entry permits and combining them on a single vessel with the intent of entering the fishery in 2007 objected to the emergency rule proposal. In this company's view, there is no "emergency" pursuant to NMFS' guidelines for the use of emergency authority, especially for the entry of additional processing capacity or a

catcher/processor vessel. They noted that NMFS disapproved the Council's September 2006 proposal, and the reasons for that disapproval would apply in this instance as well. They noted that the Council could have used its normal decision processes to establish additional measures to manage the whiting fishery and had chosen not to do so; in their view, nothing has changed so significantly as to warrant emergency regulations. They also noted that the permits acquired to allow their vessel to qualify under the limited entry program were from active vessels, so their prospective new entry would only replace existing capacity rather than add to the capacity of the fleet. Their letter identifies the specific analyses that they maintain would be needed to satisfy Magnuson-Stevens Act requirement for management regulations and asserts that such analyses would show that the "best scientific information available" does not support an emergency rule.

#### **Subsequent Public Comments on the Emergency Rule Proposal**

At the Council meeting, following the vote on the proposed emergency action, the NMFS representative invited written public comment on the prospective action while the Council prepared the actual submission for NMFS consideration, requesting that they be submitted within two weeks. NMFS wanted to be sure it had as complete an understanding as possible on the range of issues and concerns that various parties would have on this matter. During this period, the following comments were received:

The Pacific Whiting Conservation Cooperative wrote reiterating its support for emergency action. It noted that the voluntary industry arrangement that results in the slow pace of fishing early in the season and that includes collaboration and communication to avoid bycatch would likely end if there were new entry to the fishery. It indicated that there would be a "race for fish" leading to all the problems discussed by the Council when it agreed to request emergency action.

The State of Oregon submitted supplemental comments, reiterating its concerns about the risk of excessive bycatch of rockfish as well as the economic disruption to the West Coast whiting fishing fleet and to West Coast processors and their employees if there were early closure of the whiting fishery for any reason.

One party suggested that the emergency rule request be approved only with respect to the entry of new harvesting vessels. This would mean that additional mothership operations

could enter the fishery in 2007. This party suggested that it would be beneficial to other whiting fishers to increase the number of potential buyers of fish.

Two sets of comments were received from representatives of the mothership sector. They favored the proposed action, with special emphasis on ensuring that eligibility for participation is on a sector-specific basis, and that eligibility in 2007 be based on sector-specific participation beginning in 1997.

#### **Responses to Comments**

Because the conservation concerns raised by the Council in 2006 still exist and because, unlike their 2006 request, the Council's proposed remedy fully addresses those concerns by encompassing all vessels that could potentially enter the whiting fishery absent this rule, NMFS believes that the available information demonstrates that emergency action is warranted. This conclusion is further supported by the new information received in late 2006 and early 2007. These conditions may pose an unacceptably high risk that there would be serious conservation and management problems if no action is taken. The Council has been responsive to NMFS' objections to the prior request for emergency action and has taken the broader action required to address the problem in the short term, and has committed to action to resolve the whiting fishery capacity issue in the long-term through an amendment to the Groundfish FMP. NMFS notes that the emergency rule would be in effect for at most one year, and that the rule contains provisions intended to minimize financial harm to those who may have invested to participate in the fishery in 2007 not knowing they would be precluded from utilizing the investment in the fishery. NMFS notes further the critical need to ensure that bycatch limits on overfished rockfish not be exceeded so that the stocks can rebuild in accordance with the approved rebuilding plans.

NMFS agrees with the Council that the risks of serious economic disruptions in the event of excessive catch of rockfish are very high if there were no control to stop entry into the whiting fishery at least for 2007. NMFS also agrees that the risk of loss of industry cooperation in the fishing year would pose serious risks of loss of control over bycatch. With respect to the potential to allow new mothership operations, NMFS concludes that this would not fully address the risks of an accelerated "race for fish," with consequent risk of early fishing and in turn excessive bycatch. Again, the

cooperation of industry is vital to ensuring a stable fishery with minimal bycatch. NMFS determined that applying the prohibition on new entry only to the catcher sectors would not address the problem; the entry of additional at-sea processors could also lead to an accelerated race for fish as more parties compete for the available sector allocation, with a higher likelihood of a breakdown in communication and cooperation leading to excessive risk of heavy early season fishing with high bycatch and fishery disruptions. NMFS agrees that the Council intended that eligibility be determined on a sector-specific basis, and has determined that 1997 should be used as the initial year for qualification of participation in the fishery on a sector-specific basis. This was the first year in which management of the domestic whiting fishery was managed on a sector-specific basis.

#### **Evaluation of Emergency Rule Request Against Agency Guidelines**

NMFS has considered the Council's request and the information on which the request is based. NMFS considered also the information in the Council's final environmental impact statement (FEIS) for its biennial harvest limits and conservation and management measures. This includes extensive information on the status of stocks and the economic status of the fisheries and the dependency of communities which are dependent on those fisheries. NMFS has evaluated the proposal against its guidelines for the use of emergency rules, published at 62 FR 44421 (August 21, 1997), which sets forth criteria that must be met to warrant emergency rules. Each of the criteria is discussed below.

##### *1. The Situation Results From Recent, Unforeseen Events or Recently Discovered Circumstances*

Two years ago, it could not have been foreseen that Pacific whiting would be a much more important component of the West Coast groundfish fisheries as well as a potential target of Alaska fishers. As noted earlier, in 2005 and 2006, ex-vessel prices for whiting increased dramatically, and the industry projection is that prices will continue to rise in 2007. The U.S. OY for whiting in 2007 is down 10 percent from the 2006 level, so the supply of whiting for the U.S. industry will lead to increased competition even without new entry. The Council acted in March 2007 to further restrict non-whiting fishing due to higher than anticipated rockfish bycatch rates; this puts new pressure on those other sectors and makes whiting relatively more attractive, and could

promote shifting of effort to whiting if no action were taken to prevent it. Finally, while the OY for Alaska pollock is reduced and rationalization of the Alaska pollock fishery allows many vessels that normally fish in Alaska to set their own schedules for catching a share of the harvest. The pollock fishery would be available later in the year, if desired; these vessels (many of which have or could obtain West Coast trawl limited entry permits) could choose to fish for Pacific whiting early in the year and, when the whiting quota is reached, shift operations to Alaska to fish for pollock. These vessels have the capability (i.e., equipment and gear) to fish for whiting with little or no added cost. Taken together, these new and unforeseen conditions support a high likelihood of new entry to the whiting fishery in 2007 if no action were taken. This would result in unacceptably high risk of conservation and management problems.

## *2. The Situation Presents Serious Conservation or Management Problems in the Fishery*

As noted, the whiting stock is thoroughly monitored and assessed annually, and the results are generally accepted as presenting an accurate assessment of the stock. The U.S. and Canada have agreed to a Treaty for joint management of the stock and for sharing the harvestable surplus. Given the Council's relatively conservative harvest strategy for whiting, there is little reason for serious conservation concern about the current and future condition of the Pacific whiting stock.

However, it is also generally true that the more participants in a fishery managed under quotas, the greater the likelihood that conservation will become a concern, and especially in the case where the fishery is still subject to new entry. Quite simply, new entry encourages more intensive fishing as soon as a fishery is open as participants fear they will not catch a fair share of the available fish if they do not fish early. In turn there is greater pressure to fish hard with possibly less regard for minimizing waste or bycatch. This is especially true in the whiting fishery, in which industry cooperation has been a vital element in controlling the pace of the fishery and in sharing information so that participants would avoid areas of high bycatch and thus help each other extend the season as long as possible. As noted above, this cooperation would be less likely to continue if new entrants were allowed into the fishery without limit. A breakdown in cooperation and communication would be likely to result in an accelerated race for fish and

the consequent unacceptably high risk of excessive bycatch and fishery disruptions. If fishing is conducted more intensely, there is likely to be less care to avoid bycatch and more likelihood of "disaster" tows with extremely high bycatch levels. This would be especially true if the new entrants were high capacity vessels with a need to fill up fast to cover costs, or if the vessel were captained by a person not familiar with the fishery and unable to adjust to high bycatch rates. This could lead to early closure of the whiting fishery if bycatch limits are reached; it is important to note that if a bycatch limit is reached, even if only by one sector, fishing by all sectors of the whiting fishery must cease. For perspective, in early June 2004 a vessel in the mothership sector had a single tow of fish estimated to contain 3.9 mt of canary, which is equal to 83 percent of the 2007 whiting fishery bycatch limit for non-tribal whiting fisheries. An accelerated race for fish could well result in closure of the whiting fishery before the annual quota of whiting is reached, resulting in serious loss of income and employment both to fishers and to processing facilities. Accelerated fishing for Pacific whiting in the spring is also likely to result in incidental catches of salmon in excess of the incidental take allowances under biological opinions issued under the ESA. Also, as pointed out above, the yield per fish is greater later in the season than earlier, so pressure to fish early is likely to result in less usable and less valuable product.

In summary, allowing new entry to the whiting fishery in 2007 is likely to result in serious conservation and management problems.

The situation can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

The benefit of immediate action is that it provides for greater stability in the 2007 Pacific whiting fishery while the Council completes action on the amendment to manage the fishery over the long term, possibly including conservation and management measures to deal with AFA impacts as well as the impacts of otherwise unlimited entry into the whiting fishery. The Council can use its established planning process and the Secretary can use notice and comment rulemaking procedures for implementing the long-term strategy and measures. There is little cost as only new entry would be prohibited; any

vessels that participated prior between January 1, 1997, and December 31, 2006, inclusive, would be eligible to participate in 2007. It can be argued that the fishery is already overcapitalized, but at least there would not be further overcapacity due to additional new entry to the fishery for short-term gain at the expense of those with a long-standing interest in the fishery.

It is known that at least one party invested in 2006 by buying limited entry permits and aggregating them for application of a single permit on a single vessel intended to participate in the whiting fishery in 2007. There may be other such situations. The regulations for the limited entry permit program currently do not allow a permit established through aggregation of multiple permits to be subsequently disaggregated. However, to alleviate financial harm to any who in good faith made investments as described, the emergency rule provides for an exception from the prohibition against disaggregation of permits. The investor(s) may then be able to recapture at least a portion of the investment that might otherwise be lost. In addition, one party is known to have tried to register a permit for use on a "prohibited" vessel; the rule includes a provision allowing such parties to register their permits for alternate, eligible vessels in such cases.

As noted above, NMFS has established that 1997 is the initial year for which sector participation will be considered in determining eligibility for a particular sector of the whiting fishery in 2007. State landings data, Pacific Fishery Information Network (PacFIN) data, observer data, and NORPAC industry reports as appropriate to the sector, will be the sole evidence to demonstrate the sector-specific eligibility of vessels.

## **Classification**

The Assistant Administrator finds good cause under 5 U.S.C. 553(b)(B) to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable and contrary to the public interest.

The season for the primary West Coast Pacific whiting fishery opened April 15 south of 42° N. latitude (lat.) and opens May 15 south of 42° N. lat. The normal seasonal pattern of the fishery (and the pattern that the Council believes is necessary to prevent adverse impacts on fish stocks as well as on established fisheries) is to have relatively little fishing early in the season with expanded fishing later in the year, and with the fishery extending through the summer. This has been achieved in

recent years, at least in part, because of voluntary action by an industry group that has worked hard to ensure that the season will last well into the summer or fall as long as the whiting quota allows it. This allows less fishing when there are high bycatch rates for rockfish and salmon, and more fishing when bycatch rates are lower.

As noted above, there were several new pieces of information supporting the expectation of additional entry to the fleet in 2007. First, the price for whiting continues to increase to unprecedented levels, ex-vessel prices have increased from \$77 per ton in 2004 to \$137 per ton in 2006—nearly doubling since 2004, and increasing by over 22% compared to 2005. Industry projections for 2007 are that prices will continue to increase to over \$176 per ton. Second, the U.S. Optimum Yield of whiting was reduced by 10% for the 2007 season compared to 2006. Third, because of higher than projected rockfish bycatch rates, the Council took action in March that placed more severe constraints on non-whiting groundfish fishing. Fourth, the quota for Alaskan pollock was reduced this year. All of these recent changes increase the chance of an accelerated race for fish: The first by making entry more lucrative for additional vessels, the second by constraining supply of whiting and leading to more pressure among vessels to quickly capture the more limited supply of whiting, and the third and fourth by increasing the relative attractiveness of entering the whiting fishery this year.

Without this emergency rule, new entry is likely early in the season; if this happens, the voluntary limitation of early season fishing will likely cease to be effective, resulting in more intensive early season fishing and higher bycatch levels. It also would likely result in early achievement either of a bycatch limit (causing early closure of the whiting fishery) or of the whiting catch quota (also causing early closure of the whiting fishery). Fishers from Alaska could return to Alaska; West Coast-based vessels would not have that alternative and would either be idled or would add to pressure in the severely constrained other sectors of the groundfish fishery. In the worst case, the whiting fishery would catch so much in excess of its rockfish bycatch limits that the Council would be forced to impose even more limits on the other groundfish fishery sectors to keep total bycatch within the total limits. The emergency rule maintains the status quo in the fishery at least through 2007, while the Council develops a long-term management program to achieve

stability for the future. Providing opportunity for prior notice and public comments on the Council's requested action for 2007 would delay the rule to the extent that the benefits of the rule would be nullified and the protection of the resources intended by the rule would not be provided.

The proposed action will have beneficial effects on current participants in the Pacific whiting fishery and on participants in other groundfish fisheries. Without this action, it is fairly certain that there would be additional entry into the fishery, meaning greater competition for the available harvest (the U.S. whiting OY is reduced by 10% from the 2006 harvest level) and a greater likelihood of an "accelerated race for fish." This would be expected to result in early closure of the directed whiting fishery, which in turn could lead to idle capacity (for those who do not have the ability to shift to other fisheries or other groundfish sectors) or excess capacity shifting to other groundfish fisheries. Such a shift would exacerbate the economic difficulty being experienced in those non-whiting sectors due to severe constraints on fishing levels and areas available for fishing. In one possible scenario, the no action alternative would result in rockfish bycatch limits for the groundfish fisheries being exceeded in the whiting fishery at levels that would require additional reductions in other groundfish fishing sectors targeting healthy groundfish stocks.

Therefore, NMFS has concluded it is impracticable and contrary to the public interest to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(B). For the same reasons as discussed above, the Assistant Administrator also finds that good cause exists under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness of this rule. As previously discussed, this rule is necessary to prevent the conservation and management problems that would arise from additional entry to the Pacific whiting fishery in 2007. Without this rule, there will be new entry, and current stability in the fishery, with low bycatch of rockfish and salmon, will likely dissolve. This would pose an unacceptable risk of excessive bycatch of overfished rockfish and of salmon as well as an unacceptable risk of severe management problems in the economically stressed groundfish fishery.

This temporary rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

An environmental assessment was prepared for this action under the National Environmental Policy Act and a Finding of No Significant Impact was signed on May 4, 2007.

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

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

Fisheries, Fishing.

Dated: May 11, 2007.

**William T. Hogarth,**

*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 continues to read as follows:

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

■ 2. In § 660.306, paragraph(f)(6) is added to read as follows:

#### § 660.306 Prohibitions.

\* \* \* \* \*

(f) \* \* \*

(6) Fish for or land whiting, or process whiting at sea, while participating in a specific sector (as defined at § 660.373(a)), from May 14, 2007 and through November 13, 2007 with a vessel that has no history of participation within that specific sector of the whiting fishery in the period after December 31, 1996, and prior to January 1, 2007, as specified in § 660.373(j).

■ 3. In § 660.333, paragraph (f) is added to read as follows:

#### § 660.333 Limited entry fishery—eligibility and registration.

\* \* \* \* \*

(f) *Limited entry permits indivisible.*

Notwithstanding paragraph (d), a trawl-endorsed limited entry permit that was created between December 31, 2006, and May 14, 2007 by aggregating multiple limited entry permits under § 660.335(b) may be disaggregated back into the initially combined component permits.

■ 4. In § 660.335, paragraph (f)(3) is added to read as follows:

#### § 660.335 Limited entry permits—renewal, combination, stacking, change of permit ownership, and transfer.

\* \* \* \* \*

(f) \* \* \*

(3) Any transfer of a trawl-endorsed limited entry permit that occurred between December 31, 2006, and May 14, 2007 may be rescinded by the permit

owner without counting against that permit owner's once per calendar year restriction on frequency of permit transfers for the 2007 calendar year.

\* \* \* \* \*

■ 5. In § 660.373, paragraph (j) is added to read as follows:

**§ 660.373 Pacific whiting (whiting) fishery management.**

\* \* \* \* \*

(j) *2007 Pacific whiting fishery.* (1) In general, a person may fish for or land whiting or process whiting at sea in a sector of the whiting fishery (as defined at § 660.373(a)) between May 17, 2007 and November 13, 2007 only with a vessel that has history of participation in that sector of the whiting fishery in the period after December 31, 1996, and prior to January 1, 2007. Specifically:

(i) To harvest whiting in the shore-based sector between May 17, 2007 and November 13, 2007, a vessel must have harvested for delivery to a shore-based processor at least 4000 lbs (1.81 mt) of whiting in a single trip during the

primary season (as defined at § 660.373(b)) in the period after December 31, 1996, and prior to January 1, 2007. State fish ticket data collected by the states and maintained by Pacific States Marine Fisheries Commission's Pacific Fishery Information System is the sole evidence to demonstrate participation in this sector.

(ii) To harvest whiting in the mothership sector between May 17, 2007 and November 13, 2007, a vessel must have harvested whiting for delivery to motherships in the period after December 31, 1996, and prior to January 1, 2007. Observer data collected by the Northwest Fisheries Science Center and by North Pacific Groundfish Observer Program as organized under the Alaska Fisheries Science Center's NORPAC database is the sole evidence to demonstrate participation in this sector.

(iii) To process whiting in the mothership sector between May 17, 2007 and November 13, 2007, a vessel must have processed at sea, but not

harvested, whiting in the period after December 31, 1996, and prior to January 1, 2007. Observer data collected by the Northwest Fisheries Science Center and by North Pacific Groundfish Observer Program as organized under the Alaska Fisheries Science Center's NORPAC database is the sole evidence to demonstrate participation in this sector.

(iv) to harvest and process whiting in the catcher-processor sector between May 17, 2007 and November 13, 2007, a vessel must have harvested and processed whiting in the period after December 31, 1996, and prior to January 1, 2007. Observer data collected by Northwest Fisheries Science Center and by North Pacific Groundfish Observer Program as organized under the Alaska Fisheries Science Center's NORPAC database is the sole evidence to demonstrate participation in this sector.

(2) [Reserved]

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