

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** This action is authorized by regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California.

The 2008 non-tribal commercial OY for Pacific whiting is 232,545 mt. Regulations at 50 CFR 660.323(a)(2) divide the commercial Pacific whiting optimum yield (OY) into separate allocations for the catcher/processor, mothership, and shore-based sectors. The catcher/processor sector is composed of vessels that harvest and process Pacific whiting. The mothership sector is composed of catcher vessels that harvest Pacific whiting and mothership vessels that process, but do not harvest. The shore-based sector is composed of vessels that harvest Pacific whiting for delivery to land-based processors. Each commercial sector receives a portion of the commercial OY. For 2008 the catcher/processors initially received 34 percent (79,065 mt), the motherships received 24 percent (55,811 mt), and the shore-based sector received 42 percent (97,669 mt).

On November 5, 2008, 20,000 mt of the 97,669 mt shore-based sector's allocation was reapportioned to the catcher/processor and mothership sectors (73 FR 72739, December 1, 2008). The revised Pacific whiting allocations by sector as of November 6, 2008 were: catcher/processor 90,789 mt, mothership 64,087 mt, and shore-based 77,669 mt. On November 18, 2008, an additional 15,000 mt of the shore-based sector's allocation was reapportioned to the catcher/processor sector (73 FR 72739, December 1, 2008). The revised Pacific whiting allocations by sector as of November 18, 2008 were: catcher/processor 105,789 mt, mothership 64,087 mt, and shore-based 62,669 mt.

The best available information on November 26, 2008, indicated that 4,000 mt of the shore-based sector allocation and 6,000 mt of mothership sector allocation would not be used by December 31, 2008. Therefore the surplus Pacific whiting was reapportioned from the shore-based and mothership sectors to the catcher/processor sector on November 26, 2008. Facsimiles directly to fishing businesses and postings on the Northwest Regions internet site were used to provide actual notice to the affected fishers.

**NMFS Action**

This action announces the reapportionment of 4,000 mt of Pacific whiting from the shore-based sector and 6,000 mt of Pacific whiting from the mothership sector to the catcher/processor sector at 1400 local time November 26, 2008. As of November 26, 2008, the revised Pacific whiting allocations by sector for 2008 were: catcher/processor 115,789 mt, mothership 64,087 mt, and shore-based 77,669 mt.

**Classification**

The determinations to take these actions were based on the most recent data available. The aggregate data upon which the determinations were based are available for public inspection at the Office of the Regional Administrator (see **ADDRESSES**) during business hours.

This action is authorized by the regulations implementing the FMP. The Assistant Administrator for Fisheries, NMFS, finds good cause to waive the requirement to provide prior notice and opportunity for comment on these actions pursuant to 5 U.S.C. 553 (3)(b)(B), because providing prior notice and opportunity would be impracticable. It would be impracticable because of the need for immediate action. NMFS has determined that providing an opportunity for prior notice and comment would be impractical and contrary to public interest. Delay of this action would leave Pacific whiting unharvested. In addition, the catcher/processors needed an immediate reallocation if they were to keep their workers employed. For these same reasons the agency finds good cause to waive the 30-day delay in effectiveness. These actions are taken under the authority of 50 CFR 660.323(c), and are exempt from review under Executive Order 12866. Actual notice of the reapportionments was provided to the affected fishers.

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

Dated: February 9, 2009.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. E9-3022 Filed 2-11-09; 8:45 am]

**BILLING CODE 3510-22-S**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 665**

[Docket No. 0811281532-9086-02]

RIN 0648-XL64

**Fisheries in the Western Pacific; Bottomfish and Seamount Groundfish Fisheries; 2008-09 Main Hawaiian Islands Bottomfish Total Allowable Catch**

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

**ACTION:** Final specification.

**SUMMARY:** NMFS specifies a total allowable catch (TAC) for the 2008-09 fishing year of 241,000 lb (109,316 kg) of Deep 7 bottomfish in the main Hawaiian Islands (MHI).

**DATES:** This final specification is effective March 16, 2009.

**ADDRESSES:** Copies of the Fishery Management Plan for Bottomfish and Seamount Groundfish Fisheries of the Western Pacific Region (Bottomfish FMP) and related Environmental Impact Statement are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808-522-8220, fax 808-522-8226, or [www.wpcouncil.org](http://www.wpcouncil.org).

An environmental assessment (EA), including a Regulatory Impact Review (RIR), was prepared that describes the impact on the human environment that would result from this action. Copies of the EA are available from [www.regulations.gov](http://www.regulations.gov), or William L. Robinson, Regional Administrator, NMFS Pacific Islands Region (PIR), 1601 Kapiolani Blvd. 1110, Honolulu, HI 96814.

**FOR FURTHER INFORMATION CONTACT:** Toby Wood, Sustainable Fisheries Division, NMFS PIR, 808-944-2234.

**SUPPLEMENTARY INFORMATION:** This final specification is also accessible at [www.gpoaccess.gov/fr](http://www.gpoaccess.gov/fr).

NMFS specifies a TAC for the 2008-09 fishing year of 241,000 lb (109,316 kg) of Deep 7 bottomfish in the MHI, as recommended by the Western Pacific Fishery Management Council (Council). The Council recommended that TAC based on the best available scientific, commercial, and other information, taking into account the associated risk of overfishing. The MHI Management Subarea refers to the portion of U.S. EEZ

around the Hawaiian Archipelago lying to the east of 161° 20' W. long. The Deep 7 bottomfish are onaga (*Etelis coruscans*), ehu (*E. carbunculus*), gindai (*Pristipomoides zonatus*), kalekale (*P. sieboldii*), opakapaka (*P. filamentosus*), lehi (*Aphareus rutilans*), and hapu'upu'u (*Epinephelus quernus*).

When the TAC is projected to be reached, NMFS will close the non-commercial and commercial Deep 7 bottomfish fisheries until the end of the fishing year (August 31, 2009). During a fishery closure for Deep 7 bottomfish, no person may fish for, possess, or sell any of these fish in the MHI, except as otherwise authorized by law. Specifically, fishing for, and the resultant possession or sale of, Deep 7 bottomfish by vessels legally registered to Mau Zone, Ho omalu Zone, or Pacific Remote Island Areas bottomfish fishing permits, and conducted in compliance with all other laws and regulations, are not affected by the closure. There is no prohibition on fishing for or selling other non-Deep 7 bottomfish species throughout the year.

All other management measures continue to apply in the MHI bottomfish fishery. The MHI bottomfish fishery reopened on November 15, 2008, and will continue until August 31, 2009, unless the fishery is closed prior to August 31 as a result of the TAC being reached.

Additional background information on this final specification may be found in the preamble to the proposed specification published on December 10, 2008 (73 FR 75057), and is not repeated here.

### Comments and Responses

On December 10, 2008, NMFS published a proposed specification and request for public comments on the MHI bottomfish TAC (73 FR 75057). The comment period ended on December 26, 2008. NMFS received public comment regarding the proposed TAC, and responds as follows:

*Comment 1:* The proposed TAC specification's estimated 40 percent risk of overfishing is unacceptably high and is inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and National Standard 1. Although the Magnuson-Stevens Act states that a TAC cannot exceed the recommendation of the Council's Scientific and Statistical Committee (SSC), it does not preclude NMFS from selecting an ACL that is lower.

*Response:* Consistent with National Standard 3 of the Magnuson-Stevens Act, bottomfish in the Hawaiian Archipelago are managed as a unit

throughout their range which includes both the MHI and the Northwestern Hawaiian Islands (NWHI) portions of the archipelago. For the purposes of National Standard 1 and status of stock determinations, bottomfish stocks are assessed on an archipelagic-wide basis. Currently, bottomfish stocks in the Hawaiian Archipelago are not overfished and are not subject to overfishing. Establishment of a Deep 7 bottomfish TAC is a precautionary measure to prevent localized stock depletion in the MHI Management Subarea. The updated stock assessment conducted by the NMFS Pacific Islands Fisheries Science Center (PIFSC) in 2008 indicates that the selection of a Deep 7 bottomfish TAC of 241,000 lb (109,316 kg) for the MHI Management Subarea in fishing year 2008–09 results in a zero percent risk of overfishing in the Hawaiian Archipelago. In other words, a TAC of 241,000 lb (109,316 kg) provides a 100 percent probability of preventing overfishing while at the same time allowing for optimum yield to be produced from the fishery.

With respect to the MHI Management Subarea alone, the updated stock assessment indicates that this TAC would have a 40 percent risk of localized stock depletion (i.e., a 60 percent probability of preventing localized stock depletion) in fishing year 2008–09, decreasing to a 25 percent risk of localized stock depletion (i.e., 75 percent probability of preventing localized stock depletion) in fishing year 2009–10. The TAC was specified at a level that balances the need to protect stocks from archipelagic overfishing and localized stock depletion in the MHI, with the need for fishermen to be able to achieve optimum yield from the fishery. Therefore, the TAC of 241,000 lb (109,316 kg) offers a reasonable assurance of preventing overfishing, is consistent with the Magnuson-Stevens Act and National Standard 1, and forms the basis of ongoing management of the fishery through future TACs.

Additionally, other conservation and management efforts have been implemented by Federal and State of Hawaii authorities for the specific purpose of protecting bottomfish stocks of the Hawaiian Archipelago. The Papahānaumokuākea Marine National Monument (Monument) closed much of the historical bottomfish grounds in the NWHI via a network of no-take marine protected areas. Monument provisions also require that all bottomfish fishing in the NWHI cease on June 15, 2011. Thus, bottomfish fishing mortality in the NWHI will be reduced to zero. In addition, the State manages 12 Bottomfish Restricted Fishing Areas in

the MHI where bottomfish fishing is prohibited. Together, these measures complement the 2008–09 TAC of 241,000 lb (109,316 kg) for the MHI, and support the long term sustainability of bottomfish stocks throughout the Hawaiian Archipelago.

*Comment 2:* The Magnuson-Stevens Act stipulates that annual catch limits and TACs should be set to prevent overfishing, but selecting a TAC based on a 40 percent risk of overfishing virtually ensures that it will occur frequently in this sector of the fishery. Although the predicted risk of archipelagic overfishing in the model presented to the Council is negligible, localized depletion is still a matter of serious concern from a biological standpoint.

*Response:* The TAC specification for the MHI is a precautionary and interim management measure implemented to prevent archipelagic overfishing and localized stock depletion in the MHI, while allowing for optimum yield to be achieved from the fishery on a continual basis. This is distinct from the new provisions of the reauthorized Magnuson-Stevens Act relating to establishment of annual catch limits (ACLs). With few exceptions, National Standard 1 guidelines require FMPs to establish ACL mechanisms and accountability measures (AMs) for all stocks and stock complexes in the fishery. The Council is currently developing alternative mechanisms to establish ACLs for all management unit species, including bottomfish. NMFS continues to work with the Council to develop ACLs and AMs for implementation through future rulemaking.

The specified TAC is projected to have a 100-percent probability of success in preventing archipelagic overfishing, and a 60-percent probability of success in preventing localized stock depletion in the MHI in 2008–09, increasing to a 75-percent probability of success in preventing localized stock depletion in 2009–10. Real-time monitoring of the bottomfish harvest enables NMFS and the State of Hawaii to project when the TAC will be reached and, thus, close the non-commercial and commercial bottomfish fisheries in Federal and State waters, respectively, so that the TAC is not exceeded, further reducing the risk of archipelagic overfishing and localized stock depletion in the MHI.

*Comment 3:* A multispecies stock assessment, such as that used to assess the Hawaii bottomfish fishery, can mask problems that exist for individual species. Thus, management strategies should be precautionary and

conservative. Also, a 40-percent risk of overfishing for the bottomfish complex, as a whole, may represent an even higher level of risk for fish species that are currently stressed, and particularly for a species with relatively high market values, such as onaga.

*Response:* While multispecies stock assessments may potentially mask problems that exist for individual species, data that are needed to develop species-specific stock assessments are lacking at this time. National Standard 3 requires management of stocks throughout their range, and for interrelated stocks, management as a unit or in close coordination. In addition, while National Standard 1 requires that MSY should be estimated on a stock-by-stock basis whenever possible, it does provide that in the case of mixed-stock fisheries, MSY can be specified on one or more species as an indicator for the fishery as a whole. NMFS has adopted this multispecies assessment approach for Hawaiian bottomfish stocks, until such time data are sufficient to assess individual species. NMFS will continue to work with the Council, State of Hawaii, and other management partners to improve fishery monitoring programs, and will continually reassess the status of bottomfish stocks and may modify management measures, as needed.

*Comment 4:* Localized depletion and overfishing of bottomfish stocks is also a matter of concern for the fishing community. Informing MHI bottomfish fishermen that the lack of fish in the MHI is no longer a management concern because there are plenty at distant atolls in the NWHI does nothing to change the amount of fish available to them.

*Response:* The management measures and distance from population centers provides protection for bottomfish in the NWHI, and the recent archipelagic stock assessment indicates that bottomfish stocks are not overfished or subject to overfishing. Nonetheless, the Council and NMFS are concerned about the status of Deep 7 bottomfish stocks in the MHI. The specified TAC and related management measures, including non-commercial fishing permits, data collection program, and bag limits, considered with the State of Hawaii's commercial data collection program and Bottomfish Restricted Fishing Areas, are intended to better monitor and protect bottomfish in the MHI, while providing adequate opportunity for fishermen to achieve optimum yield.

*Comment 5:* The American Fisheries Society (AFS) has recommended that fishing mortality for the snapper-grouper complex be maintained "at or near natural mortality." Given the life-

history characteristics of bottomfish, and uncertainty about their fishing and natural mortality, additional caution should be exercised with respect to all policy decisions, including selection of an acceptable level of risk of overfishing.

*Response:* The PIFSC 2008 bottomfish stock assessment incorporated the best available biological information, and updated bottomfish catch and effort data through 2007. The assessment applied a statistical log-linear model to develop a spatially standardized CPUE series for the MHI and estimate bottomfish biomass, catch, and relative biomass for 2008–10. The Council and NMFS considered and discussed the available information, and the specification of a TAC of 241,000 lb (109,316 kg) for the MHI was determined to be consistent with the Magnuson-Stevens Act and National Standards.

*Comment 6:* NMFS has offered no specific guidance on acceptable levels of risk, although the Magnuson-Stevens Act does specify that it be "low." Discussions at a stock assessment symposium at the 2007 meeting of the AFS suggested that an overall risk of overfishing of 10 percent would be prudent (considering scientific and management uncertainty), and values up to 20 percent could be an acceptable upper limit of risk.

*Response:* The TAC of 241,000 lb (109,316 kg) provides a 100 percent probability of success in preventing archipelagic overfishing and, in the MHI, a 60 percent probability of success in preventing local stock depletion in fishing year 2008–09, increasing to a 75 percent probability of success in preventing local stock depletion in the MHI in fishing year in 2009–10. The Council and NMFS are required to establish ACLs and AMs for all fisheries by 2011.

*Comment 7:* The Magnuson-Stevens Act states that proposed TACs should incorporate both scientific and management uncertainty to reduce the risk of overfishing. However, the current risk assessment incorporates only scientific uncertainty, and does not consider management uncertainty (e.g., underreported or incorrectly reported fishing activity). As such, the analysis underestimates the overall risk of overfishing. Additionally, multiple models recently presented at the Council's Scientific and Statistical Committee (SSC) provided divergent conclusions about the state of the present fishery and its likely trajectory under various potential management frameworks. Considering these factors, it is prudent to apply a cautious and conservative management approach

until these discrepancies can be resolved.

*Response:* In addition to the scientific uncertainty considered in the updated stock assessment, when recommending the 2008–09 TAC the Council also considered the lag in fisheries data collection, and considered the possibility that the actual catch would exceed the specified TAC limit. This resulted in the Council recommending a TAC that is less than the 254,000 lb (115,212 kg) TAC that was initially recommended by the Council's SSC. NMFS will continue to monitor the fisheries and update stock assessments, and may modify management measures, if warranted.

*Comment 8:* At the 143rd Council meeting, the State of Hawaii representative proposed a 2008–09 TAC of 178,000 lb (80,739 kg). This TAC was suggested considering a prudent and low level of risk based on the multispecies nature of the stock assessment, localized depletion of bottomfish stocks and component species in the MHI, life history characteristics of component species, and scientific and management uncertainty. Of the proposed alternatives published in the proposed rule, we note that this is the only TAC that fits within the prudent levels of risk suggested by stock assessment scientists at the AFS meeting.

*Response:* See responses to comments above. The Council and NMFS specified a TAC of 178,000 lb (80,739 kg) for the 2007–08 fishing year. Considering that the Deep 7 bottomfish fisheries were closed for nearly seven months (from April 16, 2008, to November 15, 2008), and to balance the need to prevent archipelagic overfishing and localized stock depletion with the need to achieve optimum yield, the specified TAC for 2008–09 is higher. The Council and NMFS will consider all information when assessing bottomfish stocks and specifying future TACs, including AFS recommendations.

#### Classification

The Regional Administrator, NMFS PIR, determined that this final specification is necessary for the conservation and management of the MHI bottomfish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

A final regulatory flexibility analysis (FRFA) was prepared. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA and NMFS responses to those comments, and a summary of the

analyses completed to support the action. The analysis follows:

NMFS prepared this FRFA for the 2008–09 MHI bottomfish TAC pursuant to section 604 of the Regulatory Flexibility Act. This FRFA incorporates the IRFA, which appeared in its entirety in the Classification section of the proposed rule (73 FR 75057; December 10, 2008) and is not repeated in its entirety here.

The need for, and objectives of, the action are provided in the preambles to the proposed and final specifications. This action does not duplicate, overlap, or conflict with any other Federal rules. There are no reporting, recordkeeping, or other compliance requirements in the final specification. This action is taken under authority of the Magnuson-Stevens Act and implementing regulations at 50 CFR § 665.72. No comments were received on the IRFA.

The Small Business Administration defines a commercial fishing business as a small entity if annual gross receipts are less than \$4.0 million. All bottomfish vessels impacted by this specification are considered to be small entities under this definition. There are approximately 380 vessels engaged in the commercial harvest of MHI bottomfish. The majority of the 380 vessels comprising the affected universe are under 30 ft (9.1 m) in length overall. There are no disproportionate economic impacts from this specification based on home port, gear type, or relative vessel size.

#### Minimizing Economic Impacts on Small Entities

This rule would not have an adverse economic impact to small entities because the 2008–09 TAC of 241,000 lb (109,316 kg), if taken, would produce \$3,266 in average per-vessel revenue, as compared to \$2,412 in average per-vessel revenue realized for the 2007–08 fishery.

NMFS considered two alternative TACs that were larger than the one specified, including 249,000 lb (112,944 kg) yielding a potential \$3,375 in average per-vessel revenue, and 271,000 lb (122,923 kg) yielding a potential \$3,673 in average per-vessel revenue. Although both of these alternatives could generate larger average revenues than the selected alternative, their specification could also result in localized depletion of MHI bottomfish, which is inconsistent with National Standard 1 of the Magnuson-Stevens Act.

#### Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” As part of this rulemaking process, a small entity compliance guide was prepared. Copies of the small entity compliance guide are available from the Regional Administrator (see ADDRESSES) and are also available at [www.fpir.noaa.gov/SFD/SFD\\_regs\\_2.html](http://www.fpir.noaa.gov/SFD/SFD_regs_2.html).

This action is exempt from the procedures of E.O. 12866 because this action contains no implementing regulations.

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

Dated: February 9, 2009.

**Samuel D. Rauch III,**

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

[FR Doc. E9–3049 Filed 2–11–09; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XN23

#### Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Processors Using Hook-and-Line Gear in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific cod by catcher processors using hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allowance of the 2009 Pacific cod total allowable catch (TAC) allocated to catcher processors using hook-and-line gear in the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), February 6, 2009, through 1200 hrs, A.l.t., June 10, 2009.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2009 Pacific cod TAC allocated to catcher processors using hook-and-line gear in the BSAI is 37,660 metric tons (mt) as established by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008). See § 679.20(a)(7)(ii)(A)(4), § 679.20(a)(7)(iv)(A)(2), § 679.20(c)(3)(iii), and § 679.20(c)(5).

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that the A season allowance of the 2009 Pacific cod directed fishing allowance allocated to catcher processors using hook-and-line gear in the BSAI has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher processors using hook-and-line gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

#### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by to catcher processors using hook-and-line gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 4, 2009.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by section 679.20 and is exempt from review under Executive Order 12866.

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

Dated: February 9, 2009.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E9–3013 Filed 2–9–09; 4:15 pm]

**BILLING CODE 3510–22–S**