

FINAL REGULATORY FLEXIBILITY ANALYSIS

2020 PACIFIC WHITING HARVEST SPECIFICATIONS AND 2020 TRIBAL ALLOCATION

MAY 13, 2020

As applicable, rulemakings must comply with Executive Order (E.O.) 12866 and the Regulatory Flexibility Act (RFA). To satisfy the requirements of E.O. 12866, the National Marine Fisheries Service (NMFS) undertakes a regulatory impact review (RIR). To satisfy the requirements of the RFA, NMFS prepares an initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA), or a certification.

The NMFS Economic Guidelines that describe the RFA and E.O. 12866 can be found at:
<http://www.nmfs.noaa.gov/op/pds/documents/01/111/01-111-05.pdf>

The RFA, 5 U.S.C. § 601 *et seq.*, can be found at:
http://www.nmfs.noaa.gov/sfa/laws_policies/economic_social/rfa_revised_through_2010_jobs_act.pdf

Executive Order 12866 can be found at:
http://www.nmfs.noaa.gov/sfa/laws_policies/economic_social/eo12866.pdf

FINAL REGULATORY FLEXIBILITY ANALYSIS CONSIDERATIONS AND REQUIREMENTS

The RFA, 5 U.S.C. 603 *et seq.*, requires government agencies to assess the effects that regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize those effects. When an agency proposes regulations, the RFA requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact on small businesses, non-profit enterprises, local governments, and other small entities. The IRFA is to aid the agency in considering all reasonable regulatory alternatives that would minimize the economic impact on affected small entities. Under the RFA, an agency does not need to conduct an IRFA and/or Final Regulatory Flexibility Analysis (FRFA) if an agency can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. To certify, the agency needs to state the basis and purpose of the rule, describe and estimate the number of small entities to which the rule applies, estimate economic impacts on small entities, by entity size and

industry, and explain the criteria used to evaluate whether the rule would impose “significant economic impacts.”

Under the RFA, the term “small entities” includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration (SBA) has established size criteria for entities involved in the fishing industry. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$11 million for all its affiliated operations worldwide (see 80 FR 81194, December 29, 2015). For marinas and charter/party boats, a small business now defined as one with annual receipts, not in excess of \$7.5 million. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A small organization is any nonprofit enterprise that is independently owned and operated and is not dominant in its field. Small governmental jurisdictions such as governments of cities, counties, towns, townships, villages, school districts, or special districts are considered small jurisdictions if their populations are less than 50,000. Effective February 26, 2016, a seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (See NAICS 311710 at 81 FR 4469; January 26, 2016). For purposes of rulemaking, NMFS is also applying the seafood processor standard to catcher processors because whiting C/Ps earn the majority of the revenue from processed seafood product.

RIR/RFA Analyses

The Analyses below addresses both the RIR and RFA requirements.

Description of the Management Objectives & Legal Authority

This final rule determines the 2020 coastwide Total Allowable Catch (TAC) for Pacific whiting, establishes the U.S. TAC for Pacific whiting based on the coastwide TAC, establishes the 2020 Pacific whiting tribal allocation for Pacific Coast Indian tribes that have a Treaty right to harvest groundfish, establishes allocations for the three non-tribal commercial Pacific whiting sectors and establishes the Pacific Fishery Management Council (Council) recommendation of 1,500 mt Pacific whiting research set-aside for 2020. NMFS has reapportioned Pacific whiting from the tribal to the non-tribal sectors in ten of the past eleven years, after consultation with the participating tribe to ensure such reapportionments will not limit tribal harvest opportunities. The timing of reapportionment in the regulation was intended to allow for the tribal fishery to proceed to a point where it could likely be determined whether the full allocation would be used, while reallocating in time to allow the non-treaty sectors to catch the reallocated fish prior to the onset of winter weather conditions. In some years, the participating tribes may determine prior to September 15 that they will not use a portion of the tribal allocation.

NMFS issues this final rule for the 2020 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP), the Magnuson Stevens Fishery Conservation and Management Act Magnuson-Stevens Act), and the Pacific Whiting Act of 2006. The regulations at 50 CFR 660.50(d) establish the process by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request new allocations or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations state “the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.” These procedures have been employed by NOAA since May 31, 1996. These procedures are designed to provide a framework process by which NOAA Fisheries can accommodate tribal treaty rights by setting aside appropriate amounts of fish in conjunction with the Council process for determining harvest specifications and management measures. Since 1996, NMFS has been allocating a portion of the U.S. Total Allowable Catch (TAC) (called Optimum Yield (OY) or Annual Catch Limit (ACL) prior to 2012) of Pacific whiting to the tribal fishery. This process is done following the process established in 50 CFR 660.50(d).

Description of each alternative considered in the analysis

Using criteria identified in the Pacific Whiting Act of 2006, NMFS considered a range of alternatives for the Pacific whiting coastwide TAC. A coastwide TAC of 555,000 mt has greater economic impacts for 2020 than the coastwide TAC of 575,000 mt. Higher coastwide TACs considered in the range (597,500 mt and 666,480 mt) would have less economic impact for 2020. However, 2020 stock assessment projections indicate these higher catch levels may result in near-term stock biomass declines below target levels. This is contrary to the Whiting Act and Agreement, which requires sustainable management of the Pacific whiting resource.

NMFS considered two alternatives for the tribal allocation: the “No Action” and the “Action”. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting. Consideration of amounts lower than the tribal requests is not appropriate. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher allocation would arguably also be within the scope of the treaty right. However, a higher allocation would unnecessarily limit the non-tribal fishery.

Under the no action alternative, NMFS would not make an allocation to the tribal sector, which would not fulfill NMFS’s responsibility to manage the fishery. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Under the no-action alternative, NMFS would not make an allocation to the tribal sector, which would not fulfill NMFS’ responsibility to manage the fishery consistent with the tribes’ treaty rights. Given that there is a tribal request for allocation in 2020, this alternative received no further consideration.

Under the Action alternative, NMFS set the tribal allocation percentage at 17.5% of the U.S. adjusted TAC, as requested by the tribes. This yields a tribal allocation of 74,343 mt for 2020. In exchanges between NMFS and the tribes during November and December of 2019, the Makah tribe indicated their intent to participate in the tribal whiting fishery in 2020 and requested 17.5% of the U.S. Pacific whiting TAC. The Quileute tribe and Quinault Indian Nation indicated that they are not planning to participate in 2020. The Hoh tribe have stated that they have no plans to fish for whiting in the foreseeable future, but will contact NMFS if these plans change.

Under the Action alternative, NMFS determined the 2020 coastwide adjusted TAC of 575,000 mt of Pacific whiting, resulting in a 2020 U.S. adjusted TAC of 424,810 mt, a tribal allocation of 74,342 mt (17.5% of U.S. adjusted TAC), a research and bycatch set-aside of 1,500 mt and 348,968 mt for the non-tribal fishery.

Description of the Fishery

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

Since 1996, NMFS has been allocating a portion of the U.S. total allowable catch (TAC), referred to as Optimum Yield (OY), or Annual Catch Limit (ACL) prior to 2012, of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

Table 1. U.S. Optimum Yields (OYs) and Annual Tribal Allocation in Metric Tons (mt).

<u>Year</u>	<u>U.S. TAC ^{1/}</u>	<u>Tribal Allocation</u>
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt
2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt
2012	186,037 mt	48,556 mt
2013	269,745 mt	63,205 mt
2014	316,206 mt	55,336 mt
2015	325,072 mt	56,888 mt
2016	367,553 mt	64,322 mt
2017	441,433 mt	77,251 mt
2018	441,433 mt	77,251 mt
2019	441,433 mt	77,251 mt

¹ Beginning in 2012, the United States started using the term Total Allowable Catch, or TAC, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. Prior to 2012, the terms Optimal Yield (OY) and Annual Catch Limit (ACL) were used.

Although four tribes are potentially eligible to participate in the Pacific whiting fishery, to date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting. The Makah Tribe has typically harvested a whiting allocation every year since 1996 using midwater trawl gear. Since 1999, the tribal allocation has been made in consideration of their participation in the fishery. Table 1 provides a history of U.S. OYs/ACLs and the annual tribal allocation in metric tons (mt).

This final rule is implemented under authority of Sections 304(b) and 305(d) of the Magnuson-Stevens Act, which gives the Secretary responsibility to “carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act.” With this final rule, NMFS, acting on behalf of the Secretary, ensures that the FMP is implemented in a manner consistent with treaty rights of four Treaty Tribes to fish in their “usual and accustomed grounds and stations” in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. 1974).

Description of affected entities including the number of small entities to which the rule applies.

This final rule affects how whiting is allocated to the following sectors/programs: Tribal, Shorebased Individual Fishing Quota (IFQ) Program—Trawl Fishery, Mothership Coop (MS) Program—Whiting At-sea Trawl Fishery, and Catcher-Processor (C/P) Coop Program—Whiting At-sea Trawl Fishery. The amount of whiting allocated to these sectors is based on the U.S. TAC. From the U.S. TAC, small amounts of whiting that account for research catch and for bycatch in other fisheries are deducted. For 2020, the Council recommended 1,500 mt set-aside for research and bycatch. The amount of the tribal allocation is also deducted directly from the U.S. TAC. After accounting for these deductions, the remainder is the commercial harvest guideline. This harvest guideline is then allocated among the other three sectors as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program.

The shorebased IFQ fishery is managed with individual fishing quotas for most groundfish species, including whiting. Annually quota pounds (QP) are allocated from the shorebased sector allocation based on the individual quota shares (QS) of each QS owner. (QP is expressed as a weight and QS is expressed as a percent of the shorebased allocation for a given species or species group.) QP may be transferred from a QS account to a vessel account or from one vessel account to another vessel account. Vessel accounts are used to track how QP is harvested (landings and discards) by limited entry trawl vessels of all IFQ species/species groups. Shorebased IFQ catch must be landed at authorized first receiver sites.

The IFQ whiting quota shares (QS) were allocated to a mixture of limited entry permit holders and shorebased processors. Two non-profit organizations received quota share based on the ownership of multiple limited entry permits. The MS coop sector can consist of one or more coops and a non-coop subsector. For a MS coop to participate in the Pacific whiting fishery, it

must be composed of MS catcher-vessel (MS/CV) endorsed limited entry permit owners. Each permitted MS coop is authorized to harvest a quantity of Pacific whiting based on the sum of the catch history assignments for each member's MS/CV-endorsed permit identified in the NMFS-accepted coop agreement for a given calendar year. Each MS/CV endorsed permit has an allocation of Pacific whiting catch based on its catch history in the fishery. The catch history assignment is expressed as a percentage of Pacific whiting of the total MS sector allocation. Currently the MS sector is composed of only a single coop. The C/P coop program is a limited access program that applies to vessels in the C/P sector of the Pacific whiting at-sea trawl fishery and is a single voluntary coop. Unlike the MS coop regulations, where multiple coops can be formed around the catch history assignments of each coop's member's endorsed permit, the single C/P coop receives the total Pacific whiting allocation for the catcher/processor sector. Only C/P endorsed limited entry permits can participate in this coop.

As of January 2020, the Shorebased IFQ Program is composed of 167 Quota Share permits/accounts (134 of which were allocated whiting quota pounds), and 41 first receivers, two of which are designated as whiting-only receivers and 15 that may receive both whiting and non-whiting. The MS fishery is currently composed of a single coop, with six mothership processor permits, and 34 Mothership/Catcher-Vessel (MS/CV) endorsed permits, with three permits each having two catch history assignments. The C/P Program is composed of 10 C/P permits owned by three companies that have formed a single coop.

These regulations directly affect IFQ Quota shareholders who determine which vessel accounts receive QP, holders of mothership catcher-vessel-endorsed permits who determine how many co-ops will participate in the fishery and how much fish each co-op is to receive, and the catcher-processor co-op which is made up of three companies that own the catcher-processor permits. As part of the permit application processes for the non-tribal fisheries, based on a review of the SBA size criteria, applicants are asked if they considered themselves a "small" business, and they are asked to provide detailed ownership information. Although there are three non-tribal sectors, many companies participate in two sectors and some participate in all three sectors. All of the 34 mothership catch history assignments are associated with a single mothership co-op and all ten of the catcher-processor permits are associated with a co-op. Data on employment worldwide, including affiliates, are not available for these companies, which generally operate in Alaska as well as the West Coast and may have operations in other countries as well. NMFS has limited entry permit holders self-report size status. For 2020, all ten CP permits reported as not being small businesses, as did eight mothership catcher vessels. There is substantial, but not complete overlap between permit ownership and vessel ownership so there may be a small number of additional small entity vessel owners who will be impacted by this rule. After accounting for cross participation, multiple QS account holders, and affiliation through ownership, NMFS estimates that there are 106 non-tribal entities directly affected by these proposed regulations, 85 of which are considered "small" businesses. We expect one tribal

entity to fish in 2020. Tribes are not considered small entities for the purposes of RFA, but impacts to tribes are nevertheless considered in this analysis.

An economic analysis of the expected effects of each selected alternative relative to the No Action Alternative including estimates of economic impacts on small entities, by entity size and industry

This rule will allocate fish between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests are delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportionment process. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2019 NMFS reapportioned 40,000 mt of the original 77,251 mt tribal allocation. This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. In 2019, the tribal Pacific whiting catch was approximately 4,000 mt. This reapportioning process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2019 following the reapportionment were: Tribal 37,251 mt, C/P Coop 136,912 mt; MS Coop 96,644 mt; and Shorebased IFQ Program 169,126 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the U.S. is exported. The U.S. Pacific whiting TAC is highly variable, as have subsequent harvests and ex-vessel revenues. For the years 2015 to 2019, the total Pacific whiting fishery (tribal and non-tribal) averaged harvests of approximately 281,205 mt annually. With data available generally complete in January 2020, the 2019 U.S. non-tribal fishery had a catch of approximately 312,500 mt with the tribal fishery landing approximately 4,000 mt.

The weighted-average non-tribal shoreside price per metric ton for whiting was about \$200, with total revenue in that sector of about \$29 million, and a 2015-2019 inflation-adjusted average of approximately \$19 million. Using the 2019 shoreside price, the ex-vessel value of the at-sea whiting fishery is estimated to be about \$35 million, which is above the 2015-2019 inflation-adjusted at-sea average of \$31.5 million. The total non-tribal ex-vessel revenue in 2019 is estimated to have been about \$64 million.

Impacts to tribal catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2019 average shoreside ex-vessel price of Pacific

whiting, which was \$200 per mt. At that price, the 2020 Tribal allocation of 74,342 mt would have an ex-vessel value of \$14.9 million.

A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the final rule as a result of such comments.

NMFS received seven comment letters in response to the proposed rule. Three comments within these letters addressed the economic analysis in the IRFA. A summary of the significant issues raised follows. No substantive changes from the proposed rule were made based on comments NMFS received.

Comment 1. It is critical to consider the potential economic impacts, overall and to specific non-tribal sectors, of the proposed allocation, especially because the regulations make reapportionment of tribal whiting to non-tribal sectors dependent upon fishery wide Chinook salmon bycatch performance.

Agency Assessment 1: The economic analysis supporting the annual Pacific whiting TAC action outlines the economic impacts of the proposed tribal allocation. The purpose of the tribal allocation is to facilitate the tribes exercising their treaty right to harvest fish in their usual and accustomed fishing areas in U.S. waters. NMFS must take the necessary steps to ensure that this opportunity is available to those tribes. In 1994, the United States formally recognized that the four Washington coastal treaty Indian tribes (Makah, Quileute, Hoh, and Quinault) have treaty rights to fish for groundfish, including Pacific whiting, in the Pacific Ocean, and concluded that, in general terms, the quantification of those rights is 50 percent of the harvestable surplus of groundfish that pass through the tribes usual and accustomed fishing areas. These treaty rights are implemented by the Secretary following the procedures outlined in 50 CFR 660.60.

Regulations governing reapportionment give the Secretary discretion, but do not impose an obligation, to reapportion Pacific whiting from the tribal sector of the Pacific whiting fishery to non-tribal sectors. The reapportioning process allows the non-tribal fleet to fish unharvested tribal allocations of Pacific whiting. The economic analysis for this rule does not consider the benefits of reapportioning the tribal allocation, which is consistent with the economic analysis discussed in the 2019 final rule for Pacific whiting (84 FR 20578; May 10, 2019).

In the economic analysis for this rule, the benefits from the tribal allocation are assumed to accrue to the tribal sector, and the benefits from the non-tribal allocation are assumed to accrue to the non-tribal sectors. Reapportionment flexibility is an additional potential benefit to the non-tribal sector, only in years when the tribal sector does not prosecute the entirety of its allocation. In the economic analysis, no portion of the benefits from the tribal allocation are assumed to accrue to the non-tribal sector, which would double-count the value of the benefit of this allocation to the tribal sector.

The requirement to consider salmon bycatch as part of reapportionment is a term and condition in the 2017 Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion on the effects of the Pacific Coast Groundfish FMP on listed salmonids. Term and Condition 2c of the Biological Opinion requires that NMFS consider the level of Chinook bycatch when determining whether to reapportion whiting and the Pacific Coast Groundfish regulations were amended to require this consideration (84 FR 20578; May 10, 2019). This consideration does not remove NMFS's obligation to consider economic impacts to the entities affected by this action. However, because of the unique nature of reapportionment, NMFS's treaty trust obligations to the Pacific Coast treaty Indian tribes and ESA considerations are the ultimate drivers of that decision, rather than the economic considerations.

Comment 2. Economic harm can occur in the non-tribal whiting sectors if NMFS does not use the re-apportionment process to effectively balance the needs of the tribal and non-tribal fisheries. They further noted the importance that re-apportionment of tribal whiting to the non-tribal sectors include consideration of sector-specific Chinook bycatch and provide re-apportionment of tribal whiting to specific non-tribal sectors based on their ability to harvest additional whiting.

Agency Assessment 2: These management suggestions are outside of the scope of the measure discussed in the proposed rule but could be achieved through the Council process. In most years, NMFS has allocated reapportioned tribal Pacific whiting allocation to the non-tribal sectors based on the allocations in the Pacific Coast Groundfish FMP (i.e., 34 percent for the C/P Coop; 24 percent for the MS Coop; and 42 percent for the Shorebased IFQ Program). NMFS has also distributed reapportioned tribal whiting to specific non-tribal sectors based on concerns about Chinook salmon bycatch, and was done in 2014 (February 10, 2015; 80 FR 7390), based on recommendation by the Council. In that reapportionment action, NMFS distributed reapportioned fish to the MS and C/P sectors but not to the Shorebased IFQ sector, based on voluntary bycatch reduction measures that were taken by the MS and C/P sectors in conjunction with projected higher bycatch rates in the Shorebased IFQ sector, and the fact that the Shorebased IFQ sector had not yet attained its existing allocation. In addition, the regulations now explicitly require NMFS to consider salmon bycatch as part of the reapportionment process, based on a requirement from the 2017 ESA Section 7(a)(2) Biological Opinion on the effects of the Pacific Coast Groundfish FMP on listed salmonids (84 FR 20578; May 10, 2019). However, NMFS has only adjusted reapportionment between non-tribal sectors to address salmon bycatch considerations, and has not made adjustments based on other considerations, such as the various non-tribal sectors' ability to harvest reapportioned Pacific whiting.

NMFS notes there are many factors than can affect the non-tribal sectors' ability to harvest reapportioned Pacific whiting. The Council would need to make recommendations on the specific criteria NMFS should use to adjust reapportionment based on these factors. The Council is considering developing management alternatives to increase Pacific whiting utilization in the

MS Sector. This may provide an opportunity for other considerations about allocations to non-tribal sectors during the tribal whiting reapportionment process.

Comment 3. It is critical that re-apportionment of tribal whiting to the non-tribal sectors occur no later than September 15th.

Agency Assessment: Current regulations provide NMFS with flexibility in the timing of reapportionment and allow for reapportionment to occur prior to September 15, but do not require reapportionment to happen on or before a specific date. Revisions to the timing of the reapportionment to require it before September 15 are beyond the scope of the action discussed in the proposed rule. NMFS is responsible for consulting with the tribes to ensure that reapportionments, should they occur, will not limit tribal harvest opportunities. As explained in the RIR– IRFA, the timing of reapportionment in regulations was intended to allow for the tribal fishery to proceed to a point where it could likely be determined whether the full allocation would be used, while reallocating in time to allow the non-treaty sectors to catch the reallocated fish prior to the onset of winter weather conditions. In some years, the participating tribes may determine prior to September 15 that they will not use a portion of the tribal allocation.

As noted in the 2019 final rule for Pacific whiting (84 FR 20578; May 10, 2019), based on a review of reapportionment actions in 2012–2018, it does not appear that the timing of the reapportionment impacted operational decisions during that time period. For reference, in 2012 the non-tribal sector caught 24,142 mt more than its initial allocation, of 28,000 mt reapportioned on October 4. In 2013, after a 30,000 mt reallocation on September 18 (sixteen days earlier than in 2012), the non-tribal fishery caught 24,146 mt more than its initial allocation. The sixteen-day earlier reapportionment yielded 4 mt more catch (valued at \$1,210 in real dollars). In 2014, a 25,000 mt initial reapportionment on September 12 resulted in only 4,564 mt attained over the initial non-tribal allocation. From 2015–2018, the non-tribal fishery as a whole did not catch its initial allocation, which implies that the timing of reallocations did not likely impact operational decisions during that period. NMFS notes that in 2019, reapportionment action occurred on September 13, 2019.

Reporting and recordkeeping requirements.

There are no reporting or recordkeeping requirements with this rule.

Relevant Federal rules that may duplicate, overlap or conflict with the action.

There are no relevant Federal rules that may duplicate, overlap, or conflict with this action.

A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

This action determines the 2020 coastwide TAC of 575,000 mt, with a corresponding U.S. TAC of 424,810 mt. NMFS considered a range of alternatives for the Pacific whiting coastwide TAC, including a lower coastwide TAC of 555,000 mt and higher coastwide TACs of 597,500 mt and 666,480 mt. The lower coastwide TAC (555,000 mt) would have greater economic impacts for 2020 than the coastwide TAC of 575,000 mt. The higher coastwide TACs considered in the range (597,500 mt and 666,480 mt) would have less economic impact for 2020. However, 2020 stock assessment projections indicate these higher catch levels (e.g. 597,500 mt and 666,480 mt) may result in near-term stock biomass declines below target levels. This is contrary to the Whiting Act and Agreement, which requires sustainable management of the Pacific whiting resource.

NMFS considered two alternatives for the tribal allocation action: the “No-Action” and the “Proposed Action.” NMFS did not consider a broader range of alternatives to the proposed tribal allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting. Under the Action alternative, NMFS set the tribal allocation percentage at 17.5 percent, as requested by the tribes. This would yield a tribal allocation of 74,342 mt for 2020. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the No-Action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no-action alternative would result in no allocation of Pacific whiting to the tribal sector in 2020, which would be inconsistent with NMFS’s responsibility to manage the fishery consistent with the tribes’ treaty rights. Given that there is a tribal request for allocation in 2020, this alternative received no further consideration. *RIR-Determination of*

Significant Impact

Under E.O. 12866, a regulation is a “significant regulatory action” if it is likely to: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order. Pursuant to the procedures established to implement section 6 of E.O. 12866, the NMFS has preliminarily determined that this action is not significant.

RFA-Determination of a Significant Impact.

The Regulatory Flexibility Act requires Federal agencies to conduct a full RFAA unless the agency can certify that the proposed and/or final rule would not have a significant economic impact on a substantial number of small entities. This determination can be made at either the proposed or final rule stage. If the agency can certify, it need not prepare an IRFA, a FRFA, or a Small Entity Compliance Guide or undertake a subsequent periodic review of such rules. The NMFS Guidelines for Economic Analysis of Fishery Management Actions suggest two criteria to consider in determining the significance of regulatory impacts, namely, disproportionality and profitability. These criteria relate to the basic purpose of the RFA, i.e., to consider the effect of regulations on small businesses and other small entities, recognizing that regulations are frequently unable to provide short-term cash reserves to finance operations through several months or years until their positive effects start paying off. If either criterion is met for a substantial number of small entities, then the rule should not be certified for not having an effect on small entities. These criteria raise two questions: Do the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? Do the regulations significantly reduce profit for a substantial number of small entities?

This rule determines the coastwide TAC of 575,000 mt for Pacific whiting, and establishes the adjusted U.S.TAC of 424,810 mt, the 2020 tribal allocation of 74,342 mt, a set-aside for research and bycatch of 1,500 mt, and non-tribal allocation of 348,968 mt for 2020. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for whiting. Tribes are considered small entities. The reapportioning process allows unharvested tribal allocations of whiting, fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities. NMFS determined this rule will not adversely affect small entities, and did not receive any comments in response to the IRFA to alter this conclusion.

Prepared by Stacey Miller, NMFS, WCR (503-231-6290), 5/11/2020

Reviewed and Approved by Abigail Harley, NMFS, WCR (206-526-4273), 5/12/2020