

through e-mail, phone contact, NOAA website, and other appropriate media immediately upon issuance of the rule by the AA.

#### Classification

In accordance with section 118(f)(9) of the MMPA, the Assistant Administrator (AA) for Fisheries has determined that this action is necessary to implement a take reduction plan to protect North Atlantic right whales.

Environmental Assessments for the DAM program were prepared on December 28, 2001, and August 6, 2003. This action falls within the scope of the analyses of these EAs, which are available from the agency upon request.

NMFS provided prior notice and an opportunity for public comment on the regulations establishing the criteria and procedures for implementing a DAM zone. Providing prior notice and opportunity for comment on this action, pursuant to those regulations, would be impracticable because it would prevent NMFS from executing its functions to protect and reduce serious injury and mortality of endangered right whales. The regulations establishing the DAM program are designed to enable the agency to help protect unexpected concentrations of right whales. In order to meet the goals of the DAM program, the agency needs to be able to create a DAM zone and implement restrictions on fishing gear as soon as possible once the criteria are triggered and NMFS determines that a DAM restricted zone is appropriate. If NMFS were to provide prior notice and an opportunity for public comment upon the creation of a DAM restricted zone, the aggregated right whales would be vulnerable to entanglement which could result in serious injury and mortality. Additionally, the right whales would most likely move on to another location before NMFS could implement the restrictions designed to protect them, thereby rendering the action obsolete. Therefore, pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive prior notice and an opportunity to comment on this action to implement a DAM restricted zone to reduce the risk of entanglement of endangered right whales in commercial lobster trap/pot and anchored gillnet gear as such procedures would be impracticable.

For the same reasons, the AA finds that, under 5 U.S.C. 553(d)(3), good cause exists to waive the 30-day delay in effective date. If NMFS were to delay for 30 days the effective date of this action, the aggregated right whales would be vulnerable to entanglement, which could cause serious injury and

mortality. Additionally, right whales would likely move to another location between the time NMFS approved the action creating the DAM restricted zone and the time it went into effect, thereby rendering the action obsolete and ineffective. Nevertheless, NMFS recognizes the need for fishermen to have time to either modify or remove (if not in compliance with the required restrictions) their gear from a DAM zone once one is approved. Thus, NMFS makes this action effective 2 days after the date of publication of this document in the **Federal Register**. NMFS will also endeavor to provide notice of this action to fishermen through other means upon issuance of the rule by the AA, thereby providing approximately 3 additional days of notice while the Office of the **Federal Register** processes the document for publication.

NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001 and March 2003, the Assistant Secretary for Intergovernmental and Legislative Affairs, Department of Commerce, provided notice of the DAM program and its amendments to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rules implementing the DAM program. A copy of the federalism Summary Impact Statement for the final rules is available upon request (**ADDRESSES**).

The rule implementing the DAM program has been determined to be not significant under Executive Order 12866.

**Authority:** 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: February 17, 2009.

**Samuel D. Rauch III,**

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

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#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Part 660

[Docket No.0812171612-9134-02]

**RIN 0648-XM21**

##### Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications

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

**ACTION:** Final rule; closure of directed fishing for Pacific sardine.

**SUMMARY:** NMFS issues this final rule to implement the annual harvest guideline (HG) and management measures for Pacific sardine in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of January 1, 2009, through December 31, 2009. This HG has been determined according to the regulations implementing the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP) and establishes allowable harvest levels for Pacific sardine off the Pacific coast. This rule also announces that the directed fishing harvest total for the first allocation period (January 1 - June 30) has been reached and therefore directed fishing for Pacific sardine is now closed until July 1, 2009.

**DATES:** Effective February 20, 2009 through December 31, 2009, except for the directed harvest closure that is effective through June 30, 2009.

**ADDRESSES:** Copies of the report "Assessment of Pacific Sardine Stock for U.S. Management in 2008" or the Final Regulatory Flexibility Analysis (FRFA) prepared for this final rule may be obtained from the Southwest Regional Office, Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802.

**FOR FURTHER INFORMATION CONTACT:** Joshua Lindsay, Southwest Region, NMFS, (562) 980-4034.

**SUPPLEMENTARY INFORMATION:** The CPS FMP, which is implemented by regulation at 50 CFR part 660, subpart

I, divides management unit species into two categories: actively managed and monitored. Harvest guidelines for actively managed species (Pacific sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Biomass estimates are not calculated for species that are only monitored (jack mackerel, northern anchovy, and market squid).

During public meetings each year, the biomass for each actively managed species within the CPS FMP is presented to the Pacific Fishery Management Council's (Council) Coastal Pelagic Species Management Team (Team) and the Council's Coastal Pelagic Species Advisory Subpanel (Subpanel). At that time, the biomass, the acceptable biological catch (ABC) and the status of the fisheries are reviewed and discussed. This information is then presented to the Council along with HG recommendations and comments from the Team and Subpanel. Following review by the Council and after hearing public comment, the Council makes its HG recommendation to NMFS.

In November 2008, the Council adopted, and NMFS then approved an ABC or maximum HG of 66,932 mt for the 2009 Pacific sardine fishing year. This ABC is the result of applying a biomass estimate of 662,886 mt to the harvest control rule established in the CPS FMP. This ABC/HG is 25 percent less than the ABC/HG recommended by the Council and adopted by NMFS for the 2008 fishing season. The Council recommended, and NMFS approved, that 1,200 mt of this available ABC/HG be initially subtracted from the ABC and reserved for a potential industry-based research project. NMFS will need to issue an Exempted Fishing Permit (EFP) for such an activity to occur and will be requesting comments from the public on such an EFP prior to a decision being made. A decision on whether to issue an EFP will be made prior to the start of the second seasonal period which is July 1, 2009. If it is determined that an EFP cannot be issued then the 1,200 mt will be added to the third period's directed harvest allocation prior to the start of that period.

The Council also recommended, and NMFS approved, that the remaining 65,732 mt be used as the initial overall HG and be allocated across the seasonal periods established by Amendment 11 (71 FR 36999) and that an incidental catch set-aside of 6,500 mt be established. Subtracting this set-aside from the initial overall HG establishes an initial directed harvest fishery of 59,232 mt and an incidental fishery of 6,500 mt. The purpose of the incidental

fishery is to allow for the restricted incidental landings of Pacific sardine in other fisheries, particularly other CPS fisheries, if and when a seasonal directed fishery is closed.

The directed harvest levels and incidental set-asides are initially allocated across the three seasonal allocation periods in the following way: January 1–June 30, 22,006 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt; July 1–September 14, 25,293 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt; September 15–December 31, 11,933 mt is allocated for directed harvest with an incidental set-aside of 4,500 mt. If during any of the seasonal allocation periods the applicable adjusted directed harvest allocation is projected to be taken, the fishery will be closed to directed harvest, except for live bait harvest, and only incidental harvest will be allowed. For the remainder of the period, any incidental Pacific sardine landings will be counted against that period's incidental set-aside. The incidental fishery will also be constrained to a 20-percent by weight incidental catch rate when Pacific sardine are landed with other CPS so as to minimize the targeting of Pacific sardine. In the event that an incidental set-aside is projected to be attained, all fisheries will be closed to the retention of Pacific sardine for the remainder of the period. If the set-aside is not fully attained or is exceeded in a given seasonal period, the directed harvest allocation in the following seasonal period would automatically be adjusted to account for the discrepancy. Additionally, if during any seasonal period the directed harvest allocation is not fully attained or is exceeded, then the following period's directed harvest total would be adjusted to account for this discrepancy as well. The above in-season harvest restrictions are not intended to affect the operation of the live bait portion of the Pacific sardine fishery.

If the total HG or these apportionment levels for Pacific sardine are reached or are expected to be reached, the Pacific sardine fishery would be closed via appropriate rulemaking until it re-opens either per the allocation scheme or the beginning of the next fishing season. The Regional Administrator will publish a notice in the **Federal Register** announcing the date of such closures.

This rule announces that based on the best available information recently obtained from the fishery, the directed fishing harvest total for the first allocation period (January 1 - June 30) has been reached and therefore directed fishing for Pacific sardine is now closed

until July 1, 2009. Fishing vessels must be at shore and in the process of offloading at the time of closure.

For further background information on this action please refer to the preamble of the proposed rule (75 FR 252, January 5, 2009).

NMFS received one comment regarding the Pacific sardine annual specifications.

*Comment 1:* The commenter stated that the HG formula does not adequately take into account ecosystem needs and that of the two biomass estimates put forth by the SSC for consideration by the Council for management in 2009 that the lower biomass estimate and thus the lower resulting HG should have been chosen.

*Response:* NMFS agrees that Pacific sardine is an important prey component of the California Current ecosystem and as such the current harvest control rule formula used to determine the harvest guideline for Pacific sardine takes into account ecosystem as well as physical environmental factors. This is achieved by means of a formula that, after overall biomass is determined, takes into account the viability of the sardine stock and its value as forage when determining the guideline number. This is accomplished by a harvest rate or harvest "fraction" that is adjusted between 5 percent and 15 percent based on current ocean temperatures. Because past shifts in sardine productivity are linked with warm or cold ocean regimes a higher fraction is allotted for harvest when ocean temperatures are warmer and sardine production is greater, while the lower fraction is used when ocean temperatures are cooler and sardine production is decreased. In addition, a 150,000 mt stock biomass threshold, or "cutoff", is established below which no harvest is allowed in order to ensure a minimum spawning biomass is protected. Each year this "cutoff" number of 150,000 mt is subtracted from the overall biomass number before the harvestable biomass is calculated to take into account the importance of Pacific sardine as forage.

During the November 2008 Council meeting, the Council was presented an updated assessment of the Pacific sardine biomass along with outputs from two different model runs which resulted in two different biomass estimates (662,886 mt and 586,369 mt) and ultimately two different HGs (66,932 mt and 56,946 mt). The model run that estimated a biomass of 662,886 mt adhered to the existing assessment configuration (approved in 2007) while introducing the most recent data (i.e., 2007–08 landings, 2007–08 age/length distributions, and the Daily Egg

Production Method estimate produced from the California Cooperative Oceanic Fisheries Investigation survey in April 2008), but did not meet some of the acceptance criteria for an updated assessment under the CPS Terms of Reference (TOR). In contrast, the model run that estimated a biomass of 586,369 mt adhered more closely to the CPS TOR for updated assessments but did not include the most recent data described above. The SSC determined that both assessment results were based on the best available science, but that it was not possible to identify which better represents the "best available science," and therefore there was no scientific basis for choosing one over the other.

The Council decided to recommend the higher of the two assessment results because it incorporated the most recent data, was determined by the experts on the SSC to reflect the "best available science," and because the resulting HG would lessen the economic losses likely to result from reducing the HG compared to 2008. NMFS believes the recommendation of the Council was appropriate because the conservative nature of the harvest control rule for Pacific sardine (as described in this section) ensures the HG will not threaten the Pacific sardine stock, the fact that both assessment results constituted the best available science, and because the higher HG provides a greater opportunity to achieve optimum Yield.

### Classification

The Administrator, Southwest Region, NMFS, determined that this final rule is necessary for the conservation and management of the CPS fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

NMFS 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) for the closure of the January 1–June 30 directed harvest of Pacific sardine. For the reasons set forth below, notice and comment procedures are impracticable and contrary to the public interest. These measures respond to the best available information and are necessary for the conservation and management of the Pacific sardine resource. The most recent data from the fishery, received by NMFS on February 1, 2009, shows that reported landings as well as the current rate of fishing are significantly greater than anticipated. Based on this data, NMFS believes that the directed harvest allocation for the

period January 1 through June 30 will be attained much sooner than predicted and prior to publication of this rulemaking. A delay in effectiveness would cause the fishery to further exceed the in-season directed harvest level. These seasonal harvest levels are important mechanisms in preventing overfishing and managing the fishery at optimum yield. The established directed and incidental harvest allocations are designed to allow fair and equitable opportunity to the resource by all sectors of the Pacific sardine fishery and to allow access to other profitable CPS fisheries, such as squid and Pacific mackerel. Many of the same fishermen who harvest Pacific sardine rely on these other fisheries for a significant portion of their income. For the same reasons, NMFS finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for both the establishment of the harvest guideline and closure of the January 1–June 30 directed harvest. To help keep the regulated community informed of the potential for an early closure, NMFS advised the CPS Advisory Subpanel that based on current landings directed harvest would likely be closed before the end of February. The Subpanel is comprised of representatives from all sectors and regions of the sardine industry, including processors, fishermen, user groups, conservation groups and fishermen association representatives. As landing totals become available, they are also posted on NMFS' Southwest Regional Office website, <http://swr.nmfs.noaa.gov/>. NMFS will also announce this the harvest guidelines and closure through other means available, including fax, email, and mail to fishermen, processors, and state fishery management agencies. Therefore, NMFS finds that there is good cause to waive the 30-day delay in effectiveness in this circumstance.

This final rule is exempt from Office of Management and Budget review under Executive Order 12866.

No issues were raised by public comments in response to the IRFA or on the economic impacts of the rule generally. Therefore, no changes were made to the IRFA. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. The results of the FRFA are stated below. For copies of the FRFA please see the ADDRESSES section above.

The purpose of this final rule is to implement the 2009 HG for Pacific sardine in the U.S. EEZ off the Pacific

coast. The HG is promulgated according to the regulations implementing the CPS FMP and establishes allowable harvest levels for Pacific sardine off the Pacific coast. The HG is determined using an environmentally-based formula accounting for the effect of ocean conditions on stock productivity.

The HG is apportioned based on the following allocation scheme: 35 percent of the HG is allocated coastwide on January 1; 40 percent of the HG, plus any portion not harvested from the initial allocation is then reallocated coastwide on July 1; and on September 15 the remaining 25 percent, plus any portion not harvested from earlier allocations, will be released. If the total HG or these apportionment levels for Pacific sardine are reached at any time, the Pacific sardine fishery is closed until either it re-opens per the allocation scheme or the beginning of the next fishing season. There is no limit on the amount of catch that any single vessel can take during an allocation period or the year; the HG and seasonal allocations are available until fully utilized by the entire CPS fleet.

The small entities that are affected by this action are the vessels that compose the U.S. West Coast CPS finfish fleet.

Approximately 107 vessels are permitted to operate in the sardine fishery component of the CPS fishery: 63 permits in the Federal CPS limited entry fishery off California (south of 39° N. lat.), and a combined 44 permits in Oregon and Washington's state Pacific sardine fisheries. This final rule has an equal effect on all of these small entities and therefore will impact a substantial number of these small entities in the same manner. These vessels are considered small business entities by the U.S. Small Business Administration since the vessels do not have annual receipts in excess of \$4.0 million. Therefore, there would be no economic impacts resulting from disproportionality between small and large business entities under this action.

The profitability of these vessels as a result of this final rule are based on the average Pacific sardine ex-vessel price per mt. NMFS used average Pacific sardine ex-vessel price per mt to conduct a profitability analysis because cost data for the harvesting operations of CPS finfish vessels was unavailable.

For the 2008 fishing year the HG was set at 89,093 mt. Approximately 87,000 mt (58,000 in California and 29,000 in Oregon and Washington) of this HG was harvested during the 2008 fishing season with an estimated ex-vessel value of \$14.5 million. Although the 2008 HG was 42 percent lower than the HG for 2007, due to an increase in

average annual ex-vessel price per pound annual ex-vessel revenue for 2008 was similar to that in 2007.

The HG for the 2009 Pacific sardine fishing season (January 1, 2009 through December 31, 2009) is 65,732 metric tons (mt). This HG is 25 percent lower than the 2008 HG. If the fleet were to take the entire 2009 HG, and assuming a coastwide average ex-vessel price per mt of \$168, the potential revenue to the fleet would be approximately \$11 million. This would be similar to the average total coastwide ex-vessel value achieved from 2002–2007. Whether this will occur depends greatly on market forces within the fishery and on the regional availability of the resource to the fleets and the fleets' ability to find pure schools of Pacific sardine. A change in the market and/or the potential lack of availability of the resource to the fleets could cause a reduction in the amount of Pacific sardine that is harvested, in turn, reducing the total revenue to the fleet from Pacific sardine.

There will likely be a drop in profitability based on this final rule compared to last season due to the lower HG this year. However, from 2002 through 2007 the average coastwide annual ex-vessel revenue was \$11

million, therefore at current ex-vessel price per mt, the harvest guideline for 2009 should provide similar revenue as seen from 2002 through 2007.

No significant alternatives to this final rule exist that would accomplish the stated objectives of the applicable statutes and which would minimize any significant economic impact of this proposed rule on the affected small entities. The CPS FMP and its implementing regulations require NMFS to set an annual HG for the Pacific sardine fishery based on the harvest formula in the FMP. The harvest formula is applied to the current stock biomass estimate to determine the ABC, from which the HG is then derived. Determining the annual HG merely implements the established procedures of the FMP with the goal of continuing to provide expected net benefits to the nation, regardless of what the specific annual allowable harvest of Pacific sardine is determined to be.

There are no reporting, recordkeeping, or other compliance requirements required by this final rule. Additionally, no other Federal rules duplicate, overlap or conflict with this final rule.

### Small Business 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.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a notice to fishermen that also serves as a small entity compliance guide (guide) was prepared and will be distributed to fishermen and processors. The guide will also be available on the internet at <http://swr.nmfs.noaa.gov>. Copies of this final rule and guide, i.e. notice to fishermen, will be available upon request from the Southwest Regional Office (see **ADDRESSES**).

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

Dated: February 12, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator For Fisheries,  
National Marine Fisheries Service.*

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