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Date: Thu, Mar 30, 2017 at 11:05 AM

Subject: Submission of "Recent Trends in Three Selected West Coast Groundfish Species"-Supplemental Briefing Book

To: PFMC Comments - NOAA Service Account <[pfmc.comments@noaa.gov](mailto:pfmc.comments@noaa.gov)>

Dear Chairman Pollard and Council Members,

As you know, in 2014 the West Coast Limited Entry Groundfish Trawl Fishery was certified by the Marine Stewardship Council (MSC) as a well managed and sustainable fishery. This was a great day for the participants in the fishery and for our management system as a whole, as the MSC is the gold standard in the world for independent, third party, fishery certification schemes. The fishery is the largest to be certified in the number of species to be certified (thirteen) and in the volume of literature that was available for the assessment team to review. Given that, there were only five conditions placed upon the fishery, which is a testament to the integrity and thoroughness of the management system.

As the fishery's client, the Oregon Trawl Commission, prepared an action plan to satisfy those conditions within five years and then shared that with the Council in the fall of 2013. The industry then asked the Council to consider any analyses that was generated from the action plan to be considered for assignment for review by the Council's SSC. From that request, the Council responded in the affirmative with a letter dated November 27, 2013. Today, I am submitting an analysis to the Council titled "*Recent Trends in Three Selected West Coast Groundfish Species*", authored by former SSC member Tom Jagielo.

The rationale for the analysis was a direct result of Cope, et al paper on Productivity-Susceptibility Analysis (PSA) titled "*An Approach to Defining Stock Complexes for U.S. West Coast Groundfishes Using Vulnerabilities and Ecological Distribution*", (2011). The report summarizes information for Silvergrey and Shortraker Rockfish from Alaska and British Columbia, as those species are at their southern extent of their range in this region, along with recent trends in total catch for those regions and the US West Coast. Additionally, recent catch and survey data are summarized for California skate on the US West Coast.

The report is organized as follows. For each species, information on recent: 1) total catch, 2) survey abundance and distribution, and 3) stock assessments is presented, sequentially, for: 1) Alaska, 2) British Columbia, and 3) the US West Coast. Finally, a summary of the empirical trends is discussed, to provide a relative perspective with respect to the US West Coast.

Thank you for the opportunity to present this analysis to the Council.

Sincerely,

Brad Pettinger  
Director  
Oregon Trawl Commission

# Recent Trends in Three Selected West Coast Groundfish Species

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A Report Prepared for the Oregon Trawl Commission

Tom Jagielo Consulting  
8/4/2016

A review of recent trends in catch, survey abundance, and biomass for shortraker rockfish, silvergray rockfish, and California skate was prepared for the Oregon Trawl Commission. Available information was summarized for Alaska, British Columbia, and the US West Coast (WA/OR/CA) for the years 2009-2014. This report was prepared to assist with the second MSC audit of the US West Coast Limited Entry Groundfish Trawl Fishery.

## Introduction

Information on the stock status of shortraker rockfish (*Sebastes borealis*), silvergray rockfish (*Sebastes brevispinis*), and California skate (*Raja inornata*) is sparse along the US West Coast (Washington/Oregon/California). Shortraker and silvergray rockfish are at the southern extent of their ranges in this region, and California skate is an unassessed species not targeted by commercial fisheries.

The purpose of this report is to provide information on these three species, to assist with the second Marine Stewardship Council (MSC) audit of the US West Coast Limited Entry Groundfish Trawl Fishery. In regions to the north of the US West Coast, where abundance is higher, a richer body of information on abundance trends and current stock status are available for shortraker and silvergray rockfish. This report summarizes that information for Alaska and British Columbia, along with recent trends in total catch for those regions and the US West Coast. Additionally, recent catch and survey data are summarized for California skate on the US West Coast.

The report is organized as follows. For each species, information on recent: 1) total catch, 2) survey abundance and distribution, and 3) stock assessments is presented, sequentially, for: 1) Alaska, 2) British Columbia, and 3) the US West Coast. Finally, a summary of the empirical trends is discussed, to provide a relative perspective with respect to the US West Coast.

## Shortraker Rockfish

Shortraker rockfish is one of the largest rockfish species, with a broad distribution throughout the North Pacific, ranging from Japan, the Okhotsk Sea, and southeastern Kamchatka to the Bering Sea and Aleutian Islands south to Point Conception; they are common from eastern Kamchatka to British Columbia and are less common on the US West Coast (Love et. al. 2002). On the US West Coast, shortraker are found north of 39°30' N. latitude, with the highest density north of 44° N. latitude and in depths between 110 and 220 fm. (PFMC and NMFS 2015).

## Recent Catch Trends

### Alaska

In Alaska, shortraker rockfish are taken in both the Bering Sea - Aleutian Islands (BSAI) and Gulf of Alaska (GOA) using trawl and longline gear. From 2009-2014, total catch has ranged from 757 mt to 1103 mt (Figure 1). Estimates of total catch for 2005-2015 are tabulated in Appendix I, Table AI-1.

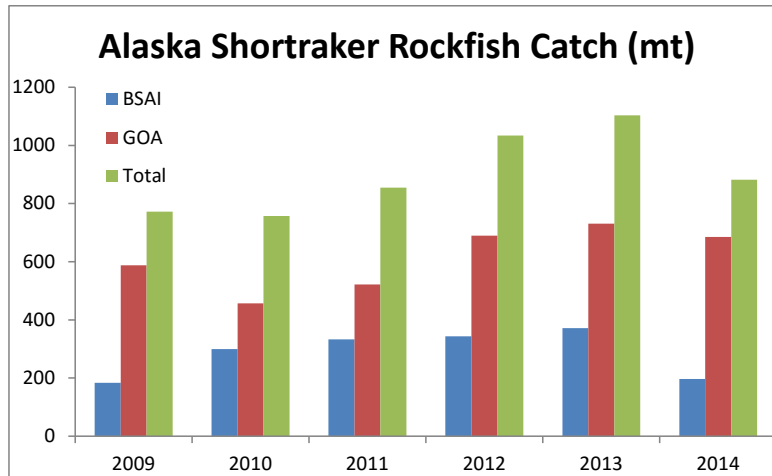


Figure 1. Estimated total catch of shortraker rockfish in the Bering Sea – Aleutian Islands (BSAI), and Gulf of Alaska (GOA) 2009-2014. *Source: Spies et. al. (2014); Echave et. al. (2015).*

#### British Columbia

Shortraker are taken in both trawl and longline fisheries in British Columbia. From 2009-2014, total catch has ranged from 100.2 mt to 154.8 mt (Figure 2). Estimates of total catch for 2007-2015 are tabulated in Appendix I, Table AI-2.

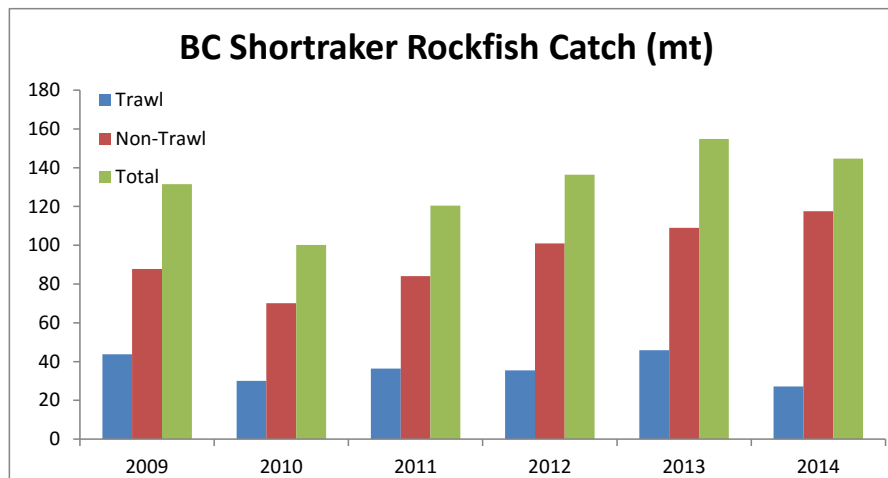


Figure 2. Estimated total catch of shortraker rockfish in British Columbia, 2009-2014. *Source: DFO 2016a).*

#### US West Coast

Shortraker catches are taken almost exclusively above 40°10' N. latitude on the US West Coast, in trawl and longline fisheries. In addition to sorted shortraker catches, catch also occurs as part of the combined shortraker/rougheye/blackspotted rockfish complex; within which individual species are not separately enumerated. From 2009-2014, estimates of total catch have ranged from 24.9 mt to 33.6 mt (Figure 3). Estimates of total catch for the shortraker complex were generally below 11 mt during that period,

with the exception of a peak at 38.5 mt in 2012. Estimates of catch for 2002-2014 are tabulated by fishery sector in Appendix I, Table AI-3.

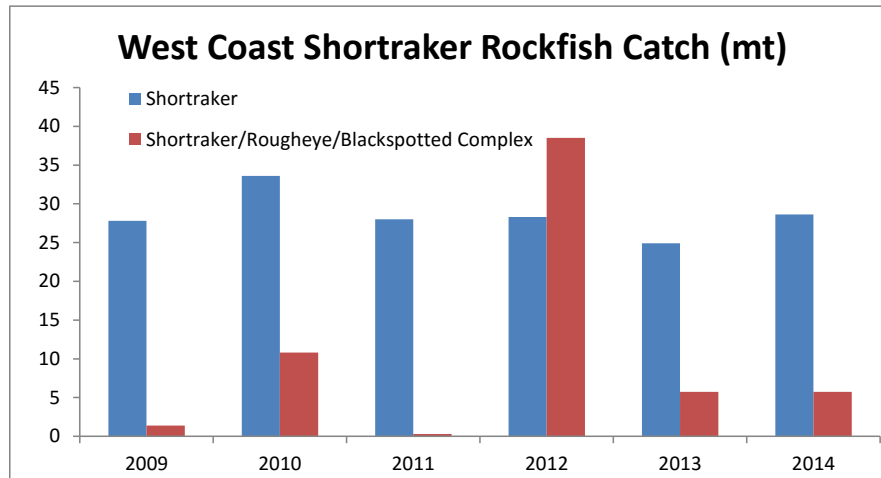


Figure 3. Estimated total catch of shortraker rockfish, and the shortraker rockfish complex (shortraker/rougheye/blackspotted rockfish), north of 40°10' N. latitude, 2009-2014. *Source:* [https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data\\_products/species\\_management.cfm](https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm)

On the US West coast, trawl catches of shortraker most commonly co-occur with catches of darkblotched splitnose, aurora, Pacific ocean perch, rougheye/blackspotted, and redbanded rockfish (Table 1) (PFMC and NMFS 2015).

Table 1. Slope rockfish species co-occurrence in West Coast Groundfish Observer Program (WCGOP) trawl data (2002–2011) at the haul level. This table represents the percentage of all hauls containing the species on a particular column that also has the species on the particular row. Darkest shading equals highest co-occurrence. *Source:* Table 4-24 in PFMC and NMFS (2015).

	Darkblotched Rockfish (6,933)	Splitnose Rockfish (6,534)	Aurora Rockfish (5,650)	Pacific Ocean Perch Rockfish (4,358)	Redbanded Rockfish (3,018)	Rougheye/Blackspotted Rockfish (1,521)	Blackgill Rockfish (1,249)	Sharpchin Rockfish (855)	Shortraker Rockfish (604)	Bank Rockfish (337)	Yellowmouth Rockfish (39)
Darkblotched Rockfish	XXXX	47%	32%	62%	66%	65%	50%	64%	55%	48%	72%
Splitnose Rockfish	45%	XXXX	39%	55%	77%	58%	64%	78%	51%	82%	77%
Aurora Rockfish	26%	34%	XXXX	30%	37%	44%	61%	21%	50%	29%	36%
Pacific Ocean Perch Rockfish	39%	37%	23%	XXXX	53%	55%	25%	63%	52%	8%	67%
Redbanded Rockfish	29%	36%	20%	37%	XXXX	45%	28%	55%	38%	28%	49%
Rougheye/Blackspotted Rockfish	14%	14%	12%	19%	23%	XXXX	15%	21%	45%	5%	44%
Blackgill Rockfish	9%	12%	14%	7%	12%	12%	XXXX	8%	14%	26%	21%
Sharpchin Rockfish	8%	10%	3%	12%	16%	12%	5%	XXXX	8%	8%	41%
Shortraker Rockfish	5%	5%	5%	7%	8%	18%	7%	6%	XXXX	2%	10%
Bank Rockfish	2%	4%	2%	1%	3%	1%	7%	3%	1%	XXXX	15%
Yellowmouth Rockfish	0%	1%	0%	1%	1%	1%	1%	2%	1%	2%	XXXX

## Distribution and Abundance

### Alaska

Biennial surveys are conducted by the National Marine Fisheries Service (NMFS) in the BSAI (Spies et. al. 2014), and in the GOA (Echave et. al. 2015), that produce biomass estimates of shortraker rockfish. Abundance is highest in the GOA, where biomass in recent years ranged from 44,185 mt to 67,370 mt (Figure 4). Biomass estimates from these surveys

are tabulated by area for 2002-2015 in Appendix II, Table AII-1. The spatial distribution of shortraker rockfish catches in recent Gulf of Alaska surveys are shown in Figure 5.

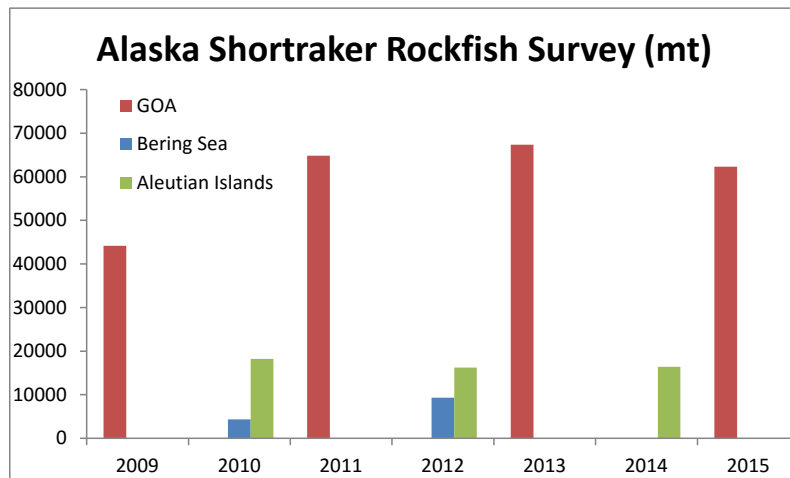


Figure 4. Biomass of shortraker rockfish in NMFS trawl surveys in Alaska. *Source: Spies et. al. (2014); Echave et. al. (2015).*

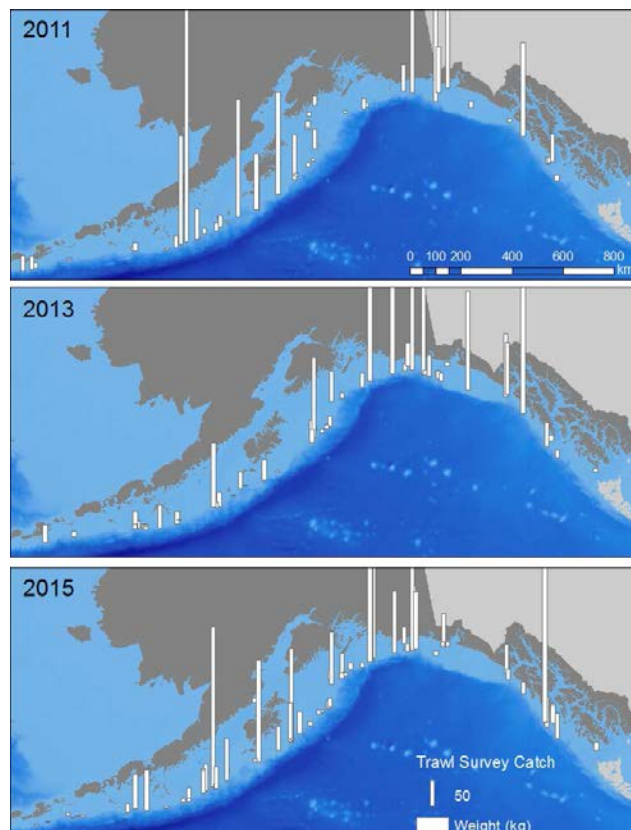


Figure 5. Spatial distribution of shortraker rockfish catches in the Gulf of Alaska during the 2011, 2013, and 2015 NMFS bottom trawl surveys. *Source: Figure 11-2 in Echave et. al. (2015).*

### British Columbia

Synoptic groundfish trawl surveys conducted in British Columbia are used to prepare indices of abundance time-series of shorttraker rockfish (DFO 2016a). Trends in abundance are shown below, by region, for: 1) the west coast Vancouver Island (Figure 6), 2) Queen Charlotte Sound (Figure 7), 3) Hecate Strait (Figure 8), and 4) the west coast Haida Gwaii (Figure 9). Relatively level, or increasing trends in abundance were observed in the Queen Charlotte Sound and Hecate Strait areas, while declining trends in abundance were noted for west coast Vancouver Island and the west coast Haida Gwaii regions, over the recent time period plotted.

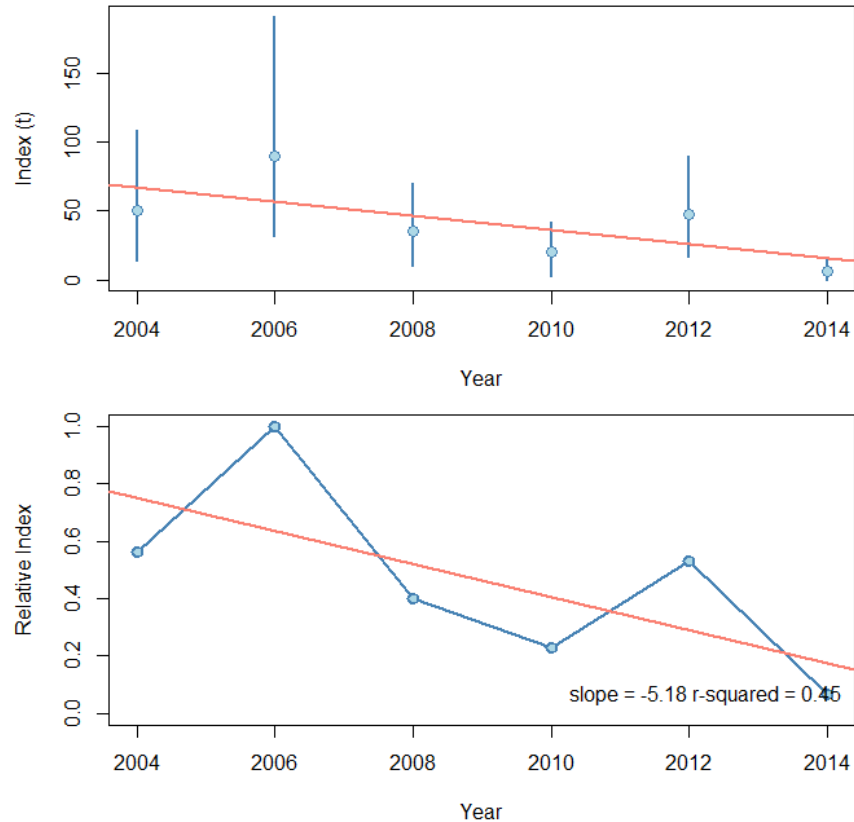


Figure 6. Shorttraker rockfish biomass indices from the west coast Vancouver Island synoptic groundfish trawl surveys. *Source: DFO (2016a).*

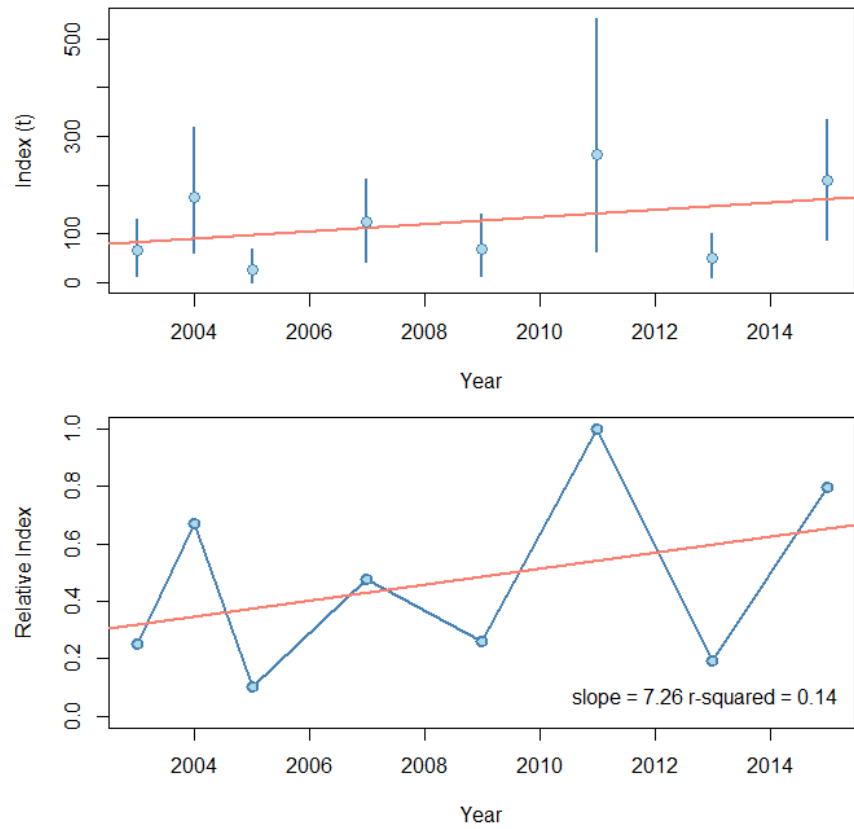


Figure 7. Shortraker rockfish biomass from Queen Charlotte Sound synoptic groundfish trawl surveys. *Source: DFO (2016a).*



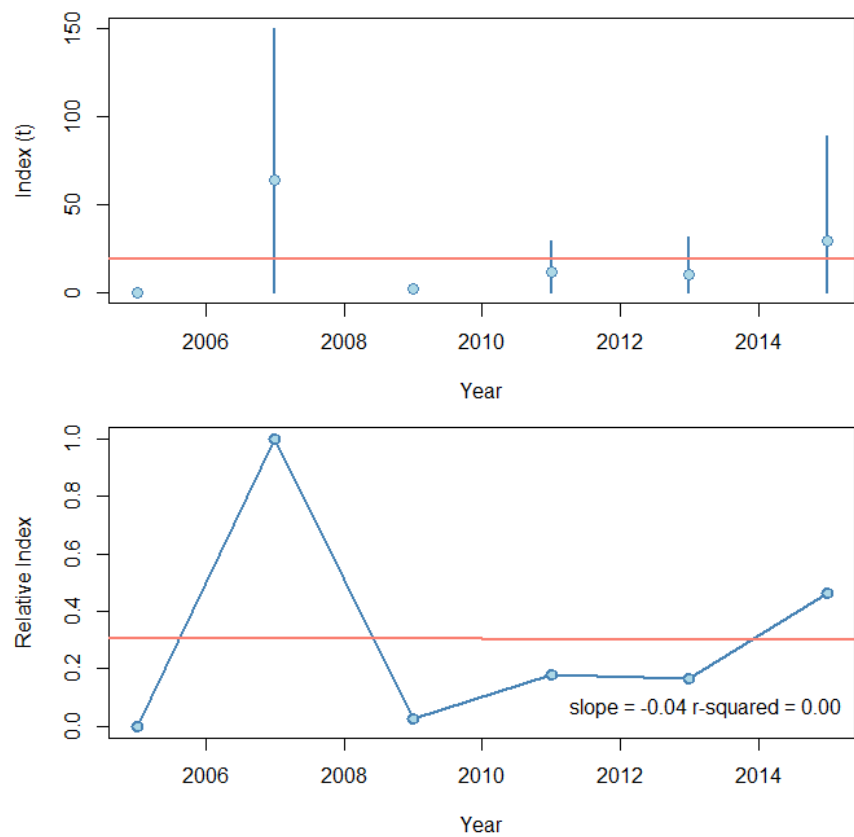


Figure 8. Shortraker rockfish biomass from the Hecate Strait synoptic groundfish trawl surveys. *Source: DFO (2016a).*

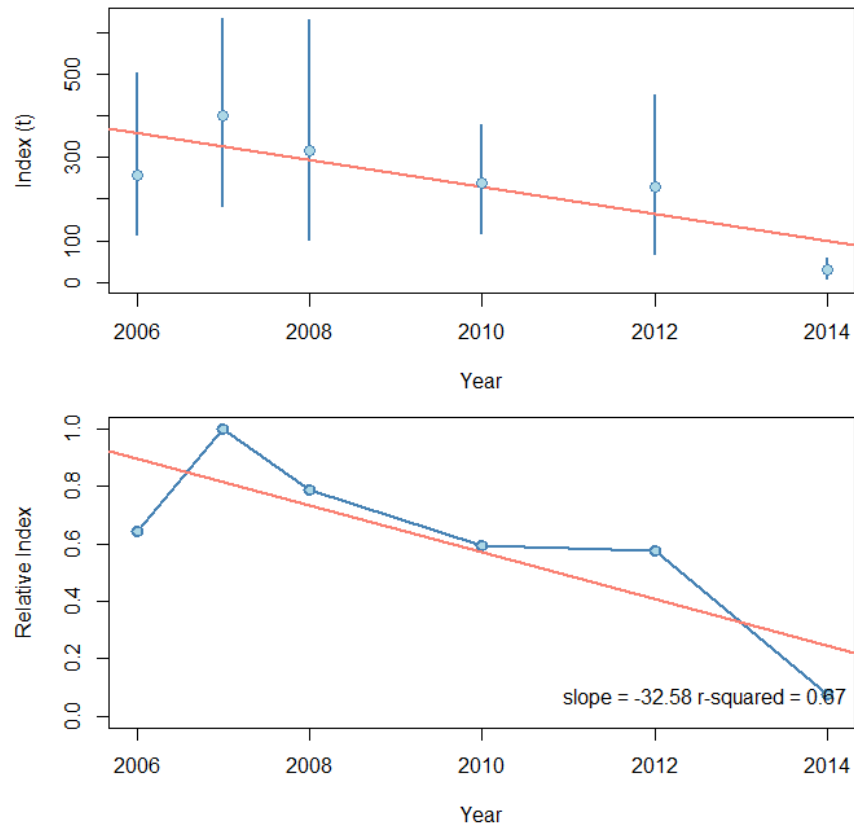


Figure 9. Shortraker rockfish biomass from the west coast Haida Gwaii synoptic groundfish trawl surveys. *Source: DFO (2016a).*

The spatial relative abundance of shortraker rockfish in British Columbia trawl catches is shown in Figure 10, where catch per unit effort (CPUE) is mapped for the period 1996-2016. Abundance appears to be distributed fairly evenly among the trawled regions within British Columbia, with localized areas of higher catch rates (red boxes in Figure 10) found in each of the north, central, and southern portions of the coast.

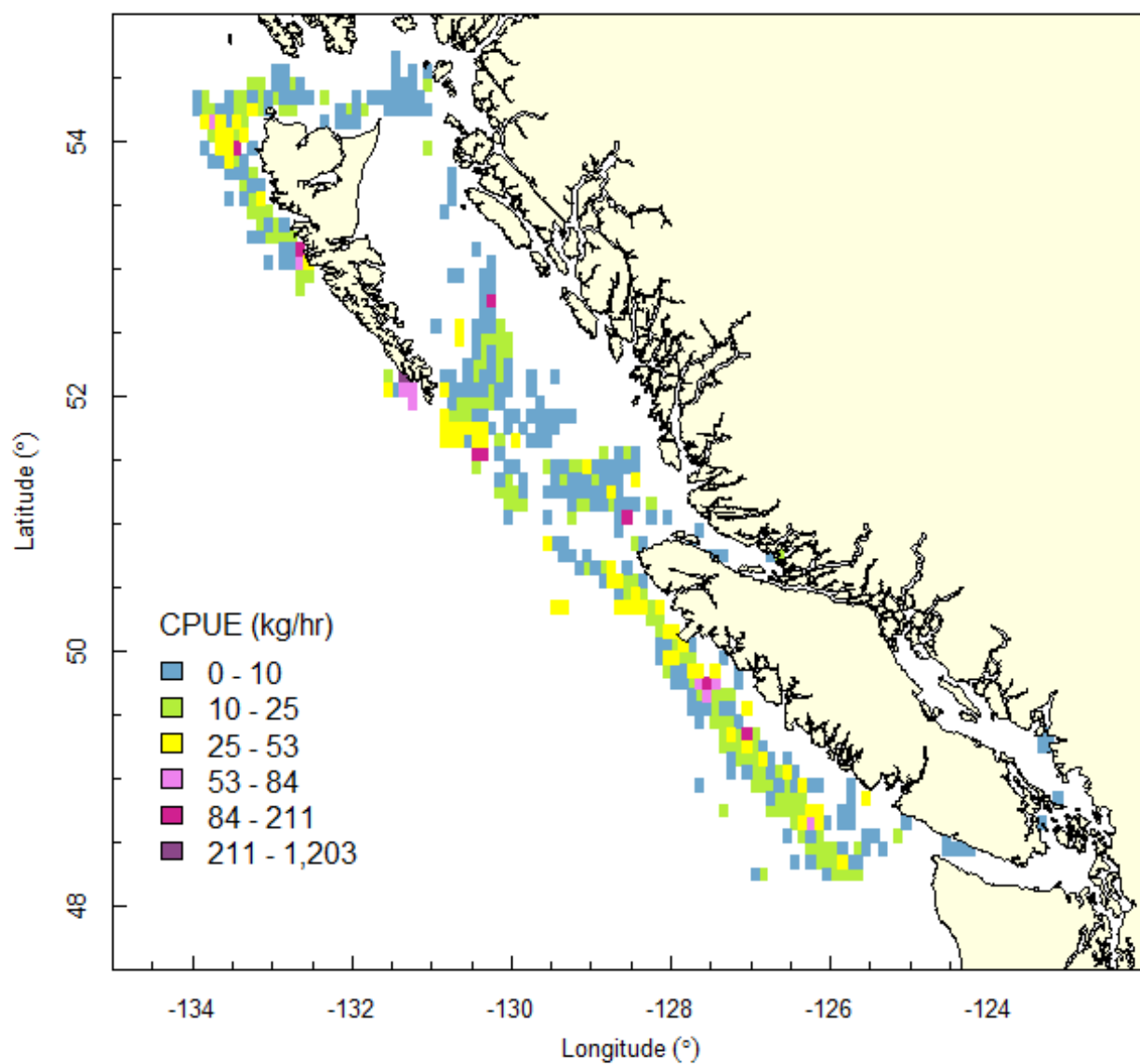


Figure 10. British Columbia shortraker rockfish commercial trawl catch per unit effort (kg/hr), 1996-2016. Source: DFO (2016a).

### US West Coast

Shortraker are rarely taken in NMFS US West Coast trawl survey tows; they were present in only three tows for all surveys conducted from 2009-2015 (Jim Hastie, NMFS, Pers. Comm. 7-25-2016). A relatively small amount of shortraker are taken in the US West Coast trawl fishery, almost exclusively north of 40°10' N. latitude (see the panel in the third column and third row of Figure 11).

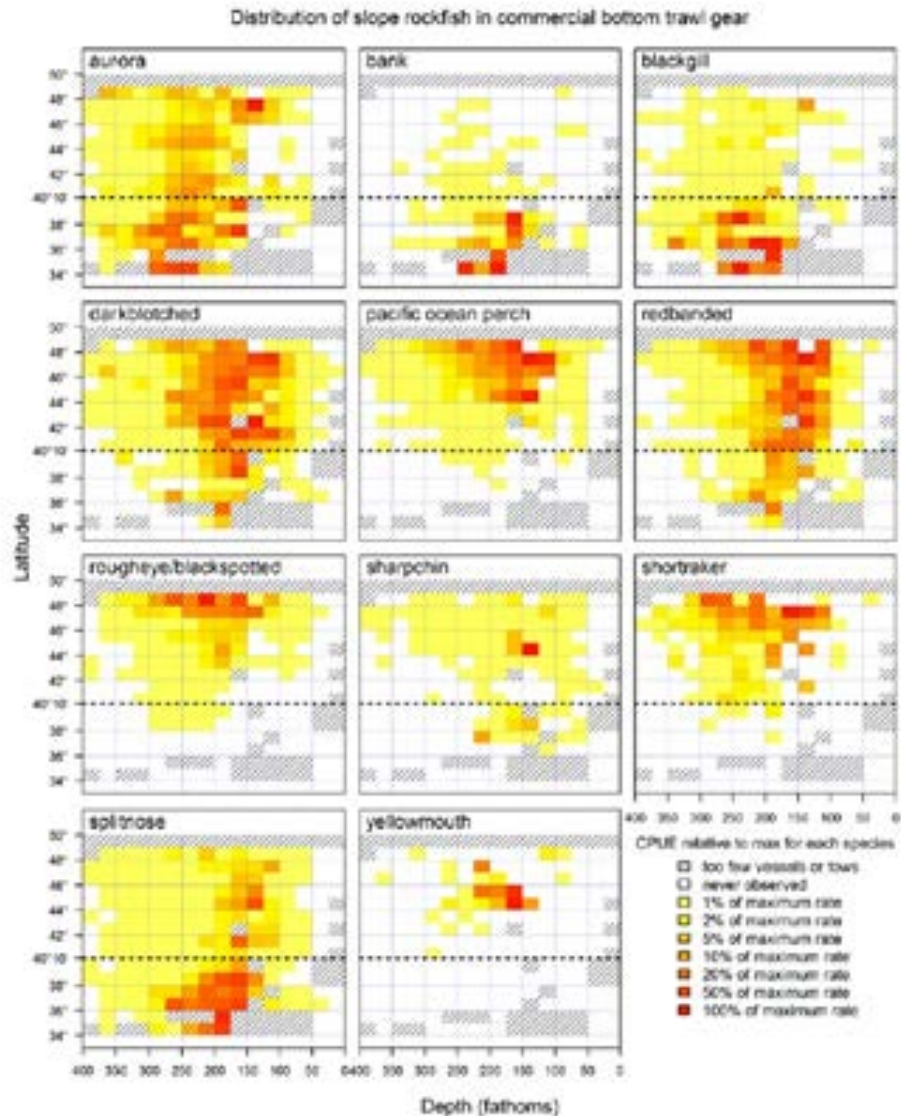


Figure 11. Spatial distribution of slope rockfish in US West Coast Groundfish Observer Program trawl data (2002 to 2011). Colors represent CPUE relative to the maximum within each species. Darkest red equals the highest CPUE; lightest yellow equals the lowest CPUE. The dotted line in each panel shows 40°10' N. latitude. Source: Figure 4-14a in *PFMC and NMFS (2015)*.

As noted above, it is not uncommon for shortraker to be caught together with rougheye rockfish. An analysis of trawl fishery tows shows a pattern in the latitude (Figure 12-top) and depth (Figure 12-bottom) where shortraker or rougheye were caught, compared with hauls where they were not present. Hauls with rougheye or shortraker in the catch tended to occur further north and deeper than those that did not have those species (PFMC and NMFS 2015).

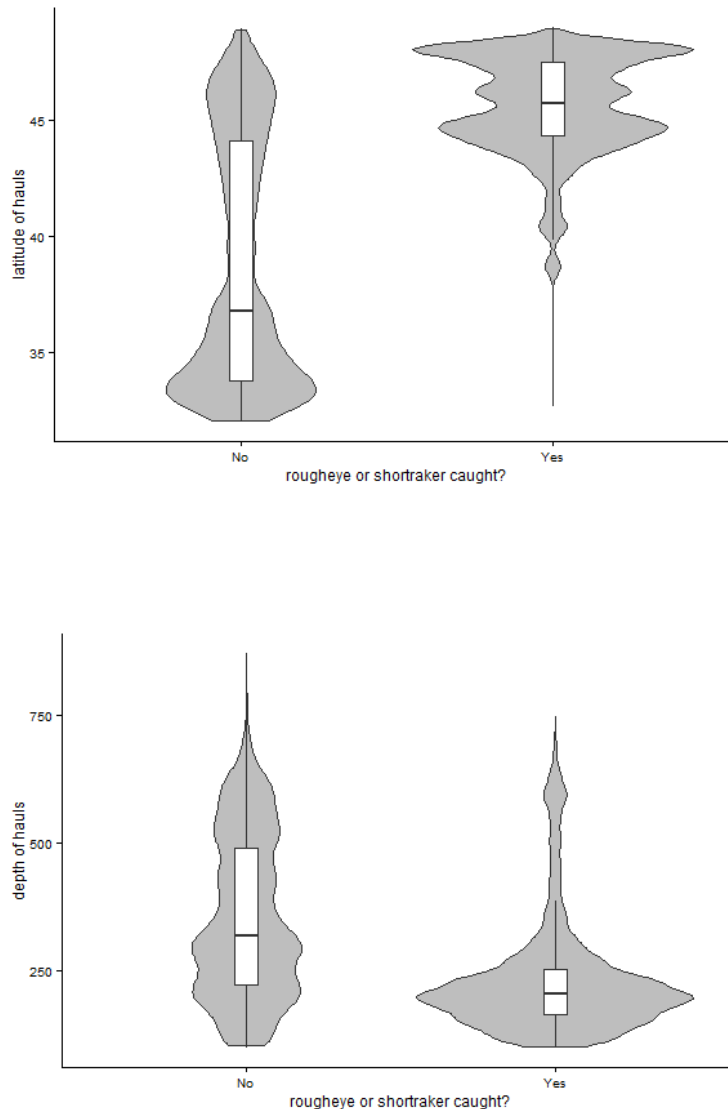


Figure 12. A comparison of fishery hauls (2007-2013) with (right side) or without (left side) shortraker or rougheye rockfish, by latitude (top), and depth (bottom). In these “violin plots”, the wide parts indicate more hauls than the narrow parts. Inside the violin plots are boxplots, which display the median (thick middle line) and the 25th and 75th percentiles on the lower and upper edges of the box. The median identifies the midpoint at which half of the sets fall above and below. *Source: Figure B-33 in PFMC and NMFS (2015).*

## Stock Assessment and Status

### Alaska

Shortraker are assessed biennially by NMFS in the BSAI (Spies et. al. 2014, 2015), and GOA (Eschave et. al. 2015), to coincide with new trawl survey information. In the BSAI, the assessment is conducted with the North Pacific Fishery Management Council (NPFMC) Tier 5 method; in this methodology, an exploitation rate is applied to the estimated current biomass to obtain the acceptable biological catch (ABC) and overfishing limit (OFL) (Spies et. al. 2015). In the GOA, a random effects model is used to estimate exploitable biomass to calculate the ABC and OFL values (Eschave et. al. 2015). Time series estimates of abundance for the two regions are shown in Figure 13.

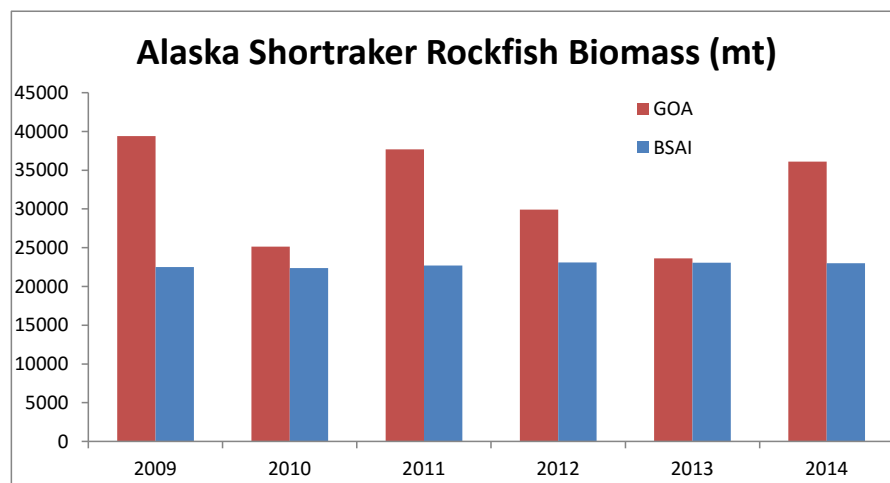


Figure 13. Alaska NMFS shortraker rockfish stock assessment results. Estimated Bering Sea-Aleutian Islands (BSAI) biomass (mt), and GOA relative population weight, from 2009-2014. Source: BSAI: Table 8 of Spies et al. (2014); GOA: Table 11-5 of Eschave et. al. (2015).

In the BSAI, the 2015 biomass was 23,000 mt., and the OFL, ABC, and TAC values specified were, 690 mt, 518 mt, and 250 mt, respectively (Spies et. al. 2015). In the GOA, the 2016 biomass was 57,175 mt, and the OFL, ABC, and TAC values were 1715 mt, 1286 mt, and 1286 mt, respectively (Eschave et. al. 2015).

### British Columbia

Shortraker have not been assessed in British Columbia since 1999; thus, a recent analysis of stock status is not available (DFO 1999).

### US West Coast

On the US West Coast, shortraker is an unassessed category 3 groundfish stock, managed as part of a minor slope rockfish complex (PFMC and NMFS 2015). Overfishing Level (OFL) contribution values are estimated by depletion-based stock reduction analysis (DB-SRA) (NMFS 2010). In a recent analysis, the total catch of shortraker rockfish was estimated to be at or above the 2015 OFL contribution in 9 of 11 years (PFMC and NMFS 2015). In the 2016 PFMC Groundfish SAFE document, the shortraker OFL,

ABC, and ACL values specified for the years 2017 and 2018 are 18.7 mt, 15.6 mt, and 15.6 mt, respectively (PFMC 2016).

Managers have noted that the vast majority of the shortraker rockfish biomass and catch occurs to the north of the US West Coast EEZ, in waters off British Columbia and Alaska, and thus it is likely the small proportion of removals in Pacific Coast groundfish fisheries will have little effect on overall stock status (PFMC and NMFS 2015).

## Silvergray Rockfish

Silvergray rockfish are a continental shelf species with a distribution that ranges from Alaska to California, and are most common between the central GOA and Oregon. (Love 2002). On the US West Coast, silvergray density is highest north of 40° N. latitude, and in depths between 55 and 160 fm. (PFMC and NMFS 2015).

### Recent Catch Trends

#### Alaska

In the GOA, from 2009-2014, total catch of silvergray rockfish ranged from a low of 22.9 mt in 2009, to a high of 92.5 mt in 2011 (Figure 14). Estimates of total catch for 2005-2015 are tabulated in Appendix I, Table AI-4.

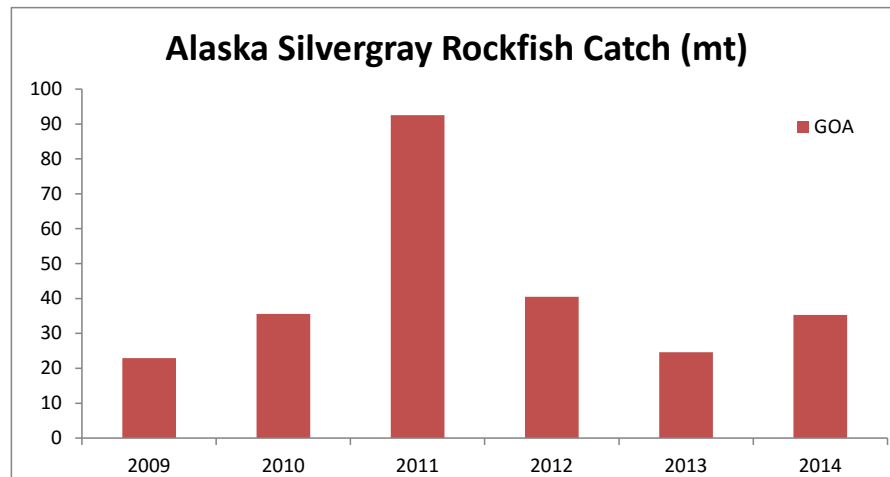


Figure 14. Estimates of total silvergray rockfish catch in the Gulf of Alaska, 2009-2014. *Source: Table 16.5, in Tribuzio and Echave (2015).*

#### British Columbia

From 2009-2014 in British Columbia, estimated total catch of silvergray rockfish ranged from a low of 1269.4 mt in 2014, to a high of 1451.1 mt in 2009 (Figure 15). Estimates of total catch for 2007-2015 are tabulated in Appendix I, Table AI-5.

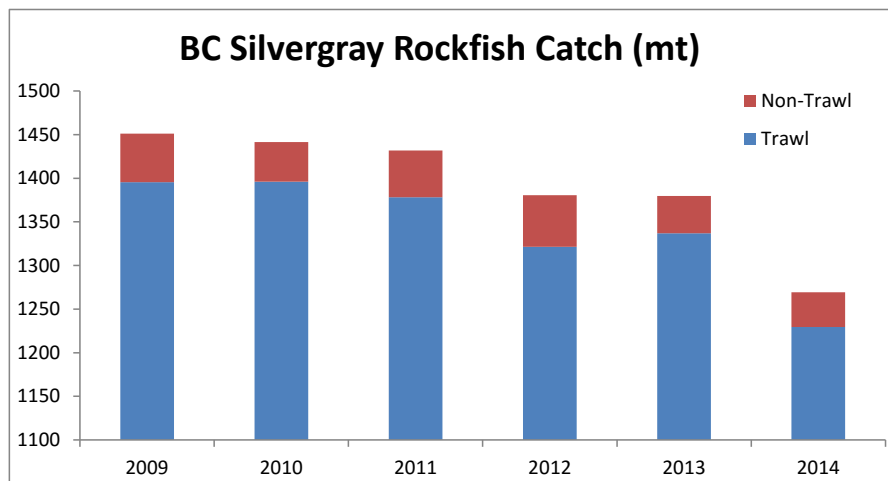


Figure 15. Estimates of total silvergray rockfish catch in British Columbia, 2009-2014. *Source: DFO (2016b).*

#### US West Coast

Estimates of total silvergray rockfish catch on the US West Coast have been under 5 mt for the period 2009-2014, and have ranged from a low of 1.02 mt to a high of 4.52 mt (Figure 16). Estimates of total catch by fishery sector are tabulated in Appendix I, Table AI-6.

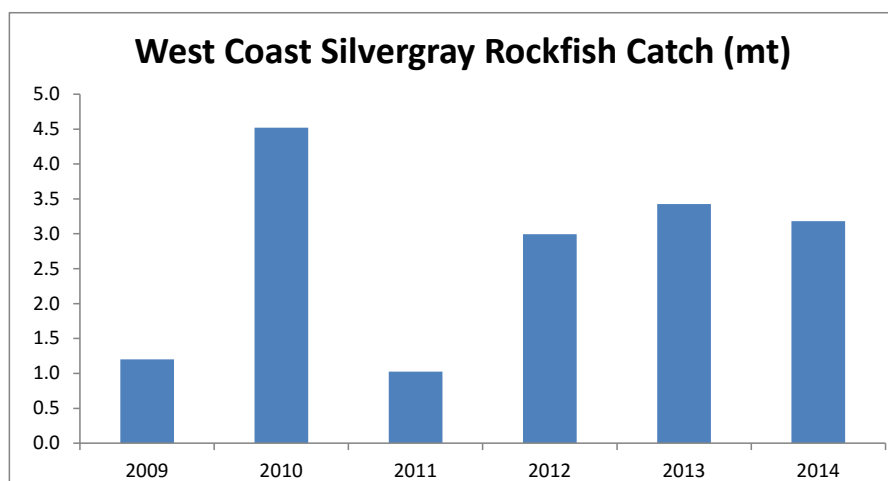


Figure 16. Estimates of total silvergray rockfish catch for the US West Coast, north of 40°10' N. latitude, 2009-2014. *Source:*

[https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data\\_products/species\\_management.cfm](https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm)



## Distribution and Abundance

### Alaska

Silvergray rockfish are routinely found in the biennial NMFS GOA trawl surveys (Figure 17). Since 2009, biomass estimates have been highly variable, ranging from a low of 9,851 mt in 2009 to a high of 100,049 mt in 2011.

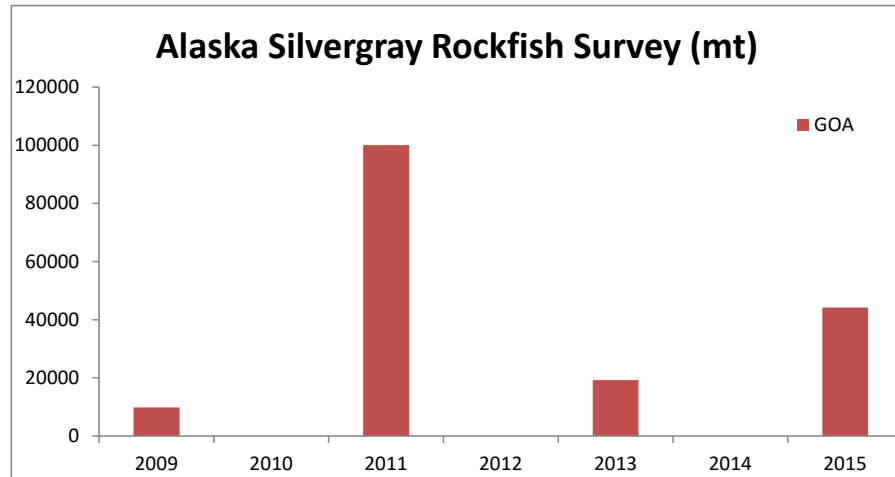


Figure 17. Biomass of silvergray rockfish in NMFS GOA trawl surveys in Alaska. *Source: Tribuzio and Echave (2015).*

The relative spatial distribution of silvergray rockfish in recent NMFS GOA surveys is shown in Figure 18. Biomass estimates are highest in the eastern GOA, followed in abundance by the central GOA, and western GOA, respectively.

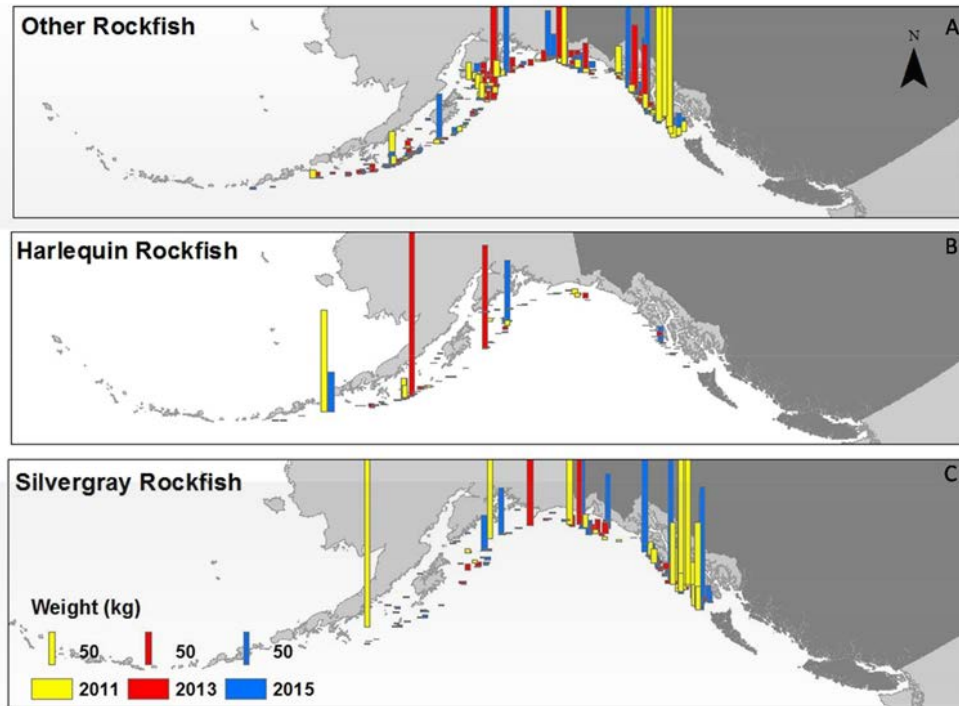


Figure 17. Spatial distribution of silvergray rockfish catches (bottom panel) in the Gulf of Alaska during the 2011, 2013, and 2015 NMFS bottom trawl surveys. *Source: Figure 16.2 in Tribuzio and Echave (2015).*

### British Columbia

Synoptic groundfish trawl surveys conducted in British Columbia are used to prepare indices of abundance time-series of silvergray rockfish (DFO 2016b). Trends in abundance are shown below, by region, for: 1) west coast Vancouver Island (Figure 18), 2) Queen Charlotte Sound (Figure 19), 3) Hecate Strait (Figure 20), and 4) west coast Haida Gwaii (Figure 21). Overall, fairly level to upward trends in abundance were observed.

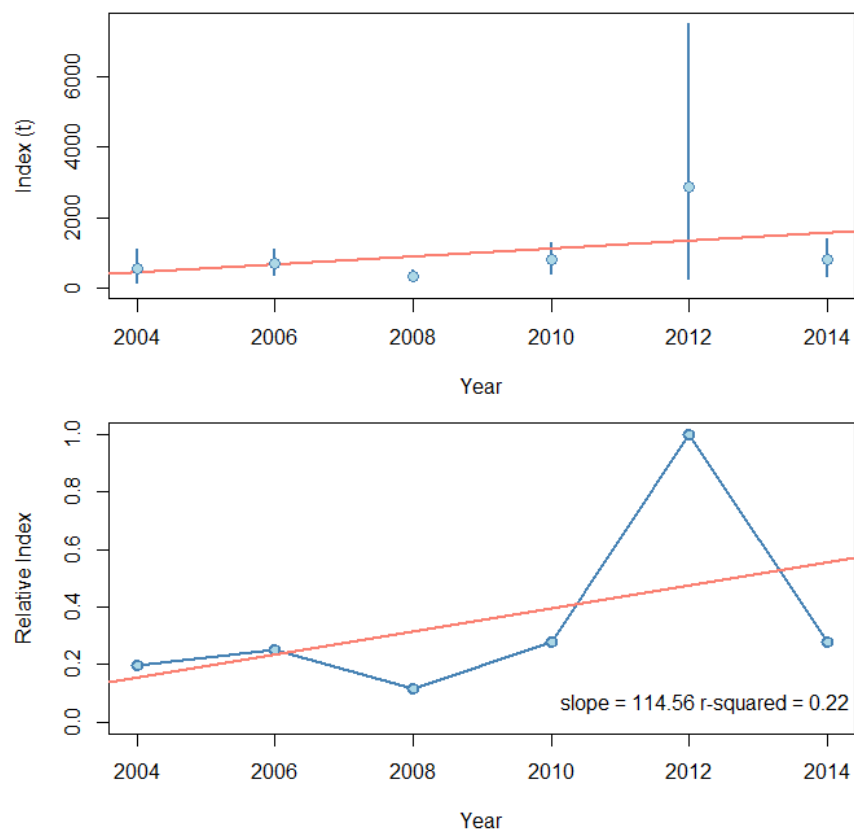


Figure 18. Silvergray rockfish biomass indices from the west coast Vancouver Island synoptic groundfish trawl surveys. *Source: DFO (2016b).*

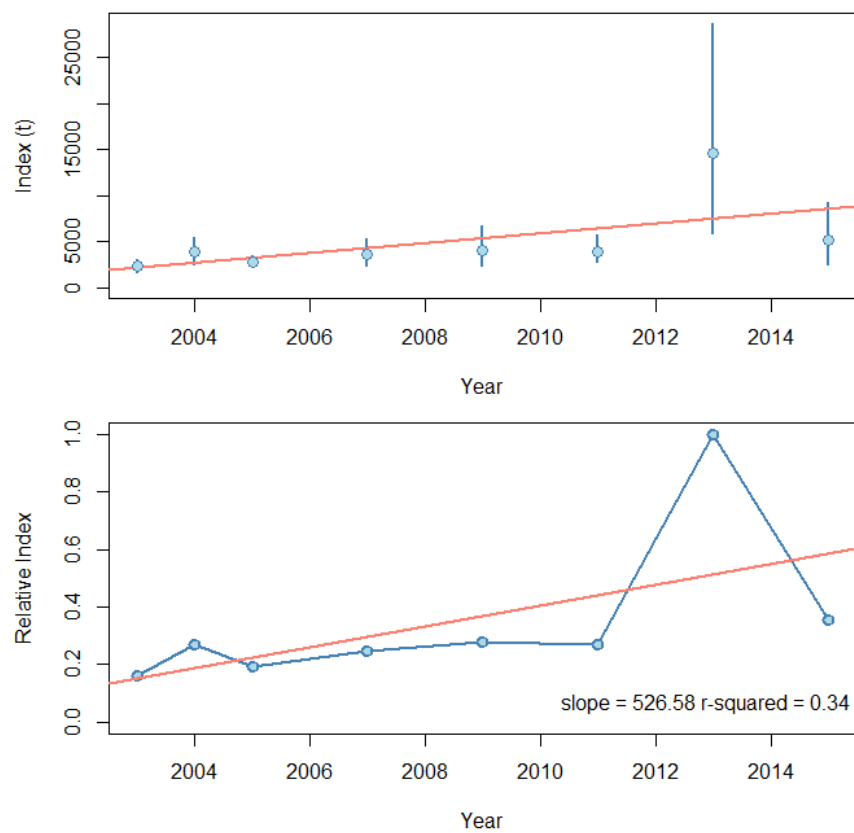


Figure 19. Silvergray rockfish biomass indices from the Queen Charlotte Sound synoptic groundfish trawl surveys. *Source: DFO (2016b).*

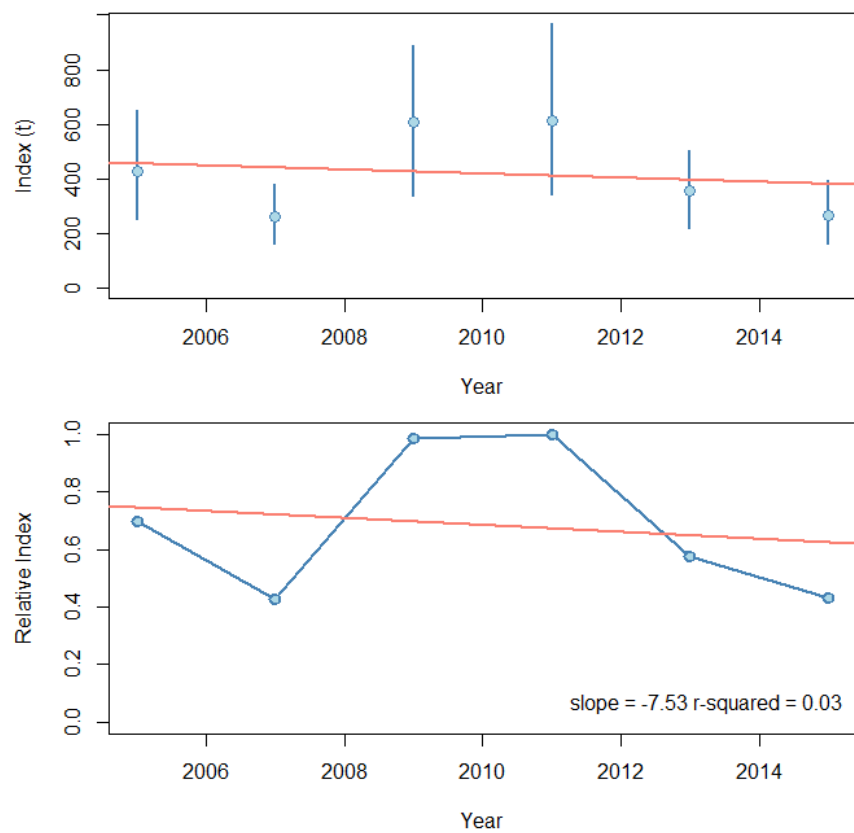


Figure 20. Silvergray rockfish biomass indices from the Hecate Strait synoptic groundfish trawl surveys. Source: *DFO (2016b)*.

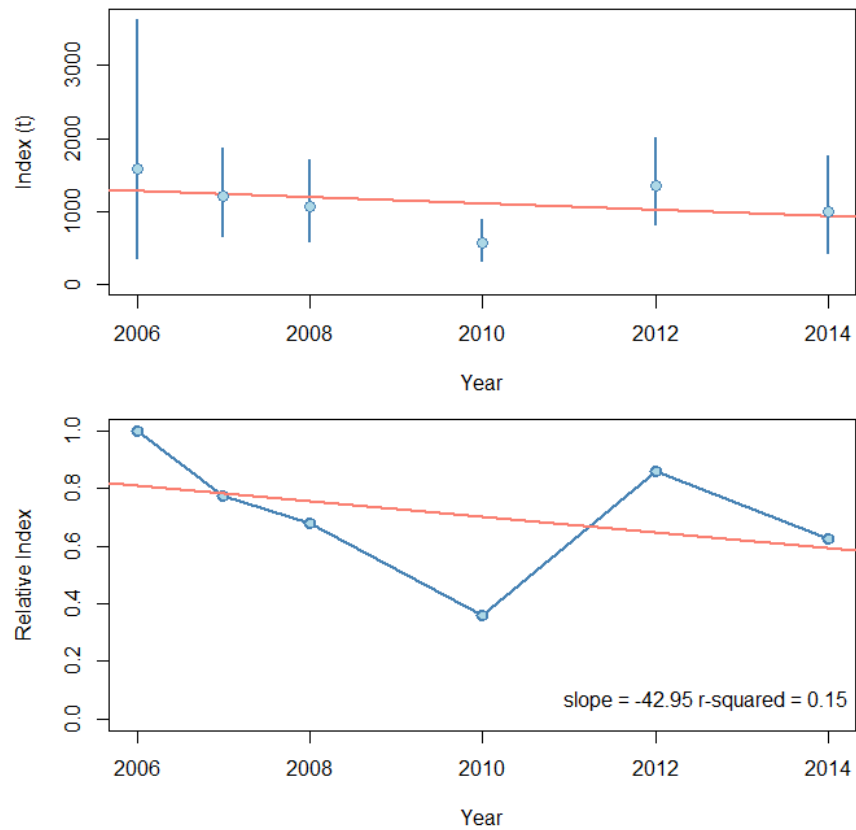


Figure 21. Silvergray rockfish biomass indices from the west coast Haida Gwaii synoptic groundfish trawl surveys. *Source: DFO (2016b).*

The relative spatial distribution of silvergray abundance in recent trawl surveys is shown below, by region, for: 1) west coast Vancouver Island (Figures 22 and 23), 2) Queen Charlotte Sound (Figures 24-26), and 3) Hecate Strait (Figures 27-29). In these figures, circle sizes are scaled across all years within a region; for example in Queen Charlotte Sound, the largest circle represented 57,477 kg/km<sup>2</sup> in 2013 (Figure 26).

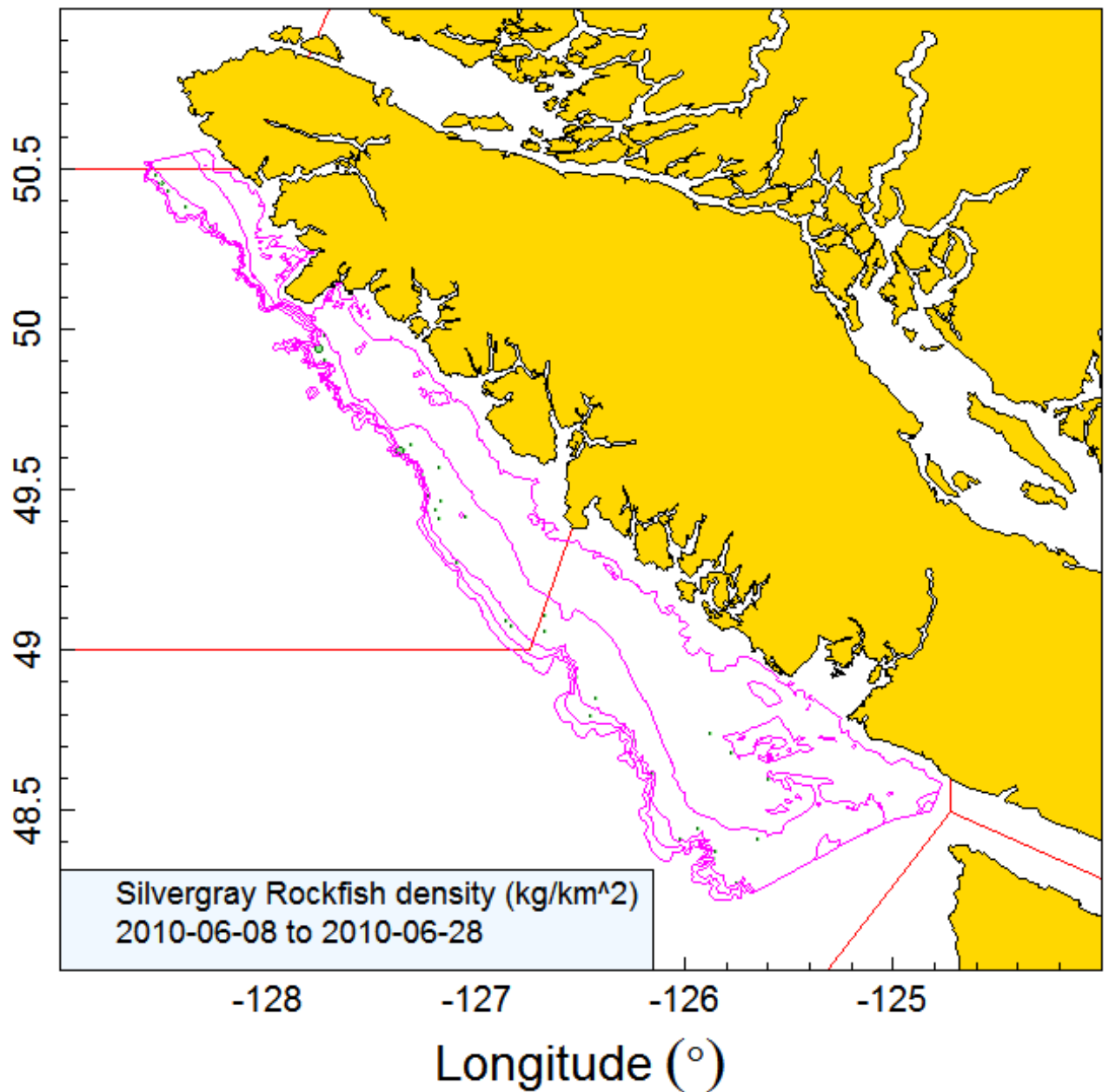


Figure 22. Density plot of Silvergray Rockfish for the 2010 west coast Vancouver Island synoptic survey. Circle sizes are scaled across all years, with the largest circle = 25,419 kg/km<sup>2</sup> in 2012.  
*Source: Figure B45, in Starr et al (2016).*

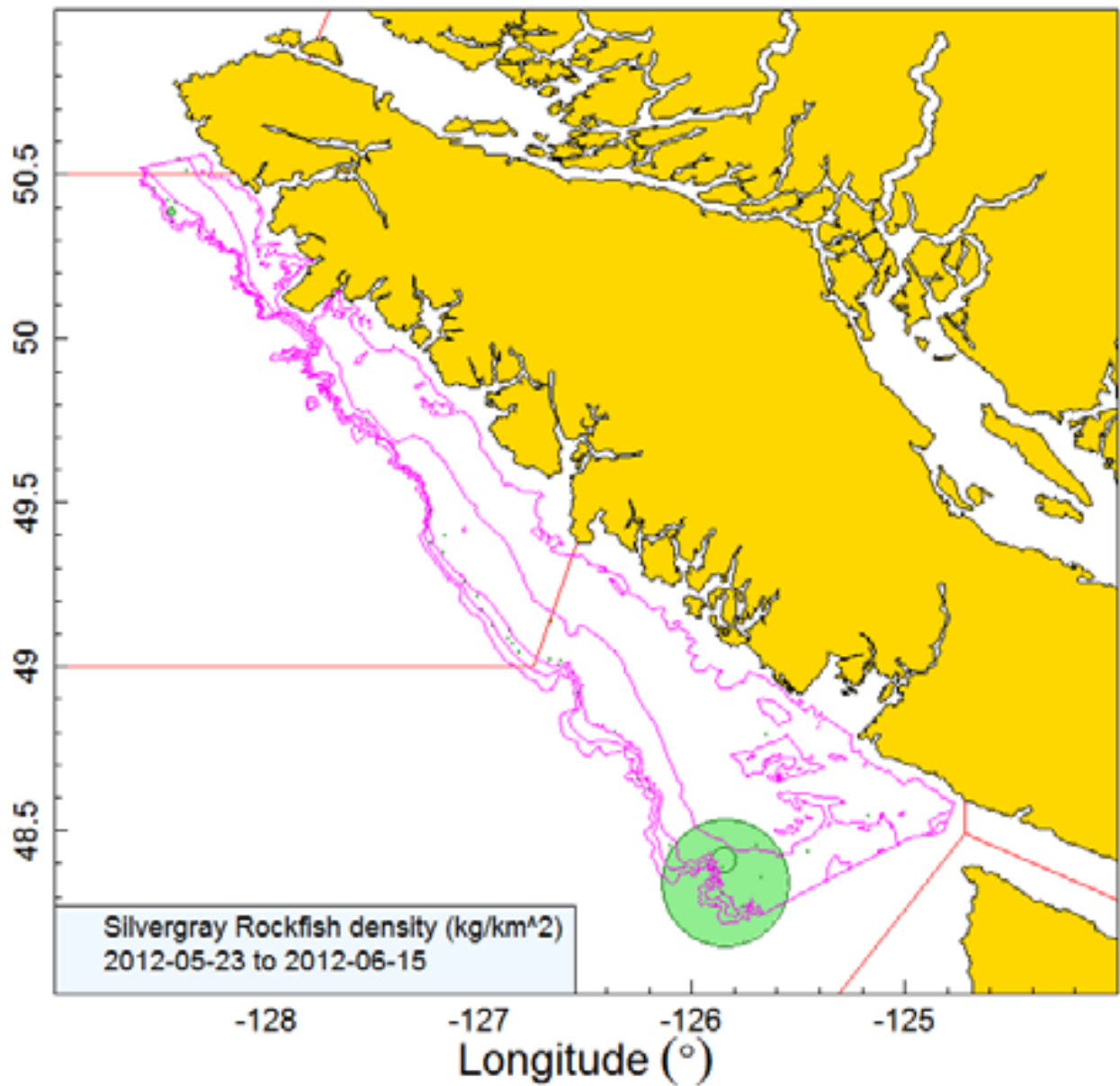


Figure 23. Density plot of Silvergray Rockfish for the 2012 west coast Vancouver Island synoptic survey. Circle sizes are scaled across all years, with the largest circle = 25,419 kg/km<sup>2</sup> in 2012. Source: Figure B46, in Starr et al (2016).



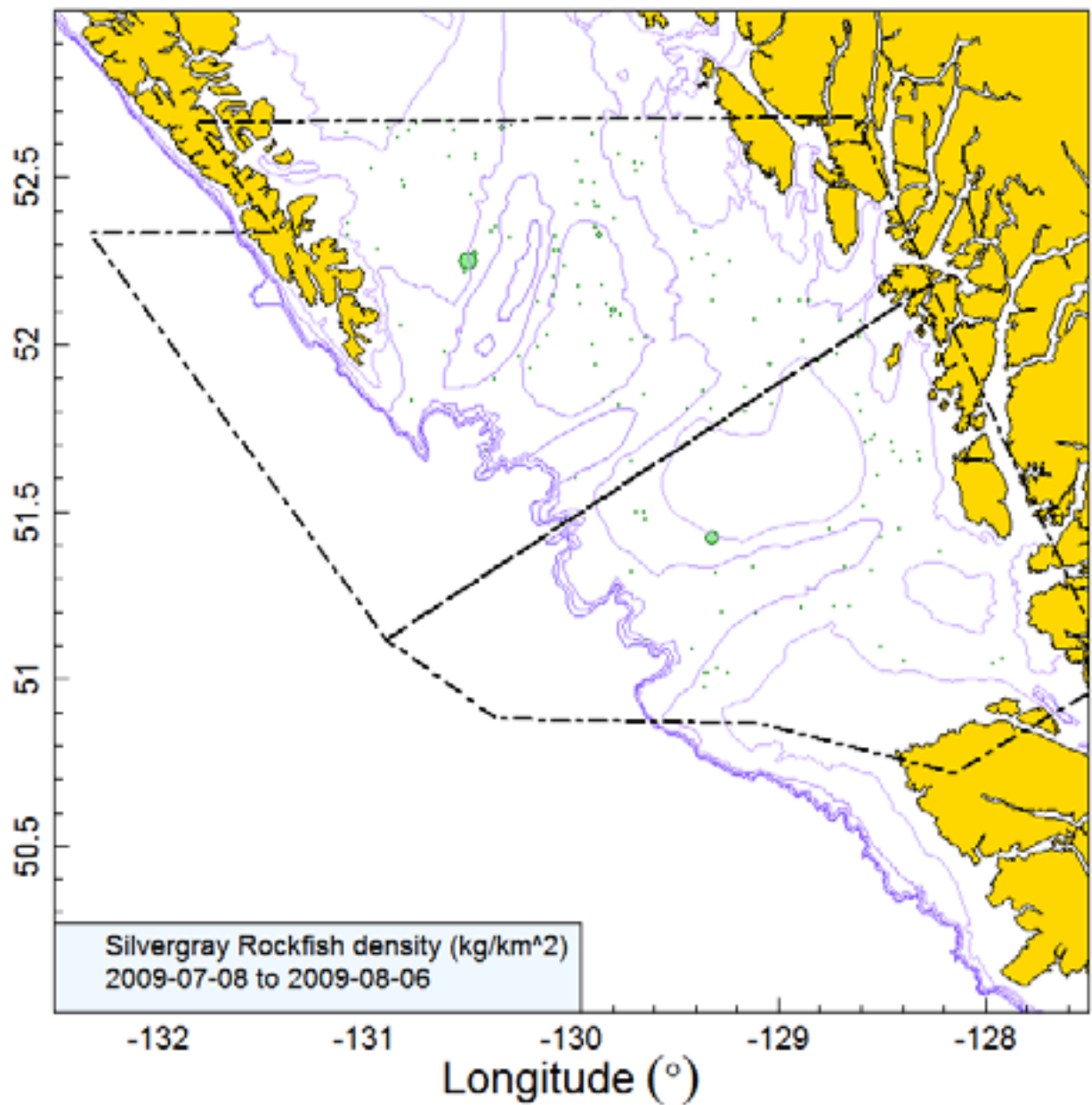


Figure 24. Density plot of Silvergray Rockfish for the 2009 Queen Charlotte Sound synoptic survey. Circle sizes are scaled across all years, with the largest circle = 57,477 kg/km<sup>2</sup> in 2013. Source: Figure B36, in Starr *et al* (2016).

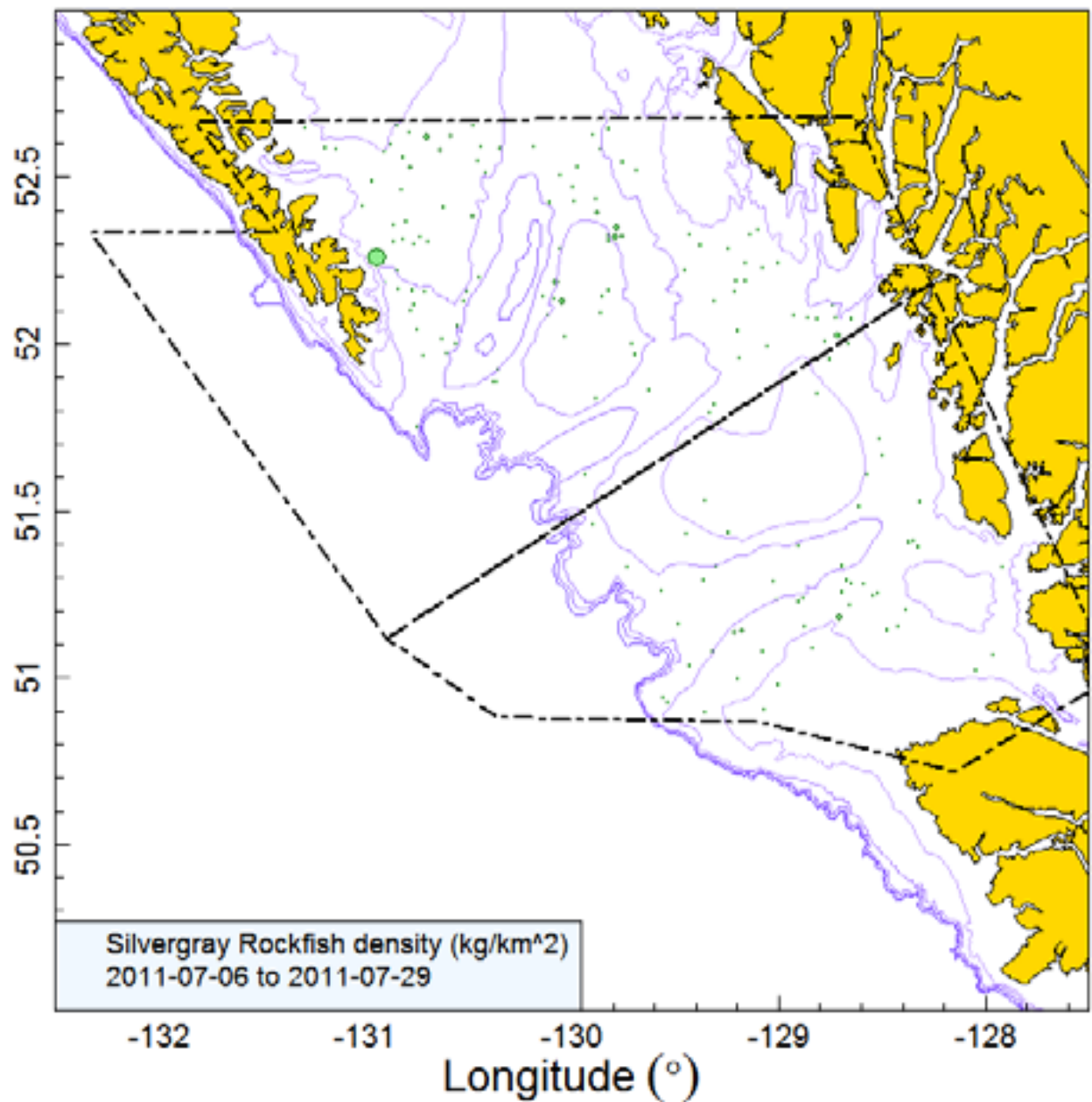


Figure 25. Density plot of Silvergray Rockfish for the 2011 Queen Charlotte Sound synoptic survey. Circle sizes are scaled across all years, with the largest circle = 57,477 kg/km<sup>2</sup> in 2013.  
*Source: Figure B37, in Starr et al (2016).*

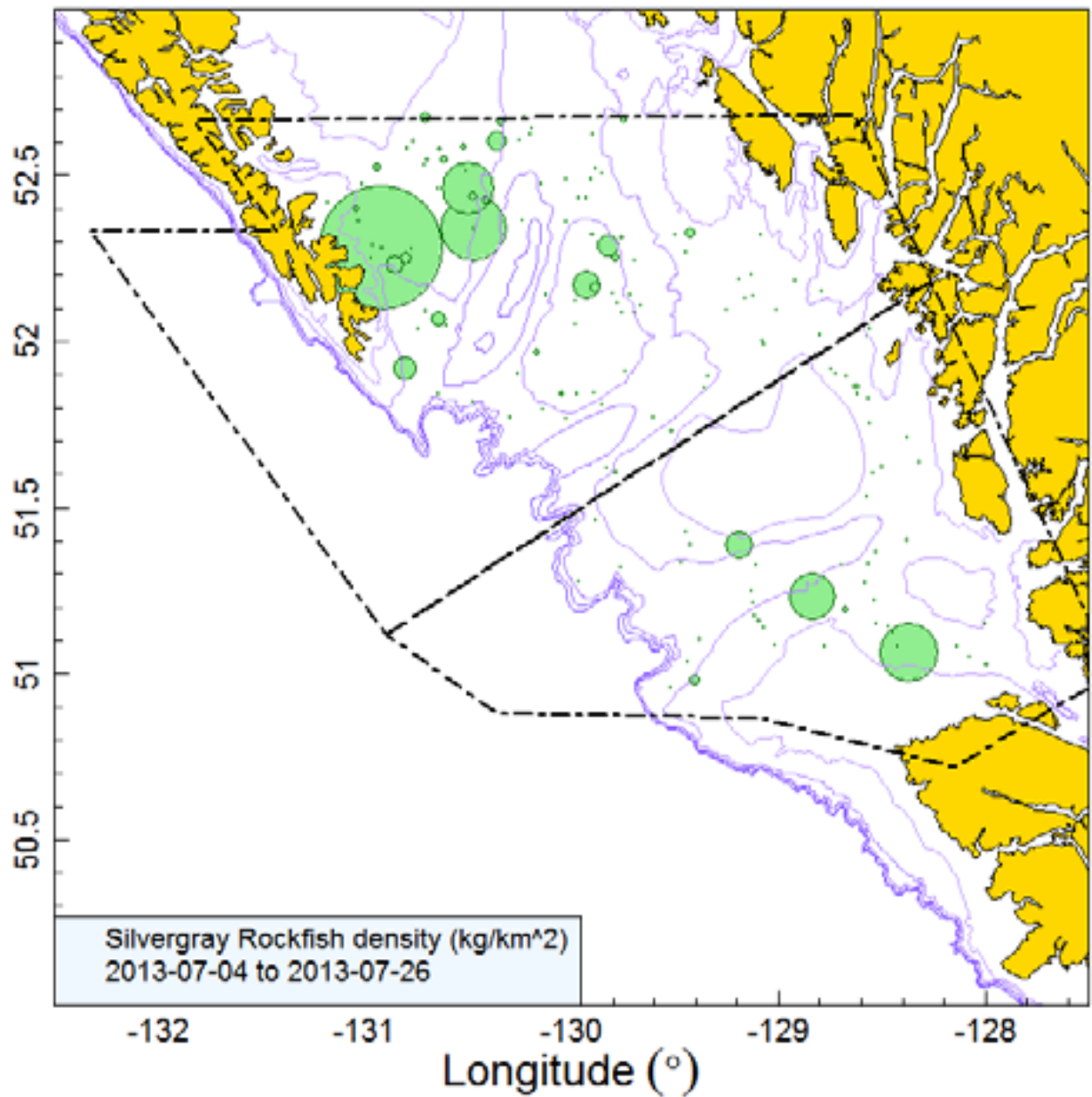


Figure 26. Density plot of Silvergray Rockfish for the 2013 Queen Charlotte Sound synoptic survey. Circle sizes are scaled across all years, with the largest circle = 57,477 kg/km<sup>2</sup> in 2013. Source: Figure B38, in Starr et al (2016).

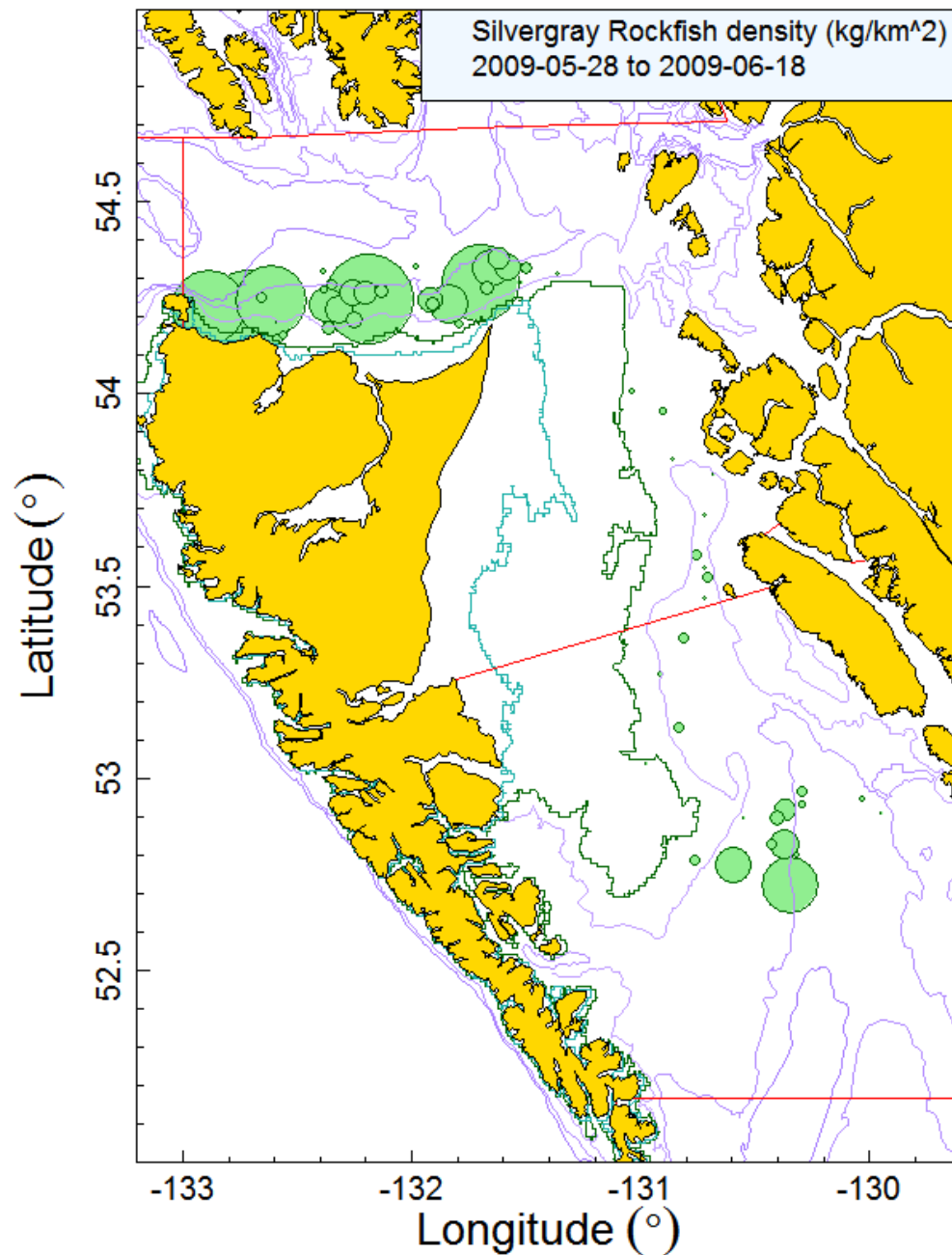


Figure 27. Density plot of Silvergray Rockfish for the 2009 Hecate Strait synoptic survey. Circle sizes are scaled across all years, with the largest circle = 1,675 kg/km<sup>2</sup> in 2011. *Source: Figure B26, in Starr et. al. (2016).*

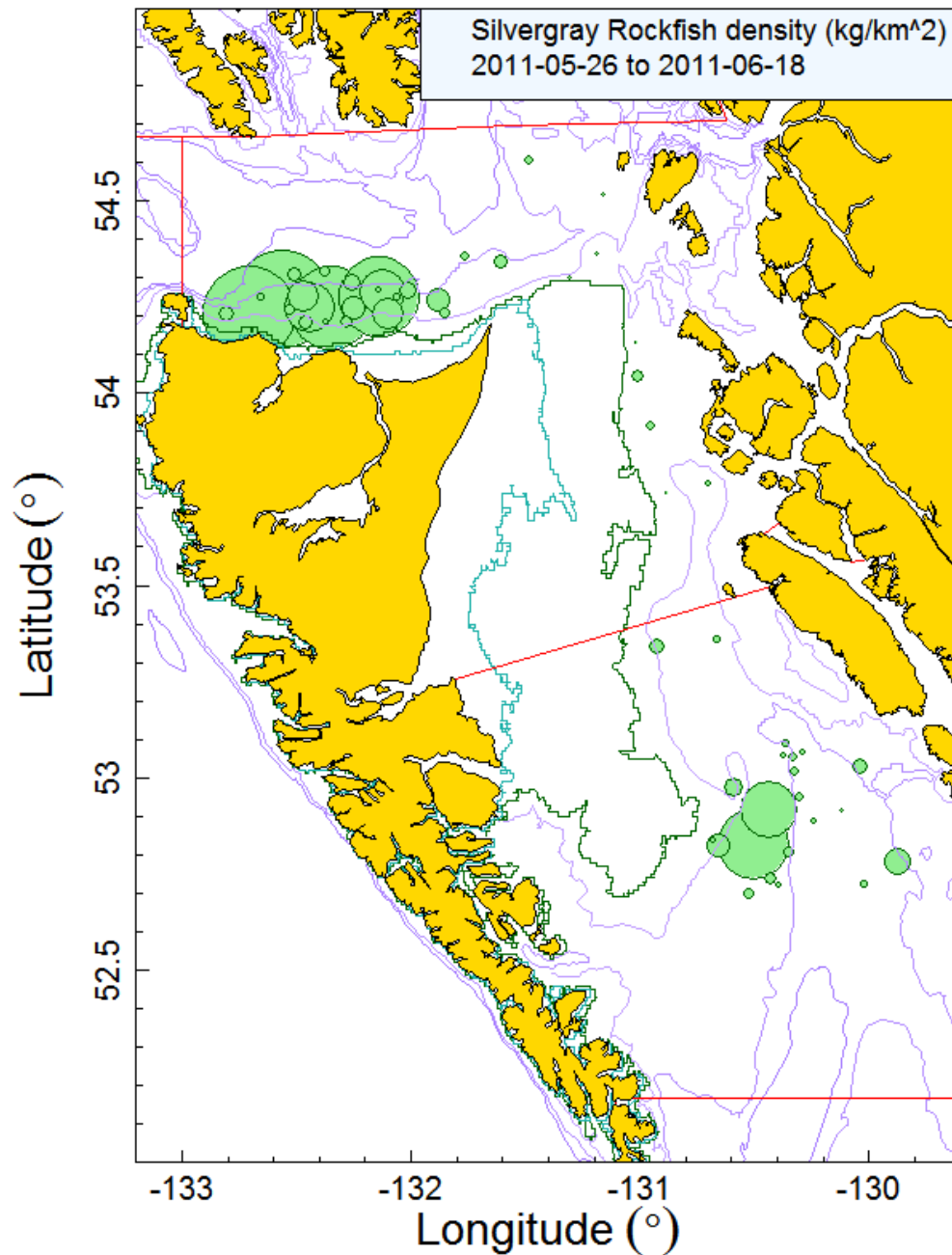


Figure 28. Density plot of Silvergray Rockfish for the 2011 Hecate Strait synoptic survey. Circle sizes are scaled across all years, with the largest circle = 1,675 kg/km<sup>2</sup> in 2011. *Source: Figure B27, in Starr et. al.(2016).*

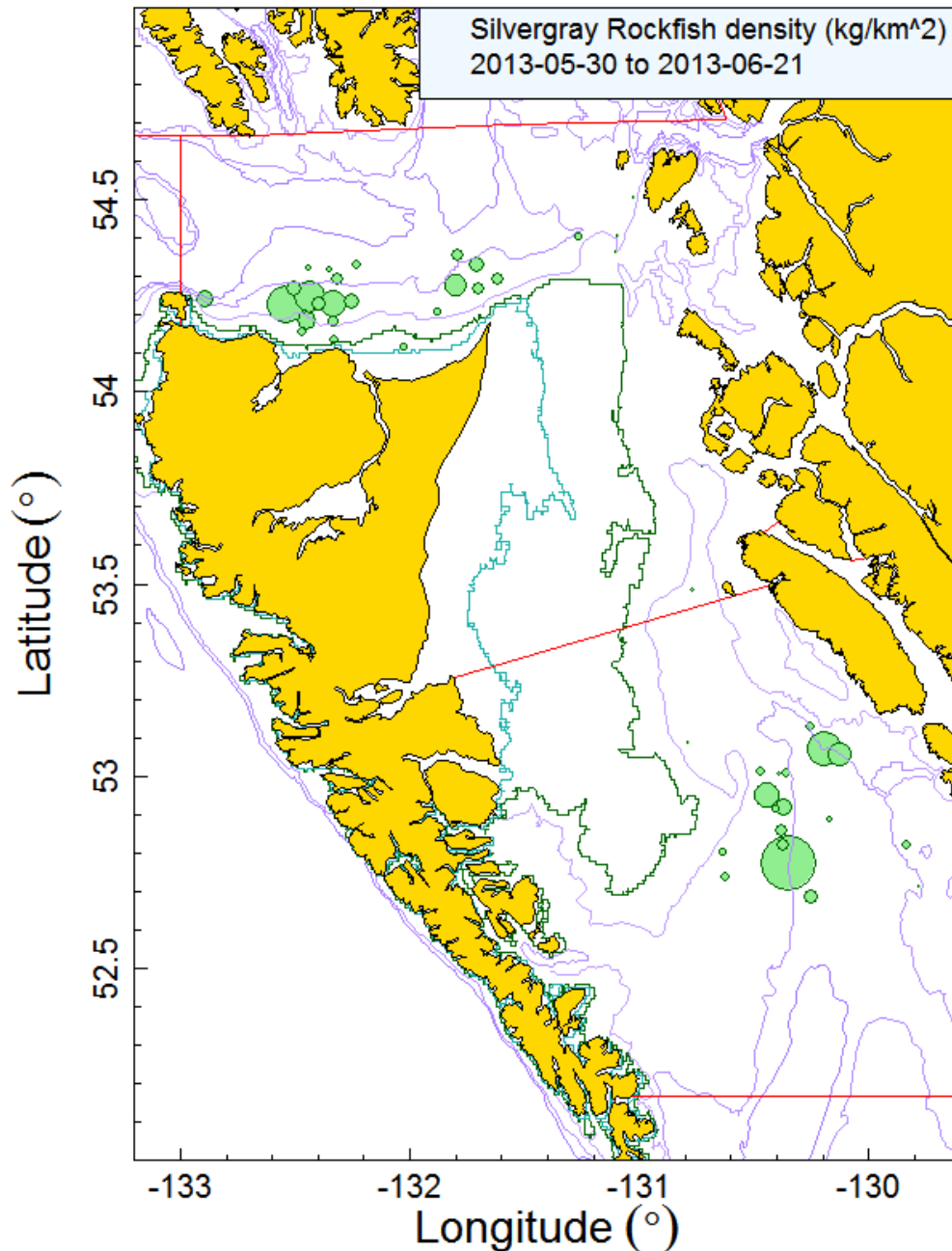


Figure 29. Density plot of Silvergray Rockfish for the 2013 Hecate Strait synoptic survey. Circle sizes are scaled across all years, with the largest circle = 1,675 kg/km<sup>2</sup> in 2011. *Source: Figure B28, in Starr et al (2016).*

The spatial relative abundance of silvergray rockfish in British Columbia trawl catches is shown in Figure 30, where catch per unit effort (CPUE) is mapped for the period 1996-2016. Some of the highest catch rates (see the red boxes in Figure 30) appeared to be aggregated in the Queen Charlotte Sound and Haida Gwaii regions of the northern BC coast.



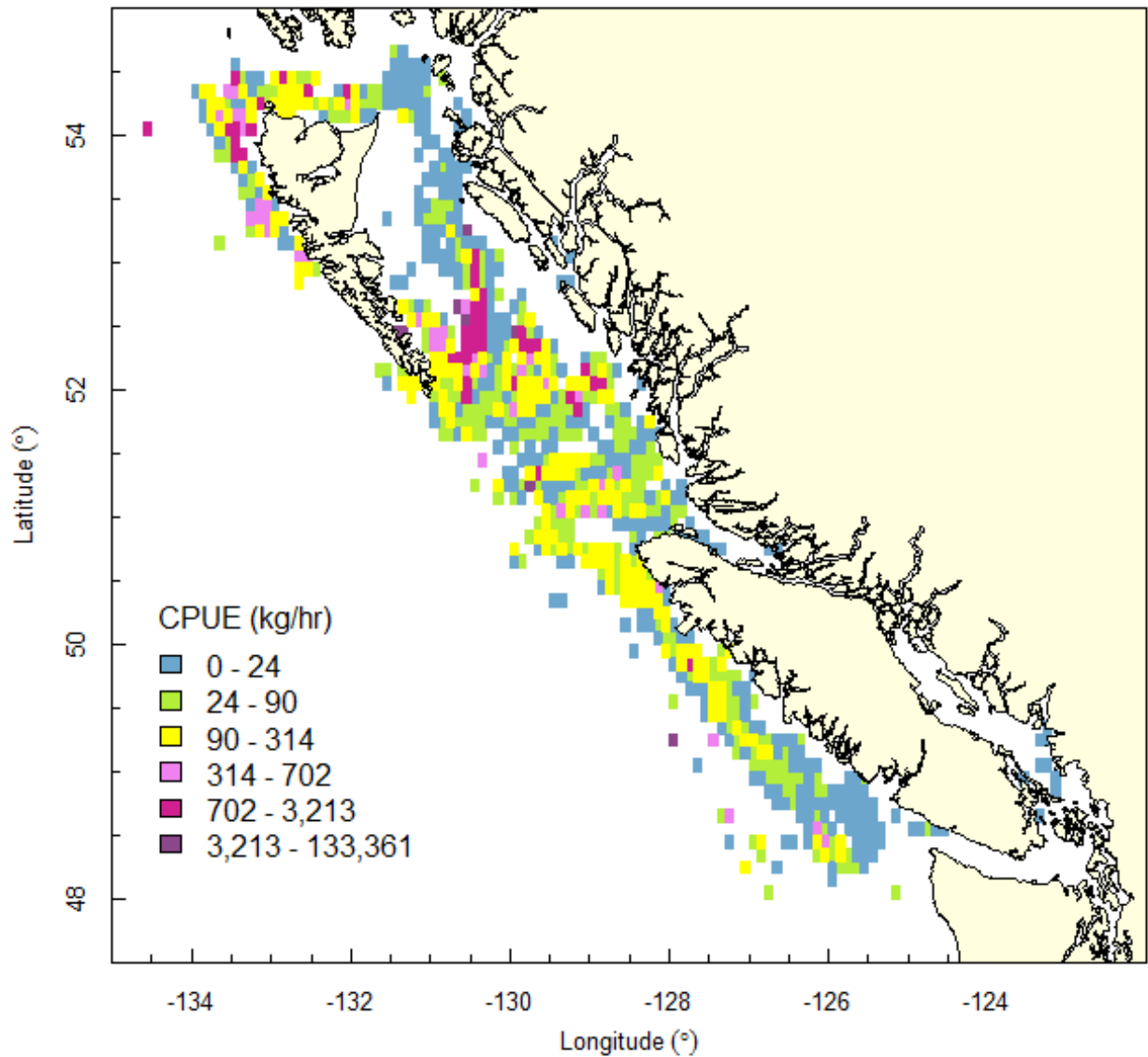


Figure 30. British Columbia silvergray rockfish commercial trawl catch per unit effort (kg/hr), 1999-2016. Source: DFO 2016b.

#### US West Coast

Silvergray rockfish are taken in relatively few NMFS US West Coast trawl survey tows. They were present in only 52 tows across all surveys conducted from 2009-2015; thus precluding estimates of biomass (Jim Hastie, NMFS, Pers. Comm. 7-25-2016).

## Stock Assessment and Status

### Alaska

In the GOA, silvergray rockfish are assessed and managed as part of the Other Rockfish (OR) complex. The OR complex is assessed on a biennial schedule to coincide with the availability of new trawl survey biomass estimates (Tribuzio and Echave 2015). The contribution of silvergray biomass to the total OR complex biomass closely follows the abundance trend in the NMFS trawl surveys. The 2015 values of exploitable biomass, OFL, and ABC were 43,046.3 mt, 2,152.3 mt, and 1,614.2 mt for GOA silvergray rockfish, respectively (Tribuzio and Echave 2015).

### British Columbia

A recent assessment of silvergray rockfish in British Columbia reported that the 2014 spawning biomass was 0.56 of the unfished level (5–95% range: 0.41–0.70), and 2.04 times the  $B_{msy}$  level (5–95% range: 1.22–3.00), indicating that the stock is in the “healthy zone” as defined by the DFO Sustainable Fisheries Framework (Figure 31) (Starr et. al. 2016).

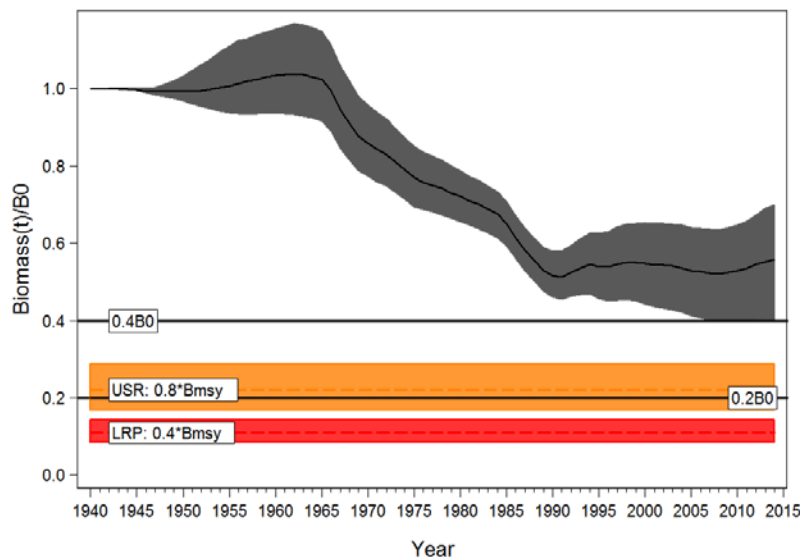


Figure 31. Trajectory of estimated female spawning stock biomass as a fraction of unfished biomass ( $B_0$ ), with estimated 90% credibility intervals. *Source: Figure 6 in Starr et. al. (2016).*

### US West Coast

Silvergray are unassessed on the US West Coast, and are managed as part of the Minor Shelf Rockfish-North and Minor Shelf Rockfish-South complexes. The OFL contribution of silvergray is determined by DB-SRA analysis (NMFS 2010). The OFL, ABC, and ACL contributions of silvergray to the Northern complex were 159.4 mt, 133.0 mt, and 133.0 mt, respectively, for both 2017 and 2018 specifications; the contributions to the Southern complex specifications of OFL, ABC, and ACL for those years were 0.5 mt, 0.4 mt, and 0.4 mt, respectively.



## California Skate

California skate are distributed coastwide in depths from 0 to 367 fm, with the highest densities occurring between 0 and 10 fathoms, south of 39° N latitude (PFMC 2016). California skate have little commercial value, although the trawl fleets account for the majority of catch as bycatch (PFMC and NMFS 2015).

### Recent Catch Trends

#### US West Coast

Estimates of California skate total catch for the period 2009-2014 ranged from a low of 1.9 mt in 2014, to a high of 15.6 mt in 2010 (Figure 32). Catch by fishery sector are tabulated in Appendix I, Table AI-7.

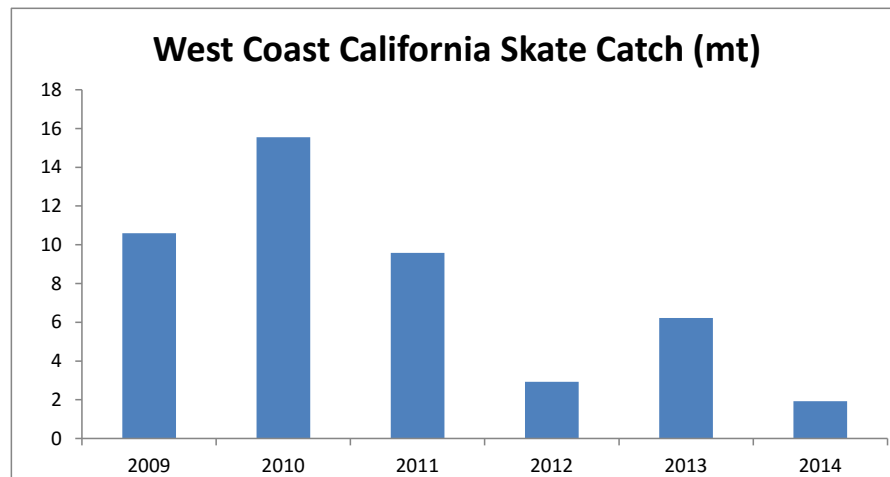


Figure 32. Estimates of total California skate catch for the US West Coast, 2009-2014.

Source: [https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data\\_products/species\\_management.cfm](https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm)

### Distribution and Abundance

#### US West Coast

Estimates of California skate abundance in NMFS trawl surveys from 2003-2012 are shown in the top center panel of Figure 33, below.

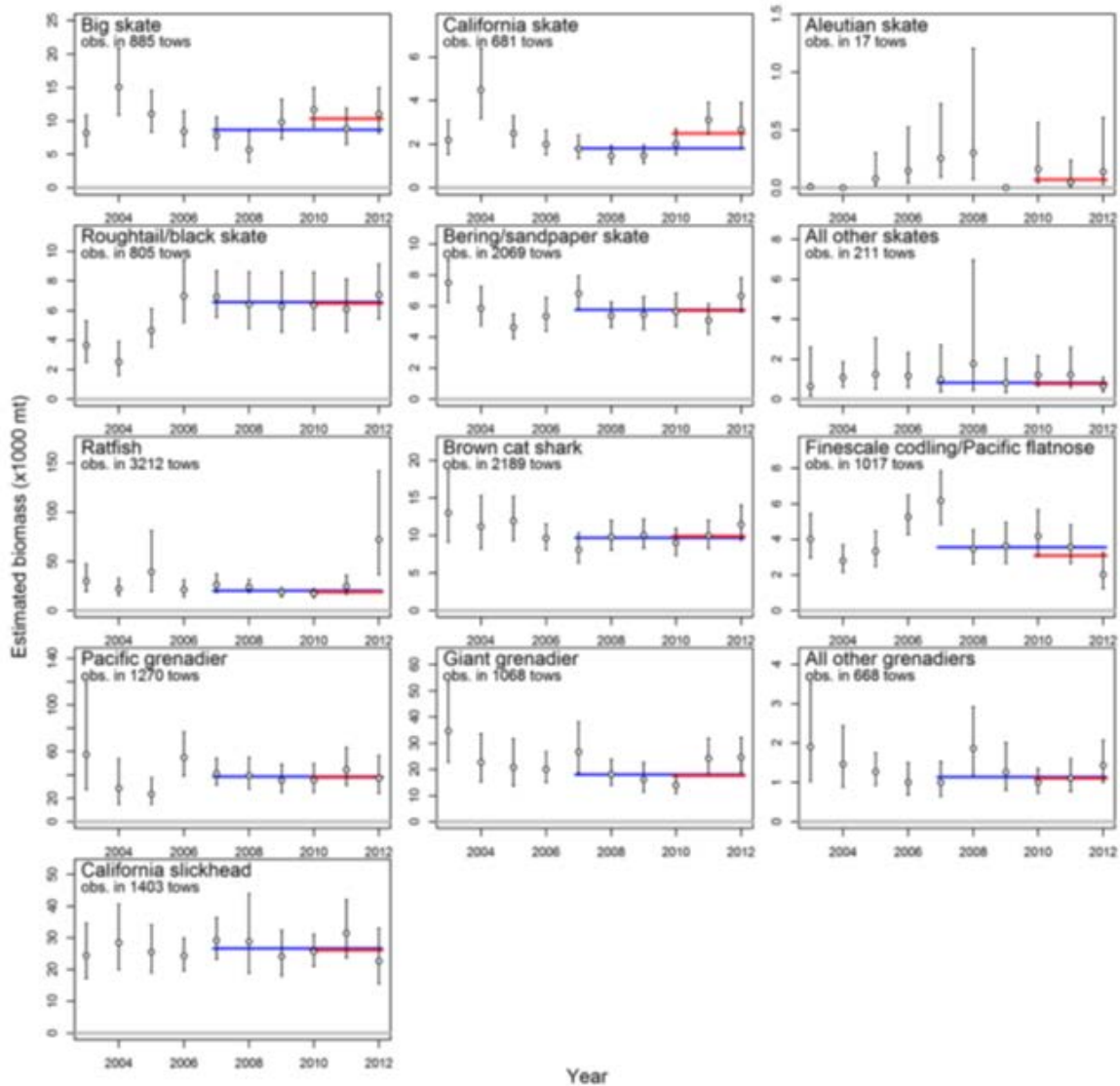


Figure 33. Time series of estimated survey biomass with estimated 95 percent confidence intervals for California skate (top middle panel), 2003-2012. Horizontal lines indicate weighted average value over the most recent 6-year and 3-year periods. Number of observations refers to total number of tows that included the species out of 6,453 tows for this 10-year period. *Source: Figure 4-24 in PFMC and NMFS (2015).*

California skate were present in 434 tows in NMFS trawl surveys from 2009-2014, ranging from Cape Blanco, OR to the US-Mexico border (Jim Hastie, NMFS, Pers. Comm. 7-25-2016). The spatial distribution of California skate taken in NMFS trawl surveys is available for viewing online at <https://www.nwfsc.noaa.gov/data/map>; most of the survey tows with California skate occurred in the Monterey and Conception INPFC areas.

## **Stock Assessment and Status**

### *US West Coast*

California skate is an unassessed species that was recently removed from the Other Fish complex and designated an Ecosystem Component (EC) species (PFMC 2015); thus, OFL, ABC, and ACL values are no longer specified for this species (PFMC 2016). The 2005 catch of 89 mt was higher than the 2015 California skate OFL contribution of 86 mt; however, catches of California skate have not exceeded 18 mt since 2007. (PFMC and NMFS 2015).

## **Summary and Discussion**

### **Shortraker rockfish**

Survey and fishery data indicate that the abundance of shortraker rockfish is highest in Alaska (Figures 4, 5), continues southward along the entire coast of British Columbia (Figure 10), and tails off markedly along the northern US West Coast (Figure 12). Correspondingly, average catches from 2009-2014 are highest in Alaska (900.5 mt), followed by British Columbia (131.3 mt) and the US West Coast (28.5 mt) (Tables AI-1, AI-2, and AI-3). Virtually all of the catch from the US West Coast is taken north of 40°10' N. latitude (Table AI-3). In its area of highest abundance (Alaska), recent survey data and stock assessments indicate a healthy stock; the recent trends in survey abundance show no sign of systematic decline (Figure 13), and the combined biomass estimates for the BSAI and GOA was over 80,000 mt for 2015 (Spies et. al. 2014, Eschave et. al. 2015). Just to the north of the US West Coast, in British Columbia, survey trends since 2004 were mixed in the separate regions surveyed, with no predominant coastwide trend evident (Figures 6-9). On the US West Coast, few shortraker are taken in trawl surveys, precluding estimates of abundance for this region (Jim Hastie, NMFS, Pers. Comm. 7-25-2016).

The above observations support the conclusion that the shortraker rockfish stock as a whole is healthy at its geographic center of abundance, and is found at the southern extent of its distribution on the US West coast.

### **Silvergray rockfish**

Survey and fishery data indicate that the abundance of silvergray is highest in northern British Columbia (Figures 22-31) and also extends substantially into the eastern and central areas of the GOA (Figure 17). Average catches from 2009-2014 are highest in British Columbia (1,392.3 mt), followed by the GOA (41.9 mt) and the US West Coast, north of 40°10' N. latitude (2.7 mt) (Tables AI-4, AI-5, and AI-6). In its area of highest abundance (British Columbia), survey data and a recent stock assessment indicate a healthy stock; the recent trends in survey abundance show no sign of systematic coastwide decline (Figures 18-21), and the estimated spawning biomass for 2014 was approximately 2 times the  $B_{msy}$  level (Starr et. al. 2016). On the US West Coast,

silvergray are uncommon in trawl surveys, precluding estimates of abundance for this region (Jim Hastie, NMFS, Pers. Comm. 7-25-2016).

The above observations support the conclusion that the silvergray rockfish stock as a whole is healthy at its geographic center of abundance, and is found at the southern extent of its distribution on the US West coast.

## California skate

Survey and fishery data indicate that the abundance of California skate on the US West Coast is highest in central-southern California; in NMFS trawl surveys from 2009-2014, most of the survey tows with California skate occurred in the Monterey and Conception INPFC areas (<https://www.nwfsc.noaa.gov/data/map>; Jim Hastie, NMFS, Pers. Comm. 7-25-2016). In a recent report (PFMC and NMFS 2015), survey abundance in the last three years analyzed (2010-2012) showed a slight increase in biomass estimates over immediately preceding years (Figure 33). California skate catch from the US West Coast averaged 7.8 mt from 2009-2014, and was estimated at 1.93 mt in 2014. Initially it seems incongruent that, while survey abundance has generally increased since 2010 (Figure 33), total trawl catch has decreased since then (Table AI-7; Figure 32). This may be partially accounted for by the different spatial distribution of survey vs. fishery tows; the NMFS trawl survey extends shoreward to a depth of 30fm; however, the zone inside of 3 miles is closed to trawl gear in California (PFMC and NMFS (2015)).

California skate has recently been designated as an Ecosystem Component species on the US West Coast. Species assigned to this category are fishery management plan (FMP) species that are not actively managed in the fishery (i.e., no harvest specifications are specified); ecosystem component species are not targeted, are not generally retained for sale or personal use, are not subject to overfishing, and are not overfished or approaching an overfished condition (PFMC 2015).

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<http://www.afsc.noaa.gov/REFM/Docs/2015/GOAorock.pdf>

## Appendix I. Time series of total catch estimates for Alaska, British Columbia, and the US West Coast.

### Shortraker Rockfish

Table AI-1. Estimated total catch of shortraker rockfish for Alaska, 2005-2015.

Sources: <sup>1</sup> BSAI shortraker rockfish stock assessment. Table 2. (Spies et al. 2014). The 2014 catch datum is From Spies et al. (2015).											
<sup>2</sup> GOA shortraker rockfish stock assessment. Table 11-3. (Echave et al 2015).											
<b>Alaska Shortraker Rockfish Catch</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
<b>Shortraker Rockfish Total Catch</b>	<b>668</b>	<b>876</b>	<b>931</b>	<b>731</b>	<b>772</b>	<b>757</b>	<b>855</b>	<b>1034</b>	<b>1103</b>	<b>882</b>	<b>538</b>
Bering Sea - Aleutian Islands <sup>1</sup>	170	212	323	133	184	300	333	344	372	197	
Gulf of Alaska <sup>2</sup>	498	664	608	598	588	457	522	690	731	685	538

Table AI-2. Estimated total catch of shortraker rockfish for British Columbia, 2007-2015.

Source: DFO 2016. GFASTer Report for Shortraker Rockfish. Run date 7-22-2016. 42 p. Provided by Kate Rutherford, DFO, Nanaimo.										
<b>British Columbia - Shortraker Rockfish Catch</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
<b>Shortraker Rockfish - Total Catch</b>	<b>84.3</b>	<b>113.1</b>	<b>131.5</b>	<b>100.2</b>	<b>120.5</b>	<b>136.4</b>	<b>154.8</b>	<b>144.7</b>	<b>167.6</b>	
Trawl	35.6	30.0	43.7	30.1	36.3	35.5	45.8	27.2	44.8	
Non-Trawl	48.7	83.1	87.8	70.1	84.1	101.0	109.0	117.5	122.8	

Table AI-3. Estimated total catch of shortraker rockfish for the US West Coast, by fishery sector, 2002-2014.

Sources: (2002-2012) --PFMC Groundfish Harvest Specifications Final EIS 2015-2016 (PFMC and NMFS 2015). Table 4-25.													
(2013-2014) - <a href="https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm">https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm</a>													
West Coast Shortraker Rockfish Catch - North of 40°10' N. lat.	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
Shortraker Rockfish - Total Catch	18.9	27.1	19.7	14.8	11.7	31.8	34.8	27.8	33.6	28.0	28.3	24.9	28.6
Incidental	0.6	1.4	0.5	0.0	0.0	0.2	0.0	0.1		0.0	0.2	0.1	0.1
Nearshore Fixed Gear				0.1					0.0		0.0		
Non-nearshore Fixed Gear	1.8	0.9	3.2	3.8	1.9	1.7	4.6	2.7		3.0	6.5	2.9	3.6
Non-Tribal At-sea Hake	0.1	0.1	0.5	0.3	0.4	0.3	0.3	0.2	4.2	0.2	0.7	0.0	0.0
Pink Shrimp				0.2		0.0	0.1		0.2				
Shoreside Hake		0.0	0.6			1.2	0.2	0.1		2.4	5.6	0.6	0.7
Tribal At-sea Hake						0.0		0.0	1.4				
Tribal Shoreside	1.0	0.6	0.6	1.0	1.4	1.0	1.6	1.0	0.0	1.3	1.3	0.7	1.4
Limited Entry Trawl Permit – Trawl Gear	15.4	24.1	14.3	9.4	8.0	27.4	28.0	23.7	1.1	20.7	12.7	20.4	22.5
Limited Entry Trawl Permit – Fixed Gear									26.6	0.4	1.3	0.0	0.3
Research												0.1	0.0
Shortraker/Rougheye/Blackspotted Rockfish	0.3	9.6	0.4	6.4	1.1	5.7	34.3	1.4	10.8	0.3	38.5	5.7	5.7
Non-nearshore Fixed Gear	0.2	0.5	0.4	3.1	0.3	1.3	33.0	0.6	10.8	0.2	36.4	5.7	5.7
Non-Tribal At-sea Hake	0.1			3.1		0.0	0.1			0.0	0.0		
Limited Entry Trawl Permit – Trawl Gear		9.1	0.0	0.2	0.8	4.4	1.2	0.7		0.0			
Limited Entry Trawl Permit – Fixed Gear									0.2	2.2	0.1	0.1	

## Silvergray Rockfish

Table AI-4. Estimates of total catch of silvergray rockfish in the GOA, 2005-2014.

Sources: <sup>1</sup> Gulf of Alaska Other Rockfish Assessment. Table 16.5. (Tribuzio and Echave 2015).											
Silvergray Rockfish Catch	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
<b>Silvergray Rockfish</b>											
Gulf of Alaska <sup>1</sup>	4.3	12.8	12.4	9.6	22.9	35.6	92.5	40.5	24.6	35.3	52.5

Table AI-5. Estimates of total catch of silvergray rockfish in British Columbia, 2007-2014.

Source: DFO 2016. GFASTeR Report for Silvergray Rockfish. Run date 7-22-2016. 49 p. Provided by Kate Rutherford, DFO, Nanaimo.									
British Columbia -Silvergray Rockfish Catch	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
Silvergray Rockfish - Total Catch	1321.7	1275.8	1451.1	1441.5	1431.9	1380.5	1379.6	1269.4	1639.4
Trawl	1263.5	1206.0	1395.4	1396.2	1378.1	1321.3	1336.9	1229.3	1600.7
Non-Trawl	58.2	69.8	55.7	45.3	53.8	59.1	42.7	40.1	38.7

Table AI-6. Estimates of total catch of silvergray rockfish on the US West Coast, 2009-2014.

Source: <a href="https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm">https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm</a>						
Estimated Total Catch -- North of 40°10' N. lat.	2009	2010	2011	2012	2013	2014
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
<b>Silvergray Rockfish North of 40°10' N. lat.</b>	<b>1.20</b>	<b>4.52</b>	<b>1.02</b>	<b>2.99</b>	<b>3.43</b>	<b>3.18</b>
Incidental			0.00	0.03		0.03
Nearshore Fixed Gear	0.00					
Non-nearshore Fixed Gear	0.20	0.10	0.07	0.13	0.37	0.50
Non-Tribal At-sea Hake	0.40	0.75	0.27	0.78	0.13	0.09
Pink Shrimp						
Shoreside Hake		0.02	0.15	0.57	0.59	0.33
Tribal At-sea Hake		0.05	0.01			
Tribal Shoreside			0.01	0.00	1.10	0.53
Limited Entry Trawl Permit -- Trawl Gear	0.50	3.50	0.30	1.37	0.74	0.57
Limited Entry Trawl Permit -- Fixed Gear				0.01		0.00
Research	0.10	0.10	0.21	0.10	0.48	0.03
Recreational WA						
Recreational OR			0.01			1.10
Recreational CA						



Table AI-7. Estimates of total catch of California skate on the US West Coast, 2009-2014.

Source: <a href="https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm">https://www.nwfsc.noaa.gov/research/divisions/fram/observation/data_products/species_management.cfm</a>						
<b>Estimated Total Catch</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)	Total catch (mt)
<b>California Skate</b>	10.6	15.6	9.6	2.9	6.2	1.9
Incidental				0.0	--	--
Nearshore Fixed Gear				--	0.0	0.0
Non-nearshore Fixed Gear	0.0	0.3		0.0	0.0	--
Non-Tribal At-sea Hake				--	--	--
Pink Shrimp				0.0	--	0.0
Shoreside Hake				--	--	--
Tribal At-sea Hake				--	--	--
Tribal Shoreside				--	--	--
Limited Entry Trawl Permit – Trawl Gear	3.2	3.2	3.1	2.1	0.4	0.9
Limited Entry Trawl Permit – Fixed Gear				--	--	--
Research			0.4	0.3	0.3	0.3
Recreational WA				--	--	--
Recreational OR				--	--	--
Recreational CA				--	--	--
CA Halibut	7.4	12.1	6.1	0.5	5.5	0.7

## Appendix II. Time series of trawl survey biomass estimates.

### Shortraker Rockfish

Table AII-1. Biomass estimates of shortraker rockfish from NMFS trawl surveys in Alaska, 2002-2015.

Sources: <sup>1</sup> BSAI Shortraker Rockfish stock assessment. Table 7. (Spies et al. 2014).														
<sup>2</sup> GOA Shortraker Rockfish stock assessment. Table 11-6. (Echave et al 2015).														
NMFS Bottom Trawl Surveys	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)
<b>Shortraker Rockfish</b>														
Bering Sea <sup>1</sup>	4851		2570				7308		4365		9299			
Aleutian Islands <sup>1</sup>	16805		33242		12961				18239		16230		16429	
Gulf of Alaska <sup>2</sup>		42023		42568		35125		44185		64835		67370		62317

### Silvergray Rockfish

Table AII-2. Biomass estimates of silvergray rockfish from trawl surveys in British Columbia, 2009-2013.

Source: Starr et al. (2016). Stock assessment for Silvergray Rockfish ( <i>Sebastes brevispinis</i> ) along the Pacific coast of Canada.					
Silvergray Rockfish Surveys	2009	2010	2011	2012	2013
	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)	Biomass (mt)
<b>Silvergray Rockfish</b>					
Queen Charlotte Sound	4078		3972		14806
West Coast Vancouver Island		801		2893	
West Coast Haida Gwaii		566		1358	



**Agenda Item C.4  
Public Comment  
April 2017**

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Reply To:  
**Heather Fathali, Attorney at Law**  
[hfathali@cascadia.com](mailto:hfathali@cascadia.com)

March 30, 2017

Mr. Herb Pollard, Chair  
And Members of the Pacific Fishery Management Council  
Pacific Fishery Management Council  
7700 NE Ambassador Place, Suite 101  
Portland, OR 97220-1384

Dear Mr. Pollard and Members of the Pacific Fishery Management Council:

**RE: Future Council Meeting Agenda and Workload Planning/  
Regulatory Amendment to HMS Permit Regulations**

I write to request that the Council vote to set aside time at a future meeting to consider amending the HMS regulations to extend permit eligibility to American Indians Born in Canada (ABCs). The Council heard this request when I presented at the PFMC meeting on March 13, 2017 in Vancouver, WA; but the Council did not hold a vote to place the matter on a future agenda. I understand that a vote to place the matter on a future agenda is required; that an appropriate future time might be June, September, or November this year; and I request that the Council vote to consider this matter at its earliest convenience.

Current HMS permit regulations include the general eligibility requirement that a vessel owner be a citizen of the United States.<sup>1</sup> We request that HMS permit regulations be amended such that ABC status<sup>2</sup> is accepted as an alternative to the citizenship requirement; thus extending permit eligibility to this special population which, for many state and federal purposes, is already treated as analogous to U.S. citizenship.

Congress recognizes and commits to maintaining the Federal Government's unique and continuing relationship with, and responsibility to, the Indian people.<sup>3</sup> The federal courts have emphasized this "historically unique relationship of Indians to this country" as a basis to uphold the constitutionality of statutes treating ABCs differently than other types of non-citizens; qualifying ABCs for federal public benefits and placing them on equal footing with U.S. citizens, while treating other legal non-citizens as ineligible.<sup>4</sup>

<sup>1</sup> 50 CFR 660.707, 46 USC § 12103(b), and replicated at Page 2 of the Pacific HMS Vessel Permit Application.

<sup>2</sup> Defined by Section 289 of the Immigration and Nationality Act to include Canadians with a 50% or greater native bloodline. The status is rooted in the Jay Treaty of 1794, which is still treated as in force by the U.S. Department of State. Its relevant rights and benefits are today codified at § 289 of the Immigration and Nationality Act.

<sup>3</sup> 25 U.S.C. § 5302. Congressional declaration of policy (formerly cited as 25 USC §450a).

<sup>4</sup> *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1352 (11th Cir. 1999).

Notably, with regard to the federal public benefits open to ABCs, Congress defines “federal public benefit” to include “any grant, contract, loan, professional license, or **commercial license provided by an agency of the United States** or by appropriated funds of the United States.”<sup>5</sup> It follows that HMS permits are a type of commercial license provided by an agency of the United States — NOAA—for which ABCs should not be ineligible.

As your reading of the attached materials underlying this request will reveal; extending HMS permit eligibility to ABCs not only satisfies the spirit behind the Vessel documentation laws requiring U.S. citizenship, but is also consistent with “the Federal Government’s unique and continuing relationship with and responsibility to the Indian people” including ABCs.<sup>6</sup> We urge you to consider the attached materials underlying this request, and set aside time to discuss the matter in full at an upcoming meeting.

For your reference, please find attached the following materials:

- PowerPoint I presented at the PFMC meeting in Vancouver, WA on Mar. 13, 2017.
- Original request to NMFS requesting an amendment to HMS permitting regulations that would extend qualification to ABCs, dated Nov. 5, 2014
- Response from NMFS, dated Sept. 14, 2016
- Letter from Dr. Freese on behalf of NMFS, to PFMC, dated Oct. 31, 2016
- Copies of cited statutes regarding ABCs and federal public benefits

I thank you for your consideration of this matter. Please do not hesitate to contact me for further information, documentation, or with any questions or concerns.

Sincerely,



Heather Fathali  
Attorney at Law

---

<sup>5</sup> 8 USC § 1611(c)(1)(a).

<sup>6</sup> *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1352 (11th Cir. 1999) (recognizing “the Federal Government’s unique and continuing relationship with and responsibility to the Indian people”). *See also Akins v. Saxbe*, 380 F.Supp. 1210, 1219–20 (D.Me.1974) (recognizing Congressional interest in preserving aboriginal rights of American Indians to move freely across territories originally occupied by them).”

# American Indians Born in Canada and the Right of Free Access to the United States

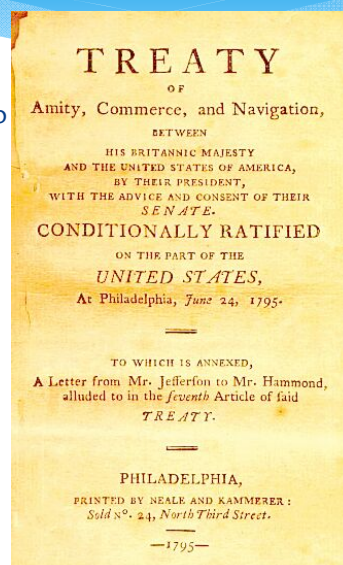
Agenda Item C.5.b.  
Supplemental Public Comment  
March 2017

Heather Fathali, Attorney at Law, Cascadia Cross-Border Law  
Greg Boos, Attorney at Law, Cascadia Cross-Border Law

## The Jay Treaty

- \* In 1794, Great Britain and the U.S. negotiated the Jay Treaty, seeking in part to relieve tribal tensions caused by the imposition of the new border.
- \* In relevant part, Article III of the Treaty provides:
 

It is agreed that it shall at all times be free to . . . the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America. . . .”
- \* The Treaty did not create a new right for Indians; it simply recognized their pre-existing right to move freely across their traditional lands now separated by the border.





## The Jay Treaty and American Indians Born in Canada

- \* The Jay Treaty is still treated as in force by the U.S. Department of State.
- \* The relevant rights and benefits are today codified at § 289 of the Immigration and Nationality Act (INA).
- \* “American Indian Born in Canada” (ABC) is a statutory term of art that encompasses indigenous peoples of North America, who were born in Canada, and who have at least a 50% native bloodline.

## Who Qualifies?

- \* A Canadian with “*at least 50 per centum blood of the American Indian Race.*” INA § 289. This is the only remaining racial metric in U.S. immigration laws.
- \* Tribal enrollment is irrelevant to qualification – status is entirely bloodline-based.
- \* Lack of tribal enrollment is equally irrelevant – status is entirely bloodline-based.

## Who Does Not Qualify?

- \* **A tribal card alone will not confer status as an ABC.**  
Tribal membership is not dispositive because there are many tribes/bands in Canada that do not require a 50% bloodline.
- \* Derivatives (spouse, children) do not qualify unless they independently meet the bloodline requirement.

## Documenting as an ABC

- \* The U.S. government already considers ABCs to be lawful permanent residents. They may apply to document their bloodline and status as part of a green card application; or, if they don't apply for a green card, they must have their bloodline adjudicated by a CBP officer each and every time they cross the border.
- \* Burden rests on the applicant to prove their bloodline. Documentation includes evidence of parents' bloodline, grandparents' bloodline, and sometimes even the bloodlines of great-grandparents.
- \* In 2015, out of the over 1 million green card applications filed that year, USCIS reported only 206 green card applications by individuals asserting ABC status. That's less than .0002%!  
<https://www.dhs.gov/immigration-statistics/yearbook/2015/table7>

## Reciprocity?

- \* The Canadian government holds the Jay Treaty does not affect the admissibility of U.S.-born Indians to Canada.
- \* However, Canadian courts recognize and protect an *aboriginal* right to freely pass the border.
  - \* This right is protected by Canada's Constitution.
- \* This right is not based on bloodline. It is a culturally-based test that assesses a number of factors.

## What are the Benefits?

### ABCs are not bound by US immigration law...

**Free Passage:** *"Nothing in this title [meaning the entire INA] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."* INA § 289.

- \* Qualifying ABCs enjoy a right of free access to the United States unrestricted by U.S. immigration laws.
  - \* This right of free access extends to any purpose – including living in the U.S., working in the U.S., studying in the U.S., and serving in the U.S. military.
- \* No requirement to obtain visas or passports.
- \* ABCs cannot be deported on any ground.



## What are the Benefits?

**ABCs are on equal footing with U.S. citizens for many Federal and State purposes...**

- \* The Welfare Reform Act of 1996 classifies all non-citizens as “qualified” or “unqualified” for Federal public benefits.
  - \* At 8 USC 1641, the Act enumerates the categories of “qualified” non-citizens, primarily: green card holders, refugees, and certain victims of domestic violence. ABCs are not on the list of “qualified” non-citizens. (but stay tuned... this is a statute that must be read in its entirety)
  - \* 8 USC 1611(a) provides that everyone who is not listed as “qualified” is considered “unqualified,” and is ineligible for Federal public benefits. Additionally, 8 USC 1611(c)(1)(A) defines “Federal public benefit” to include “any grant, contract, loan, professional license, or **commercial license provided by an agency of the United States** or by appropriated funds of the United States.”
  - \* 8 USC 1612(a)(1) exempts ABCs from the limiting provision at 1611(a) which provides that everyone who is “not qualified” is ineligible for Federal public benefits. They are the only category of non-citizen that is exempted in this way.
  - \* The constitutionality of treating ABCs differently than other non-citizens has been examined and upheld by our Federal courts, based on “the Federal Government’s unique and continuing relationship with and responsibility to the Indian people.” *Rodriguez v. United States*, 169 F.3d 1342, 1352 (11th Cir. 1999).
- \* ABCs are treated as U.S. citizens for many state benefits; in Washington State for example, for the purposes of determining an individual’s citizenship status for public assistance, “U.S. citizens” are defined to include American Indians Born in Canada. WAC 388-424-0001.

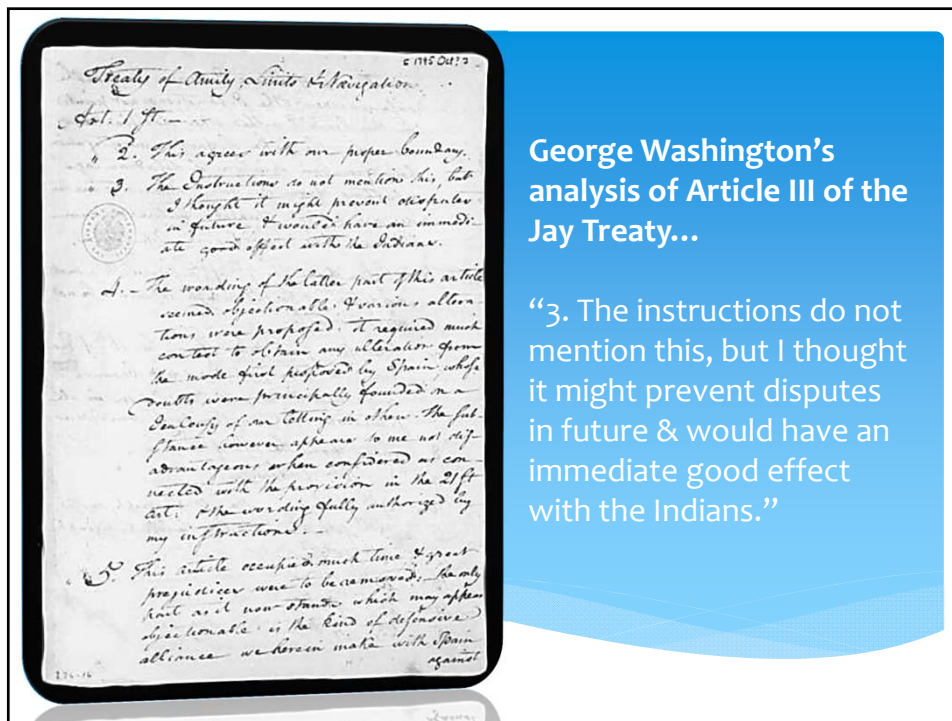
## What are the Benefits?

**ABCs are even treated more favorably than U.S. citizens for some permitting purposes!**

- \* Generally, individuals seeking entry to the United States must report in person to a CBP Officer at a U.S. port-of-entry. 8 CFR 235.1.
- \* An alternative to the in person reporting requirement exists in CBP’s Canadian Border Boat Landing (I-68) Program, which allows certain applicants entering the United States by small boat from Canada to telephonically report their arrival to CBP. See <https://www.cbp.gov/travel/pleasure-boats-private-flyers/cbbl>.
- \* While there is no requirement that such boaters must obtain a Form I-68; boaters who choose not to obtain a Form I-68 must report, in person, for inspection by a CBP Officer at a port-of-entry each time they enter the United States. Persons traveling by boat who do not have a Form I-68 and fail to present themselves for inspection are subject to arrest, possible fine, or if a Non-US Citizen, removal from the United States. See <https://www.cbp.gov/travel/pleasure-boats-private-flyers/cbbl>.
- \* However, in a legal opinion published by the General Counsel of legacy INS (now DHS) regarding the scope of the I-68 program; the unique and special status of ABCs is emphasized. The INS General Counsel goes out of his way to note in his opinion that the I-68 program does not apply to ABCs at all, because “the INA does not restrict the right of Canadian natives ‘who possess at least 50 per centum of blood of the American Indian race’ to enter the United States. . . These individuals are exempt from ‘all immigration restrictions imposed on aliens’ by the INA,” concluding that “Qualified Canadian born Native Americans, therefore, may sail in the United States portion of the boundary waters and land on the United States shore, without having to first obtain a Form I-68.” *Genco Op. No. 92-43 (INS), 1992 WL 136938*.

## The Jay Treaty and American Indians Born in Canada

- \* Extending HMS permit eligibility to ABCs:
  - \* Is consistent with “the Federal Government’s unique and continuing relationship with and responsibility to the Indian people” including ABCs.
  - \* Is consistent with the our Federal and state governments’ widespread practice of placing ABCs on equal footing with U.S. citizens.
  - \* Continues to satisfy the policies underlying the U.S. citizenship requirement for vessel permitting.



Reply To:  
**Heather Fathali, Attorney at Law**  
[hfathali@cascadia.com](mailto:hfathali@cascadia.com)

November 5, 2014

U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
501 West Ocean Boulevard, Suite 4200  
Long Beach, CA 90802

Dear Craig D'Angelo:

**RE: Regulatory Amendment to Qualify American Indians Born in Canada  
to Hold Pacific Highly Migratory Species Vessel Permit**

I write on behalf of my client, Mr. Tom Hearty, who was denied a Pacific Highly Migratory Species (HMS) Vessel Permit on June 15, 2014. His denial letter states that vessels with ownership by individuals who are not U.S. citizens may not be issued a Pacific HMS Permit.

Mr. Hearty is a Canadian citizen and a Legal Permanent Resident (LPR) of the United States; however, his LPR status is unique because it is derived from his special American Indian born in Canada (ABC) status. An ABC is treated by the United States as essentially equivalent to a U.S. citizen with regard to all immigration rights and benefits. As such, I seek a regulatory amendment giving ABCs the qualification to hold an HMS permit. Alternatively, I seek an informal amendment through a policy memorandum.

To provide a context, ABC status is rooted in the Jay Treaty, which was negotiated by the United States and Great Britain in 1794 in part to mitigate the bisection of tribal lands by the newly established U.S./Canada border; it provided that American Indians could travel freely across the international boundary. The Jay Treaty is still treated as in force by the U.S. Department of State, and its relevant rights and benefits are today codified at § 289 of the Immigration and Nationality Act (INA).

Section 289 of the INA grants Canadians with a 50% or greater American Indian bloodline (defined by the statute as "American Indians born in Canada") privileges unparalleled by all but United States citizens, virtually unrestricted by U.S. immigration laws— as described by the U.S. Embassy in Canada (Ottawa), they may enter and remain in the U.S. for purposes including "employment, study, retirement, investing, and/or immigration"; ABCs are not deportable on any ground, and are not required to obtain immigrant visas.

The unique status held by ABCs, and Mr. Hearty's status as such, is significant because the regulations for Pacific HMS Vessel Permits include the general eligibility requirement that a vessel owner be a citizen of the United States; set forth at 50 CFR 660.707, 46 USC § 12103(b), and replicated at Page 2 of the Pacific HMS Vessel Permit Application.

Title 46 defines the term "citizen of the United States" by simply adopting the definition of a U.S. national set forth by the Immigration and Nationality Act (INA). *46 USC § 104*. The INA defines a national of the United States as either (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *INA § 101(a)(22)*. However, it must be noted that the INA is a pervasively cross-referenced statute, and its sections cannot be read in isolation. This is especially important with regard to § 289, governing ABCs, which states that

*"Nothing in this title [all of Title 8, including the definition of a U.S. national] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."*

This extraordinary provision essentially exempts ABCs from the substantive immigration laws otherwise set forth by the INA. As such, it is inappropriate to gauge ABCs against the INA definition for citizenship adopted by Title 46; rather, they should be treated as equivalent to U.S. citizens for permitting purposes, which would be more consistent with the underlying policies behind the citizenship requirement for vessel permitting.

Vessel documentation laws requiring U.S. citizenship date back to the very first Congress. The modern Merchant Marine Act was passed in 1920, with Congress making its intent clear in the Preamble—to foster an American Merchant Marine "that would be readily available to the nation in times of emergency and one that would channel the benefits of carrying domestic trade to U.S. citizens." *See 41 Stat. 988 (1920) (preamble)*. These objectives continue to be echoed in the most current iteration of the Merchant Marine Act. *46 U.S.C. § 50101*.

These concerns remain fully addressed by permitting vessels owned by ABCs to hold Pacific HMS permits. ABCs are free to live in the United States, to work in the United States, and to serve in the United States military. ABCs are on equal footing with U.S. citizens for the purposes of most federal public benefit programs, including the Supplemental Nutrition Assistance Program (SNAP; commonly known as Food Stamps), Social Security Insurance, and Medicaid.

The same is true for state benefits; in Washington State for example, for the purposes of determining an individual's citizenship status for public assistance, "U.S. citizens" are defined to include American Indians Born in Canada. *WAC 388-424-0001*.

The Federal Regulations which govern Highly Migratory Species are found at *50 CFR § 660 subpart K—Highly Migratory Fisheries*. Pacific HMS Vessel permitting regulations are specifically set forth at *50 CFR § 660.707—Permits*, which is the section through which the U.S. citizenship requirement is derived. However, it is significant to note that directly preceding the section on permitting is *50 CFR § 660.706—Pacific Coast Treaty Indian Rights*, which provides

an exemption from the HMS regulations for certain treaty Indians to harvest HMS in their usual and accustomed fishing areas in U.S. waters.

Given the Federal Regulations' explicit recognition of Indian treaty fishing rights at § 660.706, a regulatory amendment (or informal amendment through a policy memorandum) giving ABCs the qualification to hold an HMS permit would not only complement the Indian treaty recognition and other exemptions already in place; but it would be consistent with the federal government's longstanding treatment of ABCs as essentially equal to U.S. citizens, and would continue to satisfy the policies underlying the U.S. citizenship requirement for vessel permitting.

Attached to this letter I enclose the most recent edition of an article I have co-authored about American Indians Born in Canada; which details the history of the Jay Treaty, the rights and benefits held by American Indians Born in Canada, and the cross-border issues faced by American Indians Born in Canada today.

Please do not hesitate to contact me if you have any questions. I look forward to working with you to facilitate the implementation of this important amendment.

Sincerely,

Heather Fathali  
Attorney at Law





**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
7600 Sand Point Way N.E., Bldg. 1  
Seattle, Washington 98115

September 14, 2016

Heather Fathali  
Attorney At Law  
Cascadia Cross-Border Law  
1305 11<sup>th</sup> Street, Suite 301  
Bellingham, WA 98225

Dear Ms. Fathali:

This letter is in response to your request for reconsideration of our denial of issuance of a Pacific Highly Migratory Species Vessel Permit (HMS Permit) to your client, Tom Hearty. Mr. Hearty is a Canadian citizen, a Legal Permanent Resident (LPR) of the United States, and an American Indian born in Canada. We previously denied the request on the grounds that, subject to the applicable regulations, vessels owned by individuals who are not United States citizens may not be issued a permit. You requested a "regulatory amendment" making American Indians born in Canada eligible for HMS permits or in the alternative, an informal amendment through a policy memorandum. You offered in support of your request a law review article by Greg Boos et. al., *Canadian Indians, Inuit, Métis, and Métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States*, 4 SEATTLE J. ENVTL. L. 343 (2014).

As reflected in the HMS Permit application, applicable regulation requires that in order for an individual to be an eligible vessel owner he or she must be "a citizen of the United States."<sup>1</sup> This requirement is set forth in 50 CFR § 660.707 which states that only "a person eligible to own a documented vessel under the terms of 46 U.S.C. 12102(a) may be issued ... an HMS permit."<sup>2</sup> 46 U.S.C. § 12103, formerly cited as 46 U.S.C. § 12102, lays out the eligibility requirements for documented vessels including that any eligible individual owner of a documented vessel must be "a citizen of the United States."<sup>3</sup> Title 46 of the U.S. Code defines the term "citizen of the United States" as someone "who is a national of the United States as defined in section 101(a) (22) of the Immigration and Nationality Act."<sup>4</sup> INA § 101(a)(22) defines the term "national of the United States" to mean either "a citizen of the United States" or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."<sup>5</sup>

<sup>1</sup> National Oceanic and Atmospheric Administration National Marine Fisheries Service, Pacific Highly Migratory Species Vessel Permit Application, available at

[http://www.westcoast.fisheries.noaa.gov/fisheries/migratory\\_species/pacific\\_hms\\_permits.html](http://www.westcoast.fisheries.noaa.gov/fisheries/migratory_species/pacific_hms_permits.html)

<sup>2</sup> 50 C.R.F. § 660.707 (a) (4).

<sup>3</sup> 46 U.S.C. § 12103 (b) (1).

<sup>4</sup> 46 U.S.C. § 104.

<sup>5</sup> 8 U.S.C. § 1101 (a) (22).



It is undisputed that Mr. Hearty is not a U.S. citizen; it is our assumption also that Mr. Hearty was not born to non-citizen nationals of the United States. Mr. Hearty has not sought to show that he is a U.S. national through his owing permanent allegiance to the United States. Our review of your request, in light of the eligibility criteria for holding an HMS permit under applicable regulations, leads us to conclude that Mr. Hearty is not eligible for an HMS permit. This is the National Marine Fisheries Service's second review of this request, and per the regulations at 50 CFR §660.707(b), it constitutes final agency action.

As Mr. Hearty cannot meet the prerequisites for issuance of an HMS Permit for his vessel, we understand your communication to be a request that NMFS change applicable regulations to create an exemption for American Indians born in Canada. For such a change to regulations, it is necessary to engage the Pacific Fishery Management Council. Thus, NMFS will transmit your letter as a rulemaking request to that body.

Please contact Melissa Hooper, at 206-526-4357 or [melissa.hooper@noaa.gov](mailto:melissa.hooper@noaa.gov), if we may be of any further service in this matter.

Sincerely,



Barry A. Thom  
Regional Administrator



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
7600 Sand Point Way N.E., Bldg. 1  
Seattle, Washington 98115  
October 31, 2016

Mr. Herb Pollard, Chair  
Pacific Fishery Management Council  
7700 NE Ambassador Place, Suite 101  
Portland, Oregon 97220-1384

Dear Mr. Pollard:

I am writing to request that the Pacific Fishery Management Council (Council) consider the attached request for a regulatory amendment to the Pacific Highly Migratory Species (HMS) regulations to address a permit eligibility issue for American Indians who are born in Canada.

Mr. Tom Hearty requested that the National Marine Fisheries Service (NMFS) issue a Pacific HMS Permit to him on the basis that he is an American Indian born in Canada (he is also a Canadian citizen and Legal Permanent Resident of the United States). As described in the attached letter that we sent to Mr. Hearty, we determined that he is not eligible for an HMS Permit under the existing regulation at 50 CFR § 660.707, which requires that permit holders be citizens of the United States. We therefore denied Mr. Hearty's request for an HMS Permit and subsequently reconsidered and upheld our denial of that request.

After discussion with, and at the request of, Mr. Hearty's counsel, we are transmitting to you his request that the Council consider proposing a change to the relevant regulations to allow Mr. Hearty and others in his situation to be eligible for a permit, perhaps by creating an exemption for American Indians born in Canada.

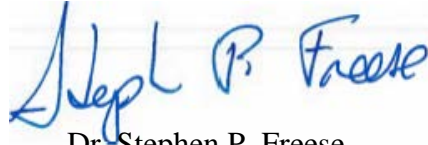
We request that the Council give this request consideration as it plans its workload for upcoming meetings. Mr. Hearty's counsel has indicated also that engagement of representatives of the indigenous people's community will be crucial to consideration of this issue. Mr. Hearty's counsel are located in Washington state, so it would be most convenient for them to attend the March 2017 Council meeting for in-person discussions; but they have indicated that they are willing to speak with Council staff at the earliest convenience of staff members.





For your reference, also attached is correspondence from Mr. Hearty's counsel requesting a rehearing and our subsequent affirmation of the denial. If you have any questions on this matter, please contact Melissa Hooper, Acting Chief of the Permits and Monitoring Branch, at 206-526-4357 or [melissa.hooper@noaa.gov](mailto:melissa.hooper@noaa.gov).

Sincerely,



Dr. Stephen P. Freese  
Acting Assistant Regional Administrator  
for Sustainable Fisheries

CC: Ms. Heather Fathali, Attorney At Law  
Mr. Chuck Tracy, Executive Director, Pacific Fishery Management Council

Attachments:

- HMS Permit denial letter (2014)
- Email from Ms. Fathali to Craig D'Angelo
- Response from NMFS



United States Code Annotated

Title 8. Aliens and Nationality (Refs &amp; Annos)

Chapter 14. Restricting Welfare and Public Benefits for Aliens

**§ 1611. Aliens who are not qualified aliens ineligible for Federal public benefits**

United States Code Annotated | Title 8. Aliens and Nationality | Effective: October 28, 1998 (Approx. 3 pages)

Effective: October 28, 1998

8 U.S.C.A. § 1611

**§ 1611. Aliens who are not qualified aliens ineligible for Federal public benefits**[Currentness](#)**(a) In general**

Notwithstanding any other provision of law and except as provided in subsection (b) of this section, an alien who is not a qualified alien (as defined in [section 1641](#) of this title) is not eligible for any Federal public benefit (as defined in subsection (c) of this section).

**(b) Exceptions**

(1) Subsection (a) of this section shall not apply with respect to the following Federal public benefits:

(A) Medical assistance under title XIX of the Social Security Act [[42 U.S.C.A. § 1396 et seq.](#)] (or any successor program to such title) for care and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of such Act [[42 U.S.C.A. § 1396b\(v\)\(3\)](#)]) of the alien involved and are not related to an organ transplant procedure, if the alien involved otherwise meets the eligibility requirements for medical assistance under the State plan approved under such title (other than the requirement of the receipt of aid or assistance under title IV of such Act [[42 U.S.C.A. § 601 et seq.](#)], supplemental security income benefits under title XVI of such Act [[42 U.S.C.A. § 1381 et seq.](#)], or a State supplementary payment).

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Public health assistance (not including any assistance under title XIX of the Social Security Act [[42 U.S.C.A. § 1396 et seq.](#)]) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(D) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(E) Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development, any program under Title V of the Housing Act of 1949 [[42 U.S.C.A. § 1471 et seq.](#)], or any assistance under [section 1926c of Title 7](#), to the extent that the alien is receiving such a benefit on August 22, 1996.

**NOTES OF DECISIONS (2)**[Constitutionality](#)[Preemption](#)

(2) Subsection (a) of this section shall not apply to any benefit payable under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General, to any benefit if nonpayment of such benefit would contravene an international agreement described in section 233 of the Social Security Act [42 U.S.C.A. § 433], to any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act [42 U.S.C.A. § 402(t)], or to any benefit payable under title II of the Social Security Act to which entitlement is based on an application filed in or before August 1996.

(3) Subsection (a) of this section shall not apply to any benefit payable under title XVIII of the Social Security Act (relating to the medicare program) [42 U.S.C.A. § 1395 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General and, with respect to benefits payable under part A of such title [42 U.S.C.A. § 1395c et seq.], who was authorized to be employed with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits.

(4) Subsection (a) of this section shall not apply to any benefit payable under the Railroad Retirement Act of 1974 [45 U.S.C.A. § 231 et seq.] or the Railroad Unemployment Insurance Act [45 U.S.C.A. § 351 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General or to an alien residing outside the United States.

(5) Subsection (a) of this section shall not apply to eligibility for benefits for the program defined in section 1612(a)(3)(A) of this title (relating to the supplemental security income program), or to eligibility for benefits under any other program that is based on eligibility for benefits under the program so defined, for an alien who was receiving such benefits on August 22, 1996.

(c) "Federal public benefit" defined

(1) Except as provided in paragraph (2), for purposes of this chapter the term "Federal public benefit" means--

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

(2) Such term shall not apply--

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

#### CREDIT(S)

(Pub.L. 104-193, Title IV, § 401, Aug. 22, 1996, 110 Stat. 2261; Pub.L. 105-33, Title V, §§ 5561, 5565, Aug. 5, 1997, 111 Stat. 638, 639; Pub.L. 105-306, §§ 2, 5(a), Oct. 28, 1998, 112 Stat. 2926, 2927.)

#### Notes of Decisions (2)

8 U.S.C.A. § 1611, 8 USCA § 1611

Current through P.L. 114-316. Also includes P.L. 114-318 to 114-327, and 115-1 to 115-3. Title 26 current through 115-3.



United States Code Annotated  
 Title 8. Aliens and Nationality (Refs & Annos)  
 Chapter 14. Restricting Welfare and Public Benefits for Aliens

## § 1612. Limited eligibility of qualified aliens for certain Federal programs

United States Code Annotated | Title 8. Aliens and Nationality | Effective: October 1, 2008 (Approx. 8 pages)

Effective: October 1, 2008

8 U.S.C.A. § 1612

### § 1612. Limited eligibility of qualified aliens for certain Federal programs

[Currentness](#)

#### (a) Limited eligibility for specified Federal programs

##### (1) In general

Notwithstanding any other provision of law and except as provided in paragraph (2), an alien who is a qualified alien (as defined in [section 1641](#) of this title) is not eligible for any specified Federal program (as defined in paragraph (3)).

##### (2) Exceptions

##### (A) Time-limited exception for refugees and asylees

With respect to the specified Federal programs described in paragraph (3), paragraph (1) shall not apply to an alien until 7 years after the date--

- (i) an alien is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act [[8 U.S.C.A. § 1157](#)];
- (ii) an alien is granted asylum under section 208 of such Act [[8 U.S.C.A. § 1158](#)];
- (iii) an alien's deportation is withheld under section 243(h) of such Act [[8 U.S.C.A. § 1253](#)] (as in effect immediately before the effective date of section 307 of division C of [Public Law 104-208](#) or section 241(b)(3) of such Act [[8 U.S.C.A. § 1231\(b\)\(3\)](#)] (as amended by section 305(a) of division C of [Public Law 104-208](#));
- (iv) an alien is granted status as a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980); or
- (v) an alien is admitted to the United States as an Amerasian immigrant pursuant to section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in section 101(e) of [Public Law 100-202](#) and amended by the 9th proviso under Migration and Refugee Assistance in title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989, [Public Law 100-461](#), as amended).

##### (B) Certain permanent resident aliens

Paragraph (1) shall not apply to an alien who--

- (i) is lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act [[8 U.S.C.A. § 1101 et seq.](#)]; and
- (ii) (I) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [[42 U.S.C.A. § 401 et seq.](#)] or can be credited with such qualifying quarters as provided under [section 1645](#) of this title, and (II) in the case of any such qualifying quarter creditable for any period beginning after December

#### NOTES OF DECISIONS (17)

[Constitutionality](#)  
[Construction with other laws](#)  
[Eligibility for benefits](#)  
[Retroactive effect](#)

31, 1996, did not receive any Federal means-tested public benefit (as provided under [section 1613](#) of this title) during any such period.

**(C) Veteran and active duty exception**

Paragraph (1) shall not apply to an alien who is lawfully residing in any State and is--

- (i) a veteran (as defined in [section 101](#), [1101](#), or [1301](#), or as described in [section 107 of Title 38](#)) with a discharge characterized as an honorable discharge and not on account of alienage and who fulfills the minimum active-duty service requirements of [section 5303A\(d\) of Title 38](#),
- (ii) on active duty (other than active duty for training) in the Armed Forces of the United States, or
- (iii) the spouse or unmarried dependent child of an individual described in clause (i) or (ii) or the unremarried surviving spouse of an individual described in clause (i) or (ii) who is deceased if the marriage fulfills the requirements of [section 1304 of Title 38](#).

**(D) Transition for aliens currently receiving benefits**

**(i) SSI**

**(I) In general**

With respect to the specified Federal program described in paragraph (3)(A), during the period beginning on August 22, 1996, and ending on September 30, 1998, the Commissioner of Social Security shall redetermine the eligibility of any individual who is receiving benefits under such program as of August 22, 1996, and whose eligibility for such benefits may terminate by reason of the provisions of this subsection.

**(II) Redetermination criteria**

With respect to any redetermination under subclause (I), the Commissioner of Social Security shall apply the eligibility criteria for new applicants for benefits under such program.

**(III) Grandfather provision**

The provisions of this subsection and the redetermination under subclause (I), shall only apply with respect to the benefits of an individual described in subclause (I) for months beginning on or after September 30, 1998.

**(IV) Notice**

Not later than March 31, 1997, the Commissioner of Social Security shall notify an individual described in subclause (I) of the provisions of this clause.

**(ii) Food stamps**

**(I) In general**

With respect to the specified Federal program described in paragraph (3)(B), ineligibility under paragraph (1) shall not apply until April 1, 1997, to an alien who received benefits under such program on August 22, 1996, unless such alien is determined to be ineligible to receive such benefits under the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.]. The State agency shall recertify the eligibility of all such aliens during the period beginning April 1, 1997, and ending August 22, 1997.

**(II) Recertification criteria**

With respect to any recertification under subclause (I), the State agency shall apply the eligibility criteria for applicants for benefits under such program.

**(III) Grandfather provision**

The provisions of this subsection and the recertification under subclause (I) shall only apply with respect to the eligibility of an alien for a program for months beginning on or after the date of recertification, if on August 22, 1996, the alien

is lawfully residing in any State and is receiving benefits under such program on August 22, 1996.

**(E) Aliens receiving SSI on August 22, 1996**

With respect to eligibility for benefits for the program defined in paragraph (3)(A) (relating to the supplemental security income program), paragraph (1) shall not apply to an alien who is lawfully residing in the United States and who was receiving such benefits on August 22, 1996.

**(F) Disabled aliens lawfully residing in the United States on August 22, 1996**

With respect to eligibility for benefits for the specified Federal programs described in paragraph (3), paragraph (1) shall not apply to an alien who--

(i) in the case of the specified Federal program described in paragraph (3)(A)--

(I) was lawfully residing in the United States on August 22, 1996; and

(II) is blind or disabled (as defined in paragraph (2) or (3) of section 1614(a) of the Social Security Act ([42 U.S.C. 1382c\(a\)](#))); and

(ii) in the case of the specified Federal program described in paragraph (3)(B), is receiving benefits or assistance for blindness or disability (within the meaning of section 3(j) of the Food Stamp Act of 1977 ([7 U.S.C.A. § 2012\(j\)](#)))<sup>1</sup>.

**(G) Exception for certain Indians**

With respect to eligibility for benefits for the specified Federal programs described in paragraph (3), section 1611(a) of this title and paragraph (1) shall not apply to any individual--

(i) who is an American Indian born in Canada to whom the provisions of section 289 of the Immigration and Nationality Act ([8 U.S.C.A. § 1359](#)) apply; or

(ii) who is a member of an Indian tribe (as defined in [section 5304\(e\) of Title 25](#)).

**(H) SSI exception for certain recipients on the basis of very old applications**

With respect to eligibility for benefits for the program defined in paragraph (3)(A) (relating to the supplemental security income program), paragraph (1) shall not apply to any individual--

(i) who is receiving benefits under such program for months after July 1996 on the basis of an application filed before January 1, 1979; and

(ii) with respect to whom the Commissioner of Social Security lacks clear and convincing evidence that such individual is an alien ineligible for such benefits as a result of the application of this section.

**(I) Food stamp exception for certain elderly individuals**

With respect to eligibility for benefits for the specified Federal program described in paragraph (3)(B), paragraph (1) shall not apply to any individual who on August 22, 1996--

(i) was lawfully residing in the United States; and

(ii) was 65 years of age or older.

**(J) Food stamp exception for certain children**

With respect to eligibility for benefits for the specified Federal program described in paragraph (3)(B), paragraph (1) shall not apply to any individual who is under 18 years of age.

**(K) Food stamp exception for certain Hmong and Highland Laotians**

With respect to eligibility for benefits for the specified Federal program described in paragraph (3)(B), paragraph (1) shall not apply to--

(i) any individual who--

(I) is lawfully residing in the United States; and

(II) was a member of a Hmong or Highland Laotian tribe at the time that the tribe rendered assistance to United States personnel by taking part in a military or rescue operation during the Vietnam era (as defined in [section 101 of Title 38](#));

(ii) the spouse, or an unmarried dependent child, of such an individual; or

(iii) the unremarried surviving spouse of such an individual who is deceased.

**(L) Food stamp exception for certain qualified aliens**

With respect to eligibility for benefits for the specified Federal program described in paragraph (3)(B), paragraph (1) shall not apply to any qualified alien who has resided in the United States with a status within the meaning of the term “qualified alien” for a period of 5 years or more beginning on the date of the alien's entry into the United States.

**(M) SSI extensions through fiscal year 2011**

**(i) Two-year extension for certain aliens and victims of trafficking**

**(I) In general**

Subject to clause (ii), with respect to eligibility for benefits under subparagraph (A) for the specified Federal program described in paragraph (3)(A) of qualified aliens (as defined in [section 1641\(b\)](#) of this title) and victims of trafficking in persons (as defined in [section 7105\(b\)\(1\)\(C\) of Title 22](#)) or as granted status under section 101(a)(15)(T)(ii) of the Immigration and Nationality Act), the 7-year period described in subparagraph (A) shall be deemed to be a 9-year period during fiscal years 2009 through 2011 in the case of such a qualified alien or victim of trafficking who furnishes to the Commissioner of Social Security the declaration required under subclause (IV) (if applicable) and is described in subclause (III).

**(II) Aliens and victims whose benefits ceased in prior fiscal years**

Subject to clause (ii), beginning on September 30, 2008, any qualified alien (as defined in [section 1641\(b\)](#) of this title) or victim of trafficking in persons (as defined in [section 7105\(b\)\(1\)\(C\) of Title 22](#) or as granted status under section 101(a)(15)(T)(ii) of the Immigration and Nationality Act) rendered ineligible for the specified Federal program described in paragraph (3)(A) during the period beginning on August 22, 1996, and ending on September 30, 2008, solely by reason of the termination of the 7-year period described in subparagraph (A) shall be eligible for such program for an additional 2-year period in accordance with this clause, if such qualified alien or victim of trafficking meets all other eligibility factors under title XVI of the Social Security Act, furnishes to the Commissioner of Social Security the declaration required under subclause (IV) (if applicable), and is described in subclause (III).

**(III) Aliens and victims described**

For purposes of subclauses (I) and (II), a qualified alien or victim of trafficking described in this subclause is an alien or victim who--

**(aa)** has been a lawful permanent resident for less than 6 years and such status has not been abandoned, rescinded under section 246 of the Immigration and Nationality Act, or terminated through removal proceedings under section 240 of the Immigration and Nationality Act, and the Commissioner of Social Security has verified such status, through procedures established in consultation with the Secretary of Homeland Security;

**(bb)** has filed an application, within 4 years from the date the alien or victim began receiving supplemental security income benefits, to become a lawful permanent resident with the Secretary of Homeland Security, and the Commissioner of Social Security has verified, through procedures established in consultation with such Secretary, that such application is pending;

**(cc)** has been granted the status of Cuban and Haitian entrant, as defined in section 501(e) of the Refugee Education Assistance Act of 1980 ([Public Law](#)

[96-422](#)), for purposes of the specified Federal program described in paragraph (3)(A);

(dd) has had his or her deportation withheld by the Secretary of Homeland Security under section 243(h) of the Immigration and Nationality Act (as in effect immediately before the effective date of section 307 of division C of [Public Law 104-208](#)), or whose removal is withheld under section 241(b)(3) of such Act;

(ee) has not attained age 18; or

(ff) has attained age 70.

#### **(IV) Declaration required**

##### **(aa) In general**

For purposes of subclauses (I) and (II), the declaration required under this subclause of a qualified alien or victim of trafficking described in either such subclause is a declaration under penalty of perjury stating that the alien or victim has made a good faith effort to pursue United States citizenship, as determined by the Secretary of Homeland Security. The Commissioner of Social Security shall develop criteria as needed, in consultation with the Secretary of Homeland Security, for consideration of such declarations.

##### **(bb) Exception for children**

A qualified alien or victim of trafficking described in subclause (I) or (II) who has not attained age 18 shall not be required to furnish to the Commissioner of Social Security a declaration described in item (aa) as a condition of being eligible for the specified Federal program described in paragraph (3)(A) for an additional 2-year period in accordance with this clause.

#### **(V) Payment of benefits to aliens whose benefits ceased in prior fiscal years**

Benefits paid to a qualified alien or victim described in subclause (II) shall be paid prospectively over the duration of the qualified alien's or victim's renewed eligibility.

##### **(ii) Special rule in case of pending or approved naturalization application**

With respect to eligibility for benefits for the specified program described in paragraph (3)(A), paragraph (1) shall not apply during fiscal years 2009 through 2011 to an alien described in one of clauses (i) through (v) of subparagraph (A) or a victim of trafficking in persons (as defined in [section 7105\(b\)\(1\)\(C\) of Title 22](#)) or as granted status under section 101(a)(15)(T)(ii) of the Immigration and Nationality Act), if such alien or victim (including any such alien or victim rendered ineligible for the specified Federal program described in paragraph (3)(A) during the period beginning on August 22, 1996, and ending on September 30, 2008, solely by reason of the termination of the 7-year period described in subparagraph (A)) has filed an application for naturalization that is pending before the Secretary of Homeland Security or a United States district court based on section 336(b) of the Immigration and Nationality Act, or has been approved for naturalization but not yet sworn in as a United States citizen, and the Commissioner of Social Security has verified, through procedures established in consultation with the Secretary of Homeland Security, that such application is pending or has been approved.

#### **(3) "Specified Federal program" defined**

For purposes of this chapter, the term "specified Federal program" means any of the following:

##### **(A) SSI**

The supplemental security income program under title XVI of the Social Security Act [[42 U.S.C.A. § 1381 et seq.](#)], including supplementary payments pursuant to an agreement for Federal administration under section 1616(a) of the Social Security Act [[42 U.S.C.A. § 1382e\(a\)](#)] and payments pursuant to an agreement entered into under section 212(b) of [Public Law 93-66](#).



## **(B) Food stamps**

The food stamp program as defined in section 3(l) of the Food Stamp Act of 1977.

### **(b) Limited eligibility for designated Federal programs**

#### **(1) In general**

Notwithstanding any other provision of law and except as provided in [section 1613](#) of this title and paragraph (2), a State is authorized to determine the eligibility of an alien who is a qualified alien (as defined in [section 1641](#) of this title) for any designated Federal program (as defined in paragraph (3)).

#### **(2) Exceptions**

Qualified aliens under this paragraph shall be eligible for any designated Federal program.

#### **(A) Time-limited exception for refugees and asylees**

##### **(i) Medicaid**

With respect to the designated Federal program described in paragraph (3)(C), paragraph (1) shall not apply to an alien until 7 years after the date--

- (I) an alien is admitted to the United States as a refugee under section 207 of of the Immigration and Nationality Act [[8 U.S.C. 1157](#)];
- (II) an alien is granted asylum under section 208 of such Act [[8 U.S.C. 1158](#)];
- (III) an alien's deportation is withheld under section 243(h) of such Act [[8 U.S.C. 1253](#)] (as in effect immediately before the effective date of section 307 of division C of [Public Law 104-208](#)) or section 241(b)(3) of such Act [[8 U.S.C. 1231\(b\)\(3\)](#)] (as amended by section 305(a) of division C of [Public Law 104-208](#));
- (IV) an alien is granted status as a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980); or
- (V) an alien<sup>2</sup> admitted to the United States as an Amerasian immigrant as described in subsection (a)(2)(A)(i)(V) of this section until 5 years after the date of such alien's entry into the United States.

##### **(ii) Other designated Federal programs**

With respect to the designated Federal programs under paragraph (3) (other than subparagraph (C)), paragraph (1) shall not apply to an alien until 5 years after the date--

- (I) an alien is admitted to the United States as a refugee under [section 1157](#) of this title;
- (II) an alien is granted asylum under [section 1158](#) of this title;
- (III) an alien's deportation is withheld under [section 1253\(h\)](#) of this title (as in effect immediately before April 1, 1997) or [section 1251\(b\)\(3\)](#) of this title (as amended by section 305(a) of division C of [Public Law 104-208](#));
- (IV) an alien is granted status as a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980); or
- (V) an alien admitted to the United States as an Amerasian immigrant as described in subsection (a)(2)(A)(i)(V) of this section until 5 years after the date of such alien's entry into the United States.

## **(B) Certain permanent resident aliens**

An alien who--

- (i) is lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act [[8 U.S.C.A. § 1101 et seq.](#)]; and
- (ii) (I) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [[42 U.S.C.A. § 401 et seq.](#)] or can be credited with such

qualifying quarters as provided under [section 1645](#) of this title, and (II) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under [section 1613](#) of this title) during any such period.

**(C) Veteran and active duty exception**

An alien who is lawfully residing in any State and is--

- (i) a veteran (as defined in [section 101](#), [1101](#), or [1301](#), or as described in [section 107 of Title 38](#)) with a discharge characterized as an honorable discharge and not on account of alienage and who fulfills the minimum active-duty service requirements of [section 5303A\(d\) of Title 38](#),
- (ii) on active duty (other than active duty for training) in the Armed Forces of the United States, or
- (iii) the spouse or unmarried dependent child of an individual described in clause (i) or (ii) or the unremarried surviving spouse of an individual described in clause (i) or (ii) who is deceased if the marriage fulfills the requirements of [section 1304 of Title 38](#).

**(D) Transition for those currently receiving benefits**

An alien who on August 22, 1996, is lawfully residing in any State and is receiving benefits under such program on August 22, 1996, shall continue to be eligible to receive such benefits until January 1, 1997.

**(E) Medicaid exception for certain Indians**

With respect to eligibility for benefits for the program defined in paragraph (3)(C) (relating to the medicaid program), [section 1611\(a\)](#) of this title and paragraph (1) shall not apply to any individual described in subsection (a)(2)(G) of this section.

**(F) Medicaid exception for aliens receiving SSI**

An alien who is receiving benefits under the program defined in subsection (a)(3)(A) of this section (relating to the supplemental security income program) shall be eligible for medical assistance under a State plan under title XIX of the Social Security Act ([42 U.S.C. § 1396 et seq.](#)) under the same terms and conditions that apply to other recipients of benefits under the program defined in such subsection.

(3) "Designated Federal program" defined

For purposes of this chapter, the term "designated Federal program" means any of the following:

**(A) Temporary assistance for needy families**

The program of block grants to States for temporary assistance for needy families under part A of title IV of the Social Security Act [[42 U.S.C.A. § 601 et seq.](#)].

**(B) Social services block grant**

The program of block grants to States for social services under title XX of the Social Security Act [[42 U.S.C.A. § 1397 et seq.](#)].

**(C) Medicaid**

A State plan approved under title XIX of the Social Security Act [[42 U.S.C.A. § 1396 et seq.](#)], other than medical assistance described in [section 1611\(b\)\(1\)\(A\)](#) of this title.

**CREDIT(S)**

([Pub.L. 104-193, Title IV, § 402](#), Aug. 22, 1996, 110 Stat. 2262; [Pub.L. 104-208](#), Div. C, Title V, § 510, Sept. 30, 1996, 110 Stat. 3009-673; [Pub.L. 105-18, Title II, § 6005](#), June 12, 1997, 111 Stat. 191; [Pub.L. 105-33, Title V, §§ 5301, 5302\(a\), \(b\), 5303\(a\), \(b\), 5304, 5305\(b\), 5306\(a\), \(b\), 5562, 5563](#), Aug. 5, 1997, 111 Stat. 597, 598, 600, 601, 602, 638, 639; [Pub.L. 105-185, Title V, §§ 503 to 508](#), June 23, 1998, 112 Stat. 578, 579; [Pub.L. 107-171, Title IV, § 4401\(a\), \(b\)\(1\), \(c\)\(1\)](#), May 13, 2002, 116 Stat. 333; [Pub.L. 110-328](#), § 2, Sept. 30, 2008, 122 Stat. 3567; [Pub.L. 110-234, Title IV, § 4115\(c\)\(2\)\(D\)](#), May 22,

2008, 122 Stat. 1110; [Pub.L. 110-246](#), § 4(a), Title IV, § 4115(c)(2)(D), June 18, 2008, 122 Stat. 1664, 1871.)

## Notes of Decisions (17)

### Footnotes

[1](#) So in original. Probably should be "2012(j))".

[2](#) So in original. Probably should be "alien is".

8 U.S.C.A. § 1612, 8 USCA § 1612

Current through P.L. 114-316. Also includes P.L. 114-318 to 114-327, and 115-1 to 115-3.  
Title 26 current through 115-3.

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United States Code Annotated  
 Title 8. Aliens and Nationality (Refs & Annos)  
 Chapter 14. Restricting Welfare and Public Benefits for Aliens

**§ 1641. Definitions**

United States Code Annotated | Title 8. Aliens and Nationality | Effective: December 23, 2008 (Approx. 3 pages)

Effective: December 23, 2008

8 U.S.C.A. § 1641

**§ 1641. Definitions**

Currentness

**NOTES OF DECISIONS (1)**

Qualified aliens

**(a) In general**

Except as otherwise provided in this chapter, the terms used in this chapter have the same meaning given such terms in section 101(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)].

**(b) Qualified alien**

For purposes of this chapter, the term "qualified alien" means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is--

- (1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.],
- (2) an alien who is granted asylum under section 208 of such Act [8 U.S.C.A. § 1158],
- (3) a refugee who is admitted to the United States under section 207 of such Act [8 U.S.C.A. § 1157],
- (4) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for a period of at least 1 year,
- (5) an alien whose deportation is being withheld under section 243(h) of such Act [8 U.S.C. 1253] (as in effect immediately before the effective date of section 307 of division C of Public Law 104-208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104-208),
- (6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act [8 U.S.C. 1153(a)(7)] as in effect prior to April 1, 1980;<sup>1</sup> or
- (7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980).

**(c) Treatment of certain battered aliens as qualified aliens**

For purposes of this chapter, the term "qualified alien" includes--

- (1) an alien who--
  - (A) has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) has been approved or has a petition pending which sets forth a prima facie case for--

(i) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) of the Immigration and Nationality Act [8 U.S.C.A. § 1154(a)(1)(A)(ii), (iii) or (iv)],

(ii) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) of the Act [8 U.S.C.A. § 1154(a)(1)(B)(ii) or (iii)],

(iii) suspension of deportation under section 244(a)(3) of the Immigration and Nationality Act [8 U.S.C.A. § 1254(a)(3)] (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(iv) status as a spouse or child of a United States citizen pursuant to clause (i) of section 204(a)(1)(A) of such Act [8 U.S.C.A. § 1154(a)(1)(A)(i)], or classification pursuant to clause (i) of section 204(a)(1)(B) of such Act [8 U.S.C.A. § 1154(a)(1)(B)(i)];<sup>2</sup>

(v) cancellation of removal pursuant to section 240A(b)(2) of such Act [8 U.S.C. 1229b(b)(2)];

(2) an alien--

(A) whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without the active participation of the alien in the battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) who meets the requirement of subparagraph (B) of paragraph (1);

(3) an alien child who--

(A) resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent's spouse or by a member of the spouse's family residing in the same household as the parent and the spouse consented or acquiesced to such battery or cruelty, but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided; and

(B) who meets the requirement of subparagraph (B) of paragraph (1); or

(4) an alien who has been granted nonimmigrant status under [section 1101\(a\)\(15\)\(T\)](#) of this title or who has a pending application that sets forth a prima facie case for eligibility for such nonimmigrant status.

This subsection shall not apply to an alien during any period in which the individual responsible for such battery or cruelty resides in the same household or family eligibility unit as the individual subjected to such battery or cruelty.

After consultation with the Secretaries of Health and Human Services, Agriculture, and Housing and Urban Development, the Commissioner of Social Security, and with the heads of such Federal agencies administering benefits as the Attorney General considers appropriate, the Attorney General shall issue guidance (in the Attorney General's sole and unreviewable discretion) for purposes of this subsection and [section 1631\(f\)](#) of this title, concerning the meaning of the terms "battery" and "extreme cruelty", and the standards and methods to be used for determining whether a substantial connection exists between battery or cruelty suffered and an individual's need for benefits under a specific Federal, State, or local program.

#### CREDIT(S)

(Pub.L. 104-193, Title IV, § 431, Aug. 22, 1996, 110 Stat. 2274; Pub.L. 104-208, Div. C, Title III, § 308(g)(8)(E), Title V, § 501, Sept. 30, 1996, 110 Stat. 3009-624, 3009-670; Pub.L. 105-33, Title V, §§ 5302(c)(3), 5562, 5571(a) to (c), 5581(b)(6), (7), Aug. 5, 1997,

111 Stat. 599, 638, 640, 643; [Pub.L. 106-386](#), Div. B, Title V, § 1508, Oct. 28, 2000, 114 Stat. 1530; [Pub.L. 110-457, Title II, § 211\(a\)](#), Dec. 23, 2008, 122 Stat. 5063.)

### Notes of Decisions (1)

### Footnotes

[1](#) So in original. The semicolon probably should be a comma.

[2](#) So in original. The semicolon probably should be “, or”.

8 U.S.C.A. § 1641, 8 USCA § 1641

Current through P.L. 114-316. Also includes P.L. 114-318 to 114-327, and 115-1 to 115-3. Title 26 current through 115-3.

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