

EMERGENCY RULE CONSIDERATIONS

The following materials are provided in this document to facilitate Council considerations of whether or not to pursue 2006 salmon seasons that would require the recommendation of an emergency rule.

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Regarding Item 2 - Relevant Council statements or questions on the record brought up at the March 2006 Council meeting have been inserted in item 2 in ***bold italic font***.

Regarding Item 3 - Council staff has inserted footnotes containing relevant information from the Council record on the 2006 salmon season process. Additionally, footnotes are inserted in areas where further information or rationale should be considered by the Council before recommending any emergency rule.

PFMC  
03/30/06

## 1. SALMON FMP EXCERPT ON RELEVANT LANGUAGE

### 3.2.2 Conservation Alert

*“A fishery shall be classified as approaching a condition of being overfished if, based on trends in fishing effort, fishery resource size, and other appropriate factors, the Secretary estimates that the fishery will become overfished within two years.”*

*Magnuson-Stevens Act, § 304(e)(1)*

To anticipate and react to potential stock declines which might lead to overfishing, the Council has established a conservation alert process with criteria and actions as described below.

#### 3.2.2.1 Criteria

A conservation alert is triggered during the annual preseason process (Chapter 9) if a natural stock or stock complex, listed in Table 3-1, is projected to fall short of its conservation objective (MSY, MSY proxy, MSP, or floor in the case of some harvest rate objectives [e.g., 35,000 natural Klamath River fall chinook spawners]). While a projected one-year shortfall may be of little biological concern, it may also represent the beginning of production problems and is worthy of note to help prevent future stock decline.

#### 3.2.2.2 Council Action

The Council will take the following actions for stocks which trigger a conservation alert that do not qualify as exceptions under Section 3.2.4 (see Table 3-1):

1. Close salmon fisheries within Council jurisdiction that impact the stock.
2. In the case of Washington coastal and Puget Sound salmon stocks and fisheries managed under U.S. District Court orders, the Council may allow fisheries which meet annual spawner targets developed through relevant U.S. v. Washington, Hoh v. Baldrige, and subsequent U.S. District Court ordered processes and plans, which may vary from the MSY or MSP conservation objectives. Other than the exceptions noted above, the Council may not recommend ocean salmon fisheries which are expected to trigger a conservation alert.

### **3.2.4 Exceptions**

*“Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.”*

*Magnuson-Stevens Act, National Standard 6*

This plan contains three exceptions to the application of overfishing criteria and subsequent Council actions for stocks or stock complexes with conservation objectives in Table 3-1: (1) hatchery stocks, (2) stocks for which Council management actions have inconsequential impacts, and (3) stocks listed under the ESA.

#### **3.2.4.1 Hatchery Stocks**

Salmon stocks important to ocean fisheries and comprised exclusively of hatchery production generally have conservation objectives expressed as an egg-take or the number of spawners returning to the hatchery rack to meet program objectives. Because hatchery stocks can generally sustain significantly higher harvest exploitation rates than natural stocks, ocean fisheries rarely present a threat to their long-term survival.

#### **3.2.4.2 Natural Stocks with Minimal Harvest Impacts in Council-Managed Fisheries**

Several natural stock components identified within this FMP are subject to minimal harvest impacts in Council fisheries because of migration timing and/or distribution. As a result, the Council’s ability to affect the overall trend in the abundance of these components through harvest restrictions is virtually nil.

#### **3.2.4.3 Stocks Listed Under the Endangered Species Act**

The Council regards stocks listed as endangered or threatened under the ESA as a third exception to the application of overfishing criteria of the Magnuson-Stevens Act. The ESA requires federal agencies whose actions may jeopardize listed salmon to consult with NMFS.

## **2. COUNCIL OPERATING PROCEDURE 10 EXCERPT ON EMERGENCY RULE CRITERIA AND PROCESS**

*Note: Relevant Council statements or questions on the record brought up at the March 2006 Council meeting have been inserted in bold italic font.*

### CRITERIA FOR REQUESTING EMERGENCY CHANGES TO THE SALMON FMP

Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act allows the Secretary of Commerce to implement emergency regulations independently or in response to a Council recommendation of an emergency if one is found to exist. The Secretary has not published criteria for determining when an emergency exists. A Council FMP may be altered by emergency regulations, which are treated as an amendment to the FMP for a limited period of 180 days and which can be extended for an additional 180 days.

Council FMPs can be changed by the amendment process which takes at least one to two years, or modified temporarily by emergency regulations, which can be implemented in a few weeks. Framework plans, like the Council's salmon FMP, have been developed to allow flexibility in modifying management measures between seasons and during the season.

Some measures, like most conservation objectives and allocation schemes, are deliberately fixed in the plan and can be changed only by amendment or temporarily modified by emergency regulation. (Certain conservation objectives also may be changed by court order or without an amendment if, in the view of the Salmon Technical Team, Scientific and Statistical Committee, and Council, a comprehensive review justifies a change.) They are fixed because of their importance and because the Council wanted to require a rigorous analysis, including extensive public review, to change them. Such an analysis and review were conducted when these management measures were originally adopted. It is the Council's intent to incorporate any desired flexibility of conservation objectives into the framework plan, making emergency changes prior to the season unnecessary. The Oregon coastal natural coho conservation objective is an example of a flexible objective, which is more conservative when stock abundance is low.

The use of the emergency process essentially "short circuits" the plan amendment process and reduces public participation, thus there needs to be sufficient rationale for using it. Moreover, experience demonstrates that if there is disagreement or controversy over a council's request for emergency regulations, the Secretary is unlikely to approve it. An exception would be an extreme resource emergency.

To avoid protracted, last-minute debates each year over whether or not the Council should request an emergency deviation from the salmon FMP, criteria have been developed and adopted by the Council to screen proposals for emergency changes. The intent is to limit requests to those which are justified

and have a reasonable chance of approval, so that the time spent in developing the case is not wasted and expectations are not unnecessarily raised.

### Criteria

The following criteria will be used to evaluate requests for emergency action by the Secretary:

1. The issue was not anticipated or addressed in the salmon plan, or an error was made.

*The following statements are part of the March 2006 Council meeting record:*

- A. *Naturally produced Klamath River fall Chinook abundance was not forecast to be below the 35,000 spawner conservation objective until February 2006.*
- B. *The nature of the C. Shasta infestation was not fully known until recently.*
- C. *The extent of the 2005 fall ocean fishery take of Klamath fall Chinook was not known until February 2006.*

2. Waiting for a plan amendment to be implemented would have substantial adverse biological or economic consequences.

*Absent an FMP amendment, all salmon fisheries affecting natural Klamath River fall Chinook would be closed, with adverse socioeconomic consequences as described in public testimony at the March 2006 Council meeting and documented in Preseason Report II - Analysis of Proposed Regulatory Options for 2006 Ocean Salmon Fisheries, Socioeconomic Impacts of Proposed Options pp. 18-19,47-50.*

3. In the case of allocation issues, the affected user representatives support the proposed emergency action.

*Criterion 3 may have been designed for allocation specific issues that are not applicable. An example of such an application of this criterion is the 1992 emergency rule that exempted an existing allocation formula for salmon fisheries north of Cape Falcon to allow a transfer of 5,000 coho from the recreational fishery to the commercial fishery. However, an emergency rule to allow ocean salmon fisheries in 2006 may entail allocation alterations within the non-Indian fisheries from recent years.*

4. The action is necessary to meet FMP objectives.

*At the March 2006 Council meeting, the third overall fishery objective in the FMP (see below) was cited as applicable under this criterion.*

*FMP Overall Fishery Objective 3 - "Seek to maintain ocean salmon fishing seasons which support the continuance of established recreational and commercial fisheries while meeting salmon harvest allocation objectives among ocean and inside recreational and commercial fisheries that are fair and equitable, and in which fishing interests shall equitably share the obligations of fulfilling any treaty or other legal requirements for harvest opportunities (In its effort to maintain the continuance of established ocean fisheries, the Council*

*includes consideration of maintaining established fishing communities. In addition, a significant factor in the Council's allocation objectives in Section 5.3 is aimed at preserving the economic viability of local ports and/or specific coastal communities (e.g., recreational port allocations north of Cape Falcon). Chapter 6 in Appendix B and the tables it references provide additional specific information on the fishing communities."*

5. If the action is taken, long-term yield from the stock complex will not be decreased.

*At the March 2006 Council meeting, a cursory Council review of Klamath River naturally produced adult fall Chinook spawner-progeny relationship data (Agenda Item C.4.a, Supplemental Attachment 3, March 2006) concluded that long-term depression of yield was not apparent. The Council assigned the STT with assessing impacts to the long-term yield from the Klamath fall Chinook complex that result from fishing seasons in the 2006 public review options, and producing an analytical statement for the April Council meeting.*

#### Process

The Council will consider proposals for emergency changes at the March meeting and decide whether or not a specific issue appears to meet all the applicable criteria. If the Council decides to pursue any proposal, it will direct the Salmon Technical Team to prepare an impact assessment for review by the Council at the April meeting, prior to final action. Any proposals for emergency change will be presented at the public hearings between the March and April meetings. It is the clear intent of the Council that any proposals for emergency change be considered no later than the March meeting in order that appropriate attention be devoted at the April meeting to developing management recommendations which maximize the social and economic benefits of the harvestable portion of the stocks.

The Council may consider other proposals for emergency change at the April meeting if suggested during the public review process, but such proposals must clearly satisfy all of the applicable criteria and are subject to the requirements for an impact assessment by the Salmon Technical Team.

### 3. AGENDA ITEM G.3.C, NMFS REPORT, NOVEMBER 2005

Listed below is the NMFS report distributed at the November 2005 Council meeting on the use of emergency rules. Council staff has inserted footnotes containing relevant information from the Council record on the 2006 salmon season process. Additionally, footnotes are inserted in areas where further information or rationale should be considered by the Council before recommending any emergency rule.

#### NATIONAL MARINE FISHERIES SERVICE REPORT ON USE OF EMERGENCY RULES

Ocean troll fisheries were severely constrained in 2005 in order to meet the 35,000 natural spawner escapement conservation objective for Klamath River fall Chinook. This action prompted a review of the escapement floor and consideration of a permanent modification to the conservation objective. Any such modification would require an amendment to the Salmon Fishery Management Plan (Salmon FMP). The Pacific Fishery Management Council (Council) deferred making this decision until the November meeting to allow consideration of additional information, including the possibility of using an emergency rule to provide flexibility to manage around the escapement floor. The Council directed NOAA's National Marine Fisheries Service (NMFS) to provide a report on this issue in time for discussion at the November meeting.

Before examining the required criteria for implementing an emergency rule, it should be noted that provisions exist under the Magnuson-Stevens Act to allow for public involvement during the rulemaking process. Emergency rule implementation severely limits this public participation and therefore, should only be used for extremely urgent, special circumstances where substantial harm to or disruption of the resource, habitat, fishery, industry participants, community, or public health would be caused during the time it would take to follow standard rulemaking procedures.

NMFS has established policy guidelines<sup>1</sup> for determining whether the use of an emergency rule is justified under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). These guidelines set forth the criteria for determining whether an emergency exists and are consistent with the requirements of section 305(c) of the Magnuson-Stevens Act as amended by the Sustainable Fisheries Act.

In order to implement an emergency rule, the Secretary must have an administrative record justifying emergency regulatory action and demonstrating its compliance with the national standards. Although the only legal requirement for the use of an emergency rule is that an emergency must exist, this action should only be taken to address extremely rare circumstances that would lead to

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<sup>1</sup> NMFS guidelines are not codified federal regulations, but have been published in the *Federal Register* (see Agenda Item E.2.a, Supplemental Attachment 2, April 2006).

significant adverse impacts as previously detailed. The guidelines further state that an emergency action may not be based on administrative inaction to solve a long-recognized problem, and establish the following criteria to define an emergency as a situation that:

- 1) Results from recent, unforeseen events or recently discovered circumstances<sup>2</sup>; and
- 2) Presents serious conservation or management problems<sup>3</sup> in the fishery; and
- 3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.<sup>4</sup>

If the preceding criteria for defining an emergency are met, the emergency action must then be justified under one or more of the following situations:

- 1) Ecological – (A) to prevent overfishing as defined in an FMP, or as defined by the Secretary in the absence of an FMP, or (B) to prevent other serious damage to the fishery resource or habitat<sup>5</sup>; or
- 2) Economic – to prevent significant direct economic loss or to preserve a significant economic opportunity that otherwise might be foregone<sup>6</sup>; or
- 3) Social – to prevent significant community impacts or conflict between user groups<sup>7</sup>; or
- 4) Public health – to prevent significant adverse effects to health of participants in a fishery or to the consumers of seafood products.

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<sup>2</sup> Naturally produced Klamath River fall Chinook abundance was not forecast to be below the 35,000 spawner conservation objective until February, 2006.

<sup>3</sup> Accounting for the importance of sustaining marketing infrastructure and community participation as called for under National Standard 8 may represent one management problem for the 2006 salmon fishery.

<sup>4</sup> Advance notice, public comment, and deliberative consideration of the impacts of a possible emergency rule for 2006 salmon fisheries on participants occurred under the normal rulemaking process in 2006.

<sup>5</sup> Not applicable.

<sup>6</sup> Economic impacts are considerable as documented in Preseason Report II. Foregone economic opportunities to harvest abundant salmon stocks would likely exist in the absence of an emergency rule.

<sup>7</sup> Public testimony at the March 2006 Council meeting and estimated economic impacts in Preseason Report II suggest significant community impacts would occur in the absence of an emergency rule.

In addition to meeting the emergency criteria and justification requirements, the emergency rule should indicate what measures could be taken or will be considered to permanently resolve the problem addressed by the emergency rule<sup>8</sup>.

Implementation of an emergency action would, in effect, temporarily amend the FMP as detailed in the emergency rule language. Since the conservation objectives within the FMP were established to achieve optimum yield, prevent overfishing and assure the rebuilding of depressed salmon stocks, any emergency action would require confirmation from the NMFS Science Center directors that such action would continue to prevent overfishing, provide optimal yield, and conform to any affected rebuilding plans<sup>9</sup>.

Once an emergency rule has been implemented, it can remain in effect for up to 180 days. An additional 180 day extension period is possible, providing there is an opportunity for public comment and the Council is following the standard procedure to address the emergency situation through an FMP amendment.

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<sup>8</sup> The Council has initiated an FMP amendment process for considering *de minimis* impacts.

<sup>9</sup> This paragraph seemingly prevents emergency consideration of *de minimis* impacts to avoid significant economic impacts, but is not referred to in the 1997 *Federal Register Notice* cited in footnote 1. Further discussion by the Council at its April Council meeting may be necessary for clarification.