

NMFS REPORT REGARDING THE HARVEST CONTROL RULE FOR SONCC COHO
SALMON ADOPTED AT THE NOVEMBER 2021 COUNCIL MEETING

BACKGROUND

In 2018, the Hoopa Valley Tribe filed suit alleging a failure by the National Marine Fisheries Service (NMFS) to reinitiate Endangered Species Act (ESA) consultation regarding the impacts of ocean salmon fisheries on the Southern Oregon/Northern California (SONCC) coho salmon Evolutionarily Significant Unit (ESU). In March 2020, NMFS and the Hoopa Valley Tribe reached a stipulated agreement to stay the litigation which includes a timeline by which NMFS would confer with the Council on completion of a new SONCC coho salmon harvest control rule, and a timeline for ESA consultation, as warranted, on the effects of the control rule.

In June 2020 the Council formed the SONCC Coho Salmon Ad-hoc Technical Workgroup, whose primary task was to develop a range of harvest control rule alternatives for Council consideration from which the Council would adopt a preferred alternative for recommendation to NMFS. In June 2021, the Council adopted a range of alternative harvest control rules based on the work of the Workgroup. The range of alternatives adopted by the Council were narrowed to only include fixed-rate, total (ocean and freshwater) exploitation rate harvest control rules. The Council eliminated ocean-only and abundance-based control rules in its selection of a range of alternatives. The Workgroup's risk analysis of the range of alternatives suggested a new control rule for the ESU if chosen from the Council's range of alternatives would be lower than the current control rule of a 13 percent exploitation rate applied only to ocean salmon fisheries, and potentially more constraining to fisheries. The current control rule is equivalent to a total exploitation rate of approximately 22 percent (13% + 2007-2019 average freshwater exploitation rate of Trinity River population unit). At both the September and November Council meetings, NMFS expressed concern should the Council's action increase the risk to the ESU and noted that the Workgroup's risk assessment indicated that HCRs above a 15 percent total exploitation rate posed increased risk. The public and Council advisory bodies were provided the opportunity to comment on Council discussion of the adopted range of alternatives at its subsequent September and November 2021 meetings.

In regards to selecting a final preferred alternative for a new control rule, the Council adopted the following motion at its November 2021 meeting for NMFS' consideration:

I move the Council adopt the summary recommendations contained in Agenda item F.3.a, Supplemental CDFW Report 1, as follows:

Harvest Control Rule 5 as described in Agenda Item F.3.a, the Fishery Harvest Control Rule Risk Assessment. This amounts to a total fishery exploitation rate (ER) limit of 15% on SONCC coho salmon, to be implemented as follows:

- Evaluation of attainment of the limit occurs on a postseason basis each year using the annual postseason exploitation rate, which is the sum of the fishery

exploitation rates experienced in the year across all ocean and inland sources of fishery mortality (ER). The annual ERs are then averaged over the available postseason record for the period following HCR adoption, and this average must not exceed the adopted limit of 15%.

- Postseason estimates of the ocean ER will be generated using the Coho Fishery Regulation Assessment Model (FRAM), whereas the in-river ER component will be determined using data provided by co-managing agencies as described in Appendix C and Appendix I of the risk assessment report.

In addition, ocean fishery seasons shall be designed pre-season each year such that Coho FRAM projections of ocean fishery impacts to SONCC coho salmon do not exceed 9% more frequently than once every four years, which is a reduction in the status-quo allowable ocean impact rate of not more than 13%.

In December 2021, NMFS formally requested an emergency meeting of the Council in January 2022 to consider rescission of the November 2021 Motion adopting a SONCC coho salmon harvest control rule; to consider amending the Pacific Coast Salmon Fishery Management Plan to include a conservation objective for SONCC coho salmon; and to provide further direction and recommendations as appropriate.

CONCERNS WITH THE 2021 NOVEMBER MOTION

Following discussion at the November 2021 Council meeting, NMFS voted against adoption of the motion citing several substantive concerns. We identified several others upon subsequent review. These encompass policy, legal and implementation issues.

Policy and legal concerns

1. The action adopted by the Council in November is outside the range of alternatives adopted by the Council for public review and comment and poses potential additional effects on the natural and human environment that were not analyzed by the Workgroup and thus not available to the Council in making its decision, including the effects to the listed SONCC ESU, fisheries, and the exercise of tribal fishing rights. All are issues of interest to the public and government entities and there was no opportunity to provide comment on these issues before the November motion was adopted. The Council process as implemented under the provisions of the Magnuson-Stevens Act and reflected in Council operating procedures is predicated on adequate public review and comment on actions the Council takes.
2. The action adopted by the Council in November was not analyzed either by the Workgroup in its Risk Assessment or by another entity in sufficient detail to meet the requirements of NEPA.
3. The action as written implies a Tribal/Non-Tribal allocation of fishing impacts on the SONCC coho ESU which the affected California tribes were not involved in developing and about which they have expressed concern.

Implementation concerns

Detail on implementation of the action adopted by the Council in November is insufficient for NMFS to analyze.

1. The ER limit that Council fisheries would manage for each year and against which managers would assess compliance is unclear. The first sentence of the motion states that a total fishery ER limit of 15 percent would be in place and assessed postseason against a long term average. However, the final sentence of the motion only limits preseason projected ERs in ocean salmon fisheries to not exceed 9 percent more frequently than once every four years.
2. The 9 percent provision in the adopted action places no constraint on the ocean ER in one out of 4 years. Therefore, in some years, it appears that ocean ERs on SONCC coho could be unconstrained and could result in total ERs above the 15 percent total fishery ER limit described in the first sentence of the motion.
3. In implementing the 9 percent provision of the adopted action for a given year it is unclear whether the previous three years are intended to be assessed using the preseason projected ocean ER or the postseason estimated ocean ER.
4. It is unclear as to whether the postseason assessment of ocean ERs must be consistent with the preseason provision to not exceed 9 percent in more than 1 of 4 years.
5. The adopted action only describes post-season assessment of the 15 percent ER without
 1. a preseason mechanism to minimize the chance that fisheries will exceed the 15 percent postseason limit, or
 2. a mechanism to ensure the fisheries impacts actually stay within the 15 percent. So, it is unclear how the 15 percent overall rate would actually be implemented.
6. The lack of a connection between the preseason and postseason provisions of the adopted action makes it unclear what response would be required if postseason total ERs exceeded the 15 percent total ER. That affects NMFS' ability to assess impacts of the adopted action to the ESU.
7. Related to the 15 percent provision of the adopted action, the language indicates that *"The annual ERs are then averaged over the available postseason record for the period following HCR adoption"*. Taken as written, the first year of the data series would be when postseason estimates were available for 2022 which would be 2023 or 2024. Therefore, it is unclear what data would be used in the first several years to implement the action.
8. An ER evaluated for performance through an average by adding a year to its calculation every subsequent year could allow for some very high total ERs to occur, even for multiple years at a time. Given the strong 3 year life cycle of coho, were this to happen it could compromise the sustainability of one or more of the brood years for populations within the SONCC coho salmon ESU.

PATHWAYS FORWARD

NMFS has identified the following pathways the Council may take at this meeting consistent with NMFS's request for the meeting described above:

1. Rescind the November motion and adopt a new action for a harvest control rule from within the Range of Alternative analyzed in the Workgroup Risk Assessment. Adopt the new harvest control rule as an amendment to the Salmon FMP.

The Council transmits the new harvest control rule as an amendment to the salmon FMP to NMFS for consideration. Assuming the new action is sufficiently clear and supported by sufficient analysis, NMFS would consider whether to approve, disapprove or partially approve the FMP amendment with the new harvest control rule and evaluate the action for compliance with the MSA and other applicable law. NMFS would analyze the new harvest control rule in a new biological opinion issued prior to the start of the 2022 ocean fishing season.

2. Rescind the November motion. The current SONCC coho conservation objective of a 13 percent ER limit on the SONCC coho salmon ESU in ocean salmon fisheries would remain in the salmon FMP.

NMFS would complete a reinitiated consultation on the effects of fisheries managed by NMFS and the Council under the Pacific Coast Salmon Fishery Management Plan on the SONCC Coho Salmon ESU. The reinitiated consultation will consider the effect of the implementation of the Salmon FMP on SONCC coho. The conservation objective for SONCC coho currently in the FMP is a 13 percent ER limit on ocean salmon fisheries. This consultation will need to be completed prior to the start of the 2022 salmon fisheries. In conducting its consultation, NMFS would consider impacts occurring in the environmental baseline including impacts in freshwater fisheries. Collectively, the impacts equate to approximately a 22 percent total exploitation rate (see Background above). NMFS expressed concerns about a total exploitation rate on SONCC coho above 15 percent at both the September and November meetings given the available information and Workgroup analysis.