

## National Marine Fisheries Service Report on the Yelloweye Rockfish Rebuilding Analysis and Update to the Pacific Coast Groundfish Fishery Management Plan

At its November 2017 meeting, the Pacific Fishery Management Council (Council), as part of the biennial harvest specifications for 2019-2020, selected a range of annual catch limits (ACL) for yelloweye rockfish. The range of alternatives is based on the 2017 assessment for this stock. The Council forwarded the range of ACLs to the Groundfish Management Team for more detailed analysis, and expects to select its preliminarily preferred ACLs for yelloweye rockfish at the April 2018 Council meeting. Any change to the yelloweye rockfish default harvest control rule would require implementation of a new rebuilding plan for yelloweye rockfish.

The Council also discussed whether new information in the 2017 yelloweye stock assessment compelled the Council to adopt a new rebuilding plan. Specifically the 2017 yelloweye stock assessment reported a  $T_{max}$  for yelloweye that was earlier than the  $T_{target}$  date adopted in the rebuilding plan by Amendment 16-5. This statement provides guidance on the requirements for rebuilding plans, including guidance on when the Council is required to update or revise rebuilding plans.

### When Rebuilding Plans Must be Updated

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) only requires revisions to a rebuilding plan when NMFS determines that the rebuilding plan has not resulted in adequate progress towards rebuilding the stock. The National Standard One (NS1) Guidelines further explain this:

“While a stock or stock complex is rebuilding, revising rebuilding timeframes (*i.e.*,  $T_{target}$  and  $T_{max}$ ) or  $F_{rebuild}$  is not necessary, unless the Secretary finds adequate progress is not being made.” 50 CFR § 600.310(j)(3)(v) (emphasis added).

The rationale behind this provision of the NS1 guidelines was the 2013 NRC report that recommended focusing on maintaining  $F$  below  $F_{rebuild}$  to avoid issues with updating timelines based on biomass milestones that are subject to uncertainty and changing environmental conditions.

NMFS has not made a finding of inadequate progress in rebuilding yelloweye rockfish. In fact, the recent stock assessment information suggests that the stock is rebuilding more quickly than expected. As a result, there are no requirements under the Magnuson-Stevens Act or in the National Standard 1 guidelines that compel the Council to change the rebuilding timeframes or  $F_{rebuild}$  for yelloweye rockfish as a result of the 2017 stock assessment.

Furthermore, the Pacific Coast Groundfish Fishery Management Plan (FMP) allows—but does not require—the Council to update these parameters. Section 4.6.3.4 of the FMP, Updating Key

Rebuilding Parameters, states that “...if a subsequent analysis identifies an earlier target year for the current fishing mortality rate (based on the harvest control rule), there is no obligation to change in regulations either the target year (to the computed earlier year) or the harvest control rule (to delay rebuilding to the original target year).” The section goes on to explain that “[f]or example, the Council might recommend that the target year be changed if, based on new information about the status and/or biology of the stock, they determine that the existing target year is later than the recomputed maximum rebuilding time ( $T_{max}$ ).” (emphasis added). Similar language is found in Appendix F, which states that “subsequent SAFE documents or NEPA documents analyzing new harvest specifications and rebuilding plans may include updated values for the parameters listed in Section 4.6.3.3 and Table F-1 in this appendix.”

Both the Magnuson-Stevens Act and the National Standard 1 Guidelines envision that rebuilding plans would not be changed and would remain in place unless either: 1) NMFS determines that a stock is not making adequate rebuilding progress; or 2) the Council makes a decision to adopt a new rebuilding plan. Absent an affirmative choice by the Council to revisit the existing rebuilding plan, no changes are required.

Should the Council choose to maintain the rebuilding plan adopted in Amendment 16-5, NMFS recommends that the Council should not update Appendix F with the new information reported in the 2017 yelloweye stock assessment. Updating Appendix F creates confusion as to whether the Council intended to formally adopt a new rebuilding plan. However, regardless, NMFS will base its determination of whether yelloweye rockfish is making adequate rebuilding progress on the rebuilding timeframes and fishing mortality rates implemented in Amendment 16-5.

#### Required Contents of a New Rebuilding Plan

Should the Council choose to adopt a new rebuilding plan, NMFS offers the following guidance on the requirements to support the new rebuilding plan. These requirements would be triggered by either a change to the default harvest rate or a change to  $T_{target}$ .

The Magnuson-Stevens Act requires that the target time for rebuilding overfished species should be “as short as possible” while giving consideration to “the status and biology of the overfished species and the needs of the fishing communities.” The Ninth Circuit held that this was Congress’s way of ensuring that overfished species would be rebuilt as quickly as possible while “leaving some leeway to avoid disastrous short-term consequences for fishing communities.” As explained in *NRDC v NMFS*, 421 F.3d 872, 879–80 (9th Cir. 2005):

Section 1854 of the MSA contains two significant mandates that constrain the Agency’s options in adopting a rebuilding plan for an overfished species. First, the time period must be “*as short as possible*,” although the Agency may take into account the status and biology of the overfished species and the needs of fishing communities. *See* § 1854(e)(4)(i). Subsection (i)’s commands apply to *all* rebuilding periods, whatever their length. Second, Congress specified a presumptive *cap of 10 years* on any rebuilding period, subject to exceptional circumstances beyond the Agency’s control—such as an international treaty or, relevant here, “the biology of the stock of fish.” *See* § 1854(e)(4)(ii).

### *As Short as Possible*

The current yelloweye rebuilding plan is the result of litigation in which the district court for the Northern District of California ordered NMFS to implement a yelloweye rockfish ACL of 14 mt. Following that decision, NMFS adopted a rebuilding plan and default harvest control rule for yelloweye rockfish meant to comply with the district court's ruling. Any changes to the rebuilding plan will need to address why circumstances have changed such that a change to the current default harvest control rule is now warranted. Improved stock status is not sufficient to support a higher harvest rate. Rather, the record must show why the new rebuilding plan selects a target time for rebuilding ( $T_{\text{target}}$ ) that is "as short as possible" while giving consideration to "the status and biology of the overfished species and the needs of the fishing communities."

### *Time to Rebuild*

As explained by the Ninth Circuit, the Magnuson-Stevens Act has a presumptive cap of 10 years for any rebuilding plan. The National Standard 1 Guidelines further explain that Councils must specify a  $T_{\text{target}}$ , that is as short as possible, taking into account the status and biology of the overfished stock, the needs of fishing communities, recommendations by international organizations in which the U.S. participates, and interaction of the stock within the marine ecosystem.  $T_{\text{target}}$  may be above  $T_{\text{min}}$  and shall not exceed  $T_{\text{max}}$ .  $T_{\text{min}}$  means the amount of time the stock is expected to rebuild in the absence of fishing mortality. In this context, the term "expected" means to have at least a 50 percent probability of reaching the target biomass for rebuilding. If the  $T_{\text{min}}$  for a stock is less than 10 years, then  $T_{\text{max}}$  is 10 years from the start of the rebuilding plan.

If the Council adopts a new rebuilding plan, the start of the rebuilding plan will be 2019. In the case of yelloweye rockfish, the  $T_{\text{min}}$  provided by the 2017 stock assessment is 2026. Because that date would be less than 10 years from the start of the new rebuilding plan, any  $T_{\text{target}}$  that the Council selects must be no later than 2029. Because all of the alternatives before the Council have a median time to rebuild that is at or before 2029, this requirement should not limit the Council from choosing from the current range of yellowtail ACL alternatives. However, the Council will still need to demonstrate that the selected alternative allows for rebuilding in as short a time as possible.