

FOUR ELEMENTS OF MSA REAUTHORIZATION

At its March 2018 meeting, the Legislative Committee (LC) discussed the need to plan for future comments on Magnuson-Stevens Act reauthorization, particularly when requests for comment are received between Council meetings. Based in part on public comment, the LC agreed to revisit the following four elements in order to confirm and elaborate a Council response:

- Effects of alternative management measures for recreational fisheries
- Definition of ecosystem component species and the resulting extent of exemptions from annual catch limits
- The rebuilding standard (the requirement that rebuilding be “as short as possible”): Implications of replacing “possible” with “practicable”
- The rebuilding timeframe (implications of changing the current 10-year rebuilding requirement to $T_{min} + \text{one mean generation}$)

The following analyses were provided by Seth Atkinson and Corey Ridings, with edits by staff, as requested by the Legislative Committee.

1. “Alternative” Management for Recreational Fisheries

H.R. 200 proposes to add language to the Act at 16 U.S.C. 1852(h) stating that councils shall “have the authority to use alternative fishery management measures in a recreational fishery... including extraction rates, fishing mortality targets, and harvest control rules.” (See H.R. 200 (ANS) Sec. 203.)

Councils currently have the authority to use a broad range of management methods, so long as the fishery stays under the annual catch limit. The specific techniques mentioned in this provision (extraction/exploitation rates, F-targets, and harvest control rules) are already widely used around the country as ways of managing mortality to stay under the relevant annual catch limit.

However, the language could be interpreted as indicating that councils are being granted new authority they currently do not possess—specifically, *authority to manage recreational fisheries without hard catch limits and accountability measures*. The word “alternative” suggests the newly-granted authority is a substitute for annual catch limits, and the examples of management techniques (particularly exploitation rates and F-targets) suggest that the defining characteristic of this grant of authority is a lack of hard catch caps. The language also could create unintended consequences by defining techniques like harvest control rules, which are commonly used by the Pacific Council, as “alternative” management.

This interpretation is clearly intended by some proponents of the “alternative” management authority proposals, particularly in the Southeast. Such “alternative” management threatens to establish different, reduced criteria for conservation and management in recreational fisheries, as compared to commercial fisheries.

The Huffman discussion draft includes a section on “alternative” management, as does S. 1520 as amended. The Huffman draft and S. 1520 as amended both remove the actual word “alternative.” (Sec. 201; S. 1520 (ANS) Sec. 102(a)). The Huffman version also adds introductory framing language (“in implementing [] annual catch limits . . .”), and changes the operative verb (from “have the authority to use” to “consider,”). (See Huffman discussion draft Sec. 201.) S. 1520 adds a rule of construction stating that the National Standards and annual catch limit provisions have not been modified. (See S. 1520 (ANS) Sec. 301).

The redrafting of “alternative” management language in both bills is oriented around reducing the chances that it would be interpreted as granting a direct exemption from ACLs and accountability. However, they still would create a general level of confusion regarding the ACL and accountability structure in the Act.

2. The Ecosystem Component Species Exemption to ACLs

Under the current National Standard 1 Guidelines, “ecosystem component species” are species that do not require conservation and management (determined via the framework at 50 C.F.R. 600.305) but that a council decides to include in a FMP for ecosystem management or monitoring reasons. Because ecosystem component species do not require conservation and management, ACLs are not required.

H.R. 200 defines ecosystem component species as either (1) a non-target, incidentally harvested stock that is “in a fishery,” or (2) a non-target, incidentally harvested stock that is not subject to overfishing, depleted/overfished, or likely to become so. H.R. 200 then states that “ecosystem component species” do not require ACLs (H.R. 200 (ANS) Sec. 204(a)).

Under this definition, the “ecosystem component species” exemption would cover a potentially large set of stocks that currently have ACLs—roughly 80 percent of PFMC-managed stocks. The term “non-target” is difficult to apply in practice (target/non-target is more of a spectrum, rather than a binary distinction), but if applied liberally, this exemption could cover the vast majority of species in FMPs, likely resulting in an increase in overfishing in some regions.

This proposal uses terminology from the old (2009) version of the National Standard 1 Guidelines, which used a framework of “in the fishery”/ “out of the fishery” as a way of determining which stocks needed ACLs. That framework no longer exists in the regulations, and amending the statute to add an explicit reference to it would create a substantial amount of confusion.

The Huffman discussion draft also addresses “ecosystem component species,” defining them as stocks that do not require “conservation and management.” This reflects the current National Standard Guidelines and the “conservation and management” framework located there, and would not be expected to result in any significant changes on the water. The main function of the Huffman version of “ecosystem component species” would be to integrate the National Standard Guidelines with the statute more thoroughly, and to reinforce the conservation and management framework.¹

¹ NRDC and the Ocean Conservancy have recommend that the Pacific Council clarify that the H.R. 200 version of the ecosystem component species exemption is not necessary or useful and would create substantial confusion, and explain the difference between the H.R. 200 version and the Huffman version, particularly in that the latter

3. The Rebuilding Standard

The Magnuson-Stevens Act (Section 304, 16 U.S.C. 1854) currently states:

(e) REBUILDING OVERFISHED FISHERIES.—

. . .

(4) For a fishery that is overfished, any fishery management plan, amendment, or proposed regulations . . . shall—

(A) specify a time period for rebuilding the fishery that shall—

(i) **be as short as possible, taking into account** the status and biology of any overfished stocks of fish, **the needs of fishing communities,** recommendations by international organizations in which the United States participates, and the interaction of the overfished stock of fish within the marine ecosystem; and

(ii) **not exceed 10 years, except in cases where the biology of the stock of fish,** other environmental conditions, or management measures under an international agreement in which the United States participates **dictate otherwise;**

This is the “rebuilding standard”

This is the “rebuilding timeframe”

does not create a sweeping ACL exemption and is consistent with the current National Standard Guidelines. This is consistent with the Council’s previous statements on the topic; in its recent letters to Sen. Cantwell and Rep. Schrader, the Council noted the confusing wording in H.R. 200, and in its letter dated April 18, 2017, the Council noted that the National Standard Guidelines already “address ACL exceptions for ecosystem component species.”

Requirements of the “As Short as Possible” Rebuilding Standard

As interpreted by the courts, the “as short as possible” rebuilding standard requires two things. First, it requires the Council to justify its choice of T_{target} in terms of the economic needs of fishing communities. Second, at least in some situations, it may prohibit the Council from increasing the harvest rate on a rebuilding stock when new scientific information finds that stock to be farther from rebuilding than previously believed.

Justifying the Council’s Choice of T_{target} in Terms of Economic Needs

The first general requirement of rebuilding “as short as possible” is that to the extent the Council sets T_{target} above T_{min} (the no fishing level), it must explain why this is necessary to avoid economic disaster for fishing communities.²

Much has been made of the “disaster” language, with many arguments over whether that is the right concept to use. Those arguments may not be necessary, though, because as a practical matter the Council’s harvest specifications process is fairly robust:

- the Council collects and analyzes a large amount of economic data during its harvest specs process, and this information is made publicly available in the EIS/EA as well as briefing book documents;
- the Council has good practices around choosing moderate T_{target} values (i.e., not just setting $T_{target} = T_{max}$), so the resulting SPR harvest level represents an active tradeoff between conservation and fishing opportunity; and
- the Council’s EIS/EA routinely analyzes higher and lower catch options that are not ultimately selected, which provides points of contrast to illustrate the economic effects of the preferred alternative.

Additionally, judicial review of the Council’s choice of T_{target} /SPR harvest rate takes place in the context of agency deference, meaning that the Council’s choice has to be well outside the permissible range before a court will find that it violates the “as short as possible” requirement.

So the Council’s normal operations—selecting a moderate tradeoff point between conservation and economic opportunity, and explaining the effects of that tradeoff with data and analysis—generally result in rebuilding decisions that are believed by many to satisfy the “as short as possible” requirement.

Not Increasing the Harvest Rate when a Stock Is Further from Rebuilding than Expected

The “as short as possible” language also may prevent the Council from increasing the harvest rate on a rebuilding stock, when new scientific information finds that stock to be farther from rebuilding than previously believed.³

² See, e.g., *NRDC v. NMFS*, 421 F.3d 872, 880 (9th Cir. 2005).

³ See, e.g., *id.* at 881.

Essentially this can be thought of as a specific instance of the first requirement—because when a new assessment finds a stock to be farther from rebuilding than previously believed, the tradeoff tilts in favor of conservation, and the Council may not be able to justify an increase to the harvest rate.

There is some uncertainty around how this applies. It appears to be the case that if, under the new stock assessment, the allowable catch (using the existing harvest rate) would increase, then the “as short as possible” language may preclude any raising of the harvest rate. But if, under the new stock assessment, the allowable catch (using the existing harvest rate) would decrease, then it is less clear whether an attempt to raise the harvest rate would be precluded by the “as short as possible” language.

Examples of the “As Short As Possible” Standard in Council Rebuilding Decisions

The first situation described below—yelloweye rockfish in the current specs cycle—is fairly typical, and illustrates the way the Council’s normal harvest specs process fits within the “as short as possible” standard. The second situation—canary rockfish in 2013-14—is unusual in that the “as short as possible” standard may actually have operated to limit the Council’s discretion.

Yelloweye Rockfish 2019-20 Harvest Specs

Yelloweye rockfish received a new benchmark assessment in 2017, which concluded the stock has a higher biomass and a higher steepness value than previously believed. This resulted in a change to rebuilding times, making rebuilding faster under any given harvest rate (i.e., T_{min} and T_{max} move inward). Given this more optimistic, or ahead-of-schedule outlook, the Council has a choice of whether and how to revise the yelloweye SPR harvest rate and corresponding T_{target} .

The status quo harvest rate in the rebuilding plan is 76% SPR. Keeping this harvest rate would result in a 29 mt ACL in 2019, and a 30 mt ACL in 2020. This harvest rate would correspond to a T_{target} of 2027 (meaning the median likelihood of rebuilding under a harvest rate of 76% SPR is in 2027). The Council is considering alternatives with somewhat increased harvest rates, at 70% SPR and 65% SPR, which correspond to T_{target} dates of 2028 and 2029, respectively, and produce higher ACLs.

As NMFS stated in its Supplemental NMFS Report 2 under Agenda Item H.7.a in the March 2018 briefing book, “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.” This is accurate, and is simply a reflection of the requirement noted above that the Council must justify its choice of T_{target} and SPR harvest rate in terms of the balance between conservation and economic needs.

The NMFS report continues, stating that “Improved stock status is not sufficient to support a higher harvest rate.” The idea here is that if a new assessment finds a stock to be essentially similar to the previous understanding of the stock (meaning things like productivity, unfished biomass level, etc. are similar to their values in the prior assessment), and rebuilding is simply chugging along (meaning there is a higher $B_{current}$ this time around but the increase is due mainly to the passage of time, rather than to a revision of our understanding of the stock), then there is not necessarily any reason to choose a new SPR harvest rate and T_{target} . The harvest

rate and T_{target} chosen last time around should still represent a reasonable tradeoff that meets the “as short as possible” standard. In this situation, it could be questionable to increase the harvest rate, because that could mean shifting the balance toward economic needs and away from conservation with no new justification.⁴

While the above statement is accurate, yelloweye in the 2019-20 specs cycle presents a slightly different situation, because the new stock assessment shows a changed understanding of the stock—with a shorter distance remaining to rebuild than would have been expected based on the prior assessment. In other words, we are closer to rebuilding because of the passage of time since the last assessment, but also because we have shifted to a more optimistic state of nature. In this situation, the balance between conservation and economic needs has changed somewhat, and the Council should be able to justify its choice of a SPR harvest rate and T_{target} based on the new situation.⁵

This is a good example of how the Council’s routine procedures with rebuilding and the harvest specifications cycle tend to fit naturally within the “as short as possible” legal requirement.

Canary Rockfish 2013-14 Harvest Specs

This is the example that many people recall, when they think about the “as short as possible” rebuilding standard affecting Council decision-making.

In the 2013-14 groundfish harvest specifications process, canary rockfish received a new stock assessment. The new assessment found $B_{current}$ had increased somewhat, while B_{zero} was significantly larger than previously believed, and there were no major changes in productivity. The net result was a similar depletion level from what was previously believed (23.2%), but a longer time to rebuild at any given harvest rate (i.e., both T_{min} and T_{max} moved outward). The Council had to decide what harvest rate—and correspondingly what T_{target} —to use for canary, starting in the 2013-14 specs.

Because $B_{current}$ was larger than the previous year, the status quo harvest rate of 88.7% SPR applied to current biomass resulted in an increased ACL for 2013 of 116 mt (compared to 107 mt in the previous year). This harvest rate corresponded to a T_{target} of 2030, which was a slight increase from the old T_{target} of 2027.

In public comment, industry requested a more aggressive harvest rate (85.9% SPR) for canary, which would have yielded a higher ACL for 2013 (147 mt), while still corresponding to the same T_{target} year of 2030 (the difference being this harvest rate would have rebuilt at the end of 2030 rather at the beginning of that year).

⁴ Recall, however, that the status of the stock is only one side of the equation; if the economic needs of fishing communities have changed in the intervening time, then the Council may be able to justify a new SPR harvest rate even if no changes have occurred on the conservation side.

⁵ Note that the questions of what constitutes a new rebuilding plan, what the start year is for new rebuilding plans, and whether the 10-year requirement applies, are separate from the above discussion. All of those questions pertain to the rebuilding timeframe (and potentially the “adequate progress” portion of the statute), not the rebuilding standard.

In this case the “as short as possible” language may have become a limiting factor, because the stock was farther from rebuilding than previously believed and the Councils was considering increasing the harvest rate. Essentially the balance between conservation and economic needs had shifted away from conservation, based on the new stock assessment, making it questionable for the Council to push it yet further in that direction.

In the end (and in part due to input from NOAA General Counsel) the Council decided to maintain the status quo harvest rate, which already allowed for a modest increase in the ACL, and the 2013-14 specs did not run into a problem. If the Council had chosen a more aggressive harvest rate, it is possible that the “as short as possible” language might have prevented that choice.

The Implications of Changing the Rebuilding Standard to “As Short As Practicable”

Legislative proposals to change the relevant language to “as short as practicable” would directly affect the rebuilding standard. The term “practicable” is widely understood to indicate a weaker requirement than the term “possible,” and its use elsewhere in the Magnuson-Stevens Act ⁶ is consistent with this understanding. So as a general matter, changing the rebuilding language to “as short as practicable” would weaken the standard for rebuilding.

More specifically, the effect of changing the rebuilding standard to “as short as practicable” would be to weaken or remove the existing requirements to justify a choice of T_{target} / SPR harvest rate in terms of the economic needs of fishing communities, and to not increase the harvest rate on stocks that are found to be farther from rebuilding than previously believed.

There are several councils whose current rebuilding practices would more comfortably fit within the “practicable” standard. For example, councils that routinely set $T_{\text{target}} = T_{\text{max}}$ with no particular justification,⁷ or try to set rebuilding plans in which F_{rebuild} is actually more aggressive than $0.75F_{\text{msy}}$ ⁸—these practices may be more consistent with a “practicable” rebuilding standard.

4. The Rebuilding Timeline

The MSA currently requires overfished stocks to be rebuilt within 10 years, unless the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise (16 U.S.C. 1854(e)(4)(A)(ii)). A number of legislative proposals would change this timeframe.

The Huffman discussion draft and S. 1520 (as amended) would replace the 10-year timeframe with the formula currently located in the National Standard 1 Guidelines—*the minimum time for*

⁶ The requirements to manage a stock as a single unit (National Standard 3), consider efficiency (National Standard 5), minimize costs (National Standard 7), minimize adverse effects on fishing communities (National Standard 8), minimize bycatch (National Standard 9), protect human life at sea (National Standard 10), and protect Essential Fish Habitat all use the term “practicable.”

⁷ See, e.g., Greater Amberjack Rebuilding Plan Proposed Rule, 82 Fed. Reg. 55,074 (Nov. 20, 2017) (setting T_{target} equal to T_{max} because doing otherwise would have “greater negative socio-economic impacts on fishing communities,” and providing no further explanation).

⁸ As seen in some of the past New England groundfish rebuilding plans.

rebuilding (Tmin) plus one mean generation. These bills would allow an exception for stocks for which management measures under an international agreement dictate otherwise. (See Huffman discussion draft Sec. 206(a)(1)(A); S. 1520 (ANS) Sec. 104(1)).

Currently the $T_{min} + 1$ mean generation formula applies in situations where 10 years is not possible due to the biology of the stock or other environmental conditions. While the numbers vary slightly, most reviews have concluded that around half to two-thirds of all stocks subject to the rebuilding requirement of the Act have used the $T_{min} + 1$ mean generation formula, because they were unable to rebuild within the existing 10-year statutory timeline.

The net effect of the Huffman and S. 1520 (ANS) proposal would be that rebuilding timeframes would increase for a subset of stocks currently subject to the 10-year requirement. Specifically, stocks that can rebuild within 10 years, but for which $T_{min} + 1$ mean generation is longer than 10 years, would end up with a longer rebuilding timeframe than they currently have. The reverse would be true for stocks for which $T_{min} + 1$ mean generation is less than 10 years; these stocks would end up with shorter rebuilding timeframes.

Note that the exception in the Huffman and S. 1520 (ANS) proposal for when “international management measures dictate otherwise” is already in the law and does not represent a change from status quo. In those situations, the stock still gets a rebuilding timeframe; the timeframe simply is provided by international management measures rather than by federal law.

H.R. 200, like the other bills, would remove the 10-year timeframe and replace it with a uniform $T_{min} + 1$ mean generation approach. But H.R. 200 would add a number of wholesale exceptions, applying to:

- stocks for which the biology of the stock or environmental conditions dictate otherwise;
- stocks for which the Secretary determines the cause of depletion is outside the jurisdiction of the council;
- stocks in a mixed-stock fishery if the Secretary determines they cannot be rebuilt without “significant harm” to fishing communities;
- stocks that the Secretary determines are affected by informal transboundary agreements and activity outside the U.S. EEZ may hinder conservation efforts;
- stocks that have been affected by “unusual events” that make rebuilding within $T_{min} + 1$ mean generation “improbable without significant harm to fishing communities”; and
- stocks for which management measures under an international agreement dictate otherwise. (See H.R. 200 (ANS) Sec. 303(a)(1)(B)).

The last exception—stocks for which international management measures dictate otherwise—reflects the current status quo. The rest of the exceptions in H.R. 200 are new.

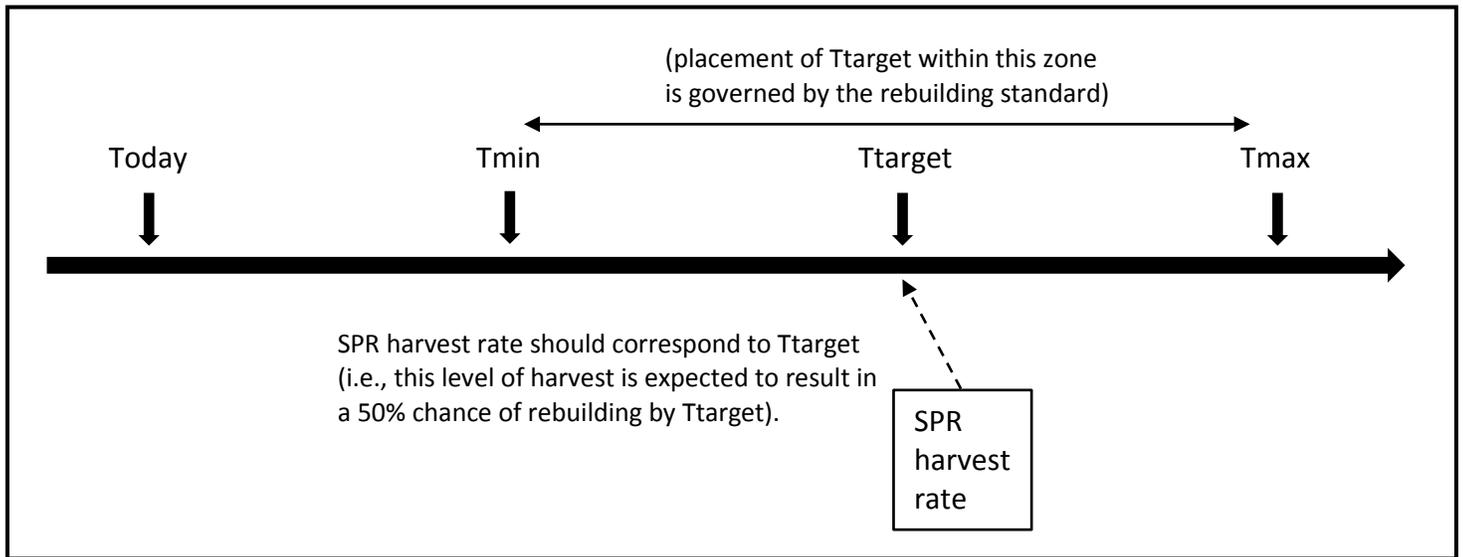
Some of the timeframe exceptions in H.R. 200 do not make sense conceptually. For example, H.R. 200 contains an exception for stocks when “the biology of the stock of fish, [or] other environmental conditions . . . dictate otherwise.” This exception makes sense in the current Act, because it provides an escape hatch to deal with situations where rebuilding is not possible within 10 years. Yet when the default rule is the $T_{min} + 1$ mean generation formula, this exception makes no sense—because $T_{min} + 1$ mean generation already accounts for biology and

environmental conditions. If a stock is long-lived and slow-growing, $T_{min} + 1$ mean generation will yield a large number of years for rebuilding; there is no need for an exception.

Other timeframe exceptions in H.R. 200 represent a significant weakening of the rebuilding requirement. For example, the exceptions for “significant harm” and “unusual events” are very broad, and NOAA Fisheries would come under heavy pressure to apply these to key stocks like Atlantic cod and red snapper. Removing timelines for these stocks would encourage less precautionary rebuilding plans than already exist, running the risk of further declines in the health of these stocks.

Finally, because this proposal takes the current regulatory formula and brings it up to the statute, nothing would be left in the regulations to cover the statutory gaps. This makes it likely that no timeframe at all would apply to stocks that meet one of these many exceptions.

REBUILDING TERMINOLOGY



T_{min} : Defined by biology. The year in which the stock would rebuild to B_{msy} , with no fishing.

T_{max} : Defined by statute and regulation. If T_{min} is 10 years or less, then $T_{max} = 10$ years. Otherwise, $T_{max} = T_{min} + 1$ mean generation.

*T_{max} is the year representing the “**rebuilding timeframe**,” which is currently governed by the statutory 10-year requirement. Because the statute has exceptions for situations where the biology of the stock or environmental conditions dictate otherwise, the National Standard 1 Guidelines provide a fall-back formula of $T_{min} + 1$ mean generation, which is used as the rebuilding timeframe (i.e., to calculate T_{max}) for stocks that meet one of the statutory exceptions.*

T_{target} : Council choice made in rebuilding plan. Located between T_{min} and T_{max} . Management measures under the rebuilding plan are calibrated to T_{target} , such that there is at least a 50% chance of rebuilding by T_{target} .

*The choice of where to put T_{target} is the “**rebuilding standard**,” and is governed by the “as short as possible” statutory language. More on this below.*

SPR Harvest Rate: The Pacific Council tends to approach rebuilding situations by setting a harvest rate for the rebuilding stock, which is expressed as a spawner per recruit (SPR) percentage. This harvest rate can be thought of as the flip side of T_{target} , because the SPR harvest rate generally corresponds to a 50% likelihood of rebuilding by T_{target} .