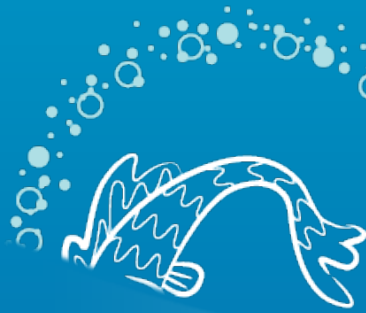


Welcome



Requirements and Authorities for Regulating under the Magnuson-Stevens Act: Balancing Public Process with the Need for Speed

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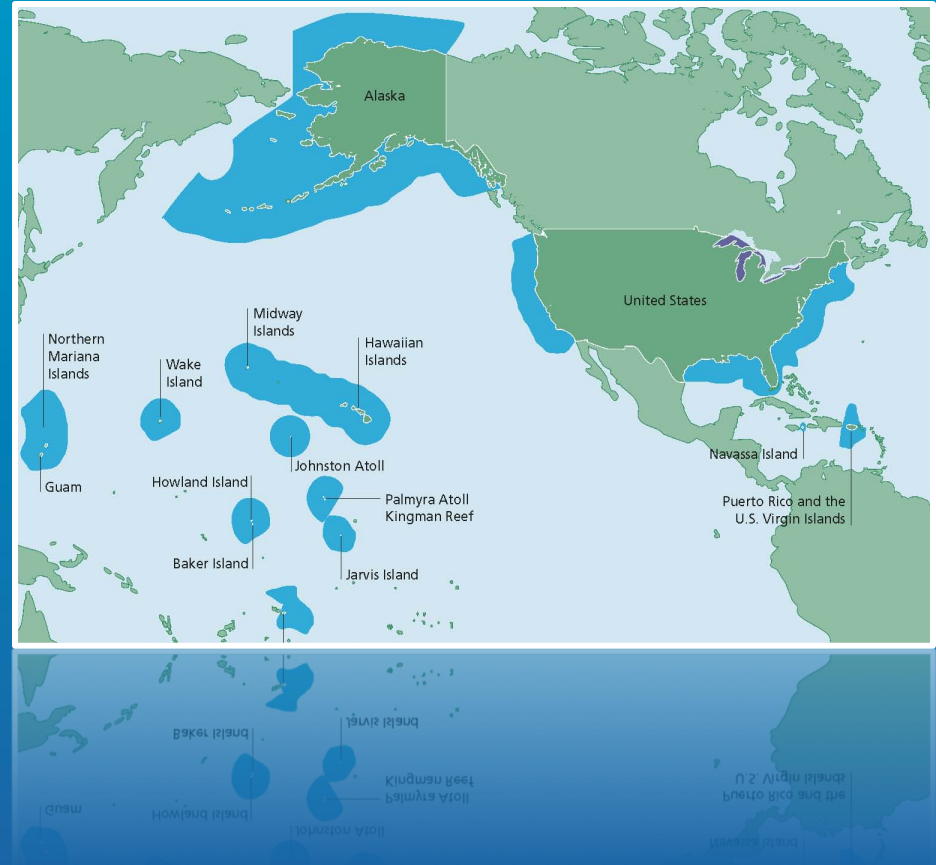
Overview

- Authorities and Requirements: MSA and other applicable law
- Fishery Management Plans and Council Process
- Context: the need for speed and efficiency
- Regulatory Tool Box: Frameworking and other approaches
 - 1997 Operational Guidelines: Frameworking Concept
 - Examples



1976: FCMA

- Established FCZ/EEZ
- Set management structure
- User-group self regulation
- Congress sets policy parameters/objectives; Councils design management; NMFS implements
- Policy: Expand domestic capacity and achieve OY (MSY as modified)



Evolving Objectives

- 1996 Sustainable Fisheries Act –
 - Changed “optimum yield” (not exceed MSY)
 - Rebuild overfished stocks **within 10 years**
 - 3 new national standards
 - Essential Fish Habitat
- 2007 Magnuson-Stevens Reauthorization Act: increased accountability and emphasis on science
 - End overfishing **immediately** (and prevent)
 - **Annual Catch Limits** (ACLs) and Accountability Measures
 - Strengthens role of Science (SSCs)
- 37 years after FMCA, councils operating within vastly different policy parameters and mandates



Fishery Management Plans

- National Standards
- FMP components (mandatory and discretionary)
- Other applicable law
- Secretarial review



The 10 National Standards

(1) Achieve OY and prevent overfishing

(2) Best available scientific information

(3) Manage stocks as a unit *

(4) Allocations fair and equitable, promote conservation, and prevent excessive shares

(5) Consider efficiency in utilization; not have economic allocation as sole purpose *

(6) Allow for variations and contingencies

(7) Minimize costs, avoid duplication *

(8) Consider fishing communities to provide for their sustained participation and to minimize adverse economic impacts *

(9) Minimize bycatch, and bycatch mortality *

6 (10) Promote safety of human life at sea *

MSA §1851(a)



15 Mandatory FMP Components

- (1) Prevent overfishing; rebuild; protect, restore, promote long-term health and stability
- (2) Description of the fishery
- (3) Specify MSY and OY
- (4) Specify capacity and domestic harvest and processing of OY
- (5) Specify the data to be submitted
- (6) Temporary adjustments to address unsafe ocean conditions
- (7) Essential fish habitat: identify, minimize impacts from fishing.
- (8) Specify the scientific data needed to implement the plan
- (9) Fishery impact statement
- (10) Overfishing definitions
- (11) Bycatch: reporting methodology and measures to minimize
- (12) Number, types, and mortality of fish caught and released recreationally; minimize mortality and ensure the extended survival
- (13) Describe sectors (commercial, recreational, and charter); quantify landings trends by sector
- (14) Allocate restrictions and benefits fairly and equitably among sectors.
- (15) Establish a mechanism for setting ACLs and Ams

(MSA § 303(a))



Consistent with Other Applicable Law

- RFA: IRFA/FRFA; publication of summary
- ESA: Section 7; Biological Opinion
- PRA: OMB clearance; notice and comment
- CZMA: Letters to states; state concurrence
- IQA: Pre-dissemination review form
- APA: Notice and comment; 30-day delay
- NEPA: EIS or EA/FONSI
- EOs 12866, 13272: Economic impact analysis
- EO 13132: Consult with states



Secretarial Review of FMPs

- Strict Timelines for FMPs/Amendments
 - From “transmittal”
 - 5 days to publish NOA
 - 60 day comment period on NOA
 - 30 days to make decision
- Limited Scope of Decision
 - 3 possible outcomes
 - Approve
 - Disapprove
 - Partially approve



Secretarial Review (cont'd)

- Criteria for Approvability
 - Compliance with National Standards
 - Address all Required FMP Provisions
 - Consistent with other applicable law
- Disapproval must be based on inconsistency with law



APA

- APA is the overarching statute that applies to rulemakings.
- Includes both substantive and procedural requirements:
 - (a) record must support decision
 - (b) opportunity for public comment
 - (c) 30-day delay in effectiveness of final rules.



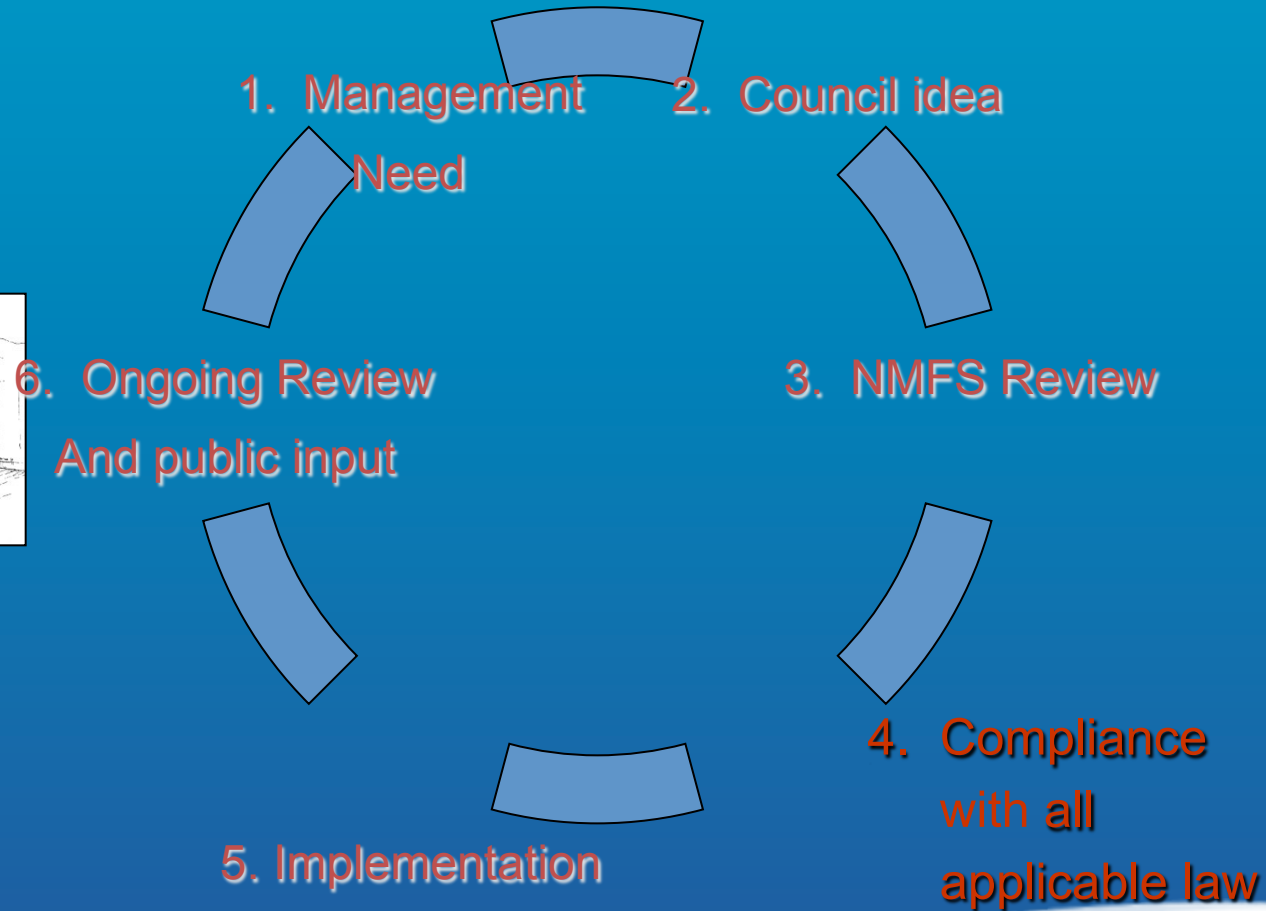
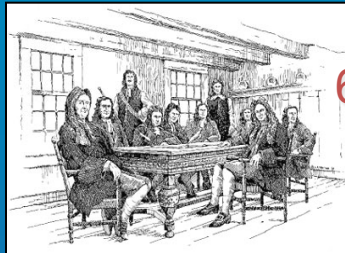
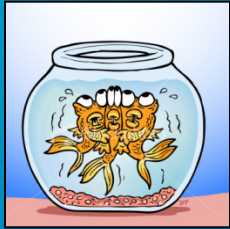
O.A.L. Mandates

NEPA	<ul style="list-style-type: none">• Consider Reasonable Alternatives• EIS: analysis, public review, 45/90/30 days• FONSI: record-based determination
ESA	<ul style="list-style-type: none">• “No jeopardy” record-based determination• Timing: consultation = 135 days
RFA	<ul style="list-style-type: none">• Consider Economic Impacts and alternatives• Certification: record-based determination
EO 12866	<ul style="list-style-type: none">• Alternatives, Cost-benefit analysis
APA	<ul style="list-style-type: none">• Record shows compliance with all law;• Notice and Comment; 30-day delay
Others	<ul style="list-style-type: none">• CZMA, PRA, treaty rights, etc.

Statutory & Regulatory Timelines

Source	Start Date	Requirement
MSA (FMP)	Transmittal	Day 5, Publish NOA for 60 days comment; Day 65, CPE; Day 95, Decision Day
MSA (Regs)	Transmittal	Day 5, begin 15 day review; Day 20, publish Pro.Rule for 15-60 days comment; Publish Fin. Rule w/30 days CPE
NEPA	EPA publish DEIS	Minimum 45 days comment, Minimum 90 days before ROD
ESA	I.D. preferred action	Minimum 90 days to consult + 45 to write B.O. (135 days)
CZMA	Consistency Determ. to State	Day 60 – Infer concurrence if no state response Day 90 – earliest possible decision day
APA	Publish Final Rule	30 day delay in effectiveness (unless waived)
EO 12866	Submission of Reg. Text to OMB	90 day OMB review period

FMP Process



Phases of FMP Development

Where	Phase	Timing
Council	I – Planning and Scoping	
Council	II – Drafting documents and analyses (MSA and OALs)	
Council	III – Public Review; Council Adoption	Completion of all steps in Phase 1 – 3 varies widely (from 1 meeting to multiple years)
	TRANSMITTAL	All documents must be complete
NMFS	IV – Secretarial Review and Implementation	MSA clock for FMPs (95 days). MSA clock for Regulations (65 -110 days or longer for “deemed” regs), plus APA 30-day delay unless waived.
Both	V- Continuing Management	Varies – Frameworking aims to reduce repetition of work and process conducted during phases 1 – 4.

Requirements Pushing Science and Timing

- National Standards 1 and 2 Secretarial FMPs/amendments
- Ending overfishing immediately and rebuilding within 10 years
- Best Available Science
- ACLs, AMs, and role of SSC
- Deadlines and maximum time limits



End & Prevent Overfishing

- For stocks determined to be overfished (or approaching overfished condition):
 - Management measures must be developed and implemented within 2 years of notification to
 - End overfishing immediately; and
 - Rebuild stocks
- Provision of MSRA effective July 2009



Ending Overfishing

- Annual Status Report
- Detailed timelines
- If Council fails to implement (?) within 2 years, Secretary must
- Specifies criteria for rebuilding plans
 - As short as possible
 - Not exceed 10 years
 - End overfishing immediately

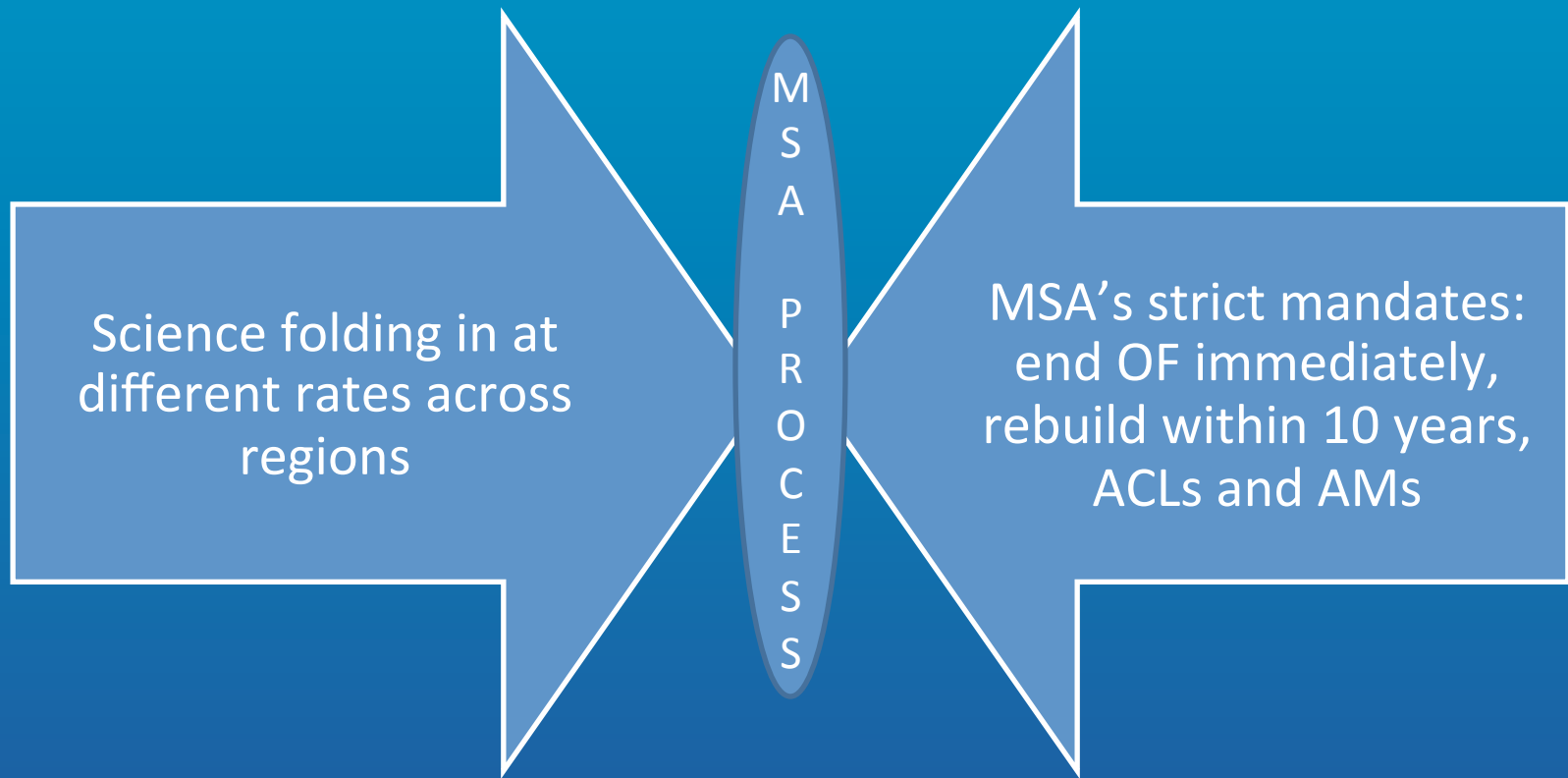


ACLs & AMs

- New requirement for all FMPs
 - 2010 for stocks subject to overfishing
 - 2011 for all other stocks
 - Exceptions: Annual life cycles, int'l agreements
- Set catch levels to prevent overfishing, based on scientific advice (SSC)
- Increased accountability



Pressure Cooker



What's the Relief?

- Frameworks
- Emergency rules and Interim Measures
- MSA General Authority (305(d))



Framework Concept

- Intend to allow for creating efficiencies throughout process
- Put certain parameters in FMP or Regulation
- When new data come in, address through a less cumbersome process :
 - (a) Council development: analyses, alternatives, iterative public process
 - (b) Proposed and Final Rule; Interim Final Rule; FR notice



Frameworking: 1997 Operational Guidelines

- Currently being updated: Some terminology and details about event schedules no longer apply. However, many concepts are still relevant.
- Terminology: Regions and Councils have taken concepts in OGs and applied them in different ways to address specific circumstances in their fisheries. Thus the term “framework” may have a different connotation as applied in one region versus how it is applied in another .



Phases of FMP Development

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Implementation: Phases IV and V

Rulemaking under MSA and APA

- Frameworks can create efficiencies at implementation stage
- Involves interaction with APA and MSA rulemaking requirements
- General Rulemaking Terminology:
 - Proposed Rule/Final Rule
 - Interim Rule/Interim Final Rule
 - Direct Final rule



Timing and Procedures for MSA Regulations

Type of MSA Regulation	MSA Timing Considerations	APA Timing Considerations
Deemed necessary by a Council. MSA 303(c), 304(b)	5 days initiate review 15 days determine consistency 15 – 60 comment period 30 days final regulations	Comment period, unless waived 30 day delay in effectiveness, unless waived
Implementing Secretarials. 304(c)	Public hearings Consultations with other agencies 60 day comment period	Comment period, unless waived 30 day delay in effectiveness, unless waived
Emergency Action or Interim Measures (OF). 305(c)	Effective for 180 days, with one extension.	Comment period, unless waived 30 day delay in effectiveness, unless waived
General authority to carry out FMPs and implement MSA. 305(d)		Comment period, unless waived 30 day delay in effectiveness, unless waived



Emergency or Interim Actions

- Interim Measures
 - Secretarial action to address overfishing while a Council develops a plan
 - 180 days, plus additional 186 days
 - Only applies to overfishing
- Emergency Measures
 - Secretarial action to address any unforeseen issues
 - 180 days, plus additional 186 days
 - Not just for overfishing
- On face, neither type of action is exempt from requirements of other applicable laws



Emergency Actions

- Is it an Emergency?
 - Unforeseen circumstances
 - Serious problems in fishery
 - Benefits outweigh normal public process
- Is Emergency justified?
 - Substantial damage and loss
 - For specific reasons:
 - Ecological
 - Economic
 - Social



Examples

- West Coast Salmon Management
- Northeast Multispecies Management
- Gulf of Mexico Red Snapper



West Coast Salmon: Regulatory Structure

660.408 Framework for Spex (p. 316)

- Planning and public review: Feb – April
- April Council recommends
- May 1, implementation : final rule, APA waivers (case law)

660.409 Framework for In-season Management (p. 322)

- (a) Fixed Provisions: NMFS authorized to act as appropriate: close upon quota; rescission of closure; adjustment for errors
- (b) Flexible Provisions: RA consults with Council Chair and States; 5 listed actions; must be consistent with other requirements; must consider specified criteria



West Coast Salmon: Framework as applied

May 1: implementation : final rule, APA waivers
(case law), EA

Instant Inseason Management:

For example: May 23: Inseason Action #3 - Closed
an area due to projected attainment of quota;
APA waiver; actual notice via hotline



Northeast Multi-species: Regulatory Structure

- 648.90(a): Procedures for development of management measures
 - PDT meets on or before Sept. 30 – review info, make recommendations on options to achieve goals, objectives, and ACLs
 - Long list of potential management actions (iii. P. 744)
 - Council recommendation, or RA select from options
 - Pro/Final rule or Framework process (dates, deadlines, rulemaking procedures spelled out in regs)
- 648.90(c): Framework Procedure for in-season adjustment (c. p. 754)
 - 2 meetings, specified categories of actions
 - Council recommendation about Final rule (criteria)(notice, time, need, monitoring)
 - RA concur?



Northeast Multi-species: As applied

- Issues
 - Procedure: APA and MSA notice and comment, Number of council meetings, development of analyses
 - Content: allows EFF designations (see 303(a))
- Frameworks 48 and 50
 - FR notice; Emergency Rule; Interim Final Rule; Proposed and Final Rule
- Does this save time?



Red Snapper: Fall Season

- Under 50 CFR 622.34 (m), the red snapper recreational fishing season opens each year on June 1 and closes when the recreational quota is projected to be reached. Prior to June 1 each year, NMFS projects the closing date based on the previous year's data, and notifies the public of the closing date for the upcoming season. If subsequent data indicate that the quota has not been reached by that closing date, NMFS may reopen the season.



Red Snapper: Fall Season

- If additional quota is available after the June landings are known. The supplemental season would open October 1, 2013; the end date would be published in the final rule.
- The Council also considered modifying the reopening of the red snapper recreational fishing season to be on weekends only, but the Council preferred to retain a continuous open season.



Red Snapper: State Closure Issue

- 2008 rebuilding restrictions; 3 states inconsistent
- 2009-2012: only TX inconsistent
- May 2012: LA announced intent
- Aug 2012: NMFS Federal season would need to be shortened if 2 states inconsistent
- Feb. 2013: Council requested emergency action to modify season (would authorize NMFS to close earlier off coasts of inconsistent states)
- March 25, 2013: NMFS published Emergency Rule
- June 1, 2013: Snapper season opens
- TX and LA filed suit.



Red Snapper: State Closure Issue

- Court held that use of MSA ER authority was not justified because the situation was foreseeable. The court also stated that there was time for, and should have been, APA notice and comment.
- Discussion: This situation was recurrent and somewhat foreseeable. Would a Framework help?



Concluding Thoughts

- MSA's action forcing mandates and timelines
 - Incoming data, need for response
- Frameworking is a tool
 - Build in as much predictability as you can or want
 - Benefits: Speed, efficiency
 - Challenges: data inputs, relinquishing discretion, complying with procedural mandates (APA and MSA)
 - Questions: Is the newest data the best data – can we react too rapidly?

