

Legal & Regulatory Requirements and the Administrative Record

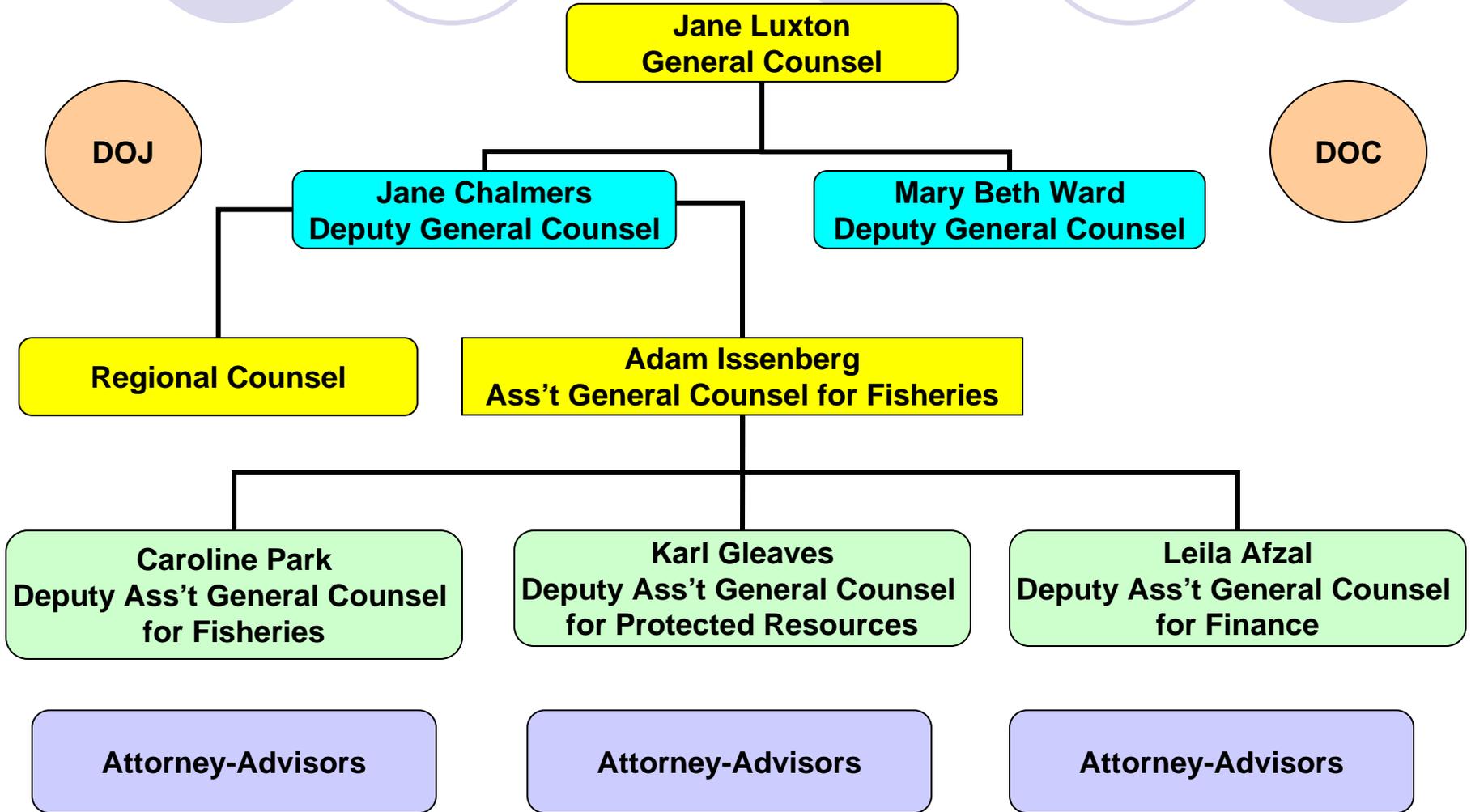
Council Member Training - October 21-23, 2008

Caroline Park

Deputy Ass't General Counsel for Fisheries

NOAA General Counsel

NOAA General Counsel Organization



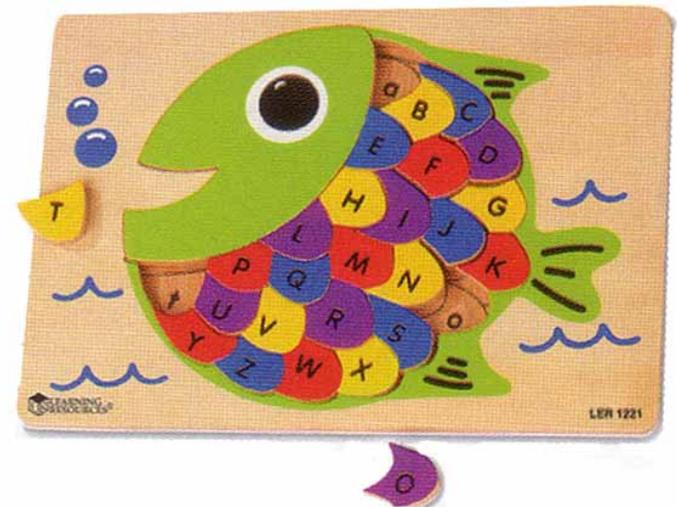
NOAA GENERAL COUNSEL

- NOAA GC Represents Agency
- NOAA GC regional counsel provides legal guidance at Council Meetings
- NOAA GCF advises HQ and provides national coordination
- Councils May Not Sue or Be Sued

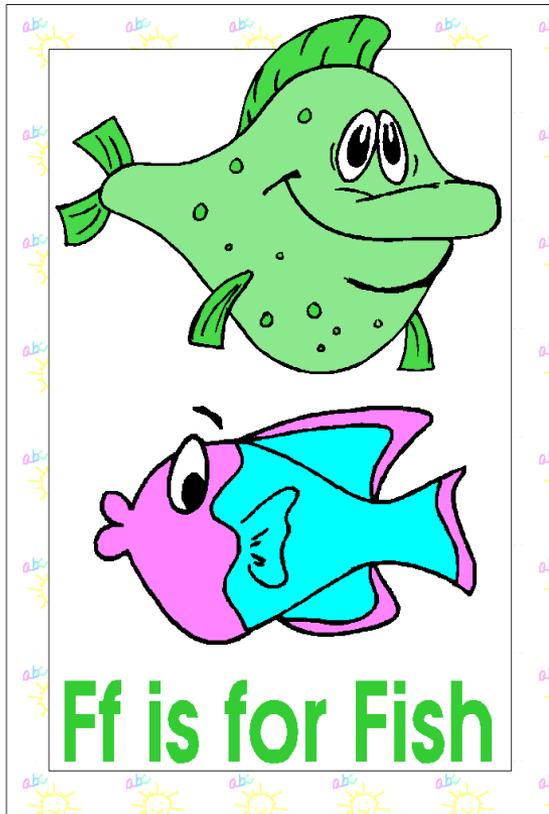


STATUTORY REQUIREMENTS APPLICABLE TO FISHERIES MANAGEMENT

- Magnuson-Stevens Fishery Conservation and Management Act
- National Environmental Policy Act
- Endangered Species Act
- Marine Mammal Protection Act
- Regulatory Flexibility Act
- Regulatory Impact Review
- Administrative Procedure Act
- Coastal Zone Management Act
- Information Quality Act
- National Marine Sanctuaries Act



MAGNUSON-STEVENSON ACT (MSA)



- Primary Authority for Fisheries Management – different Congressional purposes
- FMPs and Regulations must be:
“Consistent with Other Applicable Law”
- Documentation for other statutes helps build the record

Regulatory Flexibility Act (RFA) & Executive Order 12866 (RIR)

- RFA
 - Consider economic impacts on small entities
 - Procedural statute
 - Requires consideration of alternatives (FRFA)
- RIR
 - Applies to “significant” actions
 - Prepare cost-benefit analysis, consider alternatives
 - OMB review

Administrative Procedure Act (APA)

- Provides for “Notice and Comment” Rulemaking
 - 30-day delay in effectiveness
 - Good cause waivers
- Sets Standards and Procedures for Judicial Review of Federal Agency Actions
 - Applies to Review of MSA Regulations
- Establishes “Arbitrary and Capricious” Standard for Judicial Review
 - Gives “Deference” to Agency Decisions
 - Provides for Court review “on the Record”

LITIGATION

Magnuson-Stevens Act

- final actions can be challenged within 30 days
- no injunctions
- expedited review: 45 days to file administrative record

Other statutes

- judicial review under APA



Judicial Review: 3 Key Concepts

1. Chevron two-step process
2. “Arbitrary and Capricious”
Standard of Review (APA)
*-> “Arbitrary, Capricious, an Abuse of Discretion,
or Otherwise Not in Accordance with Law” (5
U.S.C. § 706(2)(a))*
3. Review on the record

1. Chevron “Two Step” Process

Step 1: Has Congress spoken directly to the precise question at issue?

YES → Give effect to Congressional Intent!

NO → Go to Step 2.

Step 2: Is agency’s answer based on permissible construction of statute?

From Chevron, Inc. v. Natural Resources Defense Council (U.S. Supreme Ct. 1984)



Natural Resources Defense Council v. NMFS (9th Circuit, 2005)

Challenge to Pacific Council's annual quota for dark-blotched rockfish

Issue: Whether NMFS could take into account the “needs of fishing communities” when setting a quota for a species with a rebuilding period longer than ten years.



Natural Resources Defense Council v. NMFS (9th Circuit, 2005)

Rebuilding plans must 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 stock of fish, the *needs of fishing communities*, ... and the interaction of the overfished stock of fish within the marine ecosystem; and
- (ii) Not exceed ten years, except in cases where the biology of the stock of fish [or] other environmental conditions dictate otherwise.

MSA Section 304(e)(4).



North Carolina Fisheries Ass'n v. Gutierrez (D.C. Circuit, 2007)

Challenge to S. Atlantic Council's Snapper-Grouper FMP amendment

Issue: Whether FMP amendment may take measures to end overfishing without providing a rebuilding plan for a stock.



North Carolina Fisheries Ass'n v. Gutierrez (D.C. Circuit, 2007)

Within one [now two] year after identification under paragraph (1) or notification under paragraphs (2) or (7), the appropriate Council shall prepare [and implement] a FMP, plan amendment, or regulations for the fishery –

To end overfishing [immediately] in the fishery and to rebuild the affected stocks of fish;

MSA Section 304(e)(4).



Fishing Company of Alaska v. Gutierrez **(D.C. Cir. 2007)**

Challenged N. Pacific Council BSAI groundfish retention standard

Issue: Balancing Costs with Conservation Benefits

- **Lower Court: Deference due to weight given qualitative benefits over quantitative costs**

Issue: Whether NMFS' addition of monitoring and enforcement requirements violate procedure for "submittal" of regulations implementing amendments"

- **Appellate Court: No evidence Council "deemed" the additional requirements necessary or appropriate.**

Fishing Company of Alaska v. **Gutierrez (D.C. Cir. 2007)**

Section 303(c):

**“Proposed regulations which the Council *deems* necessary or appropriate for the purposes of –
(1) implementing a fishery management plan or plan amendment shall be *submitted* to the Secretary simultaneously with the plan or amendment under Section 304.”**

Section 305(d):

“The Secretary may promulgate such regulations ... as may be necessary to [carry out any fishery management plan or amendment].”

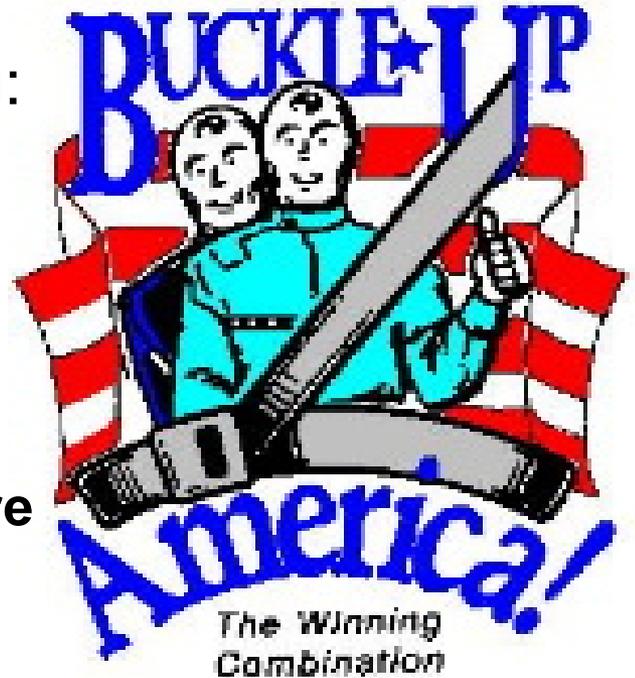
2. “*Arbitrary and capricious*”

Motor Vehicles Manufacturers Ass’n v.

State Farm Mutual Automobile

Insurance Co. (U.S. Supreme Ct. 1983):

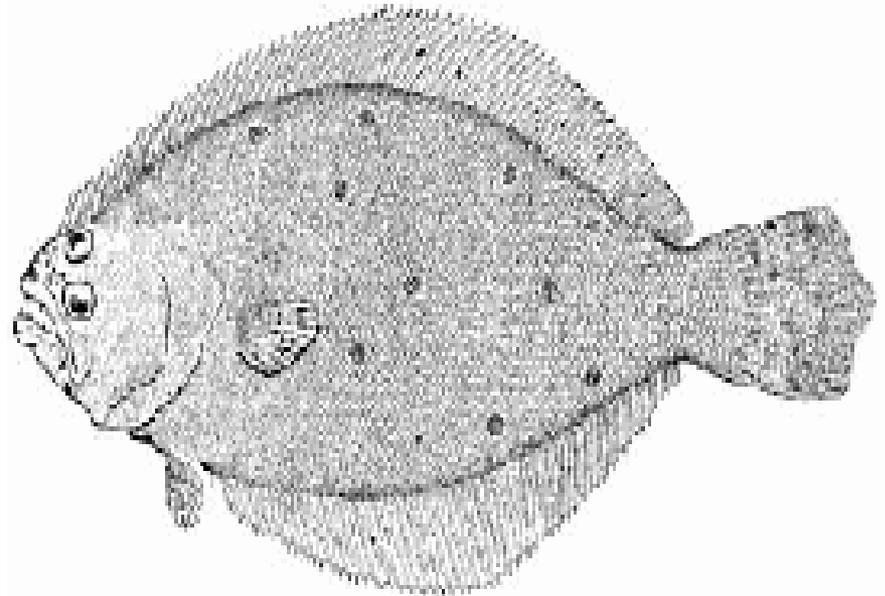
- relied on factors which Congress had not intended agency to consider
- entirely failed to consider an important aspect of the problem
- offered an explanation for its decision that runs counter to the evidence before the agency
- is so implausible that it could not be ascribed to a difference in view or the product of agency expertise



Natural Resources Defense Council v. Daley (D.C. Circuit, 2000)

**Challenge to Mid-Atlantic Council annual
quota for summer flounder**

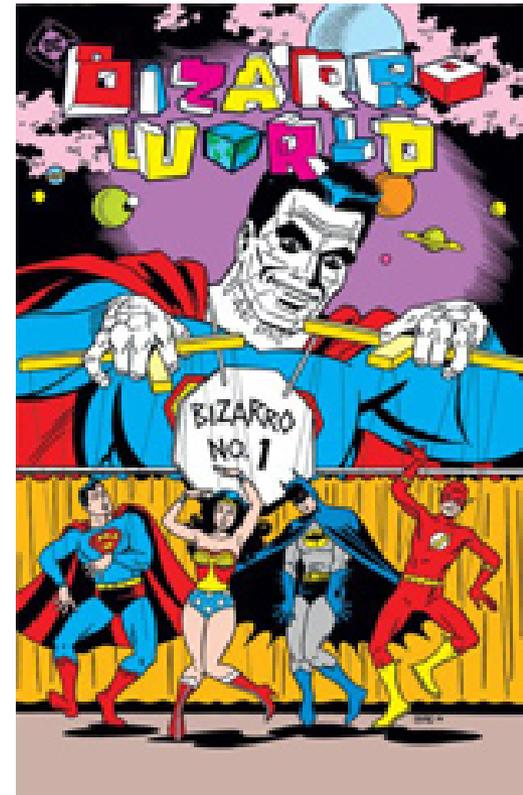
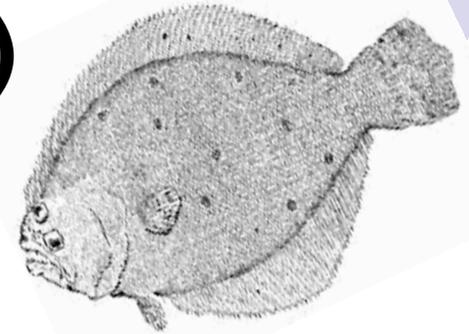
**Issue: Whether quota that
had an 18 % likelihood
of meeting target fishing
mortality rate was
arbitrary and capricious.**



Natural Resources Defense Council v. Daley (D.C. Circuit, 2000)

“Only in Superman Comics’ Bizarro World, where reality is turned upside down, could the Service conclude that a measure that is at least four times as likely to fail as to succeed offers a ‘fairly high level of confidence.’”

Court held: The quota must have, at the very least, a 50% chance of attaining the target F.



The Ocean Conservancy v. Gutierrez **(D.D.C. 2005)**

Challenge to regulations requiring circle hooks for Atlantic pelagic longline fishery

Issues: Whether the regulations were arbitrary and capricious when scientific information indicated that larger hooks would further reduce bycatch of protected sea turtles.



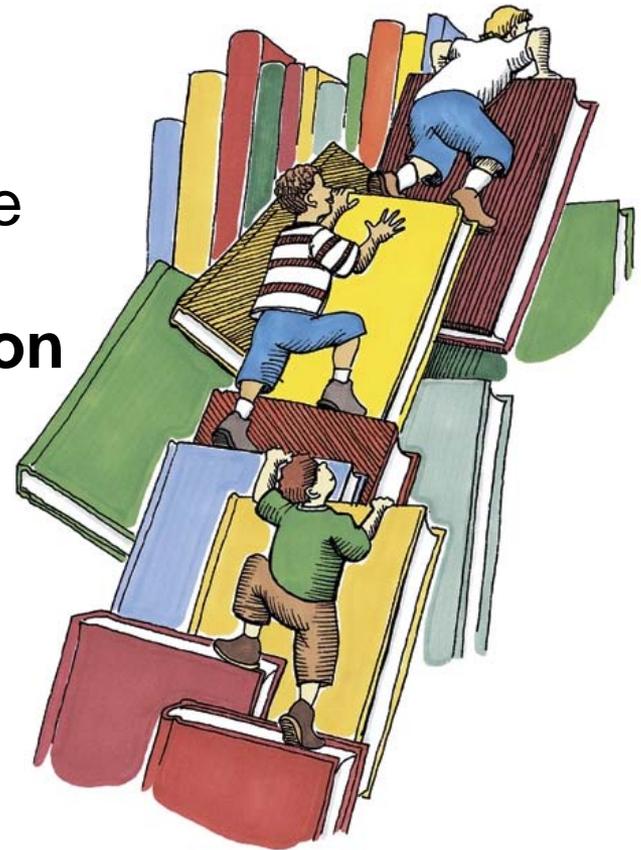
The Ocean Conservancy v. Gutierrez **(D.D.C. 2005)**



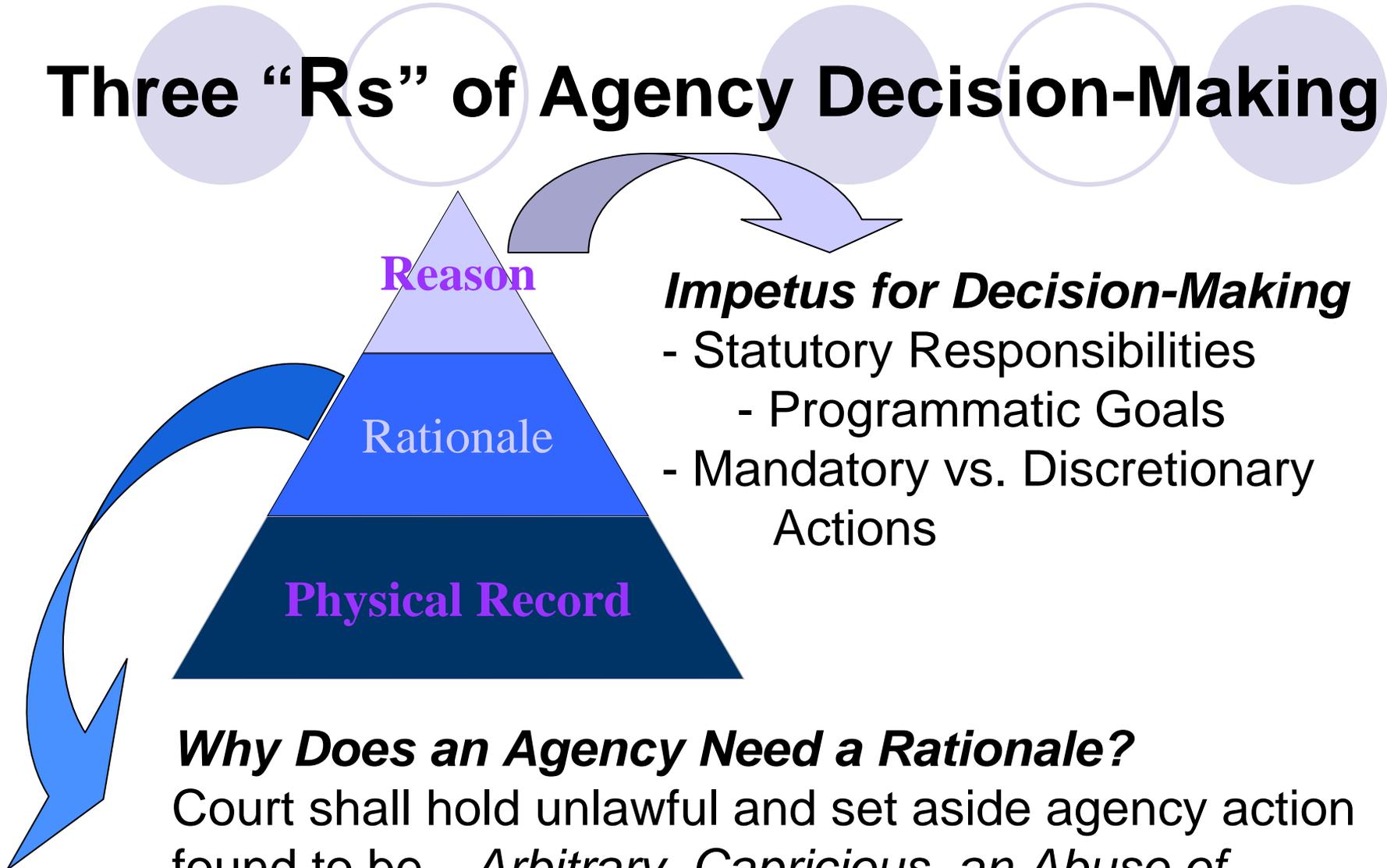
“The comprehensive approach adopted by the NMFS, therefore, was entirely reasonable because it considered not only its own data, but also other studies, expert opinions, and considerations raised by the public at large... [the] deliberative process, as reflected in the record, clearly evinces the type of diligent research and healthy debate Congress intended by adopting National Standard 2.”

3. Review on the Record

- **Document Regulatory Process**
 - Statutes & Regulations
 - Executive Orders
 - Agency procedures and guidance
- **Explain/Rationally Support Decision**
 - Legal standards satisfied?
 - Opposing views considered?
 - “Best Available Science” used?
 - Different alternatives explored?
 - Why was Preferred Choice selected?



Three “Rs” of Agency Decision-Making



Reason

Impetus for Decision-Making

- Statutory Responsibilities
- Programmatic Goals
- Mandatory vs. Discretionary Actions

Rationale

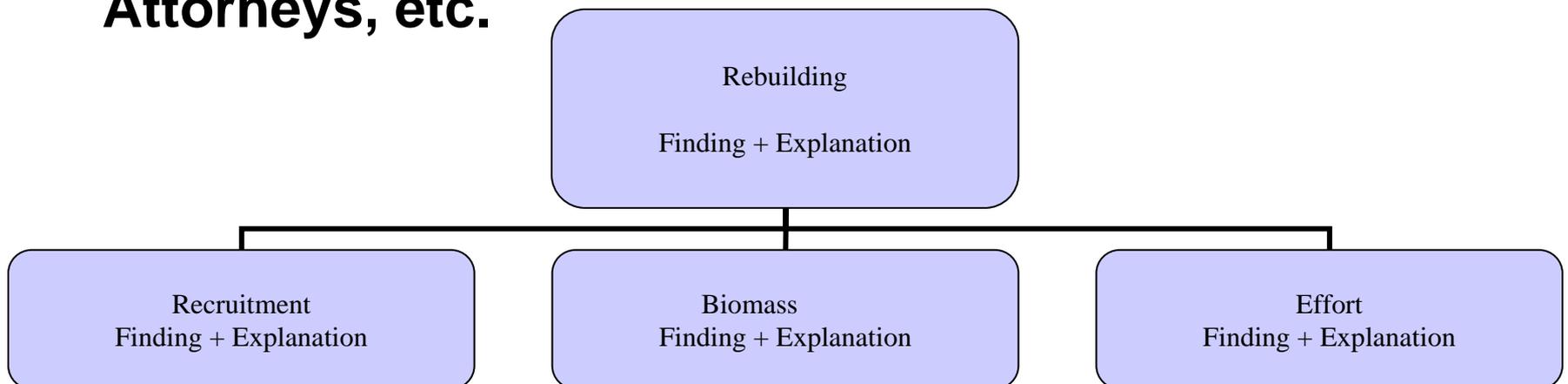
Physical Record

Why Does an Agency Need a Rationale?

Court shall hold unlawful and set aside agency action found to be... *Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law* (5 U.S.C. § 706(2)(a))

Rationale Supports the Reason

- **Finding + Explanation = Rationale**
- **Need Rationale for Each Major Conclusion and Each Subordinate Relevant Factor**
- **Public Comments (written and testimony), Scientific Data and Peer Review, Correspondence, Meetings, Attorneys, etc.**



Physical Record Supports Rationale

- Judicial Review is limited to “the record the agency presents to the reviewing court.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).
- Court Shall Review the Whole Record or Parts Cited by a Party. APA, 5 U.S.C. §706.
- Final decision documents; FMPs/Amendments; SSC & Committee Reports; Reference docs; Public input and responses (summaries of public meetings, public comments, council meeting transcripts); Policies, guidelines, directives, manuals; Earlier records if relevant; and Other Materials that Contain Relevant Facts.

Why is a clear record important?

Medicare

Family & Medical Leave Act

Patent laws

Land & Water Conservation Fund Act

U.S. Constitution, First Amendment

Social Security

FOIA

Trademark

Historical Preservation Act

Habeas Corpus

Prison Litigation Reform Act

Labor disputes

Indian Reorganization Act

Civil Rights Act, Title VII

ESA

Guantanamo Bay

Securities Exchange Act

Individuals with Disabilities Education Act

Any Questions???

