



# **COUNCIL MEMBER TRAINING**

October 31, 2006

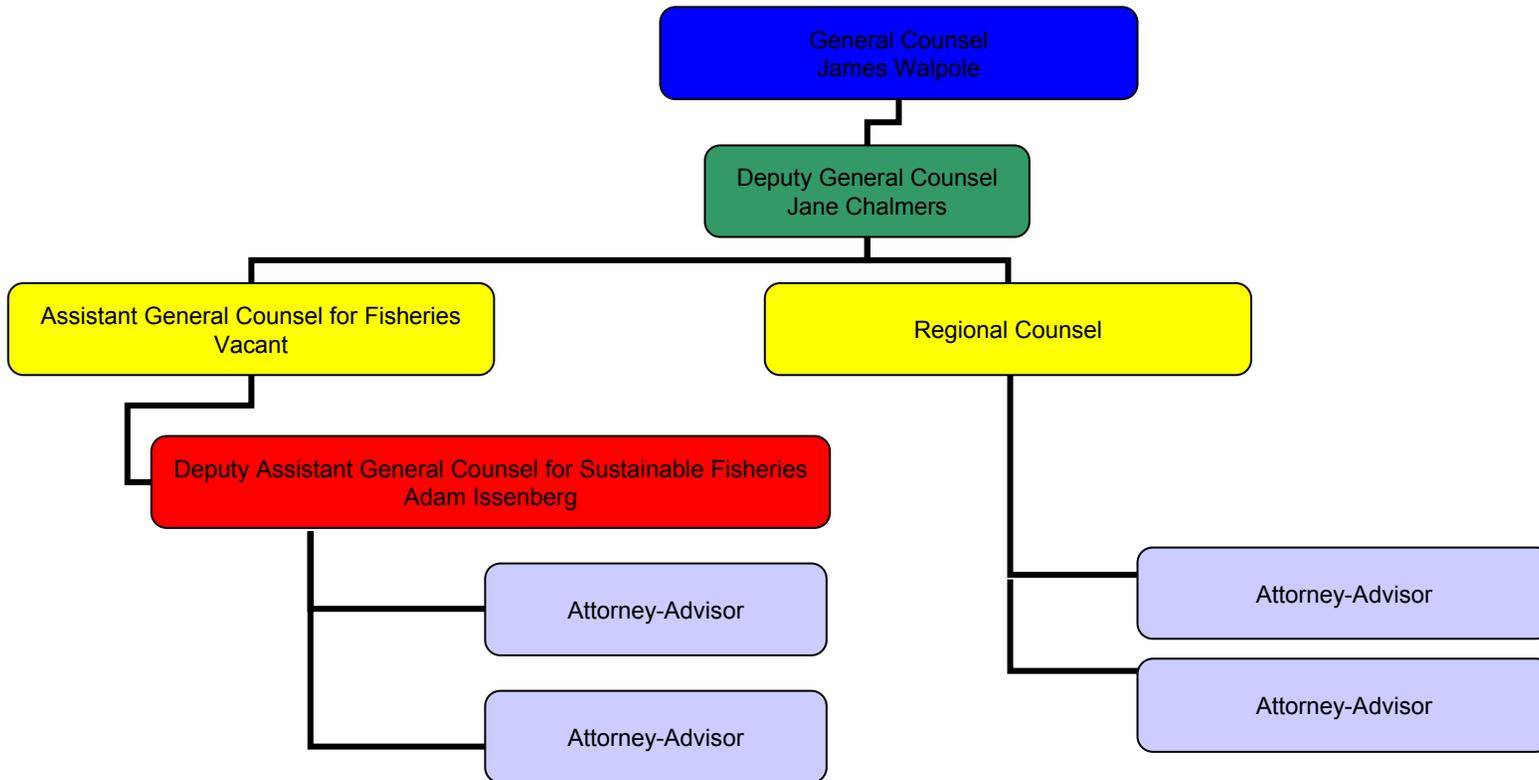
**Adam Issenberg**

Acting Assistant General Counsel for Sustainable Fisheries

**NOAA General Counsel**

# NOAA General Counsel

## ↑ Organization



# NOAA GENERAL COUNSEL

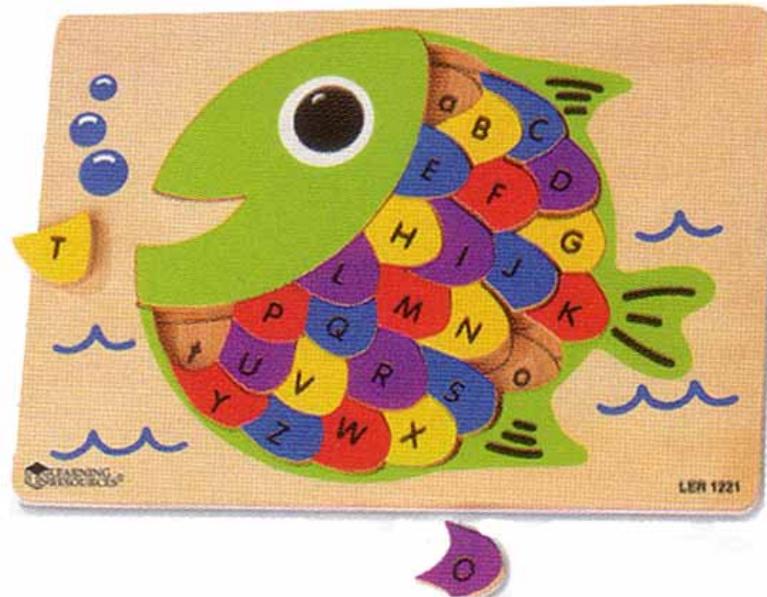
## Relationship to Fishery Management Councils

- Councils May Not Sue or Be Sued
- NOAA GC Represents Agency
- NOAA GC provides legal guidance at Council Meetings

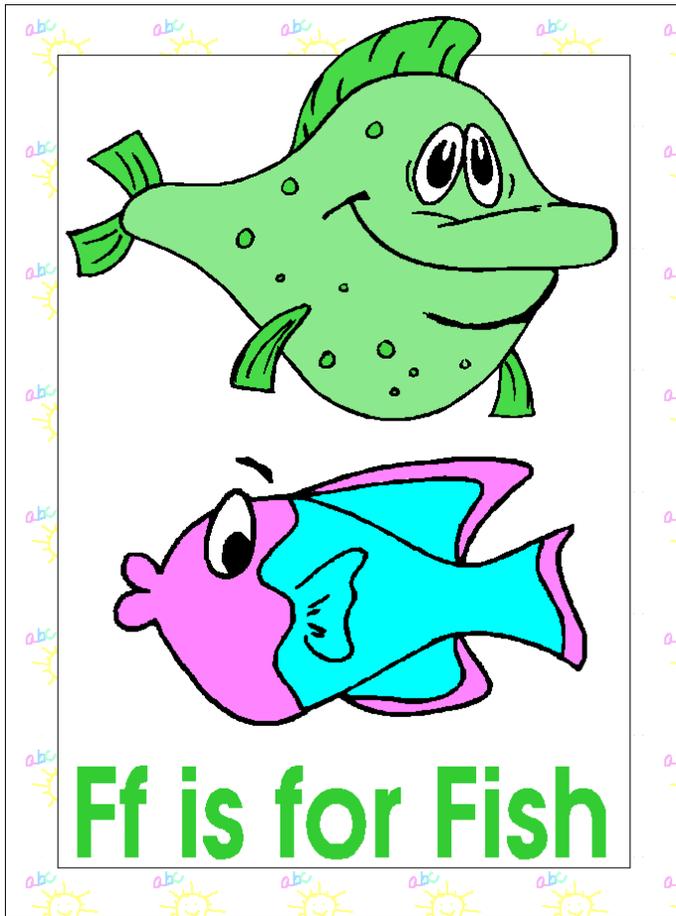


# STATUTORY REQUIREMENTS APPLICABLE TO FISHERIES MANAGEMENT

- MSA
- NEPA
- ESA
- MMPA
- RFA
- RIR
- APA
- CZMA
- DQA
- NMSA



# MAGNUSON-STEVENSONS ACT (MSA)



- Primary Authority for Fisheries Management
- FMPs and Regs Must be:  
**“Consistent with Other Applicable Law”**

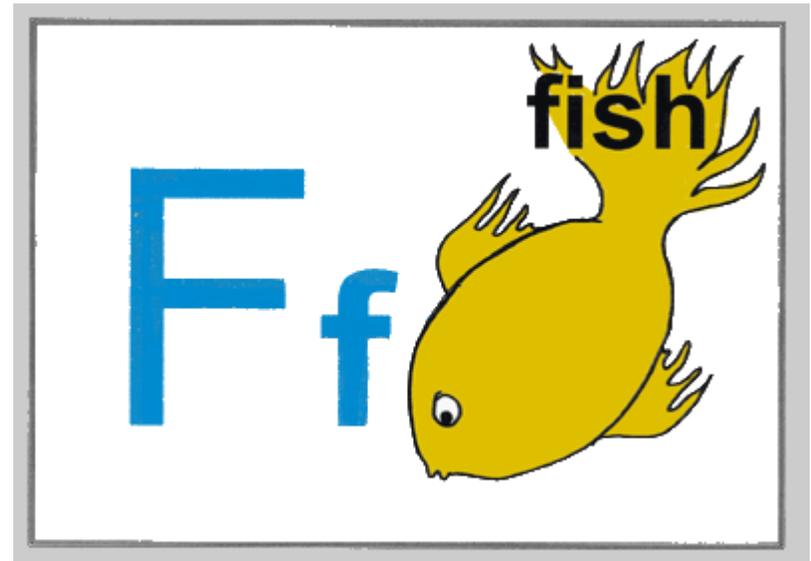


# Managing Multiple Mandates

- Different Congressional Purposes
- FMPs must be consistent with other applicable law
- Documentation for other statutes helps build the record

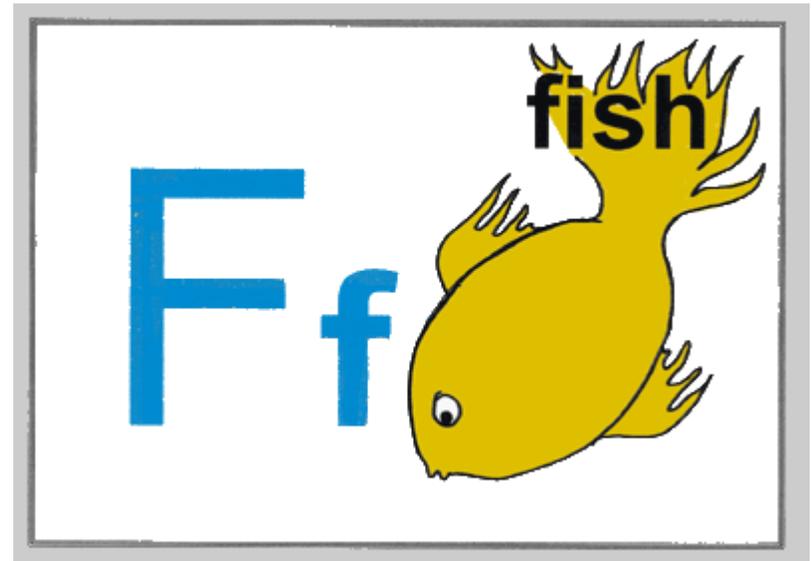
# NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

- **“Basic National Charter for protection of the environment”**



# NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

- Purposes:
  - Inform public
  - Inform decisionmaker
- Requires Documentation
  - EIS
  - EA
- Does Not Establish Standards for Decision
- Includes Procedural Requirements



# Regulatory Flexibility Act (RFA) and Executive Order 12866 (RIR)

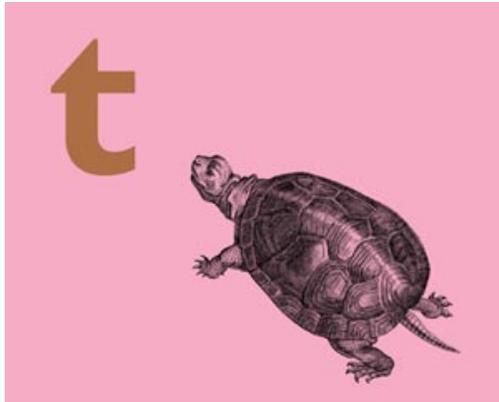
- RFA

- 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

# ENDANGERED SPECIES ACT (ESA) MARINE MAMMAL PROTECTION ACT (MMPA)



Ww



- **Emphasis on  
Resource  
Protection**

# Endangered Species Act (ESA)

## Substantive

- List Endangered and Threatened Species
- Prohibit “Take”
- Avoid “Jeopardy”

## Procedural

- Consultation
  - Biological Opinion
  - Best Available Science



# Marine Mammal Protection Act (MMPA)



- Moratorium
- Special Provisions for Fishing
- List of Fisheries
- Negligible Impact Determinations

# Administrative Procedure Act (APA)

- Sets Standards and Procedures for Federal Agency Decision-Making Process:
  - Generally Requires Notice and Comment
  - Delay of Effectiveness

# Administrative Procedure Act (APA)

- Sets Standards and Procedures for Judicial Review of Federal Agency Actions
  - Applies to Review of MSA Regulations
- Establishes “Arbitrary and Capricious” Standard
  - Gives “Deference” to Agency Decisions
- Provides for Review “on the Record”

# The 3 “Rs” of Agency Decision-Making

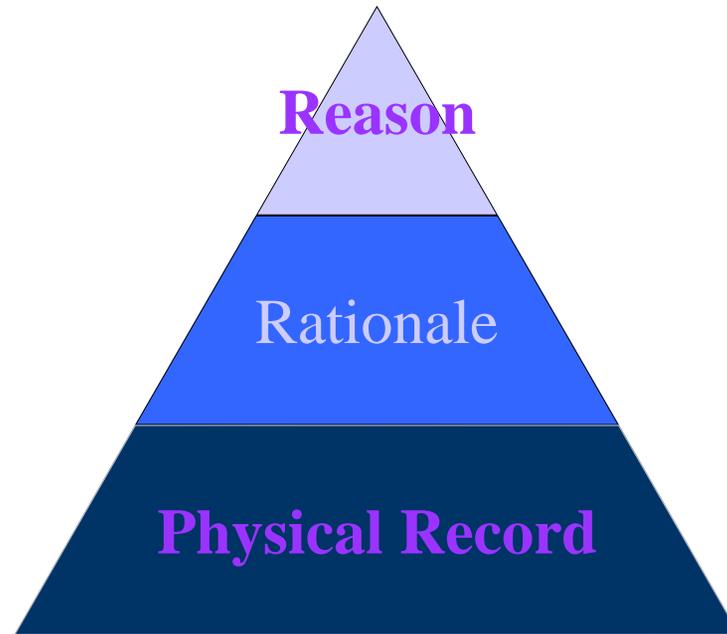
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"What about spelling?"

- Reason
- Rationale
- Physical Record

# The 3 “Rs” of Agency Decision-Making



# The Reason for the Agency Action

- Impetus for Decision-Making Process
  - Statutory Responsibilities
  - Programmatic Goals
- Mandatory vs. Discretionary Actions

# The Rationale Supporting the Reason

## Why Does an Agency Need a Rationale?

- A 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))
- Consider the Relevant Factors



# The Rationale Supporting the Reason

Finding

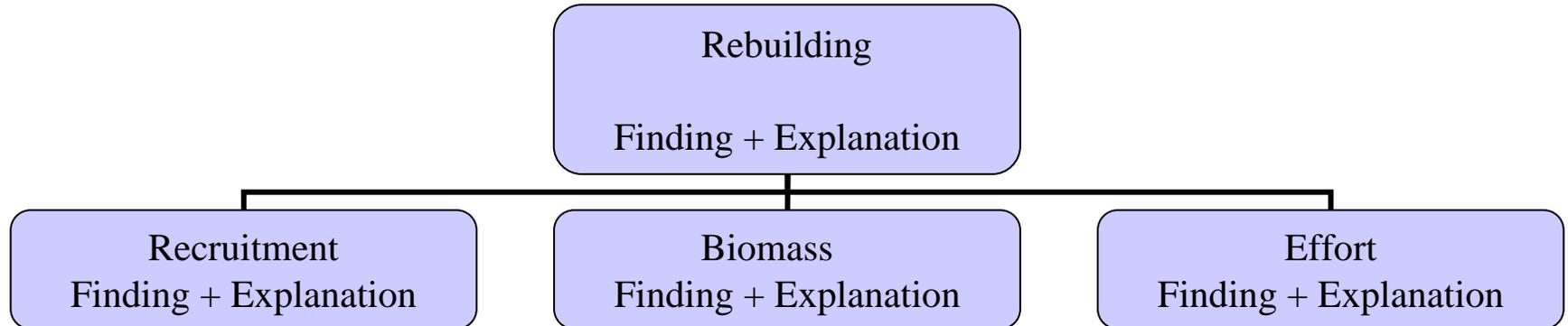
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Explanation

Rationale

# The Rationale Supporting the Reason

A Rationale is Required for Every Major Conclusion and Each Subordinate Relevant Factor



# The Rationale Supporting the Decision: The Relevant Factors

- Public Comments
- Public Testimony
- Scientific Data
- Peer Review
- Correspondence and Meetings
- Attorneys

# The Physical Record Supporting the Rationale Supporting the Reason

- The Court Shall Review the Whole Record or Those Parts of It Cited by a Party.  
Administrative Procedure Act, 5 U.S.C. §706.
- 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).

# The Administrative Record

- Document Regulatory Process
  - Applicable Statutory Process (APA Notice and Comment, MSA, NEPA, RFA, IQA, CZMA, ESA, etc.)
  - Executive Orders (E.O. 12866, E.O. 13132)
- Explain/Rationally Support Decision
  - Met Legal Standards
  - Discuss “Best Available Science” When Required
  - Consideration of Opposing Points of View
  - Explain Preferred Choice

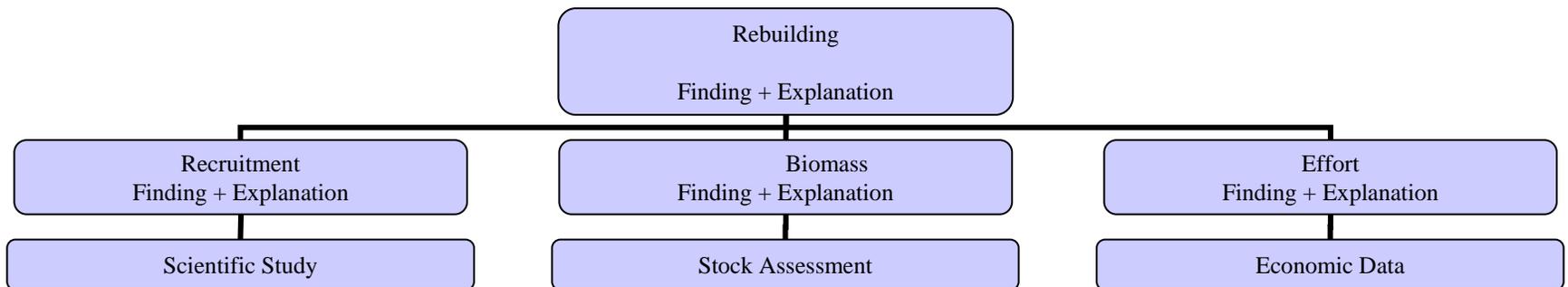


# Elements of the Physical Record

- FINAL DECISION DOCUMENT
- FMPs, Amendments, Committee Reports, SSC Reports
- ARs from earlier decisions, if relevant
- Policies, guidelines, directives manuals
- Reference documents –
- Public Input and Response –
  - Summaries of meetings with public
  - Public Comment
  - Transcripts of Council Meetings
- Any Other Materials that Contain Relevant Facts

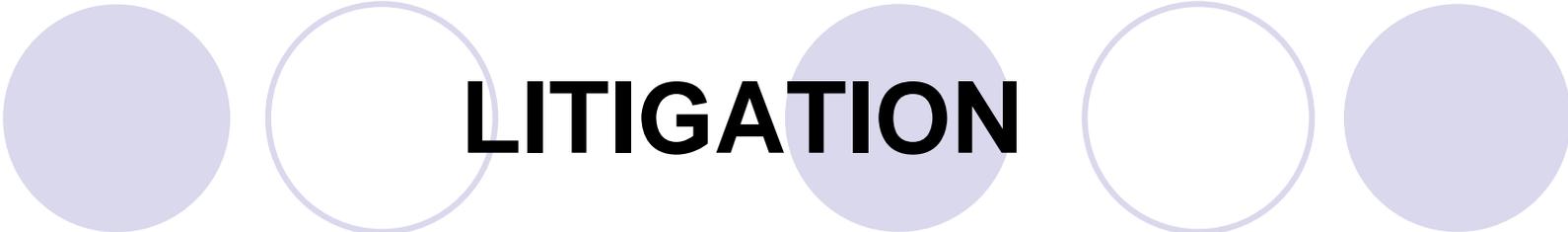
# Building The Physical Record

- The Administrative Record Should Support the Rationale for Every Major Conclusion and Each Subordinate Relevant Factor



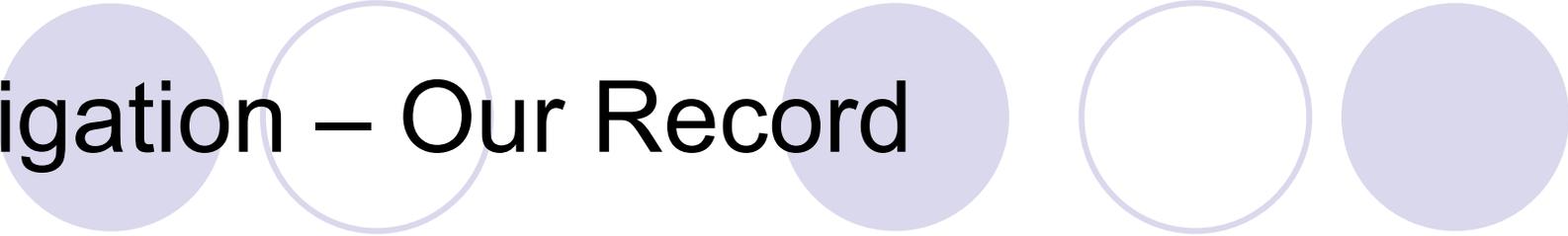
# LITIGATION





# LITIGATION

- Magnuson-Stevens Act
  - final agency actions can be challenged within 30 days
  - no injunctions
  - expedited review
- Other statutes
  - judicial review under APA



# Litigation – Our Record

- NAPA Report: Managing Fisheries By Default
  - Reported a 50% litigation success rate for MSA cases
- 2004 – 91% Success in Fisheries Cases
- 2005 – 89% Success in Fisheries Cases