



# **COUNCIL MEMBER TRAINING**

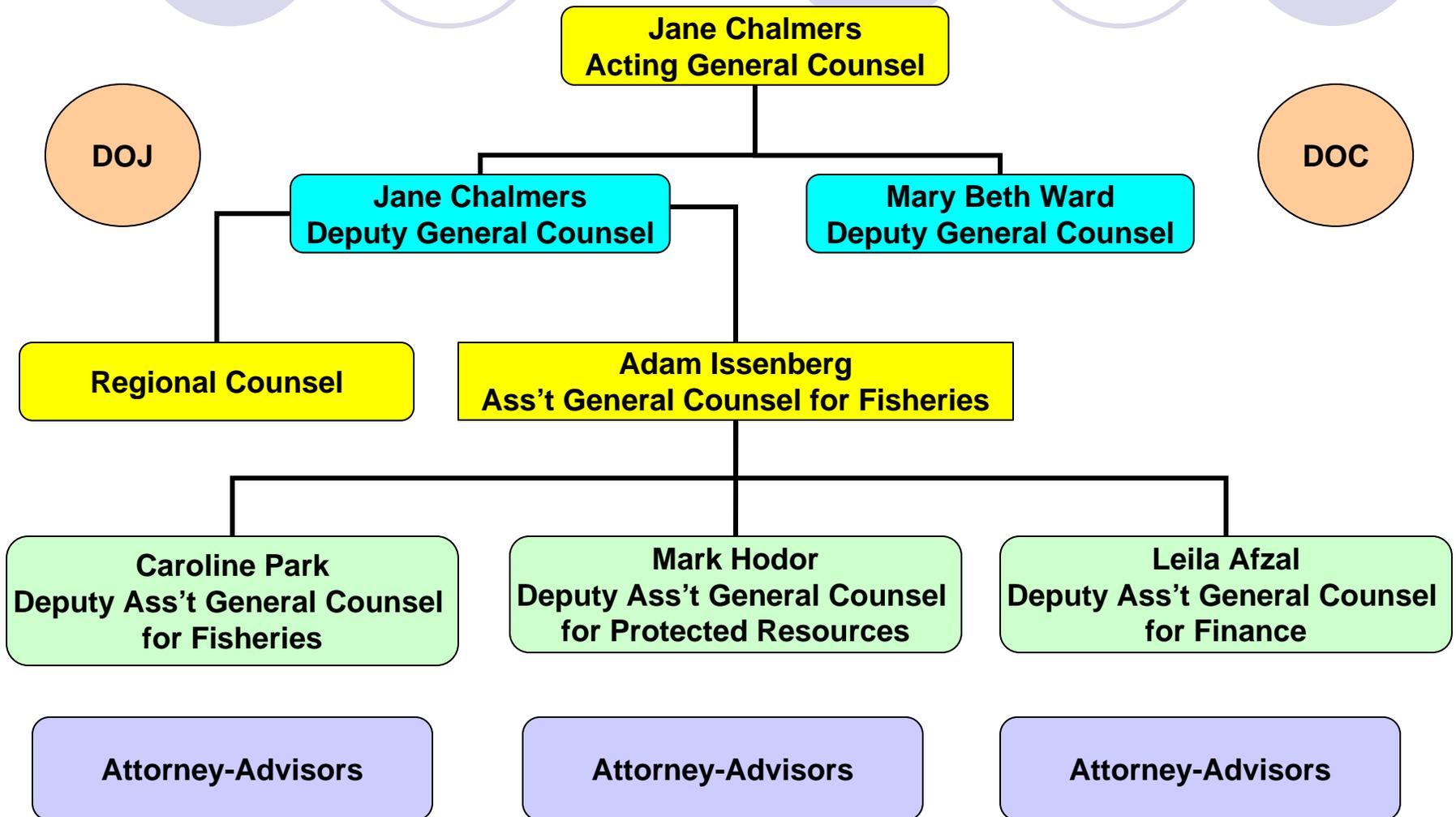
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Attorney-Advisor

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# NOAA General Counsel Organization



# NOAA GENERAL COUNSEL

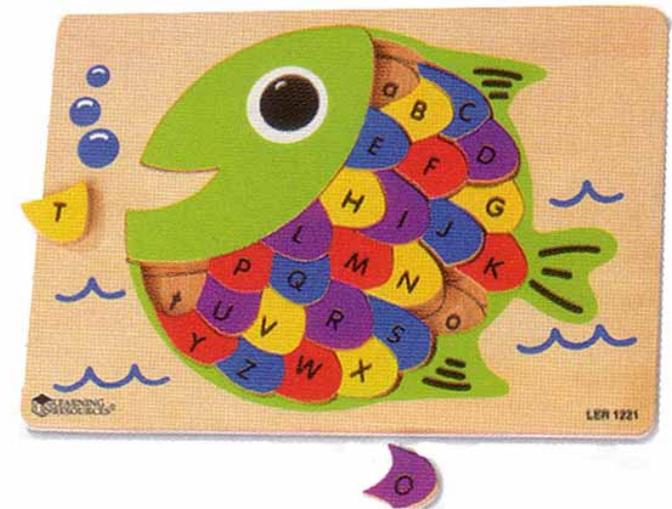
## ⌄ Relationship to Fishery Management Councils

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

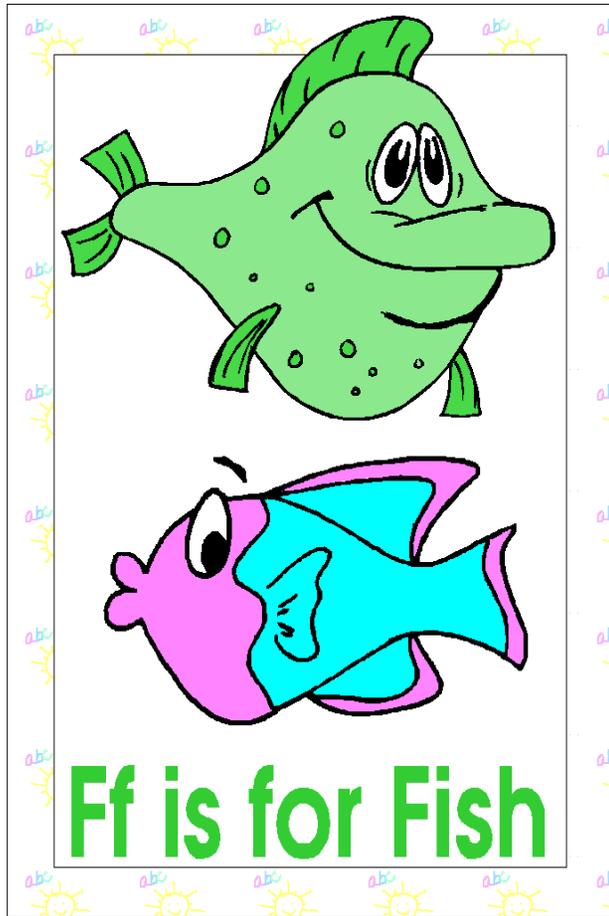


# STATUTORY REQUIREMENTS APPLICABLE TO FISHERIES MANAGEMENT

- Magnuson-Stevens 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
- FMPs and Regulations 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

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

- RFA

- Consider economic impacts on small entities
- Procedural statute
- Requires consideration of alternatives (FRFA)

- RIR

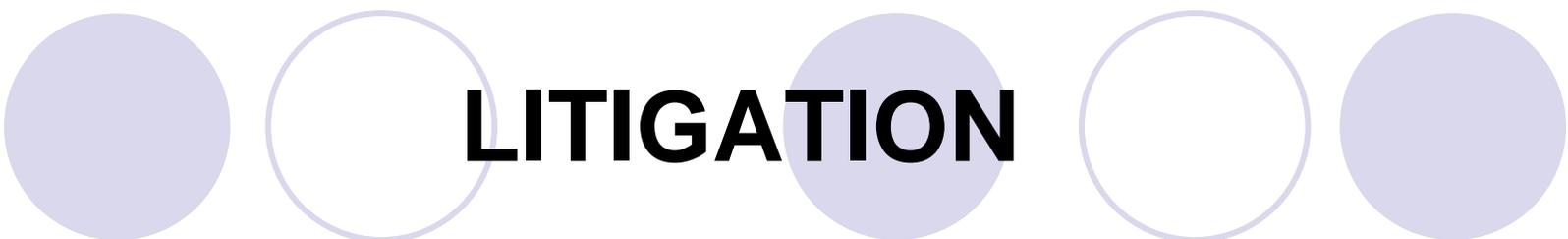
- Applies to “significant” actions
- Prepare cost-benefit analysis, consider alternatives
- OMB review

# 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





# LITIGATION

- Magnuson-Stevens Act
  - final agency actions can be challenged within 30 days
  - no injunctions
  - expedited review
- 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: Is the agency’s answer based on a permissible construction of the statute?**

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



# Natural Resources Defense Council v. NMFS (9<sup>th</sup> Circuit, 2005)

⚖ **Challenge to 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.**

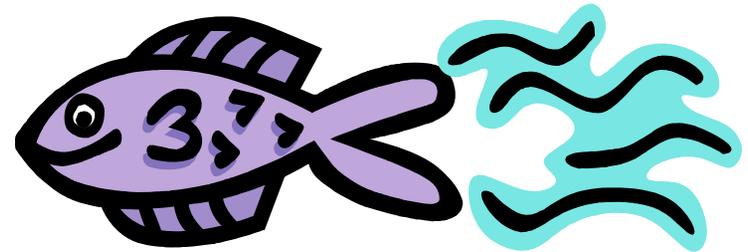


# Natural Resources Defense Council v. NMFS (9th Circuit, 2005)

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 Snapper-Grouper FMP amendment**

**Issue: Whether an FMP amendment may take measures to end overfishing without providing a rebuilding plan for a stock that is both subject to overfishing and overfished.**



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 –**

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

**MSA Section 304(e)(4).**



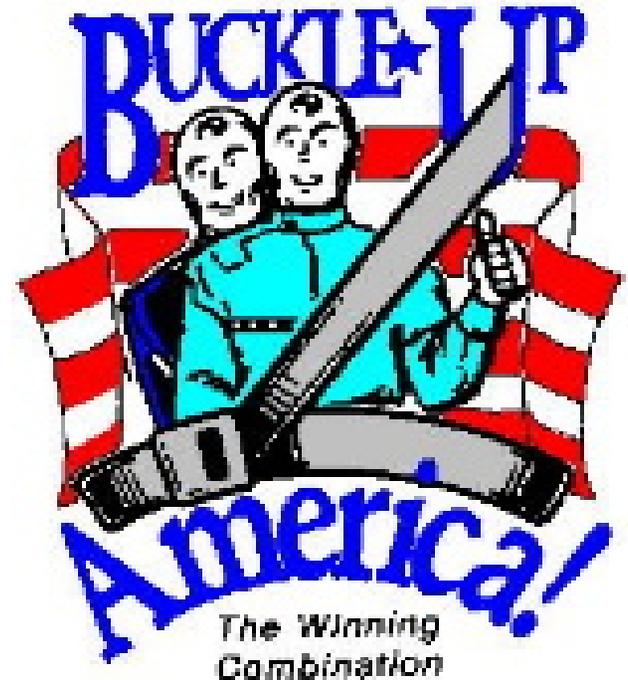
## 2. “*Arbitrary and capricious*”

Motor Vehicles Manufacturers Ass’n v.

State Farm Mutual Automobile

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

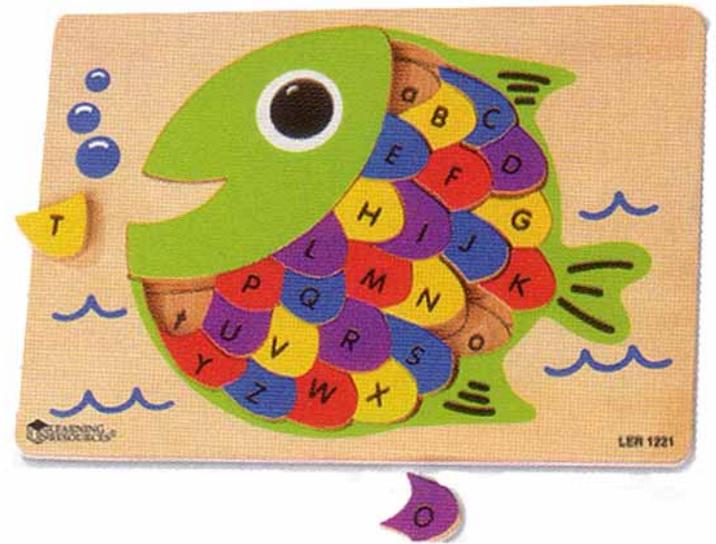
- relied on factors which Congress had not intended agency to consider
- entirely failed to consider an important aspect of the problem
- offered an explanation for its decision that runs counter to the evidence before the agency
- is so implausible that it could not be ascribed to a difference in view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



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

⚖️ **Challenge to annual quota for summer flounder**

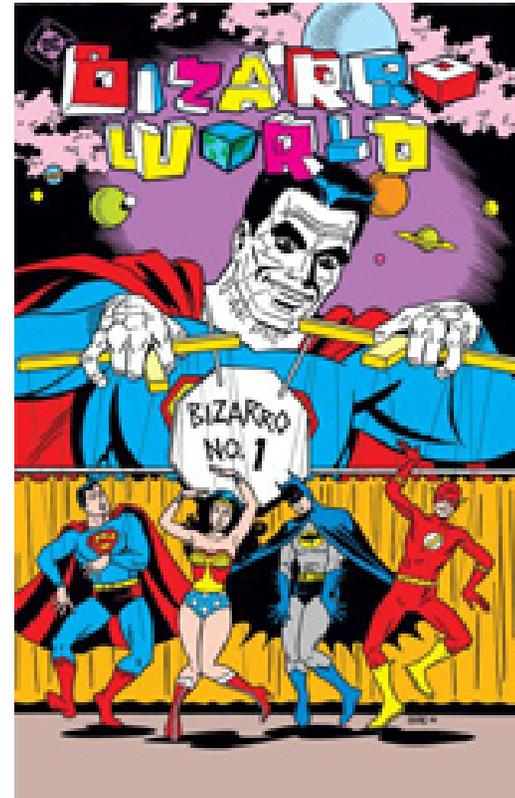
**Issue: Whether quota that had an 18 % likelihood of meeting target fishing mortality rate was arbitrary and capricious.**



# 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.’”**

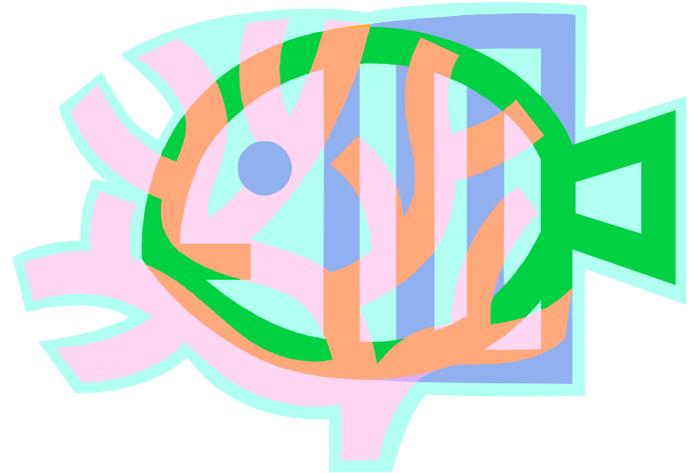
**Court held: The quota must have, at the very least, a 50% chance of attaining the target F.**



# Legacy Fishing Co. v. Gutierrez (D.D.C. Circuit, 2007)

⚖️ **Challenge to FMP  
Amendment for BSAI  
groundfish**

**Issue: Whether groundfish  
retention standard was  
arbitrary and capricious in the  
manner in which it balanced  
economic costs and  
conservation benefits.**

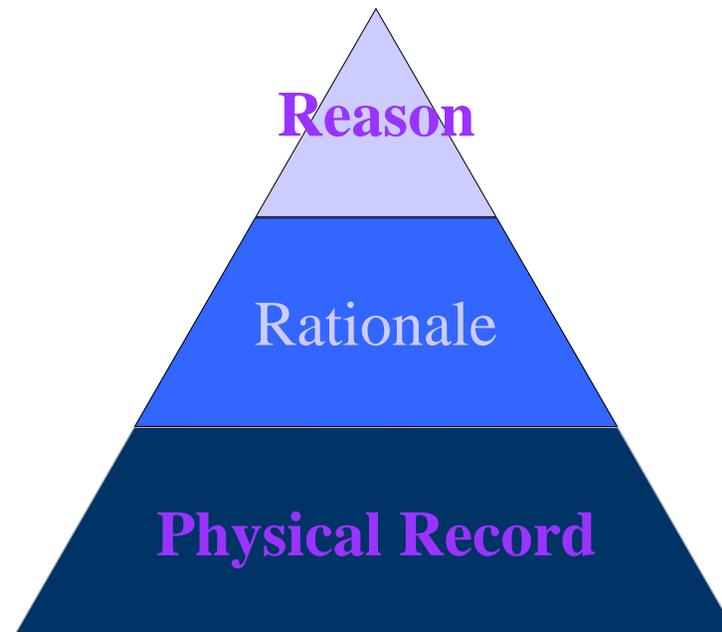


# 3. Review on the Record

- 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



# 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

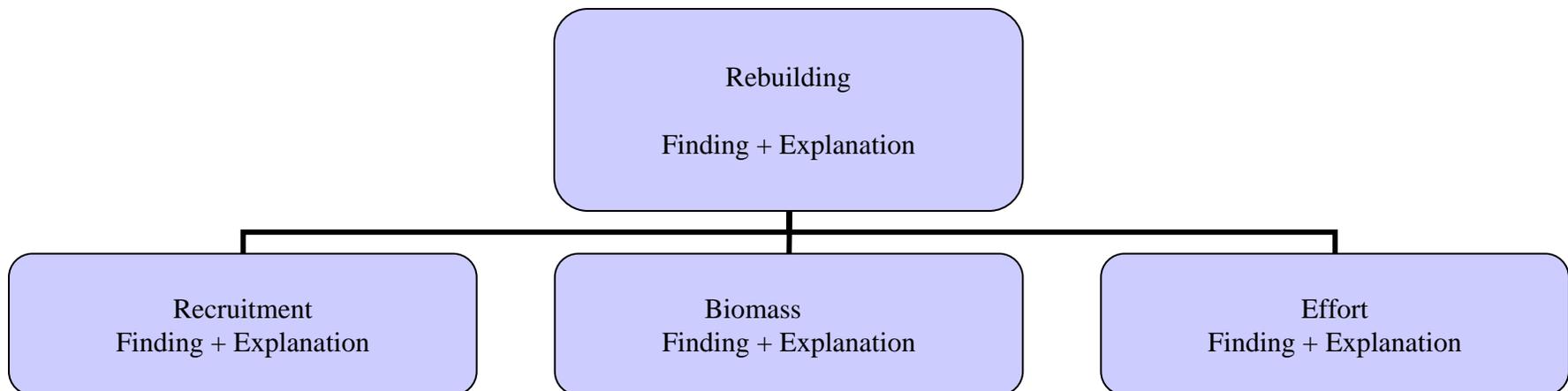
# The Rationale Supporting the Reason

## 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 + Explanation = Rationale
- Need Rationale for Each Major Conclusion and Each Subordinate Relevant Factor

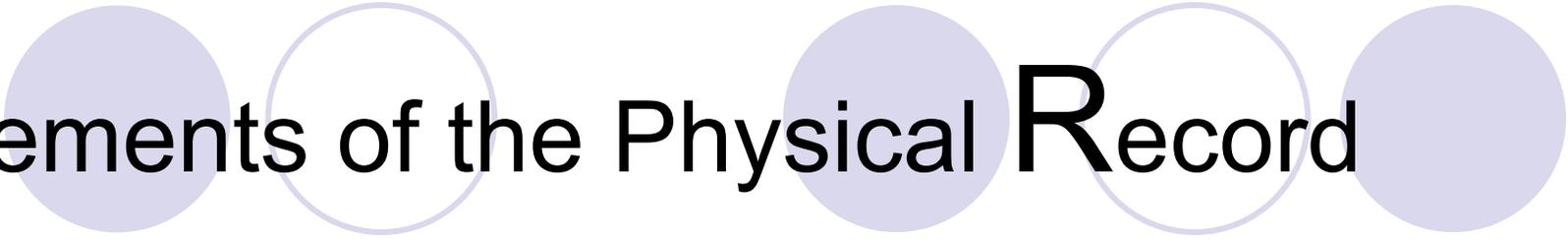


# The Rationale Supporting the Decision: *The Relevant Factors*

- 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).

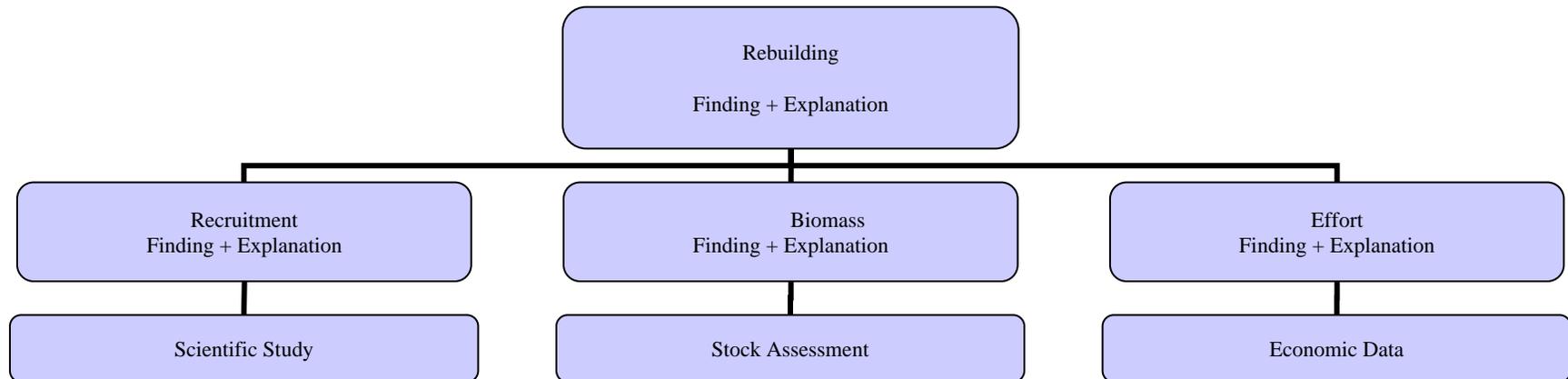


# Elements of the Physical Record

- 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

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



**Any Questions???**

