

Legal & Regulatory Requirements and Administrative Record

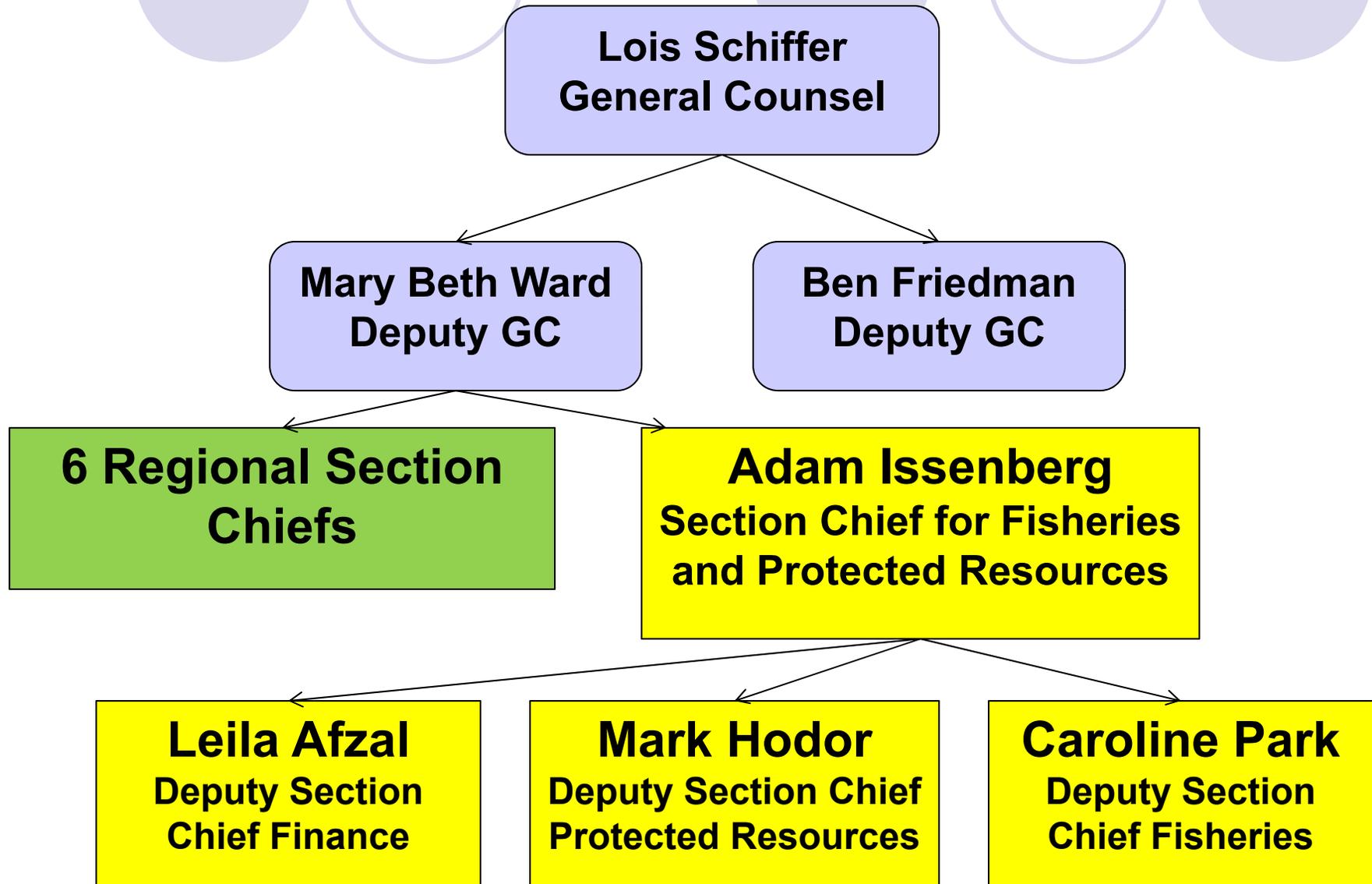
*Council Member Training
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NOAA GENERAL COUNSEL

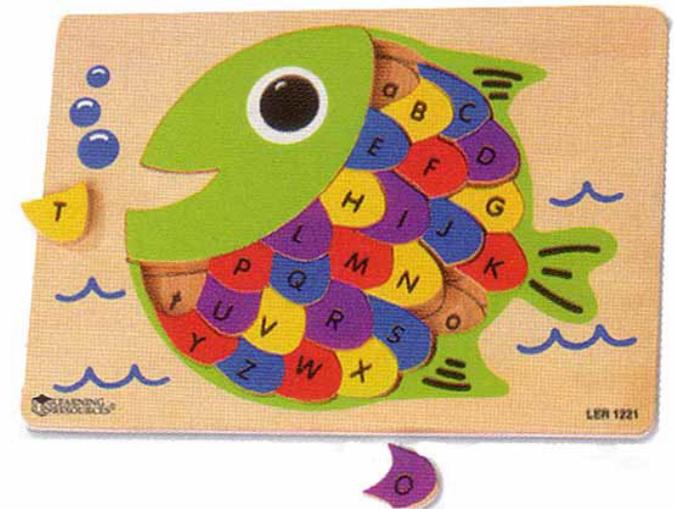
🏛️ Relationship to Fishery Management Councils

- Councils May Not Sue or Be Sued
- NOAA GC Represents Agency
- NOAA GC regional attorneys provide legal guidance at Council Meetings
- Fisheries and Protected Resources Section (Silver Spring) advises HQ and provides national coordination

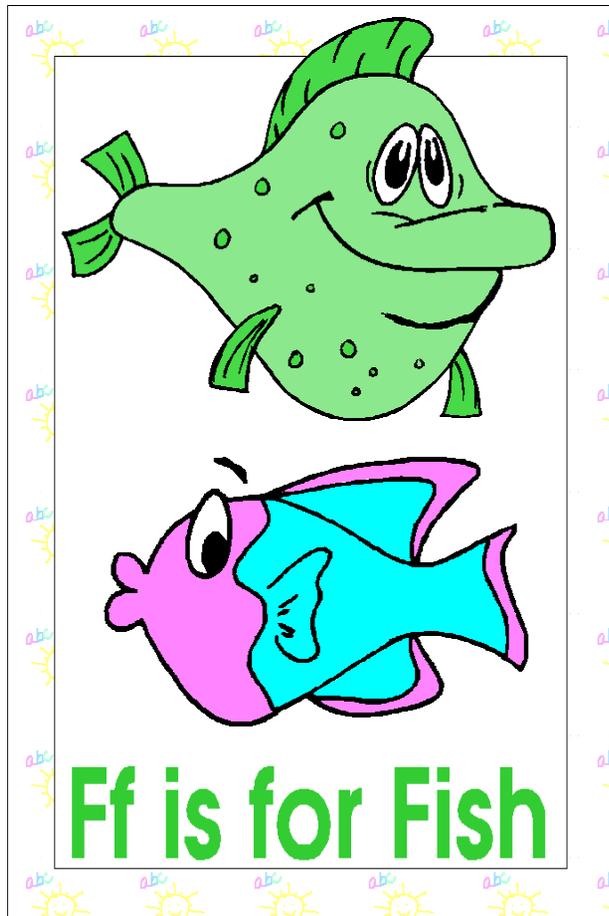


STATUTORY REQUIREMENTS APPLICABLE TO FISHERIES MANAGEMENT

- 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-STEVENS ACT (MSA)



- Primary authority for fisheries management
- Different purposes
- Fishery management plans and regulations must be:
 - “Consistent with Other Applicable Law”
- Documentation for other statutes helps build record

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

- RFA

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

- RIR

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

Plain Language Requirements

- Plain Writing Act of 2010
 - Requires executive agencies to use plain language in documents by October 13, 2011 in all communications with the general public—except regulations
- Other Plain Language Mandates (applying to regulations)
 - June 1, 1998 Presidential Memo
 - EO 12866
 - EO 12988
 - EO 13563

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 agency actions can be challenged within 30 days (no later)
- no injunctions
- expedited review

- **Other statutes**

- judicial review under the 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 the agency’s answer based on a permissible construction of the statute?

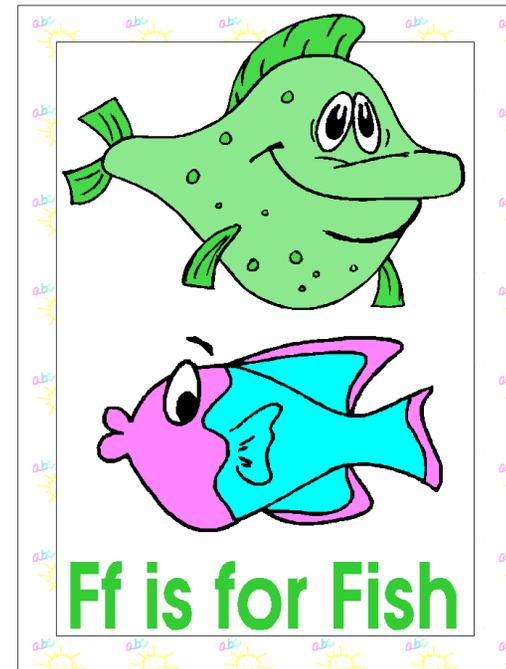
From Chevron, Inc. v. Natural Resources Defense Council (U.S. Supreme Ct. 1984)



Natural Resources Defense Council v. NMFS (9th 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.**

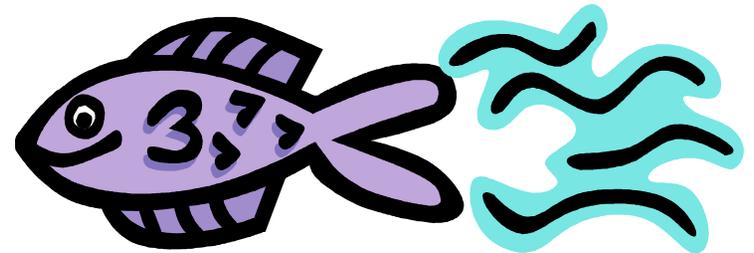


Natural Resources Defense Council v. NMFS (9th Circuit, 2005)

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).



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

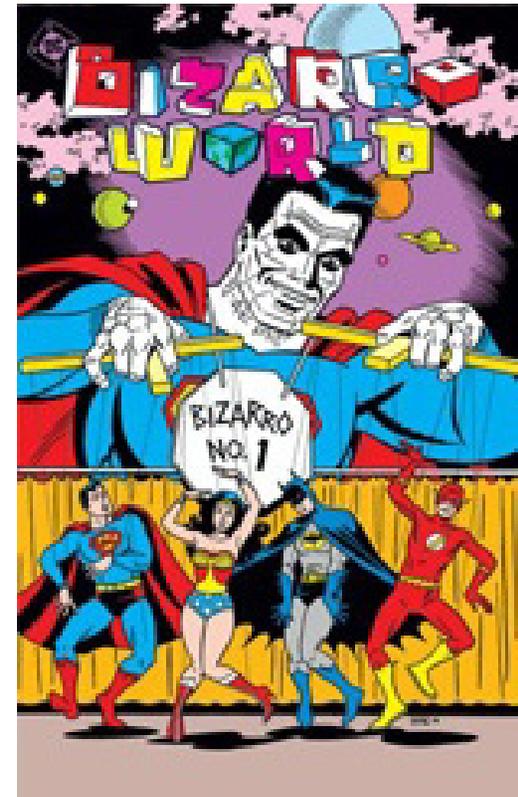


Natural Resources Defense Council v. Daley (D.C. Circuit, 2000)

Issue: Whether summer flounder quota with an 18 % likelihood of meeting target fishing mortality rate was arbitrary and capricious.

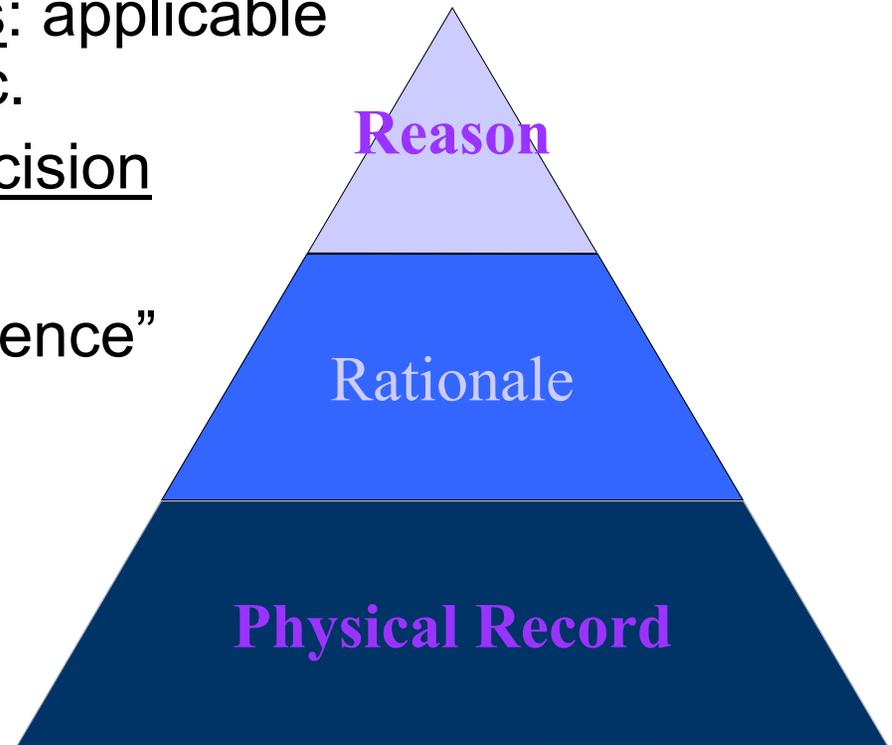
Court: “Only in Superman Comics’ Bizarro World, where reality is turned upside down, could the Service conclude that a measure that is at least four times as likely to fail as to succeed offers a ‘fairly high level of confidence.’”

Quota must have, at the very least, a 50% chance of attaining the target F.



3. Review on the Record

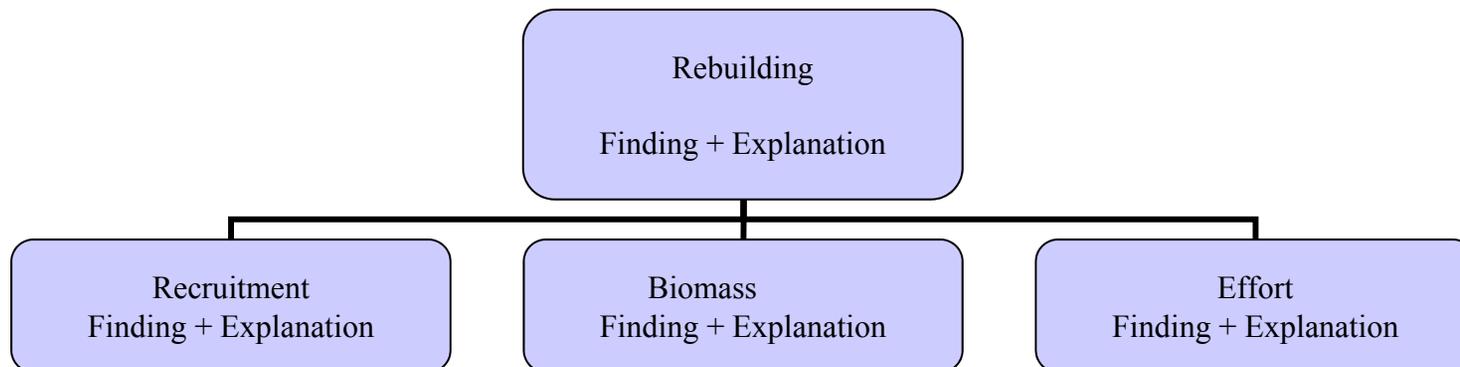
- Document Regulatory Process: applicable statutes, Executive Orders, etc.
- Explain/Rationally Support Decision
 - Met Legal Standards
 - Discuss “Best Available Science” When Required
 - Consideration of Opposing Points of View
 - Explain Preferred Choice



Reason = statutory responsibilities (mandatory v. discretionary) & programmatic goals

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))*
- Finding + Explanation = Rationale
- Need Rationale for Each Major Conclusion and Each Subordinate Relevant Factor

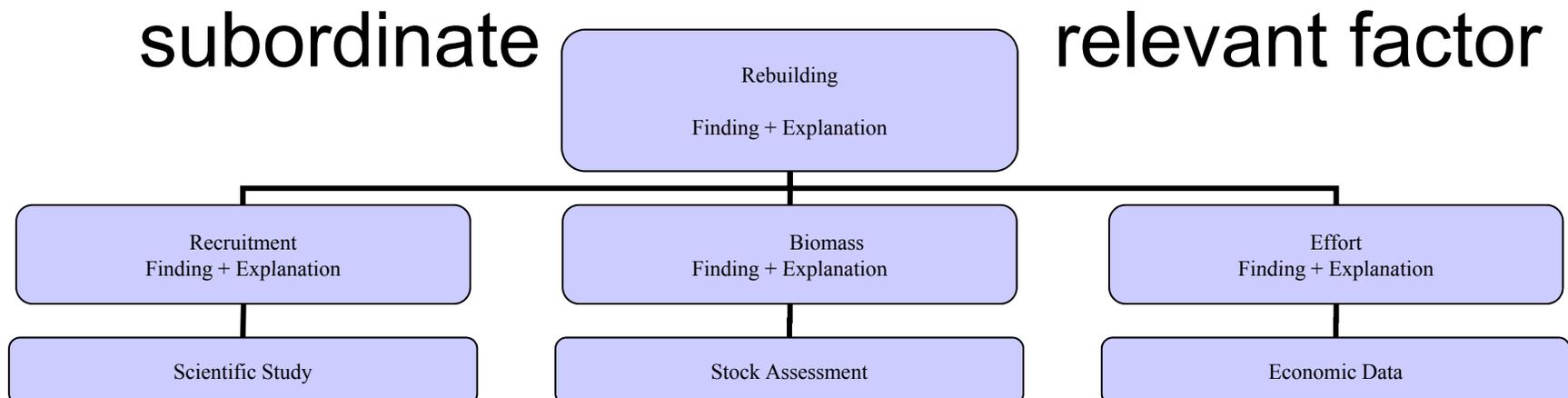


Rationale : *Relevant Factors*

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

Physical Record

- Court Shall Review the Whole Record or Those Parts of It Cited by a Party. 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).
- Support rationale for every major conclusion &



Physical Record : Elements

- 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

Any Questions???

