

**Building an Administrative Record:  
Legal & Regulatory Requirements**  
*Council Member Training*  
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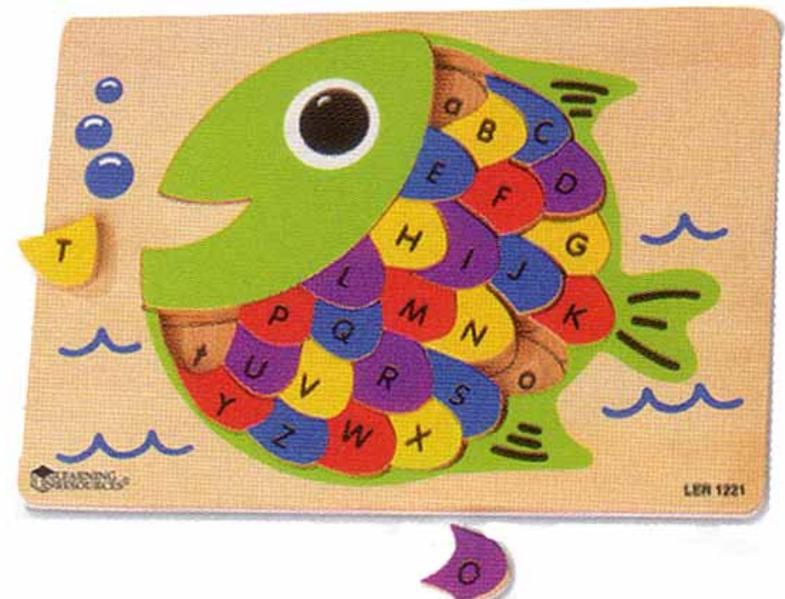
## Relationship to Fishery Management Councils

- \* 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



# 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

- \* **WHEN:**

- \* Judicial review of an agency’s statutory interpretation

- \* **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)

# 1. Chevron “Two Step” Process: *Pacific Coast Federation of Fishermen’s Associations v. Blank*

- \* **BACKGROUND:**

- \* Challenge to Pacific Council’s Trawl Rationalization Program
- \* Plaintiffs were not trawl sector participants and brought claims challenging the program’s makeup of initial quota recipients

- \* **ISSUE:**

- \* Does 303A(c)(5) require the Council and NMFS to ensure the participation of fishing communities?

# 1. Chevron “Two Step” Process: *Pacific Coast Federation of Fishermen’s Associations v. Blank*



- \* **STEP 1:** Court holds that the clear language of 303A(c)(5) only requires NMFS to consider fishing communities when establishing a limited access privilege program, but does NOT require the agency to develop criteria for allocating fishing privileges to such communities
- \* **Because the court found the language to be unambiguous, the inquiry stops at step 1**

# 1. Chevron “Two Step” Process: *Oceana v. Locke*

- \* **BACKGROUND:**

- \* Challenge to New England Fishery Management Council’s Groundfish Amendment 16 (ACL amendment)
- \* Several claims were raised, but key here was a focus on the monitoring provisions both for Amendment 16 and the Groundfish FMP as a whole

- \* **ISSUE:**

- \* Does the MSA--sections 303(a)(11) & (a)(15)--require that the Council and NMFS include bycatch reporting as part of the requirement to impose ACLs?

# 1. Chevron “Two Step” Process: *Oceana v. Locke*

- \* **STEP 1:** Court holds that the relationship between 303(a)(11) (standardized bycatch reporting methodology) and 303(a)(15) (ACLs) is ambiguous, so proceeds to...
- \* **STEP 2:** Court holds that agency’s interpretation that the two provisions are wholly separate is reasonable

**NORTHEAST  
MULTISPECIES  
(GROUND FISH)**



## 2. “Arbitrary and Capricious”

### \* **WHEN**

- \* Agency decisions under the MSA are reviewed pursuant to Section 706(2) of the APA. 16 U.S.C. § 1855(f)(1)(B)
- \* 706(2) requires courts to set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

### \* **Courts Look at Whether Agency:**

- \* 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

## 2. “Arbitrary and Capricious”: *Pacific Dawn*

- \* **BACKGROUND:**

- \* Another challenge to the Pacific Council’s Trawl Rationalization program
- \* This case came from participants in the program who were challenging the way in which quota shares were initially allocated for whiting

- \* **ISSUE:**

- \* Was there a rational justification for the formula used to allocate shares, or was the allocation arbitrary and capricious?



Source: Brenda Guild Gillespie

## 2. “Arbitrary and Capricious”: *Pacific Dawn*

- \* **HOLDING:**

- \* Even if it was conceptually reasonable for Defendants to have relied on a 2003 control date when promulgating regulations in 2010, the manner in which they did so here was not rational.

- \* **Why arbitrary?:**

- \* Council used data from after 2003 for some purposes but not others
  - \* “This appears to be a quintessential case of arbitrariness”

# 3. Review on the Record

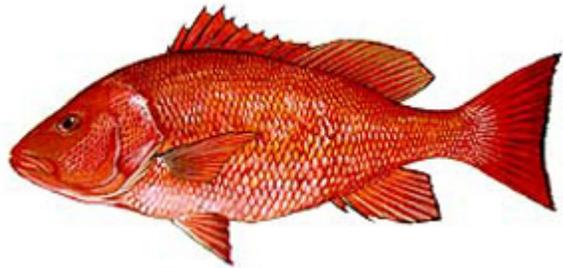


- \* Court Shall Review the Whole Record or Those Parts of It Cited by a Party. 5 U.S.C. § 706.
- \* Judicial Review is limited to “the record the agency presents to the reviewing court.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).
- \* Support rationale for every major conclusion

## 3. Review on the 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

### 3. Review on the Record: *Recreational Fishing Alliance v. NMFS*



- \* **BACKGROUND:**

- \* Challenge to the South Atlantic Fishery Management Council's Amendment 17A to the FMP for the Snapper-Grouper Fishery

- \* **ISSUE:**

- \* Did the agency fail to base its decision on the best available science?

# 3. Review on the Record: *Recreational Fishing Alliance v. NMFS*

- \* **HOLDING:**

- \* Agency properly considered all available science, including a critical report that was considered, but rejected

- \* **How did the Record Help?:**

- \* NMFS made efforts to incorporate the latest scientific data available—after critical report was published, NMFS asked the SE Fisheries Science Center to re-evaluate the data
- \* Agency considered a wide range of critical comments and provided responses to those comments

# Wrapping Up

- \* The overlapping regulatory requirements can help the Council and NMFS make well-reasoned, well-supported decisions
- \* It is as important to comply with *procedural* requirements as *substantive* requirements

# Final Lessons from Litigation

- \* **Go back to the statute**
- \* **Work with NMFS early**
- \* **Address all arguments/alternatives**
- \* **Support every decision**